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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. C94 2307 CW

REVISED [PROPOSED] ORDER GRANTING MOTION TO STOP DEFENDANTS FROM ASSAULTING, ABUSING AND RETALIATING AGAINST PEOPLE WITH DISABILITIES AT R.J. DONOVAN CORRECTIONAL FACILITY AND REQUIRING DEFENDANTS TO DEVELOP A REMEDIAL PLAN

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

Plaintiffs' Motion to Stop Defendants from Assaulting, Abusing and Retaliating Against People with Disabilities at R.J. Donovan Correctional Facility ("RJD") came on for hearing before this Court on August 11, 2020 at 2:30 p.m. The Court, having considered the parties' pleadings, the arguments of counsel, and the entire record, GRANTS Plaintiff's motion and makes the following findings:

This lawsuit was originally filed twenty-six years ago by incarcerated people and parolees with disabilities against the California officials with responsibility over the corrections and parole system. This Court certified Plaintiffs as representatives for a class including "all present and future California state prisoners and parolees with mobility, sight, hearing, learning, developmental and kidney disabilities that substantially limit one or more of their major life activities." Order Granting Pls.' Mots. to Am. Compl. and Modify the Class, Docket No. 345, Jan. 5, 1999, at 2.[1] On behalf of the class, Plaintiffs sought accommodations for their disabilities, as required under federal statutes and the United States Constitution.

Initially, Plaintiffs sued two divisions of the then California Youth and Adult Corrections authority (the "Agency"). The two divisions sued had separate areas of responsibility toward incarcerated people and parolees: The Board of Prison Terms ("BPT") had authority over parole and parole revocation hearings, and the California Department of Corrections ("CDC") was responsible for all other aspects of incarcerated people's and parolees' lives, including supervisions of parolees.[2] By agreement of the

[1] The Plaintiff class was certified on January 13, 1995. On December 24, 1999, the parties stipulated to amend the class definition to include "all present and future California state prisoners and parolees with mobility, sight, hearing, learning and kidney disabilities that substantially limit one or more of their major life activities." Stipulation and Order Am.Pl. Class, Dkt. 342, Dec. 24, 1993, at 2. The class definition was subsequently modified, as to Defendants Board of Prison Terms ("BPT") and Chairman of the BPT only, to add incarcerated people and parolees with developmental disabilities on January 5, 1999. Order Granting Pls.' Mots. to Am. Compl. and Modify the Class, Jan. 5, 1999, at 2.

[2] Since this lawsuit was originally commenced, the Agency has been reorganized and superseded by the California Department of Corrections and Rehabilitation ("CDCR"). BPT is now the Board of Parole Hearings ("BPH"). CDC has been replaced by the Division of Adult Institutions ("DAI") and the Division of Adult Parole Operations ("DAPO").

parties, litigation against the two divisions was initially bifurcated and proceeded on two separate tracks.

On September 20, 1996, this Court ordered CDC and related Defendants to develop plans to ensure that their facilities and programs were compliant with the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12131 *et seq.*, and the Rehabilitation Act ("RA"), and readily accessible to and usable by incarcerated people and parolees with disabilities. The order also required Defendants to develop policies to provide a prompt and equitable disability grievance procedure, to allow approved assistive aids for incarcerated people with disabilities in segregation units and reception centers, and to ensure accessibility in new construction and alterations. Remedial Order, Injunction and Certification for Interlocutory Appeal, September 20, 1996. The Court retained jurisdiction to enforce its terms. *Id.* at 5.[3] Subsequent proceedings against the BPT, now the BPH, are summarized in the Court's Order Granting Plaintiffs' Renewed Motion to Require Defendants to Track and Accommodate Needs of *Armstrong* Class Members Housed in County Jails, Ensure Access to a Grievance Procedure, and to Enforce 2001 Permanent Injunction, Dkt. 1974, Jan. 13, 2012, at 3-5 and 6-11, *aff'd* 732 F.3d. 955 (9th Cir. 2013), *cert. denied* 134 S.Ct. 2725 (2014).

On January 3, 2001, the CDC Defendants amended their Court Ordered Remedial Plan regarding the provision of programs and services to incarcerated people and parolees with disabilities. The *Armstrong* Remedial Plan ("ARP") requires Defendants to ensure that incarcerated people and parolees with disabilities are accessibly housed, that they are able to obtain and keep necessarily assistive devices, and that they receive effective communication regarding accommodations. The Remedial Plan also requires Defendants to include in all contracts language that requires subcontractors to comply with the ADA.

