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

VINCENT C. BRUCE,	)	No. C 99-4492 RMW (PR)
	)	
Plaintiff,	)	ORDER DENYING IN PART
	)	MOTION TO ENFORCE
v.	)	SETTLEMENT AGREEMENT;
	)	REFERRING CASE TO PRO
EDDIE YLST, et al.,	)	SE PRISONER SETTLEMENT
	)	PROGRAM
Defendants.	)	

Plaintiff, a state prisoner proceeding pro se, filed a federal civil rights complaint pursuant to 42 U.S.C. § 1983, challenging prison gang validation procedures. On September 13, 2001, the court granted defendants’ motion for summary judgment and terminated the case. On appeal, on February 3, 2004, the Ninth Circuit affirmed in part, reversed in part, and remanded in part. See Bruce v. Ylst, 351 F.3d 1283 (9th Cir. 2003). Upon remand, the parties reached a settlement agreement, and entered into a stipulated dismissal. On March 15, 2013, plaintiff filed, inter alia, a motion to enforce the settlement agreement. The case was thereafter re-assigned to the undersigned judge.

The court re-opened the case, and ordered defendants to file a response to plaintiff’s motion. Defendants filed their response, and plaintiff filed a reply. The court denied the motion

1 to enforce without prejudice in order to determine first whether the settlement agreement had  
2 been breached. The court then ordered defendants to show cause why plaintiff was not entitled  
3 to relief.

4 Defendants have filed their response, and plaintiff has filed his reply.<sup>1</sup> The court has  
5 reviewed the pleadings and records in this case. For the reasons stated below, the court will  
6 DENY plaintiff's motion in part, and refer this matter to Judge Vadas for settlement proceedings.

### 7 BACKGROUND

8 In October 1999, plaintiff initiated this civil rights case by filing a federal complaint. In  
9 January 2002, plaintiff was released from the Secured Housing Unit after being designated as an  
10 inactive member of the Black Guerilla Family prison gang in July 2001 when it was determined  
11 that he had not been involved in any gang activity for over six years. (Pl. Reply at 6; Pl. 1st  
12 Decl. ¶ 44.) Plaintiff and defendants reached a settlement agreement in this underlying case in  
13 2006. As part of the settlement agreement, plaintiff was awarded \$7500.00, and the parties  
14 agreed that a copy of the settlement agreement and the following language would be placed in  
15 plaintiff's prison file:

16 If Vincent Bruce is considered for revalidation as an associate or member of the Black  
17 Guerilla Family prison gang, the CDCR will thoroughly review the source item or  
18 sources items [sic] considered in and used to support any such revalidation to ensure  
19 that the proposed revalidation complies with CDCR criteria for revalidation that are in  
20 effect at the time of the proposed revalidation and the due process protections in effect  
21 at the time of the proposed revalidation. Such protections will include those set forth in  
22 Castillo v. Terhune, USDC N.D. Case No. C-94-2847, provided that the Castillo terms  
23 are in effect at the time of the proposed revalidation.

24 (Docket No. 230, Ex. A at ¶ 6.)

25 In 2007, plaintiff was revalidated as an associate of the Black Guerilla Family prison  
26 gang. Plaintiff challenged this revalidation by filing a federal civil rights action in Bruce v. Cate,  
27 No. 09-4649 JW (N.D. Cal.). In his complaint, plaintiff alleged that defendants (1) denied him  
28 due process by revalidating him as an associate based on false evidence and without procedural  
protections; (2) retaliated against him by revalidating him as an associate of a prison gang; and

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<sup>1</sup> Plaintiff's request for judicial notice is GRANTED.

1 (3) violated his constitutional right to receive mail. (Def's. Req. Judicial Notice, Ex. A.) On  
2 March 26, 2012, the defendants' motion for summary judgment was granted, and the civil rights  
3 action was closed. (Id.) In the order, the court found that, inter alia: (1) the 2007 revalidation  
4 process complied with due process in that the validation was supported by "some evidence," and  
5 procedural protections set forth in Toussaint v. McCarthy, 801 F.2d 1080, 1104 (9th Cir. 1986),  
6 were followed, and (2) following an in camera review, the source items used to re-validate  
7 plaintiff were reliable, under California Code of Regulations, title 15 section 3321.

8 The California Department of Corrections and Rehabilitation ("CDCR") has established a  
9 process for identifying gang affiliates. The Institutional Gang Investigator ("IGI") must first  
10 investigate gang involvement allegations. Cal. Code Regs., tit. 15, § 3378(c)(1), (c)(2).<sup>2</sup> The  
11 investigation ("active/inactive review process") is done to determine whether a validated gang  
12 affiliate is still active within the gang, meaning, whether there is any evidence of gang activity or  
13 association within the last six years. Cal. Code Regs., tit. 15, § 3341(c)(5). Revalidation after  
14 being categorized as inactive is appropriate if there is at least one reliable source item to support  
15 the finding that an inmate is still active within the gang over the last six years, and thus, either a  
16 member or associate of his gang. Cal. Code Regs., tit. 15 § 3378(f).

