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

TODD ASHKER et al.,
Plaintiffs,
v.
GOVERNOR OF THE STATE OF
CALIFORNIA et al.,
Defendants.

No. C 09-05796 CW
ORDER ON
PLAINTIFFS' MOTION
FOR DE NOVO REVIEW
OF MAGISTRATE
JUDGE'S RULING ON
RECRUITMENT
OFFENSE
(DOCKET NO. 588)

_____ /
Plaintiffs Todd Ashker et al. move for a de novo
determination of a matter decided by Magistrate Judge Vadas. In
their Settlement Agreement, the parties agreed that matters
decided by Judge Vadas would be reviewed by this Court under 28
U.S.C. § 636(b)(1)(B) (Docket No. 588). At issue here is the
interpretation of a "recruitment offense." Defendants the
Governor of the State of California et al. filed an opposition,
and each party filed supplemental briefing after an August 17,
2016 status conference before Judge Vadas. The Court DENIES
Plaintiffs relief and AFFIRMS Judge Vadas's ruling.

BACKGROUND

Pursuant to the Settlement Agreement, the California
Department of Corrections and Rehabilitation (CDCR) "shall not
place inmates into a SHU, Administrative Segregation, or Step Down
Program solely on the basis of their validation status."
Settlement Agreement ¶ 13. Attachment B to the Settlement
Agreement is a "SHU Term Assessment Chart" that lists types of
misconduct for which a prisoner could be placed in a SHU. Offense

United States District Court
For the Northern District of California

1 (9) on that chart is "STG Disruptive Behavior." Offense (9)(A)
2 and (B) are defined as follows:

3 (9) STG Disruptive Behavior:

4 (A) Acting in a leadership role by directing or
controlling STG behavior that is a behavior listed in
5 this SHU Assessment Chart.

6 (B) Recruiting inmates to become an STG affiliate, or to
take part in STG activities that is a behavior listed in
this SHU Assessment Chart.

7 Settlement Agreement, Attachment B, SHU Term Assessment Chart.

8 On December 21, 2015, in a letter brief to Judge Vadas,
9 Plaintiffs claimed ambiguity in the text of Offense (9)(B). See
10 Docket No. 576-2, Ex. B, 12/21/2015 Letter Brief at 10-14. A week
11 later, Judge Vadas held one of the regular status conferences
12 required by paragraph 49 of the Settlement Agreement. Present
13 were Plaintiffs' counsel, counsel from CDCR's Office of Legal
14 Affairs, counsel from the California Attorney General's office and
15 Sandra Alfaro, CDCR's Associate Director of High Security Mission
16 for the Division of Adult Institutions. See Declaration of Carmen
17 E. Bremer in Support of Motion regarding Interpretation of
18 Recruitment Offense ¶ 2. The minutes from that conference state:

19 **Interpretation of SHU-eligible offense 9(B):** The
20 parties agreed that CDCR will formulate by no later than
21 March 28, 2016 a policy concerning the recruitment SHU-
eligible offense under 9(B) that incorporates a coercive
element.

22 Docket No. 513-2, Minutes of December 28, 2015 status conference
23 ¶ I.d.

24 On March 28, 2016, Defendants' counsel emailed Plaintiffs'
25 counsel to indicate that Defendants "are unable to revise section
26 9b of Attachment B to the SHU Term Assessment Chart to include a
27 'coercive' component." Bremer Dec., Ex. C. Plaintiffs then moved
28 for enforcement of the December 28 agreement, which Judge Vadas

1 denied at the June 10 hearing that is the subject of this motion.
2 See Transcript of June 10, 2016 Hearing at 36.

3 The parties dispute whether the December agreement modified
4 the Settlement Agreement. See Settlement Agreement ¶ 59 (defining
5 modification). Defendants first argued that Judge Vadas did not
6 have jurisdiction under the Settlement Agreement to rule on
7 Plaintiff's motion. Judge Vadas "absolutely disagree[d] with
8 defense counsel" as to whether the Court could rule on Plaintiffs'
9 motion. Id. at 34. He explained, "Under [paragraphs 49 and 53],
10 I have not only the right but the obligation to hear these matters
11 and to rule on" the impact of the December 2015 agreement. Id. at
12 34. Judge Vadas noted that he was "troubled" by the
13 circumstances, noting, "Clearly, the parties agreed to negotiate
14 this issue on December 28, 2015. And the clear language of B
15 indicates that there was an oral agreement to do so." Transcript
16 of June 10, 2016 Hearing at 33-34.

17 Nonetheless, Judge Vadas decided that the December 2015
18 agreement did not constitute a written modification as the
19 Settlement Agreement requires for modifications to be binding.
20 Id. at 35-36; see also id. at 36 ("And so what I consider to be
21 somewhat of a technicality, given the nature of how we've been
22 proceeding, I must deny your motion.").

23 After Judge Vadas denied Plaintiffs' motion to enforce the
24 December agreement, Plaintiffs suggested that Judge Vadas issue an
25 order "indicating . . . that 9B is to be interpreted consistent
26 with our understanding of it" Id. at 37. Judge Vadas
27 responded by stating in part that "no court . . . should make
28

1 advisory opinions. I'll rule on the motions that are before me."