Plaintiffs' counsel began monitoring compliance with the ARP around the time of

[3] The Ninth Circuit affirmed the injunction against the CDC Defendants on appeal. *See Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

its implementation, and have filed a series of enforcement motions in the years since. On January 18, 2007, in light of significant evidence of multiple violations of the Remedial Plan, the Court issued an Injunction that addressed these violations and ordered Defendants to comply with sections of the Remedial Plan. *See* Dkt. No. 1045.[4] A key aspect of the 2007 Injunction was a section on accountability:

> [Defendants, in cooperation with the Office of the Inspector General and the Receiver in *Plata v. Schwarzenegger*, shall develop a system for holding wardens and prison medical administrators accountable for compliance with the *Armstrong* Remedial Plan and the orders of this Court. This system shall track the records of each institution and the conduct of individual staff members who are not complying with these requirements. Defendants shall refer individuals with repeated instances of non-compliance to the Office of Internal Affairs for investigation and discipline, if appropriate.

Id. at 7.

On March 22, 2012, Plaintiffs filed a Request for an Order to Show Cause and Notice of Motion and Motion for an Order Holding Defendants in Contempt of Court (the "Accountability Motion"). *See* Dkt. No. 2024. Plaintiffs argued in the Accountability Motion that Defendants were violating the accountability section of the 2007 Injunction by "fail[ing] to take any action to track … reported instances of staff member non-compliance, or to refer repeated instances of non-compliance to the [Office of Internal Affairs]."

On August 22, 2012, this Court issued an Order Denying Motion for Contempt, Denying as Moot Motion to Strike, and Modifying Permanent Injunction. Dkt. 2180. As the Court explained in this Order, the accountability provisions of the 2007 Injunction "required Defendants to develop effective internal oversight and accountability procedures to ensure that Defendants learned what was taking place in their facilities, in order to find violations, rectify them, and prevent them from recurring in the future, without

[4] Plaintiffs subsequently filed enforcement motions, and the Court issued orders, addressing the lack of sufficient beds for people who need wheelchairs full-time, Dkt. No. 1661, the unavailability of sign language interpreters for deaf people in education and medical settings, Dkt. No. 2345, and the unlawful retention of people in administrative segregation due to a lack of accessible beds. *See* Dkt. No. 2495.

involvement by Plaintiffs' counsel or the Court." *Id.* at 10. The Court further explained that "investigations, including the documentation of the results, are necessary to ensure that grievances are addressed and to identify staff error or misconduct and institutional deficiencies that violate class members' rights." *Id.* at 11.

The Court found that Defendants had failed to track or investigate "numerous … incidents" of violations of the ARP and Court orders. *Id.* at 12. The Court further held that "Defendants' accountability system … has not been effective." *Id.* at 15-16.

While denying Plaintiffs' motion to hold defendants in contempt, the "Court [found] the 2007 Injunction should be clarified and made more detailed, to make clear what is expected of Defendants and to allow Defendants to conform their future behavior to its terms." *Id.* at 16. The Court modified the Injunction to

> require Defends to track all allegations of non-compliance with the ARP and the orders of this Court.… This must be done regardless of the source of the allegations. The only difference is that this order also requires Defendants to list when the investigation was initiated, the name and title of the investigator, the date the investigation was completed, the results of the investigation, and the number of prior allegations of non-compliance against the involved employee or employees.

Id. at 17. The Court further held that Defendants would be required to initiate a timely investigation, within 10 business days,

> to ensure that allegations are investigated while memories are fresh, the facts surrounding the allegations are still in existence, and the violation can be remedied. Further, in order to reconcile disagreements between the parties resulting from investigations, [the] … Court finds that Plaintiffs' counsel must have access to the results of the investigation, including all sources of information relied on to substantiate or refute the allegations**.**

Id. at 18. The Court went on to hold that with referrals to the Office of Internal Affairs ("OIA") for investigation and discipline of non-complying employees, Defendants would be required to "comply with the Employee Disciplinary Matrix set forth in the CDCR Departmental Operations Manual, Chapter 3, Article 22." *Id.* The Court further found it necessary "to create a process for resolving disputes between the parties regarding whether an incident constitutes a violation of the ARP and this Court's orders[] …." *Id.* at 19.

Defendants appealed the Modified Injunction. The Ninth Circuit affirmed the

Court's order in all respects except with regard to the dispute resolution process. *See Armstrong v. Brown*, 768 F.3d 975 (2014). On remand, this Court issued an order addressing the Ninth Circuit opinion and mandating that Plaintiffs submit a second Modified Injunction incorporating the changes required by the Ninth Circuit. *See* Order Revising Modified Injunction, Dec. 5, 2014, Dkt. No. 2462.

On December 29, 2014, the Court issued an Order Modifying January 18, 2007 Injunction. *See* Dkt. No. 2479. This Modified Injunction governs accountability for CDCR staff misconduct and violations of the ARP and Court orders. Pursuant to the Modified Injunction, CDCR has issued two memoranda governing CDCR's process for reporting, logging, conducting an "inquiry" into the alleged non-compliance, and investigating allegations. Currently, Defendants track accountability issues through logs generated by software purchased from Salesforce.

