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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. C94 2307 CW

REPLY IN SUPPORT OF MOTION TO STOP DEFENDANTS FROM ASSAULTING, ABUSING AND RETALIATING AGAINST PEOPLE WITH DISABILITIES AT R.J. DONOVAN CORRECTIONAL FACILITY

Judge: Hon. Claudia Wilken
Date: August 11, 2020
Time: 2:30 p.m.
Crtrm.: TBD

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Defendants' Response, Dkt. 3006, to Plaintiffs' Motion to Stop Defendants from Assaulting, Abusing and Retaliating Against People with Disabilities at R.J. Donovan Correctional Facility ("RJD"), Dkt. 2922 ("RJD Motion" or "Motion"), is most notable for its concessions and omissions. Defendants do not challenge any of the eighty-seven declarations filed by people with disabilities, which describe the horrific abuses they have faced because of their disabilities and their fear of officer retaliation so powerful that they refrain from requesting disability accommodations. Defendants do not so much as acknowledge the lost lives, broken bones, and shattered psyches for which their officers are responsible. Defendants concede that they knew in December 2018 that there was a crisis of abuse at RJD. And Defendants' expert admits to the inadequacy of Defendants' response, including, *inter alia*, terminating only eight officers since January 1, 2017 (only two of the terminations are final), failing to install surveillance cameras, and refusing to place additional supervisory staff throughout the facility.

With the overwhelming weight of the facts against them, Defendants retreat to a few legal arguments that lack merit. Notwithstanding Defendants' assertions to the contrary, the misconduct—assaults and retaliation because of disability, denial of access to the Court-ordered disability grievance process, failures of accommodation in uses of force, and failures to comply with the Court's orders regarding accountability—plainly violate the ADA and prior Court orders. Defendants argue that the legal authority for Plaintiffs' requested relief is "unclear." But the Court has the inherent authority to enforce prior orders and, based on the facts here, can grant relief under Federal Rule of Civil Procedure 65. Defendants contend that the relief requested by Plaintiffs fails the needs-narrowness-intrusiveness requirement of the Prison Litigation Reform Act ("PLRA"). But each element of Plaintiffs' Revised Proposed Order, filed herewith, is laser focused on and necessary for stopping violations of the ADA and protecting people with disabilities. Accordingly, Plaintiffs respectfully request the Court grant the Motion and order Defendants to do what they should have done years ago: put an end to the intolerable abuse of people with disabilities at RJD.

I. DEFENDANTS DO NOT EVEN ATTEMPT TO REBUT THE EIGHTY-SEVEN DECLARATIONS FROM PEOPLE WITH DISABILITIES DOCUMENTING THE MISCONDUCT THEY HAVE EXPERIENCED OR WITNESSED AT RJD

The most powerful evidence supporting the Motion is the eighty-seven declarations from people with disabilities[1] describing the horrific cruelties officers have inflicted on them and others at RJD. *See* Reply Decl. of Gay Grunfeld in Supp. of RJD Mot. ("Grunfeld Reply Decl."), filed herewith under seal, ¶ 3. The testimony describes a prison where administrators have lost control, where officers terrorize and hurt people with disabilities without facing any consequences, and where requesting help or filing a staff complaint results in almost certain retaliation. The declarations are bolstered by evidence (typically medical records) documenting the deaths, broken bones, loss of consciousness, exacerbated disabilities, mental health decompensation, suicide attempts, hopelessness, desperation, and anger that are the direct result of the officers' abuses.

Reading Defendants' Response, however, one would have no idea that anyone had suffered so much as a scratch. Defendants' Response declines to use the actual name of this Motion. In a footnote, Defendants state that they "will not address all of the individual allegations [of staff misconduct] in the declarations on their merits … because it would subsume their response." Defs.' Resp. at 24 n.10. Defendants are true to their word. They do not attempt to contest the vast majority of the declarations or corroborating evidence. For the few declarations Defendants purport to "dispute," there is no real dispute.[2] Defendants' near-total failure to contest the declarations and supporting documents "constitutes a concession to their truth." *See Luu v.*

[1] All of the declarants are *Armstrong* class members, *Coleman* class members, and/or *Clark* class members. *Coleman* and *Clark* class members are people with disabilities. *See* 42 U.S.C. § 12102(1). Their experiences are highly relevant to whether Defendants are violating the rights of *Armstrong* class members.

[2] To "dispute" the declarations, Defendants cite to seven letters in which they claim they investigated allegations in advocacy letters sent by Plaintiffs and decided they were unfounded. *See* Defs.' Resp. at 16. Defendants' letters do not include any sworn evidence describing the investigations or supporting the findings that no misconduct occurred. One of the cited letters states only that the allegations had been referred to the Office of Internal Affairs; it does not dispute the related declaration. *See* Decl. of Michael Freedman in Supp. of RJD Mot. ("Freedman RJD Decl."), Dkt. 2922-2 to 5, ¶ 243 & Ex. 57d.

Defendants cite four complaints filed by declarants in federal court as establishing disputes regarding the facts in the declarations. *See* Defs.' Resp. at 17. Defendants, however, provide no evidence about the current status of those cases, including whether the cases are still active.

Ramparts, Inc., 926 F. Supp. 2d 1178, 1182 (D. Nev. 2013) (quotation marks and citation omitted). Worse yet, Defendants' whitewashing of the horrors at RJD suggests that they still do not take the widespread and ongoing abuses seriously and that they do not care about the suffering of the vulnerable people with disabilities they have sworn to protect.

II. DEFENDANTS' RESPONSE TO THE CRISIS AT RJD REMAINS WOEFULLY INADEQUATE AND HAS NOT PUT AN END TO THE ABUSE OF PEOPLE WITH DISABILITIES

Defendants and their expert admit, as they must, that in late-2018 RJD had a serious staff misconduct problem.[3] Defendants' Strike Team heard in December 2018 shocking and consistent reports of officers on Facility C abusing people with disabilities, using incarcerated people to do their bidding, and engaging in "gang-like" behavior. *See* Freedman RJD Decl., Ex. 2.[4] As the Chief Ombudsman for CDCR stated, "**I have never heard such despair, hopelessness, and fear from inmates**." Decl. of Gay Grunfeld in Supp. of RJD Mot. ("Grunfeld RJD Decl."), Dkt. 2922-1, Ex. H, at DOJ00013200 (emphasis added).

Defendants contend, however, that the Court should deny the Motion because Defendants have fixed any problems that existed. *See* Defs.' Resp. at 5-13, 17-22. In so arguing, Defendants ignore the undisputed evidence that RJD remains an extremely dangerous place, where officers continue to assault and retaliate against people with disabilities with impunity.