17 In order to validate a gang affiliate, a validation package must be sent to the Office of  
18 Correctional Safety ("OCS"). Cal. Code Regs., tit. 15, § 3378(c)(6). After the investigation, the  
19 IGI shall complete a general chrono, Form 128B, specifying the inmate's gang affiliation,  
20 category of involvement, and which independent source item supports his conclusion. CDCR  
21 Departmental Operations Manual ("DOM") § 52070.18.2.<sup>3</sup> Form 128B is part of the validation  
22 package that gets submitted to OCS. DOM § 52070.21.1. Form 812A shall also be completed  
23 after a thorough investigation and after an inmate has been designated as a member, associate, or  
24

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25 <sup>2</sup> All references to the California Code of Regulations refer to the regulations in effect in  
26 2007, the year plaintiff was revalidated.

27 <sup>3</sup> All references to the DOM refer to the regulations in effect in 2007, the year plaintiff  
28 was revalidated.

1 drop out. DOM §§ 52070.18.1, 61020.6. Both Forms 812A and 128B shall be retained in the  
2 inmate's central file and a copy given to the inmate. DOM §§ 52070.18.2, 61020.3.

3 Prior to submission of the validation package to the OCS, the inmate shall be interviewed  
4 by the IGI and be given an opportunity to be heard in regard to the source items used. Cal. Code  
5 Regs., tit. 15, § 3378(c)(6)(A). Before the interview, the inmate must be given written notice at  
6 least 24-hours in advance of the interview. Cal. Code Regs., tit. 15, § 3378(c)(6)(B); see also  
7 Frisk Decl. Ex. B ("Castillo settlement") at 4-5. At the time the inmate is notified, all source  
8 items referenced in the validation package shall be disclosed to him. Cal. Code Regs., tit. 15, §  
9 3378(c)(6)(C). The inmate should be given copies of all non-confidential source items and a  
10 Form 1030 to describe all confidential source items. Id. The interview must be documented and  
11 include a record of the inmate's opinion on each source item used in the verification. Cal. Code  
12 Regs., tit. 15, § 3378(c)(6)(D); see also Castillo settlement at 5. The information shall be  
13 recorded, and a written record of it given to the inmate within 14 calendar days, and, prior to the  
14 submission of the validation package to the OCS. Id. The documented interview shall also be in  
15 the package to the OCS. Cal. Code Regs., tit. 15 § 3378(c)(6)(E). Validation or rejection of the  
16 evidence relied upon shall be documented on Form 128-B2 (Gang Validation / Rejection  
17 Review) and forwarded for placement into the inmate's central file. Cal. Code Regs., tit. 15, §  
18 3378(c)(6)(G). If the OCS concludes, upon review of the package that the inmate is a gang  
19 affiliate, it is documented on Form 128B-2 and returned to the IGI. DOM § 52070.21.3. If the  
20 validation package is rejected, Form 128B-2 is filled out and returned to the IGI, and directs that  
21 any erroneous Forms 812A or 128B identifying inmate as an affiliate be removed from the  
22 inmate's file. DOM § 52070.21.4. Once the OCS makes its decision, a Classification and Parole  
23 Representative shall note in some permanent way on every document or source item used  
24 whether it was sufficient to meet validation requirements. Cal. Code Regs., tit. 15, §  
25 3378(c)(6)(G).

26 In 2007, the IGI submitted a validation package to OCS, in which it identified 6 source  
27 items supporting revalidation of plaintiff as a prison gang member. The OCS agreed, and

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Order Denying in Part Motion to Enforce Settlement Agreement; Referring Case to Pro Se Prisoner Settlement  
Program

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1 plaintiff was indeed revalidated.

2 In plaintiff's motion to enforce the settlement agreement, plaintiff alleged that his 2007  
3 revalidation process breached his 2006 settlement agreement because CDCR did not adhere to its  
4 own criteria and procedures regarding the revalidation process, and did not comply with the  
5 Castillo settlement. Plaintiff seeks injunctive, declaratory, and monetary relief.

## 6 DISCUSSION

### 7 A. Jurisdiction and Standard of Review

8 This court has jurisdiction to enforce the settlement agreement because the court  
9 specifically incorporated the terms of the settlement agreement in its order of dismissal. (Docket  
10 No. 230, Ex. B.) See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82 (1994).  
11 The underlying settlement agreement explicitly states that it shall be governed by, and construed  
12 in accordance with, California laws. (Docket No. 230, Ex. A ¶ 16.)

13 The elements of a cause of action for breach of contract in California are: "(1) the  
14 contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and  
15 (4) damage to plaintiff therefrom." Wall Street Network, Ltd. v. New York Times Co., 164 Cal.  
16 App. 4th 1171, 1178 (2008) (internal quotation marks omitted). It is the plaintiff's burden to  
17 prove these elements. Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821 (2011).

18 The clear and explicit meaning of the contract provisions, interpreted in their ordinary  
19 and popular sense, controls judicial interpretation. Cal. Civ. Code, §§ 1638, 1644; U.S. Bank  
20 National Association v. Yashouafar, 232 Cal. App. 4th 639, 646 (2014). If the language used is  
21 clear and explicit, it governs, and the court will not create an ambiguity where none exists. Id.  
22 A contract is not ambiguous merely because the parties disagree on the meaning of a phrase, or  
23 because "a word or phrase isolated from its context is susceptible of more than one meaning."  
24 State of California v. Continental Ins. Co., 55 Cal. 4th 186, 195 (2012). Rather, the "language in  
25 a contract must be construed in the context of that instrument as a whole, and in the  
26 circumstances of that case, and cannot be found to be ambiguous in the abstract." Bank of the  
27 West v. Superior Court, 2 Cal.4th 1254, 1265 (1992) (italics omitted).