In 2013, the Court ordered the parties to work together to develop better means for monitoring Defendants' compliance with the ADA, the Remedial Plan, and this Court's orders. Order Regarding Monitoring, Dkt. No. 2344. The Court directed "the parties to meet and confer, with the assistance of the court's expert as needed, on how to resolve [monitoring] … issues and improvements that might be made on the monitoring process." *Id.* at 2.

Since July 2013, the parties have met regularly under the supervision and with the guidance of the Court Expert to draft and refine a joint monitoring tool. The parties have also conducted a number of joint audits of Defendants' prisons for compliance with the ARP and this Court's orders. *See* CMC Statements. The thrust of both the Joint Audit Process and the Accountability Memorandum and Modified Injunction ("Accountability Order") are to share information among the parties with the goals of ultimately having Defendants monitor their own compliance and of creating a sustainable, ADA-compliant system that protects the rights of *Armstrong* class members.

The parties' and the Court's efforts to create a sustainable remedy have been undermined by an epidemic of staff abuse and excessive use of force at CDCR's high

security prisons. In December 2015, the OIG issued a report at the request of the California Legislature and the Prison Law Office detailing numerous incidents at High Desert State Prison ("HDSP").

By January 2018, reports of serious abuse of people with disabilities were emanating from the California Institute for Women ("CIW") and Salinas Valley State Prison ("SVSP"). In response to monitoring by Plaintiffs' counsel, the OIG issued a report detailing the inadequacy of CDCR's investigative process for finding and remedying staff misconduct and excessive use of force.

These issues have regularly been reported to the Court in the parties' Case Management Statements. *See, e.g.*, Dkt. Nos. 2821, 2844, 2863, 2874, 2887 & 2896. Plaintiffs have presented evidence of abuse and retaliation targeted at people with disabilities at a number of prisons, including HDSP, CIW, SVSP, California State Prison – Los Angeles County ("LAC"), and California State Prison – Corcoran ("COR").

Plaintiffs have brought the instant Motion to stop officers at RJD from assaulting, abusing, and retaliating against people with disabilities. Plaintiffs' counsel have been notifying Defendants of incidents of staff misconduct and violence at RJD against *Armstrong* class members in tour reports and letters for three-and-a-half years. This issue was first discussed in a Case Management Conference Statement on July 14, 2017. Dkt. No. 2688 at 4.

RJD, which houses nearly 4,000 people in San Diego, is one of CDCR's most important prisons with respect to accommodating people with disabilities and caring for people with physical and mental health problems. RJD has the second largest population of incarcerated people with disabilities in the CDCR system. As of November 2019, there were nearly 1,000 *Armstrong* class members at RJD, including 297 people who use wheelchairs, 217 people who are deaf or hard of hearing (including more than 10 who use sign language as their primary method of communication), and 13 blind class members.

RJD houses more than 2,000 class members in *Coleman v. Newsom*, Case No. 2:90-cv-00520-KJM-DB (E.D. Cal.), including more than 700 individuals in CDCR's enhanced

mental health program; 92 class members in *Clark v. California*, Case No. 3:96-cv-01486-CRB (N.D. Cal.) with developmental disabilities; and more than 1,500 people who CDCR has deemed as having high risk medical conditions.

Plaintiffs' counsel has filed eighty-seven declarations from people with disabilities describing well over one-hundred-twenty discrete instances of abuse of and discrimination and retaliation against people with disabilities occurring since 2016. This horrific conduct has occurred in almost every area of the prison, including on all five yards at RJD. The declarants identify, by name, one-hundred-four different correctional officers who have participated directly in the misconduct, including forty-nine who are identified as having participated in more than one incident. The names of dozens of other officers who participated directly in the misconduct are unknown to the declarants.

Correctional officers at RJD have repeatedly assaulted or otherwise engaged in misconduct against people with disabilities because of their disabilities or because they have requested disability accommodations. Officers at RJD demonstrate a deep disregard for and discriminatory animus toward individuals with disabilities and other vulnerable groups of people. Without adequate or sometimes any justification, staff have thrown people out of wheelchairs or beat them so badly that they fell out of their wheelchairs. Officers have attacked victims who were using their walkers at the time of the assault. Officers have routinely and intentionally closed cell doors on people with disabilities and elderly people who move slowly. Staff have accused people of faking disabilities or used discriminatory language to refer to people with disabilities and other minorities. Staff have created a near-universal perception among incarcerated people that staff target people with disabilities for misconduct. Staff have engaged in a pattern and practice of targeting abuse, violence, discrimination and retaliation toward class members and other vulnerable incarcerated people.