A. Serious Misconduct Continues to Occur, Including Horrific Retaliation Against Class Members for Submitting Declarations in this Matter

Recent, serious incidents of abuse provide the most compelling evidence that RJD remains unsafe for people with disabilities. Just a few weeks ago, this Court ordered the transfer of two

[3] *See, e.g.*, Defs.' Resp. at 1 ("Defendants recognize that the R.J. Donovan Correctional Facility has challenges necessitating support."); *id.* at 18 (acknowledging that in 2018 "incidents of staff misconduct were occurring on [RJD]'s Facility C at an unacceptable rate"); Decl. of Ken McGinnis in Supp. of Defs.' Resp., Dkt. 3006-2, Ex. B ("McGinnis Rep."), at 41 ("[C]DCR, by its own reports and documents, acknowledged a problem of staff misconduct at RJD and an environment that needed to change.").

[4] *See also* Reply Decl. of Eldon Vail in Supp. of RJD Mot. ("Vail Reply Decl."), filed herewith under seal, ¶ 21 ("In all my years of experience as a correctional practitioner and consultant, I have never seen such a systemic approach of officers recruiting incarcerated people to commit assaults on their behalf …. Such a practice is obviously wrong, morally and operationally, and completely erodes any belief by the incarcerated population of the legitimacy of the authority of institution staff.").

class members because of the serious retaliation they faced for submitting declarations in support of this Motion. *See* Dkts. 2972, 2978, 2979, 2991. Additional evidence of retaliation has come to light since the Court's July 16, 2020 hearing. On the eve of the transfer of one of the declarants, officers slipped him a note that read: "RAT RAT RAT VER [sic] you go u can't hide mother fucker I will find you old ass and cut your heart out. RAT. you don't fuck with c/o. we will be your worses [sic] nightmare." Grunfeld Reply Decl., ¶¶ 18-19 & Exs. Q-S. The letter was signed with the initials of a notorious correctional officer gang. *Id.*, Exs. Q, S; Vail Reply Decl., ¶ 25. And a witness to the retaliation against the now-transferred declarants has faced such serious retaliation himself that Defendants agreed to transfer him from RJD. *See* Grunfeld Reply Decl., ¶¶ 20-21 & Exs. H, T, U.

In addition, thirty-three declarations from people with disabilities describe abuse and retaliation at RJD that has occurred in the approximately five months since the filing of the RJD Motion. *See* Decl. of Michael Freedman in Supp. of Statewide Mot. ("Freedman Statewide Decl."), Dkt. 2948-2, Exs. 3-5, 9-24; Grunfeld Reply Decl., Exs. C-K, M-P; Reply Decl. of Penny Godbold in Supp. of RJD Mot. ("Godbold Reply Decl."), filed herewith under seal, Ex. B. These declarations recount officers intentionally pushing over a person who uses a walker after he complained officers were not taking COVID-19 precautions, Freedman Statewide Decl., Ex. 10, ¶¶ 9-10; breaking a mentally ill person's nose and foot in an unnecessary use of force, then charging the person with a false Rules Violation Report ("RVR"), Ex. 23, ¶¶ 8-14; Ex. 14, ¶¶ 5-6; Ex. 19, ¶¶ 5-8; breaking a person's wrist when they threw him to the ground for no reason, Ex. 20, ¶¶ 7-12, 17; assaulting a class member having a seizure on the yard, Ex. 13, ¶¶ 8-10; calling a developmentally disabled person "retarded," Ex. 18, ¶ 8; ignoring a person profusely bleeding from self-inflicted injuries, Ex. 15, ¶¶ 8-9; requesting or allowing incarcerated people to harm other incarcerated people, Ex. 22, ¶¶ 6-11; Ex. 18, ¶ 9; Ex. 16, ¶ 5; Ex. 12, ¶¶ 4-10; intentionally closing cell doors on elderly people who use wheelchairs and walkers, Ex. 24, ¶¶ 4-5; Ex. 13, ¶¶ 13-14; and shooting an incarcerated person with a rubber bullet for target practice, Grunfeld Reply Decl., Ex. P, ¶¶ 6-11. Furthermore, Plaintiffs have detailed how in February 2020 officers caused the death of a declarant by refusing to take his safety concerns seriously and encouraging him and his cellmate to

fight.[5] *See* Mot. to Stop Defs. from Assaulting, Abusing and Retaliating Against People with Disabilities ("Statewide Mot."), Dkt. 2948, at 11-12.

That such appalling incidents of abuse have occurred so recently and at locations throughout the prison prove that Defendants' attempts to fix the problems at RJD have failed. As Plaintiffs' expert, Eldon Vail, writes, "[n]othing in the most recent records … indicates that anything has changed at RJD." Vail Reply Decl., ¶ 13; *id.*, ¶ 27 ("I run out of words to describe the horror of such behavior on the part of custody officers.").

B. Defendants' Staff Complaint, Investigation, and Discipline Process Does Not Hold Officers Accountable for Abusing People with Disabilities

Defendants state over and over again that they take staff misconduct seriously. *See, e.g.*, Defs.' Resp. at 1, 2; Decl. of Ralph Diaz in Supp. of Defs.' Resp. ("Diaz Decl."), Dkt. 3006-4, ¶ 37. The record shows that Defendants' words are nothing more than empty platitudes.

Plaintiffs have produced undisputed evidence of misconduct at RJD directly involving more than one hundred officers. *See* Grunfeld Reply Decl., ¶ 69. Yet, since January 1, 2017, Defendants have terminated only eight officers for misconduct related to four incidents in which there was an incarcerated victim.[6] *See* Grunfeld Reply Decl., ¶¶ 34-38 & Ex. FF, at 20-21. Six of the terminations are not yet final. *Id.* All four incidents involved victims with disabilities. *See* Decl. of Gay Grunfeld in Supp. of Statewide Mot. ("Grunfeld Statewide Decl."), Dkt. 2948-1, Ex. G, at 2-3. During this same time period, not a single officer has been criminally charged, let alone convicted, for abusing an incarcerated person. *See* Grunfeld Reply Decl., ¶¶ 45-47; Grunfeld RJD Decl., Ex. R, at 138-39; Grunfeld Reply Decl., Ex. YY, at 32:17-18 (Defendants' expert admitting that "some of the excessive use of force cases could justify criminal

[5] Defendants repeatedly point to one piece of information provided by Plaintiffs that later proved to be inaccurate about an officer being physically involved in harming the decedent. *See, e.g.*, Defs.' Resp. at 16. Plaintiffs have already explained why they provided this information to Defendants. *See* Pls.' Resp. in Supp. of Prelim. Inj. ("PI Resp."), Dkt. 2999, at 7-8. Notably, however, nowhere have Defendants challenged any of Plaintiffs' evidence that officers contributed to the decedent's death by ignoring his safety concerns.