1 B. Analysis

2 Plaintiff raises several allegations in which he argues that the revalidation process  
3 violated the 2006 settlement agreement.<sup>4</sup> The court addresses each of plaintiff's claims.

4 1. The IGI and OCS conducted "underground" reviews of plaintiff<sup>5</sup>

5 Plaintiff alleges that the IGI and the OCS conducted "underground revalidation reviews"  
6 without notice and opportunity to be heard, as required under the Castillo settlement, the  
7 California Code of Regulations, and DOM. (Mot. at 12; Reply at 14-15.) As stated above, in  
8 order to validate a gang affiliate, a validation package must be sent to the OCS. Cal. Code  
9 Regs., tit. 15, § 3378(c)(6). The California Code of Regulations provides steps the prison must  
10 undertake prior to submitting the validation package to the OCS. Essentially, plaintiff alleges  
11 that, in April/May 2007, September 14, 2007, and November 21, 2007, the IGI submitted  
12 "secret" or "underground" revalidation packages, or source items, to the OCS for preliminary  
13 review to determine whether the source items were sufficient to meet validation criteria. By  
14 doing so, plaintiff alleges that defendants failed to comply with its own regulations. (Reply at 7-  
15 9; Frisk Decl. ¶¶ 11-12.)

16 However, plaintiff's characterization of these three "underground" reviews as  
17 impermissible revalidation packages is not persuasive. As Judge Ware discussed in his March  
18 27, 2012 order:

19 the record indicates that the differential treatment is the extra level of review  
20 that was agreed upon in the Bruce v. Ylst settlement agreement and intended to  
21 protect plaintiff. CDCR agreed to ensure that any future re-validation would  
22 comply with CDCR criteria for re-validation and due process protections.  
23 [Citation omitted.] Source items regarding plaintiff were scrutinized and  
24 rejected if they were found to be non-compliant. See, e.g., Doc. #47, Exh. W  
(prison officials found that March 8, 2007 memorandum, by itself, was  
insufficient to identify plaintiff as a gang affiliate) and Doc. #48, Exh. HH  
(OCS confirmed that two source items were valid and showed BGF-related

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25 <sup>4</sup> The court is mindful that the only issues before it concern whether plaintiff's 2007  
26 revalidation violated the 2006 settlement agreement. The question of whether the 2007  
revalidation itself was correct is not before the court.

27 <sup>5</sup> This claim is listed as Contention 2 in plaintiff's motion to enforce. (Mot. at 11.)

1 activity but declined to submit a validation package until additional source  
2 items were discovered and properly documented). Essentially, defendants  
3 appeared to have imposed a heightened evidentiary standard upon themselves  
4 when re-validating plaintiff. Although plaintiff was not informed every time  
5 any gang-related material referencing him was reviewed, this does not create a  
6 triable issue of fact as to whether defendants were deliberately trying to  
7 re-validate him. And the fact that evidence previously rejected as insufficient  
8 was later successfully used in a validation package is not evidence of a  
9 retaliatory motive. In fact, it again shows the heightened evidentiary standard  
10 applied when evaluating plaintiff's gang status. The March 8, 2007 confidential  
11 memorandum was considered insufficient evidence of gang activity when  
12 considered by itself, even when supported by inmate correspondence and  
13 informant interviews. Doc. #47, Exh. W. Instead, gang investigators did not  
14 submit the March 8, 2007 memorandum as part of a re-validation memorandum  
15 until a November 2007 interview with an confidential informant provided  
16 further information regarding plaintiff's BGF activity, and corroborated other  
17 information received by confidential informants. The fact that gang  
18 investigators took extra care when preparing a validation memorandum  
19 regarding plaintiff does not create a triable issue of fact as to whether his  
20 litigation and grievance activity were a but-for cause of his re-validation.

21 (Docket No. 235, Ex. A at 29 (Bruce v. Cate, No. 09-4649 JW (N.D. Cal. March 27, 2012))).

22 Plaintiff has not provided any plausible evidence to support his argument that these  
23 "underground" reviews violated the terms of the settlement agreement. That is, these informal  
24 and preliminary reviews are not prohibited by plaintiff's settlement agreement, the state  
25 regulations, or the Castillo settlement.<sup>6</sup> Thus, plaintiff's claim that the "underground reviews"  
26 breached his settlement agreement is DENIED.

27 2. Plaintiff was not provided written notice of the IGI's conclusions

28 Plaintiff alleges that defendants breached the settlement agreement because the IGI failed  
to document his conclusions or provide plaintiff written notice of his conclusions as the IGI was

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<sup>6</sup> Because the court concludes that the informal and preliminary reviews are not prohibited by plaintiff's settlement agreement, plaintiff's additional claims that the informal reviews breached the settlement agreement by depriving him of "meaningful" due process, and violating California Code of Regulations § 3378(c)(6) are also DENIED. (Mot. at 12, Contentions 3 and 4.) For the same reason, all of plaintiff's claims related to these "underground reviews," including plaintiff's claim that the CDCR failed to uniformly apply its gang validation procedures to plaintiff, in violation of DOM § 52070.6.2 because not every inmate was subject to the "underground review," are DENIED. (Mot. at 14, Contention 14; Reply at 16-17.)