Staff or incarcerated people working at staff's behest have broken victims' arms, wrists, ribs, legs, orbital sockets, teeth, feet, fingers, and jaws; many of the broken bones required surgical repairs. At least fourteen of the assaults by staff resulted in the victim

being transported from RJD to a hospital for medical attention.

Following attacks by custody staff, some *Armstrong* class members' disabilities have become more severe, including a few for whom doctors changed the class members' disability designations to reflect higher levels of impairment.

In addition to the untold human suffering for the direct victims, the medical care for these unnecessary injuries is all paid for by the taxpayers. Staff regularly exposed to this conduct can be traumatized, which can negatively impact their mental health, productivity, and attendance, all of which also affects the public fisc.

When people complain about staff misconduct or staff's failure to provide accommodations, staff frequently engage in or threaten serious retaliation. Officers use the Rules Violation Report (RVR) process to retaliate against and punish people, fabricating RVRs against the people they assault to cover up inappropriate and excessive uses of force.

For example, this Court issued a Temporary Restraining Order requiring CDCR to transfer two of the class member declarants out of RJD's Facility A after they were subjected to retaliation. *See* Dkt. No. 2972. In connection with one of the incidents of retaliation, in which a 69-year-old wheelchair user was thrown to the ground, he received two RVRs, both of which threaten his likelihood of obtaining credits or early release under the Governor's COVID-19 protocols or elderly parole.

CDCR is well aware of this pattern, having sent a strike team of investigators to conduct interviews with more than one hundred incarcerated people on Facility C at RJD in December 2018. The associate warden who led the strike team and CDCR's own investigators concluded that staff at RJD were targeting people with disabilities because of their disabilities, finding that "custody staff actively retaliat[e] against inmates for filing appeals or staff complaints or requesting assistance with safety concerns." They further concluded that "within 24 hours of an inmate dropping off an appeal … retaliation begins." The retaliation has included assaulting complainants in places with limited visibility; arranging for incarcerated people in gangs to assault the complainant; seizing a complainant's property; announcing to other incarcerated people that the complainant had a

disfavored commitment offense; or announcing that the complainant was responsible for other incarcerated people not receiving programs (i.e., televisions, dayroom, showers, etc.) Retaliation has also been leveled against staff members who participate in efforts to discipline officers.

Because of the violent misconduct and retaliation at RJD, incarcerated people are terrified of custody staff. To avoid becoming the next victim, people with disabilities forgo requesting from staff the disability accommodations they need to participate in CDCR programs, services and activities. The same fear causes class members to refrain from complaining, either informally or using an 1824 or 602 grievance, when staff deny them accommodations to which they are entitled. Defendants' own investigators concluded that "[t]he inmate allegations, taken as a whole, seem to describe an environment with no relief mechanism for inmates who feel mistreated by staff." As a result of custody staff's concerted efforts to stifle and punish complaints, "[i]nmates … 'hide' within their daily routines and suffer minor abuse in order to avoid greater abuses."

CDCR has been aware for more than three years of the problems at RJD with staff abuse of and discrimination against people with disabilities. Beginning in September 2016, a series of Plaintiffs' monitoring reports and letters, a letter from Defendants' Office of Audits and Court Compliance, and Defendants' own ombudsman and staff have documented the ongoing violence and retaliation at RJD against people with disabilities. The Chief Ombudsman for CDCR, who reports to Secretary Diaz and who was part of the RJD strike team, wrote the following in an email to CDCR's Director of Adult Institutions:

> [W]hat we heard was overwhelming accusations of abuse by the Officers with Sgt's and Lt's looking in the other direction. **I have never heard accusations like these in all my years.** I would strongly suggest placing a strike team on this yard immediately. Many of the inmates have expressed fear of what will happen to them tomorrow when the team is not there…. **This is a very serious situation and needs immediate attention. If there is any means of installing cameras immediately I would strongly suggest it**, at least in the blind spots and the back door by the gym. **A review of the appeal process, RVR's and staff complaints off that yard also needs to take place ASAP**. (Emphasis added.)

Later in the email chain, the Chief Ombudsman wrote:

> **[T]here has been little to no progress since September**…. I am not typically an alarmist, but again, **I have never heard such despair, hopelessness, and fear from inmates** and I have been on quite a few of these teams to review and interview inmates. The CIW tour results don't come close to this and CIW was very bad. (Emphasis added.)

The Office of the Inspector General conducted its own review of CDCR's responses to Plaintiffs' advocacy letters and found a "pervasive lack of timely follow through," including that CDCR "ignored" many allegations, failed to investigate twenty-eight allegations not previously known to CDCR, and failed to refer pertinent information to the Office of Internal Affairs when warranted.

CDCR has provided very little information about its investigations of staff misconduct and its decisions to impose little or no discipline on the officers at RJD who have perpetrated the staff misconduct against class members.