[6] Defendants state that nine officers were terminated, but their own records indicate otherwise. *See* Defs.' Resp. at 8. The one officer purportedly terminated in 2017 resigned before the termination became final. *See* Grunfeld Reply Decl., Ex. FF, at 20.

prosecution"). Overall, imposition of discipline at RJD has actually decreased, from 21 instances in 2017 to 19 in 2018 to 14 in 2019. *See* Grunfeld Reply Decl., Ex. FF, at 20-21.

Jeffrey Schwartz, Plaintiffs' expert on use of force and staff misconduct investigations, identified multiple problems with the discipline system—lack of video surveillance (more below), biased and poor-quality local inquiries, inappropriate rejections of referrals to the Office of Internal Affairs ("OIA"), inadequate investigations by OIA, and improper exercise by wardens of their authority and discretion to discipline. *See generally* Decl. of Jeffrey Schwartz in Supp. of Statewide Mot. ("Schwartz Decl."), Dkt. 2948-4, ¶¶ 20-107; Statewide Mot. at 12-15 & n.23 (summarizing CDCR's investigation process). To support his findings, Mr. Schwartz drafted detailed critiques of twenty-five of the forty-three investigation and disciplinary files he reviewed. *See* Schwartz Decl., ¶¶ 108-351. Defendants do not respond to Mr. Schwartz's conclusions or contest any of his case reviews. In fact, Defendants' expert agrees "there have been breakdowns and failures in the decisions of those involved in the [investigation and disciplinary] processes that have resulted in inappropriate outcomes." McGinnis Rep. at 8-9; *see* Grunfeld Reply Decl., Ex. YY, at 16:8-12; 16:21-23; 22:24-23:4; 23:6-12; 44:11-12; 45:7-9; 53:3-23; 65:18-66:19; 69:20-24; 72:19-24; 74:4-8.

The system is designed to discredit incarcerated people and exonerate staff. Since January 1, 2017, all of the terminations involved either a video or a staff report of the misconduct. *See* Freedman Statewide Decl., ¶¶ 91-94; Freedman RJD Decl., Exs. 89-90; Grunfeld Reply Decl., Ex. HH. CDCR has not identified a single instance of any type of discipline that does not fit that pattern. Thus, every time an investigation results in a conflict between a report of misconduct by an incarcerated person and a report of policy compliance by an officer (which is most cases because of Defendants' lack of video surveillance), Defendants find that no misconduct occurred. For this reason, Plaintiffs' experts both opine that Defendants must install surveillance cameras immediately. *See* Schwartz Decl., ¶¶ 32, 87, 94-98; *see also* Decl. of Eldon Vail in Supp. of RJD Mot. ("Vail RJD Decl."), Dkt. 2922-6, ¶¶ 83, 94-101. That said, even when officers are caught on camera, they sometimes are not punished appropriately. *See* Schwartz Report, ¶¶ 108-126; Grunfeld Reply Decl., ¶¶ 32, 36, 42 & Exs. FF, GG, II, JJ.

Defendants have only three responses to Plaintiffs' criticisms of the staff discipline process. First, Defendants assert that the newly-created Allegation Inquiry Management Section ("AIMS")—pursuant to which investigators within OIA conduct inquiries into some staff complaints—will solve everything. *See* Defs.' Resp. at 11-13, 21-22. But AIMS only improves inquiries, nothing else. Defendants provide no reasonable explanation why, if AIMS is such an improvement, AIMS will not investigate staff complaints related to reported uses of force that do not result in serious bodily injury and will require a written complaint to trigger AIMS involvement. *See* Schwartz Decl., ¶¶ 89-91; *see also* Grunfeld Statewide Decl., Ex. J, at 70-72, 80-99; *id.*, Exs. O-R; Grunfeld Reply Decl., Ex. YY, at 115:25-116:17; 117:16-23; 118:3-16 (Defendants' expert agreeing that all staff complaints regarding use of force should be included in AIMS). Furthermore, Plaintiffs' counsel has observed a number of interviews conducted by AIMS investigators and found the interviewers displayed the same bias toward incarcerated people and poor investigation skills as the local investigators they are replacing. *See* Godbold Reply Decl., ¶¶ 2-9 & Ex. B.

Second, Defendants assert, based on the fact that their current policies were developed pursuant to court orders in *Madrid v. Gomez*, Case No. 90-3094-TEH (N.D. Cal.), that their policies for investigating and disciplining staff are adequate. *See* Defs.' Resp. at 34. Defendants, however, have no answer to most of Mr. Schwartz's well-supported critiques of those policies. *See* Schwartz Decl., ¶ 18, 55 (standard used by OIA to accept investigations), ¶ 49 (need for medical staff to document injuries), ¶ 66 (failure to reassign officers credibly accused of misconduct), ¶ 67 (detrimental requirement that allegations and evidence of misconduct be turned over to officers accused of misconduct), ¶¶ 75-76 (impropriety of Employee Disciplinary Matrix), ¶ 221 (no requirement that video be reviewed if available).

In any event, good policies do not equal good practices. As Judge Henderson wrote in *Madrid*:

> [W]ritten policies alone serve little purpose unless staff are trained as to their content. Adequate supervision and investigation are necessary to ensure that … staff are … implementing written policies and principles learned through training. Finally, a meaningful disciplinary system is essential, for if there are no sanctions imposed for misconduct, the prison's "policies and procedures … become a dead

letter."

Madrid v. Gomez, 889 F. Supp. 1146, 1181 (N.D. Cal. 1995) (citation omitted). Donald Specter, who is counsel here and litigated *Madrid*, explains that the labor-intensive remedy in *Madrid* worked only because of rigorous oversight by a third-party monitor and plaintiffs' counsel and that, since the case was terminated in 2011, he has "observed tremendous backsliding by CDCR and defunding of the *Madrid* remedial process." Reply Decl. of Donald Specter in Supp. of RJD Mot., filed herewith, ¶¶ 9-13. And, as discussed above, the evidence shows and Defendants' expert admits there is a serious problem with CDCR's implementation of its policies. *See* McGinnis Rep. at 8.

Third, Defendants assert that the Office of the Inspector General ("OIG") approves of 95% of CDCR's internal reviews of uses of force. *See* Defs.' Resp. at 34. However, that figure relates only to reported uses of force and to CDCR's statewide performance, not its performance at RJD. Moreover, the OIG has been highly critical of RJD's response to staff abuse and CDCR's use of force and staff discipline process. *See* Grunfeld RJD Decl., Exs. EE, GG, KK; Grunfeld Statewide Decl., Ex. V; Grunfeld Reply Decl., ¶¶ 80-82 & Exs. VV-XX. The Governor also recently cut the OIG's budget. *See* Grunfeld Statewide Decl., Ex. T, at 10.