1 required to do under DOM §§ 52070.18.1,<sup>7</sup> 52070.18.2,<sup>8</sup> and California Code of Regulations,  
2 title 15, § 3375(h)<sup>9</sup>. (Mot. at 11.)

3         However, to the extent plaintiff is referring to the IGI’s “underground” reviews which all  
4 occurred prior to submission of the revalidation package to the OCS (Reply at 7-9), the court has  
5 already determined that these informal or preliminary reviews are not governed by, nor do they  
6 violate, plaintiff’s settlement agreement. In fact, DOM §§ 52070.18.1 and 52070.18.2 refer to  
7 documentation that the IGI must provide after a determination that an inmate is a gang affiliate.  
8 Plaintiff’s claims that defendants violated the settlement agreement because defendants failed to  
9 abide by DOM §§ 52070.18.1 and 52070.18.2 after these preliminary or “underground” reviews  
10 are rejected because the determination that plaintiff was a gang affiliate had not yet occurred.  
11 Cf. DOM § 52070.26 (providing that any information or source items developed which meets  
12 validation requirements should be disclosed to the inmate on CDC Form 812 A/B at the inmate’s  
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15 <sup>7</sup> “If, after the thorough investigation and documentation prescribed by DOM, Chapter 6,  
16 Article 2, the gang investigator concludes the inmate/parolee is gang affiliated . . . or has had a  
17 change in gang status, the investigator shall complete either a CDC Form 812-A, Notice of  
18 Critical Case Information - Prison Gang Identification, or a CDC Form 812-B, Notice of Critical  
19 Case Information - Disruptive Group Identification. On the form, the gang investigator shall  
20 document that affiliation, category of involvement, and the original, independent source items of  
21 information contained in the central file, which were used to support the conclusion. The  
22 completed CDC Form 812-A/B shall be retained in the inmate’s/parolee’s central file and the  
23 inmate/parolee shall be given a copy. . . .”

24 <sup>8</sup> “The gang investigator shall also document in narrative fashion on a CDC Form 128-B,  
25 General Chrono, the inmate’s/parolee’s gang affiliation, category of involvement, and specify  
26 each original, independent source item of information contained in the central file, which was  
27 relied upon to support the conclusion. A CDC Form 128-B shall also be used to document  
28 insufficient evidence to support a conclusion of gang affiliation. Documentation shall begin with  
a definite conclusion of finding based upon the evidence. It shall not be inconclusive or  
equivocal. The completed CDC Form 128-B shall be retained in the inmate’s/parolee’s central  
file and the inmate/parolee shall be given a copy. The investigator shall also assure the  
inmate/parolee has received copies of all non-confidential documents used in the validation. . . .”

<sup>9</sup> Regarding the classification process, “An inmate shall be provided a copy of all  
nonconfidential staff documentation and reports placed in the inmate’s central file unless  
otherwise requested in writing by the inmate.”



1 annual review, but “[t]he information [on a CDC Form 812 A/B] need not be disclosed if it is  
2 part of an ongoing investigation.”). In addition, California Code of Regulations, title 15,  
3 § 3375(h) refers to the classification process, not the gang revalidation process.

4 On the other hand, plaintiff alleges that he was not provided Form 812-A or 128-B  
5 chronos prior to being interviewed in conjunction with the IGI’s validation request and  
6 submission of the validation package. (Reply at 19.) While defendants state that plaintiff was  
7 given notice of all nonconfidential documents in the CDCR 1030 Confidential Information  
8 Disclosure Forms, defendants have not explicitly addressed plaintiff’s assertion that he  
9 was not provided copies of Form 812-A or 128-B chronos, assuming they were non-confidential.  
10 See DOM § 52070.21.1.<sup>10</sup> It is not clear whether the regulations, DOM, or Castillo settlement  
11 include discussion of when the IGI or prison is required to provide Form 812-A or 128-B  
12 chronos, and specifically, whether disclosure of these documents is part of the gang revalidation  
13 procedure.

14 Thus, this claim will be referred to Judge Vadas for possible settlement. If the parties are  
15 unable to reach a settlement agreement, defendants will be directed to file a supplemental brief  
16 addressing this claim, with supporting documentation and citations. If defendants discover that  
17 they failed to properly provide Forms 812-A and 128-B, defendants shall address what remedy is  
18 appropriate.

19 3. Plaintiff was not permitted to challenge the initial validation source items

20 Plaintiff alleges that the CDCR’s refusal to allow him to challenge initial validation  
21 source items relied up on plaintiff’s 1998 initial validation, even though plaintiff was told that it  
22 was CDCR policy and intent to do so breached the settlement agreement. (Mot. at 12.) Plaintiff  
23 alleges that the revalidation package included at least three source items, dated in 1995, which  
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26 <sup>10</sup> “The gang investigator shall attach to the completed Q series forms, a copy of the  
27 coordinator’s CDC Form 128-B memorandum with copies of the supporting documentation.  
28 This shall be known as a validation package. . . . The inmate shall be given copies of all non-  
confidential documents unless otherwise requested in writing by the inmate.”

1 were also used in his 1998 initial validation. (Reply at 10.) However, plaintiff does not cite to,  
2 and court cannot find, any official requirement in the Castillo settlement, the California Code of  
3 Regulations, or the DOM mandating that an inmate receive this opportunity during a revalidation  
4 process.