Those few investigations that resulted in CDCR terminating officers involved video of the incident or a statement from a CDCR employee who witnessed the misconduct. CDCR gives little to no weight to the testimony of incarcerated people who were either victims or witnesses.

With respect to the crisis at RJD, Defendants have failed to meet their obligations pursuant to this Court's orders regarding accountability. Defendants failed to include on their non-compliance logs at least twelve allegations of staff misconduct (1) that Plaintiffs' counsel raised with Defendants in advocacy letters and tour reports and (2) that are directly related to Defendants' compliance with the ADA, the RA, the ARP, and prior orders of this Court. Defendants also failed to include on the accountability logs incidents documented by their own investigators. Many of the items that Defendants did log were logged many months after Plaintiffs' counsel reported the allegations to Defendants in advocacy letters or tour reports. On the accountability logs for RJD for September 2016 to December 2019, Defendants have confirmed only one allegation of staff misconduct against a class member and have made only two referrals to OIA.

Contrary to the spirit of the Court's orders regarding accountability and the order aimed at improving monitoring in this case, Defendants have not been transparent with

Plaintiffs regarding the serious problems at RJD. The August 2018 joint audit at RJD, conducted as part of those collaborative efforts, served as one of the first moments when CDCR recognized it had a problem with staff misconduct at RJD. Yet CDCR has repeatedly failed to share information with Plaintiffs' counsel regarding CDCR's attempts to diagnose and treat the staff misconduct epidemic at RJD.

CDCR's remedial efforts to date have been inadequate and ineffective. CDCR has failed (1) to discipline officers who have engaged in misconduct; (2) to investigate all of the allegations of misconduct about which it was aware; (3) to install cameras in all areas to which incarcerated people have access; and (4) to take any steps to determine whether misconduct was occurring in areas of the prison other than Facility C or whether its effort to reduce staff misconduct have been successful. The few efforts CDCR has made primarily involve minor changes in staffing and training. Because CDCR has refused to take the problem seriously, staff misconduct continues to occur at an alarming rate.

CDCR has only terminated eight officers for four instances of misconduct against incarcerated people at RJD. Six of those terminations are pending evidentiary hearings before the State Personnel Board. All four instances involved a victim who was a person with a disability. CDCR also has not referred any officers for criminal prosecution related to misconduct against incarcerated people. Only three officers, all of whom were involved in the same incident of misconduct, have faced any discipline for any of the abuses described in the declarations from incarcerated people with disabilities. And overall imposition of discipline at RJD has actually decreased, from 21 instances in 2017 to 19 in 2018 to 14 in 2019. In order to fix staff misconduct crisis at RJD, far more discipline is necessary.

There are many reasons why the discipline has been so inadequate. Local inquiries conducted by staff at RJD were incomplete, unprofessional, and profoundly biased against incarcerated complainants and witnesses. CDCR's new Allegation Inquiry Management Section ("AIMS") will not solve the problems with inquires. As it stands, reported use of force allegations that do not result in serious bodily injury have been excised from the new

process. In order to trigger an AIMS inquiry, incarcerated people have to submit a written staff complaint. AIMS investigators have displayed the same bias as the local investigators they are replacing. And without better tools for gathering evidence of staff misconduct, including cameras and better enforcement of reporting requirements for staff, AIMS will suffer from the same problems as the current system, where allegations of staff misconduct are rejected for lack of corroborating evidence and officers go undisciplined and undeterred.

The OIA Central Intake Unit ("CIU")—which functions as the gatekeeper for all discipline of CDCR employees—blocked many potentially meritorious complaints against RJD staff from even being investigated by OIA, an issue Plaintiffs have been bringing to CDCR's attention for years. The CIU misapplied the "reasonable belief" standard in a number of cases. Moreover, the standard is inappropriate to use as an exclusionary criterion before a formal investigation has even been conducted.

Wardens at RJD—who, like all wardens in CDCR, have the authority to decide whether to find an officer has violated policy and to impose discipline—exercised their discretion poorly and inconsistently. In some cases, the wardens elected not to sustain allegations fully supported by the facts. In others, wardens made inconsistent decisions in finding misconduct and imposing penalties where allegations of misconduct were substantially similar. The Employee Disciplinary Matrix—which sets forth presumptive penalties for different types of misconduct—is seriously flawed and leads to penalties that are too low for serious misconduct that harms incarcerated people. Staff members accused of serious misconduct were nearly always permitted to remain in positions with control over incarcerated people, sometimes including their victims, and receive their salaries during the pendency of investigations. Even where evidence indicated that officers had engaged in criminal conduct, CDCR rarely referred the cases to local prosecutors.