C. Defendants Have Failed to Promptly and Thoroughly Investigate Misconduct Identified by the Strike Team and Raised in Plaintiffs' Declarations

Defendants' pathetic response to the specific allegations of misconduct identified by the Strike Team and in Plaintiffs' declarations further demonstrates they do not take misconduct "seriously." The Strike Team recommended a prompt review of all actionable information provided by the interviewees. *See* Freedman RJD Decl., Ex. 2, at 12. Yet, the majority of the follow-up work occurred **more than a year after the Strike Team left RJD**. Grunfeld Reply Decl., ¶¶ 52-57. Those year-plus delays, which Defendants' expert describes as "concerning," meant the one-year statute of limitations had expired for seeking to discipline the involved officers. Grunfeld Reply Decl., ¶ 57 & Ex. YY, at 81:16-82:1-18; 86:4-87:2; Vail Reply Decl., ¶ 40. Moreover, the follow-up inquiries were biased, incomplete, and of such poor quality that only two of the at least forty-eight actionable allegations of misconduct identified by the Strike

Team resulted in any discipline. *See* Grunfeld Reply Decl., Ex. OO (showing only two cases resulting in discipline); Vail Reply Decl., ¶¶ 41-51 (concluding that "the follow-up investigations, or lack thereof, [were] shocking" and that investigators "demonstrate[d] flawed investigative techniques and bias against incarcerated people").

To date, Defendants have only conducted interviews with nine of Plaintiffs' sixty-six declarants, even though fifty-four of the declarations were filed in February 2020. *See* Godbold Reply Decl., ¶5. As far as Plaintiffs are aware, only one incident described in the declarations has led to any discipline. *See* Grunfeld Reply Decl., ¶ 44.

D. Defendants Have Not Installed Surveillance Cameras at RJD and Have No Plans to Do So

Everyone—the Strike Team, the Chief Ombudsman, Defendants' persons most knowledgeable, the Inspector General, Defendants' expert,[7] and Plaintiffs' experts—agrees that surveillance cameras are necessary to solve the crisis at RJD. *See* RJD Mot. at 26-28; Schwartz Decl., ¶¶ 87, 94-98; Vail RJD Decl., ¶¶ 83, 94-101; Vail Reply RJD Decl., ¶¶ 52-53, 87. As Defendants' expert explains, a functioning surveillance system:

> will substantially improve the ability of the CDCR … to hold staff and inmate [sic] accountable for all inappropriate behavior, provide an efficient tool for internal affairs and criminal investigators to fully resolve complaints …, will serve as a deterrent for inappropriate behavior by both staff and inmates, and provide … the ability to monitor locations that are now difficult to monitor ….

McGinnis Rep. at 27. Defendants have had a contract with a vendor for installation of surveillance cameras throughout their system since 2016. *See* Grunfeld Reply Decl., ¶¶ 49-51 & Ex. NN. Costs of installation would be minimal in the context of CDCR's budget). *See* Decl. of Jeff Macomber in Supp. of Defs.' Resp., Dkt. 3006-5, ¶ 12 (estimating $6,600,000 cost); Grunfeld Statewide Decl., Ex. M, at 1 ($13 billion budget); Grunfeld Reply Decl., Ex. AAA. Nevertheless, Defendants have no plans to install cameras at RJD. *See* Defs.' Resp. at 13-14.

E. Defendants Failed to Address Other Findings of the Strike Team

Defendants' expert describes the Strike Team's report as a "milestone" and endorses all of

[7] *See also* McGinnis Rep. at 26 ("I fully support the recommendation to replace and upgrade the facility's video surveillance system."); *id.* at 29 (same).

its recommendations. McGinnis Rep. at 17, 18. Defendants concede, however, that they did not follow many of the Strike Team's recommendations. *See* RJD Mot. at 28-230.

Defendants' expert, like the Strike Team, states that Defendants should significantly increase supervisory staff on Facility C at RJD. *See* McGinnis Rep. at 34. Yet, Defendants state, with no analysis or support, that "after careful consideration," the problems at RJD "are sufficiently addressed by the staffing structure in place." Defs.' Resp. at 36-37 (citing Diaz Decl., ¶¶ 20-23).

The Strike Team found that officers on Facility C may have been engaging in "gang-like activity." Freedman RJD Decl., Ex. 2, at 5. The current RJD warden explains that even now, staff provide extra privileges to certain incarcerated people in exchange for those incarcerated people "bec[oming] involved in enforcement behavior against other inmates," i.e., attacking incarcerated people at the direction of staff. McGinnis Rep. at 35. Defendants, however, never conducted a thorough investigation into the alleged officer gangs. *See* Freedman RJD Decl., Ex. 83, at 165:10-24. And, as demonstrated by the recent, coordinated retaliation against witnesses in this case, including the note a declarant received signed with the initials of an officer gang, officers are still engaging in gang-like behavior. *See* Grunfeld Reply Decl., ¶¶ 18-19 & Exs. Q, S.

F. Defendants' Other Remedial Measures Have Not Worked

Defendants' other actions—short-term staffing increases no longer in effect, replacement of some RJD leadership, unsubstantiated training, mentorship, sending subject-matter experts to RJD, moving managers' offices onto yards, minor policy changes, and alleged improved communication with incarcerated people, *see* Defs.' Resp. at 7-11, 18-20[8]—have fallen short of creating meaningful change. *See* Vail Reply Decl., ¶¶ 36, 76, 79, 81. The abuses they were designed to stop have continued unabated.

[8] Defendants' declarants—including Secretary Diaz, Undersecretary Macomber, and Director Miller—provide no documentary evidence to support their claims of the steps they have taken to improve conditions at RJD. And Defendants' expert admitted that he was unable to determine the overall effectiveness of "literally all of" the initiatives taken by CDCR because he was unable to make a site visit to RJD. Grunfeld Reply Decl., Ex. YY, at 99:3-9.

G. Defendants' Data Regarding Decreases in Use of Force Incidents and Staff Complaints Do Not Establish that Defendants Have Fixed the Problems at RJD

Defendants' data regarding decreases in uses of force and staff complaints do not demonstrate that they have solved the crisis at RJD. *See* Defs.' Resp. at 20-21. Though many of the declarations describe unreported uses of force or misconduct not involving force by officers, Defendants' data capture only reported uses of force. Moreover, though the data show a reduction in use of force on Facility C from 2017 to 2019, use of force increased on Facility D by 50% and on Facility A by 15.8%. *See* Grunfeld Reply Decl., ¶¶ 64-65.