5 In addition, Judge Ware’s March 27, 2012, order confirms defendants’ argument that  
6 plaintiff’s revalidation is based solely on the six new source items, and not on the initial source  
7 items from 1995. (Docket No. 235, Ex. A at 14, n.3 (Bruce v. Cate, No. 09-4649 JW (N.D. Cal.  
8 March 27, 2012)) (“Plaintiff’s re-validation is based solely on the later six source items. . . . The  
9 reliability of the 1995 source items is not directly relevant to plaintiff’s re-validation.”). Because  
10 plaintiff’s challenged settlement agreement focuses only on any proposed revalidation process,  
11 plaintiff’s claim that his inability to challenge the validation source items, used in his 1998 initial  
12 validation proceedings, breached the settlement agreement is DENIED.

13 4. CDCR did not disclose the “articulable basis” of each validation source item

14 Plaintiff alleges that defendants failed to disclose the “articulable basis” of each  
15 validation source item as required by the Castillo settlement. (Mot. at 12.) For example,  
16 plaintiff was only provided a copy of the RVR dated September 6, 2007, but never the reasons  
17 why the RVR was being considered as a source item before the IGI interview. (Frisk Decl., Ex.  
18 E at 2 (“source item 5a”). The Castillo settlement defines “articulable basis” as “a written  
19 record of specific, articulable facts along with the rational inferences drawn from those facts.”  
20 (Frisk Decl., Ex. B at 3.) The Castillo settlement goes on to require an articulable basis for  
21 several types of source items. (Id. at 5-7.)

22 As an initial matter, it is not immediately clear whether each of the six source items used  
23 to support revalidation of plaintiff are each “independent source items.” The validation  
24 memorandum lists six “new” source items, however, the items are labelled 4, 4a, 4b, 5, 5a, and  
25 5b. (Frisk Decl., Ex. E at 1-3.) For 4a, 4b, 5a, and 5b, those source items indicate that they are  
26 “support document[s],” which leads this court to surmise that they are not considered  
27 “independent source items” as used in California Code of Regulations, title 15 § 3378(c)(8).

1 (Id.) In addition, the Castillo settlement states that a single, gang related conduct described or  
2 documented by multiple sources shall constitute one source item. (Id., Ex. B at 7.) Thus, the  
3 court is inclined to agree with plaintiff that the six “new” source items are made up of 2  
4 independent or principal source items, which each include 2 supporting source items. (Mot. at  
5 9.)

6 Nonetheless, the six source items used to revalidate plaintiff relied upon confidential  
7 informants, written communication, association, direct link, and offenses. (Id., Ex. E at 1-3.) In  
8 the Castillo settlement, the agreement specified that if the prison used communications as a  
9 source item, staff “must articulate and record why a written material or communication is  
10 evidence of gang association/membership based on the . . . communication.” (Frisk Decl., Ex. B  
11 at 6.) Similarly, if staff use a disciplinary offense as a source item, staff “shall have an  
12 articulable basis for why the offense is gang-related. . . [and] shall record this information and  
13 provide it on a written form given to the inmate.” (Id.)

14 Plaintiff does not set forth any specific argument as to why the written communication  
15 source items lack an articulable basis. In addition, the court has reviewed the offense source  
16 item – i.e., the RVR – as a supporting document to the independent source item. Specifically, an  
17 RVR dated September 5, 2006, found plaintiff and his cellmate, Stanley Williams, aka “Lil  
18 Tookie,” a validated active Black Guerilla Family (“BGF”) gang member, in possession of two  
19 stabbing weapons in their cell. (Frisk Decl., Ex. E at 2.) This information corroborated the  
20 principal source item – a confidential memorandum, dated November 21, 2007 – indicating that  
21 a confidential inmate identified plaintiff as an active BGF gang member, who possessed two  
22 weapons, and worked in concert with Williams and Frank Allen, aka “Wiggles,” who was also a  
23 validated BGF associate, and was trying to unify BGF gang members. (Id.) Taken together, the  
24 court finds that the offense supporting source item appears to set forth a sufficient articulable  
25 basis for why the offense is gang-related.

26 Plaintiff’s argument that the confidential source items do not contain “specific articulable  
27 facts” and “rational inferences” is not persuasive. The Castillo settlement does not require an

1 “articulable basis” for confidential sources. (Frisk Decl., Ex. B at 7.) Accordingly, plaintiff’s  
2 claim that defendants failed to disclose the “articulable basis” of each validation source item is  
3 DENIED.

4 5. CDCR relied on source items containing knowingly false and misleading  
5 information and violated CDCR validation criteria

6 Plaintiff argues that none of the source items identified which “source item criteria” the  
7 information was supposed to meet, pursuant to Section 3378(c)(8). (Reply at 20.) Plaintiff  
8 claims that he repeatedly requested specific facts to be disclosed regarding underlying letters  
9 referenced in two Confidential Information Disclosure forms, but defendants refused. (Id.)

10 Plaintiff appears to be arguing that the prison was required to disclose to plaintiff the  
11 “articulable basis” of why each source item met the validation source item criteria. (Id.)  
12 However, as stated previously, in the Castillo settlement, the term “articulable basis” does not  
13 apply to each source item criteria. For example, when the independent source item originates  
14 from a confidential source, the Castillo settlement agreement does not specify that the staff must  
15 have an articulable basis from which to determine that information from the confidential source  
16 is gang-related. (Frisk Decl., Ex. B ¶ 21.) It states that the confidential source must identify  
17 specific gang activity or conduct, but does not require an articulable basis as plaintiff suggests.  
18 (Id.)