The discipline system is designed to discredit incarcerated people and exonerate staff. Since January 1, 2017, all of the terminations at RJD involved either a video or a staff report of the misconduct. CDCR has not identified a single instance of any type of

discipline that does not fit that pattern. Put differently, in every instance where an investigation boils down to 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. These problems with the staff complaint, investigation, and discipline system apply to CDCR as whole. The primary failings—lack of video surveillance, biased and poor-quality inquiries, inappropriate rejections of referrals by the CIU, inadequate investigations by OIA, and improper exercise by wardens of their authority to discipline—are endemic to the system created by CDCR.

Notwithstanding broad agreement by its own investigators and administrators, the OIG, Plaintiffs' experts and Defendants' expert that cameras are critical for deterring misconduct and holding accountable officers who engage in misconduct, and the existence of a multi-year contract to install video surveillance throughout its system, CDCR has not added any camera coverage at RJD or other prisons with recent reports of violence and abuse. As was the case in December 2018, the vast majority of RJD, including most of the areas in which misconduct has occurred, has no camera coverage.

CDCR could have sought emergency funding from the legislature, as CDCR has done to address other emergencies, to fund cameras at RJD. CDCR chose not to. Instead, CDCR waited until January 2020 to submit a budget change proposal ("BCP") for the purchase and installation of some cameras at RJD, as well as for CIW and SVSP. The Governor then rejected CDCR's modest camera proposal as part of the May 2020 Budget Revise. CDCR has no plan to install surveillance cameras at RJD or to purchase or use body-worn cameras, which are essential for achieving full camera coverage, including in cells and other areas in which the budget change proposal cameras will not reach, and for capturing sound. CDCR also has no plan to deploy cameras at other prisons experiencing violence and abuse, notwithstanding its own studies showing that installation of cameras at HDSP resulted in a 50% reduction in violence.

Defendants have failed to implement other recommendations their own staff made

in response to the epidemic of violence and abuse at RJD, including increased supervisory staff, enhanced training, a review to reduce the impact of gangs on Facility C, enforcement of its policy regarding uniforms to deter officer gang activity, or issuance of a corrective action plan.

CDCR has little or no information regarding the current scope of problems at RJD and other prisons, and no reliable means of collecting and using data as an early warning system to signal if there are problematic officers, locations, or times of day with respect to misconduct.

Defendants had years to solve the problems at RJD on their own and failed. The crisis at RJD —now it its fourth year—and at other prisons requires CDCR to undertake robust and immediate action to address widespread violations of the ADA, RA, the Constitution, and this Court's prior orders, and to end untold human suffering.

The widespread and egregious abuse and violence at RJD violate the ADA, the RA, and prior orders of this Court because staff are hurting, permanently injuring and retaliating against people with disabilities because they have disabilities. *See* 42 U.S.C. §§ 12132; *see also* Dkt. 1045, at 9.

The ADA also prohibits any individuals, including public entities, from retaliating against people who exercise their rights under Title II. *See* 42 U.S.C. § 12203(a) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

The evidence is overwhelming that Defendants are allowing systemic attacks on people with disabilities at RJD by reason of their disabilities and retaliating against them for exercising their rights under the ADA. This conduct violates the statute and the Court's prior orders. *See* 42 U.S.C. §§ 12132, 12203(a); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036-38 (9th Cir. 2018) (same); *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds*, 575 U.S.

600 (2015); Dkt. 1045, at 9.

The pervasive violence and retaliation at RJD have made *Armstrong* class members too afraid to exercise their right under the ADA, RA, ARP, and prior orders of this Court to request and receive reasonable accommodations needed to participate in CDCR programs, services, and activities. *See Updike v. Multnomah Cty.*, 870 F.3d 939, 949 (9th Cir. 2017). The ADA's implementing regulations require that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i). The Court has ordered CDCR to abide by this requirement. *See* Dkt. 1045 at 9. The Court has also ordered CDCR to provide a special grievance process for incarcerated people to request accommodations. *Id.*

> The ADA also includes a broad anti-interference provision which makes it unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [Chapter 126, which includes Title II].

42 U.S.C. § 12203(b). This provision prohibits not only retaliation against people who expressly exercise their rights under the ADA, but also conduct that has a chilling effect on others' exercise of their ADA rights. *See Brown v. City of Tucson*, 336 F.3d 1181 (9th Cir. 2003); *EEOC v. Day & Zimmerman NPS, Inc.*, 265 F. Supp. 3d 179 (D. Conn. 2017).

People with disabilities are so afraid of becoming the next victim of staff misconduct at RJD that they refrain from requesting accommodations they require to participate in CDCR programs, services, and activities. Defendants, by tolerating such an environment, are preventing a prompt and equitable grievance procedure and interfering with Plaintiffs' ADA rights, all in violation of 42 U.S.C. § 12203(b), 28 C.F.R. § 35.130(b)(7)(i), 28 C.F.R. § 35.107(b), and the Court's 2007 Injunction.