Defendants' staff complaint data are similarly unpersuasive. The undisputed evidence shows that many people with disabilities do not file staff complaints because of well-founded fears of retaliation. As explained by Mr. Vail, "[g]iven the history of retaliation at RJD, I am not convinced that a reduction in staff misconduct complaints at Facility C represents progress." Vail Reply Decl., ¶ 34. It is no surprise that staff complaints have trended downwards, as the officers' misconduct and retaliation have scared people into silence.

III. THE MISCONDUCT AT RJD VIOLATES THE ADA AND PRIOR ORDERS OF THIS COURT

Defendants argue that Plaintiffs are not entitled to relief because, even if significant abuse of people with disabilities is occurring at RJD and even if Defendants have not done enough to stop it, the misconduct has nothing to do with the ADA[9] or this Court's prior orders enforcing the ADA. *See* Defs.' Resp. at 23-25. Defendants are wrong.

A. Defendants Do Not Address Plaintiffs' Argument that the Abuses of Incarcerated People at RJD Violate the ADA's Anti-discrimination Provision, with Which This Court Has Ordered Defendants to Comply

Plaintiffs assert that the misconduct at RJD violates the ADA's program access **and** anti-discrimination provisions. *See* RJD Mot. at 37-40; 42 U.S.C. § 12132 (prohibiting discrimination and denial of access to programs); *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001)

[9] Because "[t]he [ADA and Rehabilitation Act] provide identical remedies, procedures and rights." Plaintiffs refer in this brief only to the ADA. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018) (internal quotation marks omitted); *see also Armstrong v. Wilson*, 942 F. Supp. 1252, 1258 (N.D. Cal. 1996).

(same). This Court has ordered Defendants to comply with both mandates. *See* Grunfeld RJD Decl., Ex. B ("2007 Injunction"), at 9 (ordering Defendants to "comply" with Section I of the ARP); *id*., Ex. A ("ARP"), § I (copying language from 42 U.S.C. § 12132).

Defendants' Response attempts to erase the anti-discrimination provision from the ADA and the Motion. The words "discrimination" and "discriminate" do not appear in their brief. Defendants do not cite to 42 U.S.C. § 12132, discuss or distinguish *Duvall* or any Ninth Circuit cases with similar holdings, or recognize that the Court's 2007 Injunction mandates that Defendants not discriminate on the basis of disability.

More troublingly, Defendants refuse to acknowledge the mountains of undisputed evidence that Defendants have, through the abuse at RJD, intentionally discriminated against people with disabilities. Officers at RJD have repeatedly attacked or otherwise abused people with disabilities because they have disabilities, have requested disability accommodations, have complained about failures of accommodation, or have participated in the Motion. *See* RJD Mot. at 5-8; Statewide Mot. at 10-11; Pls.' Mot. for Temporary Restraining Order ("TRO Mot."), Dkt. 2970, at 4-9; PI Resp., at 2-11. Defendants' own investigators found in late-2018 and early-2019 that staff were intentionally seeking to hurt people with disabilities and other vulnerable people, *see* Freedman RJD Decl., Ex. 2, at 1, and that the "[m]ajority of the[] allegations [of misconduct] are being made by the Enhanced Outpatient inmate population or **wheelchair designated inmates**." *id.*, Ex. 3, at 8 & Ex. 4, at 8 (emphasis added); *see also id*., Ex. 2, at 4-5. The types of misconduct at issue here—punching a deaf person because he could not hear an order, assaulting a person because he requested help carrying a box, throwing people to the ground when they asked that officers handcuff them in front of their bodies as an accommodation for their disabilities, closing cell doors on people who use wheelchairs or walk slowly—are blatant, obvious, and violent forms of discrimination. Such conduct violates the ADA and this Court's 2007 Injunction. It also is—as described by a declarant who recently witnessed an officer throw a 69-year-old wheelchair user to the ground for no reason—just "plain wrong." Grunfeld Reply Decl., Ex. F, ¶ 30.

The abuse at RJD also violates the ADA's prohibition on facially-neutral practices that have a disparate impact on people with disabilities. *See J.V. v. Albuquerque Pub. Sch.*, 813 F.3d

1289, 1295 (10th Cir. 2016). As discussed above, all of the officer terminations since 2017 involved misconduct against people with disabilities, indicating that the abuse hurts people with disabilities the most. The sheer quantity of declarations from people with disabilities about abuse at RJD also shows that the misconduct disproportionately harms people with disabilities.

B. The Rampant Misconduct and Retaliation at RJD Violates the Program Access Mandate of the ADA and Prior Court Orders Because Class Members Are Too Afraid of Staff to Request Accommodations

Defendants have an obligation, pursuant to the ADA and prior orders of this Court, to provide people with disabilities a safe environment and a process for requesting disability accommodations. *See* RJD Mot. at 38-40 (citing 42 U.S.C. § 12203(b), 28 C.F.R. § 35.130(b)(7)(i), 28 C.F.R. § 35.107(b), and the 2007 Injunction); *see also Clark v. California*, 739 F. Supp. 2d 1168, 1180-81 (N.D. Cal. 2010). The evidence shows that people with disabilities are so scared of staff at RJD that they refrain from requesting the help they need through the Court-ordered grievance process or otherwise. *See* RJD Mot. at 18-20; Statewide Mot. at 10 n.19. People with disabilities are also likely afraid to participate fully in the joint audit process, which relies on class member interviews. As a result, Defendants are in violation of the ADA's program access and anti-interference provisions and this Court's carefully-crafted remedies designed to bring Defendants in compliance with the ADA. *See* 2007 Injunction; *Brown v. City of Tucson*, 336 F.3d 1181, 1193 (9th Cir. 2003) (holding threats of adverse action unless "individual foregoes a statutorily protected accommodation" violate 42 U.S.C. § 12203(b)).

Defendants assert that Plaintiffs' claims in this respect are "cursory, non-specific, and subjective." Defs.' Resp. at 22. Not so. The declarations describe specific accommodations that class members have refrained from requesting out of fear of retaliation, including pen and paper to communicate; personal notifications for a deaf class member; assistance completing forms; showers, new linens, new clothes, or extra toilet paper after disability-related incontinence accidents; wheelchair pushers; wheelchair repairs; assistance cleaning their cells; access to a mental health clinician when suicidal or otherwise decompensating; access to mental health groups; and single cell status. *See* RJD Mot. at 19-20; Statewide Mot. at 10 n.19. Other declarants express a more generalized fear of staff. *See* RJD Mot. at 20; Statewide Mot. at 10

n.19. These reports are consistent with the Strike Team's findings[10] and the Chief Ombudsman's observation, quoted above, of the fear reported by incarcerated people.