19 Plaintiff further alleges that defendants breached the settlement agreement because the  
20 prison relied upon source items that did not comply with the validation criteria. Plaintiff  
21 summarizes that the prison need only have one reliable source item showing plaintiff’s  
22 involvement in gang activity over the past six years in order to revalidate plaintiff as a gang  
23 member. (Reply at 26.) The source items must meet one of the reliability criteria in Section  
24 3378(c)(8)(A) - (M). (Id.)

25 Plaintiff argues that 5 of 6 source items used were previously rejected as not meeting  
26 validation requirements. (Reply at 27.) As such, OCS should have indicated that “This  
27 document does not meet validation requirements.” (Id.) (citing DOM § 52070.21.5.) However,  
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1 such indication must occur only after a validation package has been submitted to OCS, and a  
2 decision has been made. See DOM § 52070.21.5. Plaintiff argues that the “underground  
3 reviews” of several source items should have prompted a similar marking to demonstrate that  
4 those source items were unofficially rejected as insufficient. However, as the court indicated  
5 previously, there is no evidence to persuade the court that those “underground reviews” are  
6 subject to the California Code of Regulations or the DOM. In addition, the “underground  
7 reviews” of source items that rejected the items as insufficient did so on the basis that the source  
8 items were insufficient by themselves, but not necessarily insufficient when combined with other  
9 supporting source items.

10 Plaintiff claims that the six source items used to revalidate him do not meet evidentiary  
11 criteria under the California Code of Regulations or the Castillo settlement. Defendants do not  
12 expressly address plaintiff’s arguments. The court is mindful that plaintiff may be properly  
13 revalidated based on one reliable source item. However, as previously noted, it is not clear  
14 whether the supporting source items can or should be counted as one source item, and whether  
15 the “one reliable source item” must be an “independent source item.” Thus, this claim will be  
16 referred to Judge Vadas for possible settlement. If the parties are unable to reach a settlement  
17 agreement, defendants will be directed to file a supplemental brief addressing this claim, with  
18 supporting documentation and citations. If defendants discover that none of the source items  
19 complied with the California Code of Regulations or the Castillo agreement sufficient to  
20 revalidate plaintiff, defendants shall also address what remedy is appropriate.

21 6. CDCR violated the informant interview

22 It is not clear what plaintiff’s argument is regarding this claim. (Mot. at 12.) Because it  
23 is plaintiff’s burden to prove the elements of a breach of contract claim, and he has not done so,  
24 this claim is DENIED.

25 7. IGI failed to document plaintiff’s verbal opinions and failed to disclose the  
26 December 20, 2007 validation memorandum before submission to the OCS

27 Plaintiff alleges that at his interview on December 19, 2007, the IGI failed to document  
28

1 the verbal opinions plaintiff provided in rebuttal to each source item relied upon. (Reply at 21-  
2 22.) In addition, plaintiff claims that the IGI failed to provide plaintiff copies of his documented  
3 rebuttal and failed to disclose the December 20, 2007 validation memorandum before submitting  
4 it to the OCS. (Id., Mot. at 10.) Instead, plaintiff was given a copy of the memorandum on  
5 December 26, 2007.

6 The Castillo settlement provides that, for inactive reviews, the prisoner shall be given 24  
7 hours notice in advance of the review. (Frisk Decl., Ex. B ¶ 10.) In addition, the prisoner will be  
8 given an opportunity to record his opinions on the new source items used. (Id.) A written copy  
9 of these opinions shall be given to the prisoner within 14 calendar days of the inactive review.  
10 (Id.) When a new source item is used beyond that used in the initial validation, each inmate shall  
11 be given notice and an opportunity to be heard during the inactive review. (Id.) This complies  
12 with the DOM, which provides that the interview shall “be documented and include a record of  
13 the inmate’s opinion on each of the source items used in the validation.” DOM § 52070.21.1.  
14 “Staff shall record this information and provide a written record to the inmate within fourteen  
15 (14) calendar days and prior to submission of the validation package to the OCS.” Id.; Cal. Code  
16 Regs., tit. 15 § 3378(c)(6)(D).<sup>11</sup>

17 Plaintiff claims that the submission of his opinions on each of the source items was not  
18 complete, and some of plaintiff’s statements were misrepresented. (Reply at 22; Docket No. 254  
19 ¶ 10.) In addition, the parties do not dispute that plaintiff was not provided copy of the  
20 validation memorandum, which included the recorded opinions, until December 26, 2007.

21 The court concludes that the failure to comply with the DOM and California Code of  
22 Regulations regarding the late disclosure to plaintiff appears to be inconsistent with plaintiff’s  
23 settlement agreement, see Cal. Code Regs., tit. 15 § 3378(c)(6)(D). Plaintiff requests declaratory  
24

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25  
26 <sup>11</sup> “The interview shall be documented and include a record of the inmate’s opinion on  
27 each of the source items used in the validation. Staff shall record this information and provide a  
28 written record to the inmate within fourteen (14) calendar days *and prior to submission of the  
validation package to OCS.*” (Emphasis added.)