Defendants are also in violation of this Court's Modified Injunction, Dkt. No. 2462,

regarding accountability. Defendants have failed to log and investigate many allegations of non-compliance related to staff violence and abuse of people with disabilities at RJD. Defendant have also failed to comply with the requirement that allegations of non-compliance be logged within ten business days of Defendants' discovery of the allegation. Defendants' violations of this Court's Modified Injunction have prevented them from having a complete record of searchable allegations by officer and allegation type. A complete accountability log would also have allowed CDCR to impose progressive discipline and to engage the OIA more thoroughly in stopping the officer misconduct, including through criminal referrals.

CDCR's inability to put an end to the violence, abuse and retaliation at RJD has vitiated the Court's Accountability Order and undermined joint monitoring. For the accountability remedies to work, Defendants must have mechanisms for self-monitoring non-compliance. Because *Armstrong* class members at RJD are too afraid to complain when staff violate their rights, CDCR has lost the central means for discovering, logging, and investigating non-compliance and ultimately appropriately disciplining officers.

CDCR's action and inaction not only violate the ADA, RA, and this Courts' prior orders, but also the Eighth and Fourteenth Amendments to the United States Constitution, further empowering this Court to order relief here. Officers' harassment, retaliation, and use of egregious violence against incarcerated people, along with prison officials' intransigence and willful lack of responsiveness in the face of pervasive and systemic abuse of class members, demonstrate CDCR and RJD staff members' malicious and sadistic, let alone deliberately indifferent, attitude toward incarcerated people at RJD. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Hudson v. McMillian*, 503 U.S. 1, 5-6 (1992); *Chess v. Dovey*, 790 F.3d 961, 972-73 (9th Cir. 2015); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985). CDCR's action and inaction also have directly impeded class members' basic Fourteenth Amendment Due Process rights, including, for example, their abilities to have fair hearings regarding RVRs and to prepare for Board of Parole Hearings without false RVRs leveled against them. *See, e.g., Wolff v. McDonnell*, 418

U.S. 539, 563-67 (1974).

In order to remedy the ongoing harm to *Armstrong* class members, to ensure that Defendants meet their obligations under the ADA, RA, prior Court orders, and the United States Constitution, and to enforce the 2007 Injunction and the Accountability Order, and based on the entire record in this action, the Court hereby ORDERS the following relief:

1. Within thirty days of this Order, Defendants shall develop a plan for stopping violence, abuse and retaliation against *Armstrong* class members at RJD that includes, at a minimum, the following elements:

(a) **Cameras** – Within ninety days, CDCR must install operational surveillance cameras that have coverage of all areas of RJD in which incarcerated people have access, including, but not limited to, all exercise yards, housing units, sally-ports, dining halls, program areas, and gyms. Within sixty days, CDCR must purchase and begin using body-worn cameras for all correctional officers at RJD.

Within ninety days of the deployment of each type of camera, CDCR must adopt policies and procedures regarding the use of camera footage, including requirements that all footage be retained for a minimum of ninety days, that footage of use of force and other triggering events (staff complaints, self-harm, medical emergencies, RVRs, etc.) be retained indefinitely, and that footage, when available, be reviewed and considered as part of the consideration of the incident. CDCR must also train RJD staff regarding how and when to request that footage be retained and reviewed.

(b) **Reforms to Staff Complaint, Investigation, and Discipline Process** – CDCR must develop a plan to reform the staff complaint, investigation, and discipline process to ensure (1) that CDCR completes unbiased, comprehensive investigations into all allegations of staff misconduct in which the victim was an *Armstrong* class member, (2) that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct against *Armstrong* class members, and (3) that employees who engage in criminal misconduct against *Armstrong* class members are appropriately investigated and, if warranted, referred for prosecution ("Investigation and

Discipline Plan"). CDCR's plan must also ensure that officers accused of serious misconduct are reassigned so they cannot further harm their victims.

(c) **Third-Party Expert Monitoring of Defendants' Investigation and Discipline Plan** – The Court shall appoint an expert pursuant to Federal Rule of Evidence 706 to monitor Defendants' implementation of their Investigation and Discipline Plan. The Court's Expert shall have access to all documents—including, but not limited to grievances, incident reports, documents from staff misconduct inquiries, documents from Institutional Executive Review Committee inquiries in which the person alleges excessive use of force or other staff misconduct, 989 forms and all supporting documents, responses of the Central Intake Unit of OIA to 989 forms, OIA investigation files, investigation reports produced by the OIA and all supporting documents, 402 and 403 forms issued by the hiring authority, notices of adverse action, and *Skelly* and State Personnel Board Documents—necessary to complete the monitoring. The Court's Expert shall issue quarterly reports regarding Defendants' implementation of the Investigation and Discipline Plan. Prior to the issuance of each quarterly report, the parties and the Court's Expert shall meet and confer regarding the Court Expert's findings for the quarter.