Defendants next argue that because declarants and other people with disabilities have filed grievances, there has been no chilling effect on class members requesting accommodations. *See* Defs.' Resp. at 22-23. But protected conduct "can be chilled even when not completely silenced." *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005); Vail RJD Decl., ¶ 17 (opining that people are still willing to complain, despite risks, because of "degree of desperation and dangerous conditions that continue to exist at the RJD"). The dozens of unrebutted declarations about fearful people refraining from asking for accommodations are more than enough to show that reasonable people with disabilities have been chilled by the terrifying environment at RJD.

Lastly, Defendants' data regarding the number of grievances filed by class members are meaningless numbers, provided without any context. *See* Defs.' Resp. at 22-23. And the data are misleading because (1) Defendants inflate their count by including healthcare appeals (which are not relevant to this dispute about misconduct by custody officers) and (2) five class members (8% of declarants) filed a disproportionate number of the grievances (30%), distorting the data.[11]

C. Defendants Do Not Address Plaintiffs' Argument that Unnecessarily Throwing People Out of Wheelchairs and Walkers Violates the ADA

Plaintiffs have presented evidence—including video of three disturbing incidents—of officers throwing people in wheelchairs or walkers to the ground without adequate or sometimes any justification. *See* RJD Mot. at 6, 9; Freedman RJD Decl., Exs. 89, 90; Freedman Statewide Decl., Ex. 10, ¶ 10; TRO Mot. at 5-8; Grunfeld Reply Decl., Exs. HH-JJ; Vail Reply Decl., ¶¶ 54, 56-58 (analyzing videos). Under *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014) *rev'd in part on other grounds*, 575 U.S. 600 (2015), and *Vos v. City of Newport Beach*,

[10] *See* Freedman Decl., Ex. 2, at 11 (concluding that retaliation created "an environment with no relief mechanism for inmates who feel mistreated by staff" causing people to "'hide' within their daily routines and suffer minor abuse in order to avoid greater abuses").

[11] In support of their argument, Defendants point to four declarants who filed a significant number of grievances. *See* Defs.' Resp. at 22. Two of those declarants made no statements that their access to grievances had been chilled. *See* Freedman RJD Decl., Exs. 9, 10. And one of the other two declarants did file many appeals, but described an incident where, after being threatened by staff, he withdrew an ADA grievance to avoid retaliation. *Id.*, Ex. 36, ¶¶ 9-10.

892 F.3d 1024 (9th Cir. 2018), these failures to accommodate disabilities during uses of force violate the ADA. *See* RJD Mot. at 38. Defendants do not address this argument, conceding such violations. *See, e.g.*, *Mariscal v. Graco, Inc.*, 52 F. Supp. 3d 973, 984 (N.D. Cal. 2014).

D. Defendants Have Violated the Accountability Orders

Defendants do not contest that they failed to include on their Non-Compliance Logs the specific allegations, identified by Plaintiffs, of staff misconduct related to disability. *See* Defs.' Resp. at 39-40; RJD Mot. at 40-41; Freedman RJD Decl., ¶¶ 280-283; Grunfeld Reply Decl., ¶¶ 60-62. Instead, Defendants argue that they were not required to log and investigate the incidents pursuant to the Court's Accountability Orders because the incidents, though they are allegations of disability discrimination, did not involve alleged denials of access to programs, services, and activities. *See* Defs.' Resp. at 39-40. On the facts, Defendants are wrong, as a number of the allegations specifically involve failures of accommodation, including, for example, a denial of a wheelchair, throwing people out of wheelchairs and walkers, and closing cell doors on people with disabilities.[12] *See* Freedman RJD Decl., ¶ 280. On the law, Defendants are also wrong, as the Court "require[d] Defendants to track all allegations of non-compliance with the ARP and the orders of this Court." Grunfeld RJD Decl., Ex. C, at 16. As discussed above, Defendants violate the ARP and the 2007 Injunction when they discriminate against people on the basis of disability. Accordingly, Defendants must log discriminatory acts even when they do not involve the denial of programs, services, and activities. Their failure to do so at RJD violates the Accountability Orders. Until Defendants hold accountable officers who violate the ADA rights of *Armstrong* class members, Defendants will never graduate to self-monitoring of their system.

IV. DEFENDANTS' OTHER LEGAL ARGUMENTS ALL FAIL

A. All of Plaintiffs' Claims for Relief Fall Squarely Within the Complaint

Defendants assert that the Court should deny the Motion because the claims at issue sound

[12] Plaintiffs have never taken the position that the Accountability Orders require Defendants to log "every allegation of staff misconduct asserted by an *Armstrong* class member, regardless of whether it is connected to their disability or any access issues." Defs.' Resp. at 39. Plaintiffs identified specific allegations of misconduct that involved denial of program access or discrimination or retaliation on the basis of disability. *See* Freedman RJD Decl., ¶¶ 280-283.

in the Eighth Amendment (excessive force) and the First Amendment (retaliation for protected speech), which are not claims found in the operative Third Amended Complaint. *See* Defs.' Resp. at 23-25. To be certain, much of the misconduct also violates the Eighth and First Amendments. *See* RJD Mot. at 42-43. And this Court has adjudicated constitutional violations in this case. *See Armstrong v. Davis*, 275 F.3d 849, 864-65 (9th Cir. 2001). But, as discussed above, the misconduct at RJD violates Title II of the ADA (which is at the center of the operative complaint), the regulations implementing those statutory provisions, and this Court's orders enforcing the statute and the regulations. While the ADA's anti-interference and anti-retaliation provisions, 42 U.S.C. § 12203(a) and (b), are not cited in the complaint, they apply here. Surely Defendants cannot be arguing that this Court has no authority to act if officers (1) retaliate against class members for exercising their Court-ordered right to request accommodations or (2) engage in a reign of terror to dissuade class members from exercising that same right. Defendants have already stipulated to an Anti-Retaliation Order. Dkt. 2931. And the Court has already held it has power to enforce that Order and to prevent retaliation against witnesses. *See* Dkt. 2972 (holding retaliation against two declarants likely violated 42 U.S.C. § 12203(a) and (b)).

Relatedly, Defendants wrongly assert that Plaintiffs have not provided adequate notice to Defendants of their claims. *See* Defs.' Resp. at 23-24. Plaintiffs have been notifying Defendants that the abuse and retaliation at RJD violated the ADA and prior Court orders since 2017. *See* Grunfeld RJD Decl., ¶ 32. And in November 2019, Plaintiffs' demand letter explicitly set forth the legal bases for Plaintiffs' claims. *See* Freedman RJD Decl., Ex. 1.

B. Plaintiffs' Motion Rests on Sound Legal Footing

Defendants assert that the legal basis for Plaintiffs' entitlement to relief is "unclear and confused." Defs.' Resp. at 25. The Motion, however, identifies two grounds for granting the requested relief—the Court's inherent power to enforce and modify prior orders and Federal Rule of Civil Procedure 65.