1 and injunctive relief, as well as damages. For the reasons stated in defendants' pleadings, the  
2 court agrees that injunctive relief is indeed moot, in light of plaintiff's subsequent 2013  
3 revalidation proceedings. This claim will be referred to Judge Vadas for possible settlement. If  
4 the parties are unable to reach a settlement agreement, defendants will be directed to file a  
5 supplemental brief addressing the extent of the breach, if any, and what remedy is appropriate.

6 8. CDCR failed to allow plaintiff to be interviewed by the IGI or designee

7 Plaintiff claims that defendants violated the settlement agreement because plaintiff did  
8 not present his opinions, nor was he interviewed, by the "IGI or a designee qualified to act as an  
9 investigative lieutenant with the appropriate training, rank, and certification." (Mot. at 13.)

10 Plaintiff states that the interviewer instead was a correctional officer, and CDCR policy does not  
11 permit a correctional officer to be an acting lieutenant. (Id., n.3.) Further, plaintiff cites to DOM  
12 § 52070.14 to assert that only lieutenants are authorized to be an IGI. (Id.)

13 Plaintiff has not cited to, and the court cannot find, that the interviewer must be an IGI.  
14 The record shows that Assistant IGI T. Turmezei drafted and submitted validation package, and  
15 Assistant IGI Eubanks helped Assistant IGI T. Turmezei interview plaintiff. (Frisk Decl., Ex.  
16 E.) Further, DOM § 52070.21.1 states that prior to the submission of a validation package, the  
17 inmate shall be "interviewed by the IGI *or designee*, and given an opportunity to be heard."  
18 DOM § 52070.21.1 (emphasis added); see Cal. Code Regs., tit. 15, § 3378(c)(6)(A).<sup>12</sup> Despite  
19 plaintiff's assertion, there is no indication that a designee must be "qualified to act as an  
20 investigative lieutenant with the appropriate training, rank, and certification." Thus, plaintiff's  
21 claim that this failure breached the settlement agreement is DENIED.

22 9. CDCR failed to conduct an additional thorough review

23 Plaintiff asserts that the settlement agreement required an additional thorough review to be  
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25  
26 <sup>12</sup> "Prior to submission of a validation package to the OCS, or during the inactive status  
27 review process, the subject of the investigation shall be interviewed by the Institution Gang  
28 Investigator, or designee, and given an opportunity to be heard in regard to the source items used  
in the validation or inactive status review."

1 conducted of any proposed validation to ensure that the revalidation complied with proper criteria  
2 and procedural protections. (Mot. at 13-14.) He construes this portion of the settlement  
3 agreement to mean that defendants were required to conduct an additional, more detailed, and  
4 complete written review of any proposed revalidation, and that such review must occur after the  
5 revalidation package is submitted to the OCS. (Reply at 39-40.) Plaintiff intimates that  
6 defendants were required to set up “formal” procedures to implement the agreement. (Id. at 40.)

7 Under California law, when interpreting contracts, the written agreement is the “first and  
8 highest” evidence of the mutual intent of the parties. Pope v. Allen, 225 Cal. App. 2d 358, 364  
9 (1964). If possible, the court will determine the parties’ intention solely from the language of the  
10 letter agreement itself. See Ben-Zvi v. Edmar Co., 40 Cal. App. 4th 468, 472-73 (1995). In  
11 addition, courts will not “create for the parties a contract which they did not make, and . . . cannot  
12 insert in the contract language which one of the parties now wishes were there.” Levi Strauss &  
13 Co. v. Aetna Casualty & Surety Co., 184 Cal. App. 3d 1479, 1486 (1986). The court will,  
14 however, allow extrinsic evidence tending to prove a meaning to which the agreement’s language  
15 reasonably is susceptible, but only if the offered evidence is relevant to prove a reasonable  
16 interpretation in light of the facts, circumstances, and conditions surrounding the execution of the  
17 agreement. See Oakland-Alameda County Coliseum v. Oakland Raiders, Ltd., 197 Cal. App. 3d  
18 1049, 1057-58 (1988).

19 Here, plaintiff’s interpretation that the “thorough[] review” of source items considered  
20 requires an “additional” post-validation review and a written record of the review is not supported  
21 by the plain language of the agreement. Thus, plaintiff’s claim that this failure breached the  
22 settlement agreement is DENIED.

23 10. CDCR failed to disclose source items at annual classification reviews

24 Plaintiff alleges that the CDCR failed to disclose source items at his annual classification  
25 reviews, as required by DOM § 52070.26.<sup>13</sup> (Mot. at 14.) Defendants assert that the Institutional

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26  
27 <sup>13</sup> “At the inmate/parolee’s annual review, any information or source items  
28 received/developed during the preceding year, which meets the validation requirements as



1 Classification Committee is not required to make a separate disclosure of source items for a  
2 revalidation. (Frisk Decl. ¶ 19.) Rather, this is only completed at the initial validation stage.  
3 (Id.)

4 Defendants do not address plaintiff's claim or citation to DOM § 52070.26. Plaintiff does  
5 not explain his claim or clearly provide examples of his allegation. In addition, it is not at all  
6 clear that the DOM section to which plaintiff cites is considered part of the revalidation process  
7 so that compliance with DOM § 52070.26 is mandated by the settlement agreement. That is, it is  
8 not apparent to the court why the failure of the prison to disclose source items at a classification  
9 review to an inmate after he has already been revalidated is relevant to whether plaintiff's  
10 proposed revalidation complied with CDCR criteria for revalidation and due process protections.