2 Id.

3 LEGAL STANDARD

4 The parties agreed that this Court would review de novo
5 Magistrate Judge Vadas's decisions. Settlement Agreement ¶ 53
6 ("An order issued by Magistrate Judge Vadas under this Paragraph
7 is subject to review under 28 U.S.C. § 636(b)(1)(B)"). "A judge
8 of the court may accept, reject, or modify, in whole or in part,
9 the findings or recommendations made by the magistrate judge. The
10 judge may also receive further evidence or recommit the matter to
11 the magistrate judge with instructions." 28 U.S.C. § 636(b)(1).

12 DISCUSSION

13 Magistrate Judge Vadas and this Court have jurisdiction to
14 determine whether the December agreement qualifies as a
15 modification under the Settlement Agreement. This Court agrees
16 with Judge Vadas that it is not.

17 I. Modification of the Settlement Agreement

18 Plaintiffs argue that the December 2015 agreement is
19 enforceable as a written modification of the Settlement Agreement.
20 See Plaintiffs' Motion at 14. Any modification to the terms of
21 the Settlement Agreement "must be in writing and signed by a CDCR
22 representative and attorneys for Plaintiffs and Defendants to be
23 effective or enforceable." Settlement Agreement ¶ 59. Plaintiffs
24 acknowledge that no CDCR representative signed the agreement, but
25 first argue that it was written and that Defendants' counsel
26 agreed to it via email, sufficing for a writing and signature.
27 Plaintiffs also assert that no CDCR representative needed to sign
28 the writing because "the parties' course of conduct constitutes

1 waiver of the requirement that both CDCR's attorney and its
2 representative sign any modification of the agreement." Id.
3 Plaintiffs do not point to actions or evidence beyond the December
4 minutes and emails themselves to support this waiver argument.
5 Because the writing was signed by Defendants' counsel, but not a
6 non-attorney representative of CDCR, it is not in compliance with
7 the Settlement Agreement. Thus, the December 2015 agreement is
8 not enforceable.

9 II. Substantial Compliance

10 Plaintiffs next argue that the Court should adopt their
11 interpretation of (9)(B), to avoid substantial noncompliance with
12 the Settlement Agreement.

13 Paragraph 53 of the Settlement Agreement states:

14 If Plaintiffs contend that CDCR has not substantially
15 complied with any other terms of this Agreement that do
16 not amount to current, ongoing, systemic violations as
17 alleged in the Second Amended Complaint or Supplemental
18 Complaint of the Eighth Amendment or the Due Process
19 Clause of the Fourteenth Amendment, . . . they may seek
20 enforcement by order of this Court

21 Settlement Agreement ¶ 53. Under this provision:

22 If the parties are unable to resolve the issue
23 informally, Plaintiffs may seek enforcement of the
24 Agreement by seeking an order upon noticed motion before
25 Magistrate Judge Vadas. It shall be Plaintiffs' burden
26 in making such a motion to demonstrate by a
27 preponderance of the evidence that Defendants have not
28 substantially complied with the terms of the
29 Agreement. . . . If Plaintiffs satisfy their burden of
30 proof by demonstrating substantial noncompliance with
31 the Agreement's terms by a preponderance of the
32 evidence, then Magistrate Judge Vadas may issue an order
33 to achieve substantial compliance with the Agreement's
34 terms.

35 Id.

36 Substantial compliance means more than "taking significant
37 steps toward compliance" Rouser v. White, 825 F.3d 1076,

1 1082 (9th Cir. 2016). Defendants must comply with each term of
2 the Agreement. See id. at 1081 ("Like terms in a contract,
3 distinct provisions of consent decrees are independent
4 obligations, each of which must be satisfied before there can be a
5 finding of substantial compliance."); Plaintiffs' Reply at 2-3.

6 Plaintiffs appear to argue that Defendants' failure to
7 interpret Offense (9)(B) to require recruitment accompanied by
8 another offense constitutes a failure to comply with a term of the
9 Settlement Agreement. Plaintiffs contend that the phrase "that is
10 a behavior listed in this SHU Assessment Chart" must correspond
11 "not only 'to take part in STG activities,' but also '[r]ecruiting
12 inmates to become an STG affiliate,' . . ." Plaintiffs' Motion at
13 15. However, Offense (9)(B) is clear; recruitment alone may
14 satisfy Offense (9)(B). That Defendants issued a rule violation
15 charge to a prisoner on the basis of "gang recruitment" without an
16 allegation of "other SHU-eligible misconduct" or coercion does not
17 render Defendants noncompliant with the Settlement Agreement.
18 Thus, Plaintiffs do not make a showing of substantial
19 noncompliance that would warrant an order under Paragraph 53.

20 No term of the Settlement Agreement authorizes the Court to
21 interpret the Agreement outside the context of a showing of
22 substantial noncompliance. The Court agrees with Judge Vadas that
23 to do so would be an advisory opinion. Absent noncompliance, the
24 Settlement Agreement does not warrant such an order.

1 CONCLUSION

2 For the reasons above, the Court reviews Magistrate Judge
3 Vadas's order de novo, DENIES Plaintiffs' request to reverse it
4 (Docket No. 588) and AFFIRMS Magistrate Judge Vadas's order.

5 IT IS SO ORDERED.

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7 Dated: September 14, 2016



8 CLAUDIA WILKEN
9 United States District Judge
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