1. This Court Has the Power to Issue Further Orders to Enforce Its Prior Court Orders

If this Court finds, as it should, that Defendants are not complying with the 2007

Injunction and the Accountability Orders, the Court has the inherent power to issue further orders to ensure Defendants' compliance. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978); 11A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2961 (3d ed. Apr. 2020 update).

Defendants wrongly take issue with Plaintiffs' citations to *Brown v. Plata*, 563 U.S. 493 (2011), and *Parsons v. Ryan*, 949 F.3d 443 (9th Cir. 2020), for this proposition. As the Supreme Court explained in *Plata*:

> "The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." … A court that invokes equity's power to remedy a … violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order.

See Plata, 563 U.S. at 542–43 (citations omitted); *see also Parsons*, 949 F. 3d at 454. This Court has issued such orders multiple times. *See, e.g.*, *Armstrong v. Brown*, 768 F.3d 975 (9th Cir. 2014); *Armstrong v. Brown*, 732 F.3d 955, 957 (9th Cir. 2013), *cert. denied* 573 U.S. 912 (2014).

Lastly, Defendants' references to contempt are a red herring. Defs.' Resp. at 26. Plaintiffs are not seeking to hold Defendants in contempt, but rather to enforce prior orders of the Court.

2. Plaintiffs Satisfy the Requirements for Injunctive Relief Under Federal Rule of Civil Procedure 65

The Court can also grant relief to the class pursuant to Federal Rule of Civil Procedure 65, as Plaintiffs satisfy all of the requirements for a permanent injunction. Plaintiffs have established that Defendants are violating 42 U.S.C. §§ 12132 and 12203(a) and (b) and 28 C.F.R. §§ 35.130(b)(7)(i) and 35.107(b). Absent an injunction, the irreparable harm to class members is real and tangible. *See, e.g.*, Dkt. 2972. Plaintiffs have provided evidence of dozens of serious abuses of people with disabilities in the last five months alone. *See* Section II.A, *supra*. The balance of hardships tips strongly in the class's favor. Without protection from the Court, officers will continue to break the bones of people with disabilities, place their lives in danger, and intimidate them into refraining from requesting needed disability accommodations. In contrast, Defendants will only have to expend resources—primarily to install surveillance cameras, to change their staff discipline process to hold officers accountable for misconduct, and to increase supervisory staffing. Damages for past incidents of abuse would not put an end to Defendants'

ongoing violations of the ADA. And the public has a strong interest "in enforcement of the ADA and in elimination of discrimination on the basis of disability." *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1167 (9th Cir. 2011); *see Hernandez v. Cty. of Monterey*, 110 F. Supp. 3d 929, 958 (N.D. Cal. 2015).

V. THE RELIEF REQUESTED BY PLAINTIFFS SATISFIES THE PLRA BECAUSE IT IS NECESSARY TO PUT AN END TO THE ABUSES AT RJD THAT VIOLATE THE ADA AND PRIOR ORDERS OF THIS COURT

Defendants repeat *ad nauseam* an objection to any relief here because of supposed deference owed to the operation of their correctional systems. *See* Defs.' Resp. at 18, 31-32. That deference ends, however, when Defendants violate the rights of people with disabilities and prior Court orders enforcing those rights. *See Plata*, 563 U.S. at 511.

Defendants' more specific attacks on the various remedies requested by Plaintiffs also fail, as each element of the relief satisfies the needs-narrowness-intrusiveness requirement of the PLRA, 18 U.S.C. § 3636(a)(1)(A). The violations here emanate from Defendants' failure to train and to hold officers accountable for abusing and discriminating against incarcerated people with disabilities. Defendants agree: "[A]long with staff training, the key to addressing staff misconduct is holding violators accountable through an investigative and disciplinary process that is independent, thorough, unbiased, and transparent." Defs.' Resp. at 34. The relief requested by Plaintiffs focuses on eliminating the systemic staff misconduct against people with disabilities at RJD in the least intrusive manner possible. "[I]ntrusiveness is a particularly difficult issue for defendants to argue," as by requiring Defendants to draft a plan, the Revised Proposed Order, filed herewith,[13] leaves "to defendants' discretion as many of the particulars regarding how to deliver the relief as … possible." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010).

Reform and oversight of officer discipline process – The evidence is overwhelming that Defendants fail to hold accountable officers who abuse people with disabilities. *See* Schwartz Decl., ¶¶ 21-107; Section II.B & C, *supra*. Accordingly, Plaintiffs request that the Court (1) order Defendants to develop a plan to reform the staff complaint, investigation, and discipline process to

[13] Plaintiffs have submitted a redlined version to show the changes between the Revised Proposed Order and original Proposed Order. *See* Grunfeld Reply Decl., Ex. A.

hold officers accountable; (2) appoint a court expert to oversee Defendants' implementation of reforms; and (3) order Defendants to provide Plaintiffs with all documents related to staff complaints made by *Armstrong* class member. *See* Revised Proposed Order at 17-18. The remedy proposed by Plaintiffs complies with the PLRA because it provides Defendants leeway to develop the reforms necessary to hold officers accountable, while ensuring compliance through oversight by a neutral third party and transparency with Plaintiffs.

Video Surveillance System – Though cameras alone are not a sufficient remedy, the violations of class members' rights will not end until Defendants install cameras at RJD. Defendants object to Plaintiffs' proposed deadline of ninety days to install a video surveillance system as too short, claiming that such a project would require at least a year. *See* Defs.' Resp. at 35. The Court should reject Defendants' unsupported and hearsay-reliant assertions. First, since 2016, Defendants have had a contract in place to install video surveillance throughout their system, yet have not followed through with their plan. *See* Grunfeld Reply Decl., Ex. NN. Second, representatives from a company that installed cameras on Facility E at RJD have indicated that they could install some new cameras at RJD within 30 days and complete installation throughout the institution within 90-120 days. *See* Vail Reply Decl., ¶¶ 59-60. Third, Defendants' now-withdrawn, non-emergency Budget Change Proposal indicated they could install surveillance cameras at RJD and two other prisons in eleven months. *See* Grunfeld RJD Decl., Ex. Y, Attach. D. Certainly, Defendants can, pursuant to a Court order to remedy a crisis, install a system at one prison on a shorter timeframe. The class, who are at constant risk of abuse by officers, should not have to wait any more than ninety days for cameras to be installed.