11 As the claim currently reads, the court is not inclined to find that defendants breached the  
12 settlement agreement based on the CDCR's failure to disclose source items at plaintiff's annual  
13 classification review. Because it is plaintiff's burden to prove the elements of a breach of  
14 contract claim, and he has failed to do so, this claim is DENIED.

15 11. CDCR relied upon undisclosed evidence to establish inactive eligibility date

16 Plaintiff alleges that after the OCS revalidated him on January 16, 2008, the CDC Form  
17 128B-2 was signed and dated the same day. (Frisk Decl., Ex. G.) On that form, it calculated  
18 plaintiff's next active/inactive review eligibility date as August 14, 2013. (Id.) Plaintiff argues  
19 that an inmate's inactive eligibility date is set six years from the date of the gang affiliate's last  
20 date of activity. (Reply at 21.) Plaintiff claims that the IGI never stated, and there is no evidence  
21 to show, that plaintiff's revalidation relied upon any gang-related activity dated August 14, 2007.  
22 (Id.) In fact, argues plaintiff, the revalidation disclosure report states that the source items noted  
23 the latest gang-related activity in February 2007. (Id.) Thus, argues plaintiff, his review

24 \_\_\_\_\_  
25 defined in CCR Section 3378, shall be disclosed to the inmate/parolee on the CDC Form 812  
26 A/B. The information need not be disclosed if it is part of an ongoing investigation or if  
27 disclosure would compromise an ongoing investigation. The inmate/parolee shall be interviewed  
28 regarding the information and a request shall be made to the OCS for an updated CDC Form  
128B-2.”

Order Denying in Part Motion to Enforce Settlement Agreement; Referring Case to Pro Se Prisoner Settlement Program

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1 eligibility date should have been in February 2013, and not August 2013. Plaintiff alleges that  
2 because August 2013 was set as the eligibility date, that necessarily means that the prison must  
3 have relied upon August 2007 gang-related activity and information but failed to disclose that  
4 information to plaintiff, which was a breach of the settlement agreement to be provided notice and  
5 an opportunity to be heard.

6 To support plaintiff's assertion that an inmate's eligibility review is set six years from the  
7 last date of gang activity, plaintiff cites to California Code of Regulations, title 15, § 3378(e).  
8 However, Section 3378(e) states, "An inmate housed in a security housing unit (SHU) as a gang  
9 member or associate may be considered for review of inactive status by the Department Review  
10 Board when the inmate has not been identified as having been involved in gang activity *for a*  
11 *minimum of six (6) years.*" (Emphasis added.) It does not state that the eligibility review date is  
12 determined by calculating exactly six years from the last identified date of gang-related activity.  
13 Nor can the court find any provision supporting that proposition. More importantly, even  
14 assuming that plaintiff's eligibility review date was set six years from some undisclosed gang-  
15 related activity, that is not relevant to the issue at hand, which is whether defendants breached the  
16 settlement agreement to thoroughly review all source items used in consideration of plaintiff's  
17 revalidation to ensure the proposed revalidation complies with relevant laws.

18 Plaintiff provides a copy of an August 11, 2009 Classification Committee review form  
19 stating that the Committee reviewed plaintiff for inactive gang status and noted that "[t]he last  
20 source document used in the validation process is dated 12/10/07, indicating recent (within 6  
21 years) gang activity that occurred in August 2007." (Pl. 2d Decl., Ex. 22.) Plaintiff asserts that  
22 this document shows that his inactive review eligibility date of August 14, 2013, is based on an  
23 undisclosed gang activity allegation that must have been used to revalidate him. (Reply at 21.)  
24 However, a review of the December 10, 2007 source document used in the revalidation process,  
25 and referenced by the August 11, 2009 Committee form, shows that there was no reference to any  
26 gang activity in August 2007. (Frisk Decl., Ex. F at 5.) The source document actually references  
27 the gang activity as occurring on March 29, 2006. (*Id.*) In short, there is no persuasive evidence

1 to support plaintiff's assertion that he was in fact revalidated based on a source item that accused  
2 plaintiff of gang-related activity in August 2007.

3 Thus, plaintiff's claim that this breached the settlement agreement is DENIED.

4 **CONCLUSION**

5 1. Plaintiff's motion to enforce the settlement agreement is DENIED in part.  
6 Specifically, the motion with respect to Claims 1, 3, 4, 6, and 8-11 are DENIED.

7 2. The remaining claims are REFERRED to Judge Vadas pursuant to the Pro Se  
8 Prisoner Settlement Program for settlement proceedings on the remaining claim in this action, as  
9 described above. The proceedings shall take place within **one-hundred twenty (120) days** of the  
10 filing date of this order. Judge Vadas shall coordinate a time and date for a settlement conference  
11 with all interested parties or their representatives and, within **ten (10) days** after the conclusion of  
12 the settlement proceedings, file with the court a report regarding the prisoner settlement  
13 proceedings.

14 If these settlement proceedings do not resolve this matter, the parties will be directed to  
15 file supplemental briefing specifically addressing the merits of the surviving claims as discussed  
16 above, as well as what remedies are appropriate.

17 3. The clerk of the court shall mail a copy of this order, to Judge Vadas in Eureka,  
18 California.

19 4. The instant case is STAYED pending the settlement conference proceedings.

20 IT IS SO ORDERED.

21  
22 DATED: September 30, 2016

  
RONALD M. WHYTE  
United States District Judge