Body-worn Cameras – Defendants' opposition to body-worn cameras boils down to, "we do not want to do it." *See* Defs.' Resp. at 36. But body-worn cameras could be implemented at RJD within two months, are not especially expensive (approximately $1100 per camera), and pay for themselves in decreased costs related to uses of force, hospital visits, staff complaints, and lawsuits. *See* Vail Reply Decl., ¶¶ 62-71 & Exs. 2-4. Assuming a likely-high estimate that a maximum of 500 correctional officers are on duty at RJD at any one time, body-worn cameras would cost CDCR, a department with a more than $13 billion budget, only $550,000. *See*

Grunfeld Statewide Decl., Ex. M, at 1. Body-worn cameras complement fixed surveillance by capturing sound and interactions and areas not capable of coverage by fixed cameras. *Id.*, ¶ 66, 71; Grunfeld Reply Decl., Ex. YY, at 109:4-9 (Defendants' expert admitting sound is helpful for investigations). And contrary to Defendants' experts' assertion, body-worn cameras are already in use in a number of correctional systems. *See* Vail Reply Decl., ¶ 63; Schwartz Decl., ¶¶ 94-98. The crisis at RJD requires marshaling all available solutions, especially those that can be implemented quickly. The Court should therefore order Defendants to implement body-worn cameras within sixty days, as reflected in the Revised Proposed Order.

Increases in Supervisory Staff – Defendants' expert and the Strike Team recommended that CDCR place additional sergeants on both Second and Third Watch on Facility C. *See* McGinnis Rep. at 34 (recommending two sergeants on Second and Third Watch); Freedman RJD Decl., Ex. 2, at 1, 5, 6, 11, 12. Given the documented misconduct throughout the prison, the Court should order that two additional sergeants be placed on both Second and Third Watch on all facilities at RJD. *See* Vail RJD Decl., ¶ 103. The Court should also, as recommended by Mr. Vail, require that non-uniformed supervisors be assigned to each housing unit. *Id.*; Vail Reply Decl., ¶ 78, 83 (describing using unit managers to reform particularly troubled unit). Defendants provide no support for their suggestion that having one full-time Ombudsman at RJD for six months is sufficient to solve the deep-seated problems at the institution. *See* Defs.' Resp. at 37.

Training – Defendants "agree[] that training is an essential part of ensuring a comprehensive correctional program that is safe and effective …." Defs.' Resp. at 37. But CDCR claims, in the face of the tidal wave of undisputed evidence of misconduct at RJD, that their current training policies are adequate. *See* Defs. Resp. at 37-38. Defendants fail to produce the training materials or explain how their training addresses the many deficiencies identified by the declarations and their own Strike Team. Clearly, additional and different training is needed.

Early Warning System – Defendants agree that an early warning system is important, but make clear that they do not have an operational system. *See* Diaz Decl., ¶ 32. To prevent other prisons from spiraling out of control and to monitor conditions at RJD, the Court should order Defendants to develop an early warning system that complies with the requirements in Plaintiffs'

Revised Proposed Order. *See* Vail RJD Decl., ¶ 64; Schwartz Decl., ¶¶ 68-74.

Third-Party Review of All RVRs Issued to Class Members and Declarants – The Revised Proposed Order requires that a Court Expert "review all RVRs issued at RJD in the last three years to *Armstrong* class members and individuals who filed declarations in support of this motion to determine if the charges were false and whether RJD afforded the individuals due process." Revised Proposed Order at 20. Plaintiffs have presented substantial evidence that officers frequently issue false RVRs to cover up their misconduct and to retaliate against class members for objecting to staff misconduct. *See* Grunfeld Reply Decl., ¶¶ 22- 24, 82 & Ex. XX, at 53-55; PI Resp. at 3-6; Vail Reply Decl., ¶¶ 10-12, 31, 84. These RVRS can negatively affect incarcerated people's consideration for parole, eligibility for early release, and credits toward release. *See* Grunfeld Reply Decl., ¶ 23 & Ex. V; Vail Reply Decl., ¶ 10.

Weighing Pepper Spray Canisters – Given the evidence of officers' inappropriate use of pepper spray, the requirement that canisters be weighed after use satisfies the PLRA. *See* Vail Reply Decl., ¶¶ 73-74.

Lastly, Defendants do not object to requests for monitoring of incarcerated people who submit staff complaints, for changing policy to require that officers collect the names of all witnesses to a use of force, and that medical staff document and report suspicious injuries suffered by incarcerated people. *See* Schwartz Decl., ¶ 49. Medical and mental health staff must play a role in reducing violence against incarcerated people. *Id.* The *Coleman* Court and Special Master and the *Plata* Receiver have been apprised of the Motions. *See* Grunfeld Reply Decl., ¶ 8 & Ex. B. Reducing uses of force is in the interest of all three cases at this challenging time of pandemic.

VI. DEFENDANTS' EVIDENTIARY OBJECTIONS ARE MERITLESS

Hearsay – Many of Defendants' hearsay objections appear to be directed at admissible party admissions made by CDCR employees on matters within the scope of their employment. *See* Fed. R. Evid. 801(d)(2)(D); *Larch v. Mansfield Mun. Elec. Dep't*, 272 F.3d 63, 72 (1st Cir. 2001). The vast majority of Defendants' other hearsay objections apply to statements admissible pursuant to Rule 803(1), (2), (3), (6), (8) or not made for the truth of the matter asserted.

Fed. R. Evid. 602 – The Court should overrule Defendants' lack-of-personal-knowledge

objections to the declarations from people with disabilities, as the declarants can testify to what they believe or understand based on perception by all five senses. *See* Fed. R. Evid. 602, Notes of Advisory Committee on Proposed Rules; *L.A. Times Comm., LLC v. Dep't of the Army*, 442 F. Supp. 2d 880, 886 (C.D. Cal. 2006). The objections to summaries and analysis of exhibits in the declarations of Gay Grunfeld and Michael Freedman are unfounded because the summarized exhibits are attached to the declarations.

Local Rule 7-5 – Although Plaintiffs' counsel do not agree that the paragraphs cited by Defendants contain argument, to the extent they do so, the Court may simply disregard the argumentative portions.

Authentication – All but one of the exhibits to the Grunfeld Declaration are authenticated as true and correct copies of the documents they purport to be. *See* Fed. R. Evid. 901(b)(1). Plaintiffs' counsel has re-offered the one exception (Exhibit BB) with proper authentication.

Fed. R. Evid. 701 & 702 – The declarants' statements that relate to their (1) health or disabilities; (2) perception of others' health or disabilities; and (3) perception of the propriety of use of force are plainly admissible under Rule 701. Statements that an ankle was swollen, an arm was broken, or that that force was excessive are all rational conclusions based on their perceptions.

Relevance and Prejudice – The evidence related to *Coleman*-only class members, all of whom by definition have a disability, are relevant to show how officers at RJD treat people with disabilities. As no jury is involved here, there is no danger of confusion or undue prejudice.

CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that the Court grant the Motion and enter the Revised Proposed Order.

DATED: July 29, 2020

Respectfully submitted,
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