(d) **Information Sharing with Plaintiffs' counsel and the Court Expert** – CDCR must produce to Plaintiffs' counsel and the Court Expert on a quarterly basis all documents related to RJD staff complaints in which the alleged victim is an *Armstrong* class member, including, but not limited to, grievances, incident reports, documents from staff misconduct inquiries, documents from Institutional Executive Review Committee inquiries in which the person alleges excessive use of force or other staff misconduct, 989 forms and all supporting documents, responses of the Central Intake Unit of OIA to 989 forms, investigation reports produced by the OIA, and 402 and 403 forms issued by the hiring authority. CDCR must also provide Plaintiffs' counsel with monthly, written updates regarding progress on the elements of its plan to stop staff misconduct at RJD, including data regarding staff complaints and use of force.

(e) **Staffing** – CDCR must significantly increase supervisory staff on all

watches on all yards at RJD. CDCR must create non-uniformed positions in each housing unit fully empowered to supervise correctional staff in those units, with a focus on improving the relationships between uniformed staff and incarcerated people.

(f) **Training** – CDCR must development and implement Human Rights, de-escalation, and cultural training for all custody, mental health staff, and medical staff at RJD to include discussion of reporting requirements, whistleblowing, non-retaliation, and treatment of incarcerated people as patients.

(g) **Data Collection and Early Warning System** – CDCR must immediately develop an effective, electronic system to track all incidents at RJD, including use of force, staff misconduct complaints, fights between incarcerated people, rule violations, injuries suffered by incarcerated people, suicide attempts, cell extractions, medical emergencies, found contraband, vandalism, escapes and escape attempts, and fires by date, time, location, staff involved, incarcerated people involved, and whether the incarcerated people are *Armstrong* class members. The RJD tracking system should include data from CDCR's Electronic Health Record regarding use of force injuries and fatalities and injuries and fatalities that are not consistent with the victim's health or age or the information provided. CDCR should work with the Receiver in *Plata v. Newsom*, No. 4:01-cv-01351 (N.D. Cal) and the Special Master in *Coleman v. Newsom*, Case No. 2:90-cv-00520-KJM-DB (E.D. Cal.), through the coordination process to ensure medical tracking at RJD is robust and health care workers feel safe.

(h) **Oversight** – CDCR headquarters must exercise oversight over all staff complaints, use of force reviews, and related staff disciplinary proceedings at RJD in which an employee is accused of engaging in misconduct against an incarcerated person. CDCR must conduct quarterly interviews of randomly-selected incarcerated people at RJD using the methodology and interview questionnaire utilized by the December 2018 investigators.

(i) **Anti-Retaliation** – CDCR must put an end to retaliation against class members and staff at RJD who report staff misconduct and must ensure complainants'

safety.

(j) **Other Remedies** – CDCR must create a policy requiring that all pepper spray canisters at RJD be weighed before and after use. The Court Expert appointed to monitor Defendants' implementation of Defendants' Investigation and Discipline Plan must 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. CDCR must create a policy requiring monitoring, for a period of ninety days following a person filing a staff complaint at RJD, of the person's conduct and treatment to ensure staff are not engaging in retaliation.

(k) **Other Prisons** – CDCR must explain whether additional prisons, including its high-security missions, should adopt the remedies listed here based on such factors as violence against vulnerable people with disabilities, number of homicides and suicides, number of complaints, presence of contraband, prevalence of overdoses and other similar factors, and if not, why not. CDCR cannot wait years to address abuse of and retaliation against people with disabilities when it knows this conduct is occurring. The remedies developed here to address this unfortunately prevalent conduct should be extended across the prison system as soon as possible.

(l) **Suspension of State Law** – If any provisions of state law interfere with CDCR's ability to enact remedies necessary to remedy the violations of the ADA, RA, ARP, the Constitution, and orders of this Court, CDCR must request a court order suspending those provisions including the suspension of state law if necessary to achieve these purposes.

2. Within forty-five days of this Order, after reviewing comments from Plaintiffs' counsel, Defendants shall issue the plan in final form and implement its provisions forthwith. Defendants must present drafts of all plans, policies, and procedures developed pursuant to this Order to Plaintiffs' counsel at least fifteen days in advance of the deadlines. Both parties must make all possible efforts to resolve any disagreements as

to their adequacy. Defendants shall ensure that staff with sufficient authority to amend and approve procedures attend all meet-and-confer sessions. In the event that disagreements cannot be resolved, Defendants shall implement the procedures as written on the date ordered and Plaintiffs' counsel shall file objections with the Court. The Court will rule on the objections and issue orders and amended procedures as necessary.

3. If Defendants fail to come up with a plan within 45 days to address staff misconduct against persons with disabilities at RJD which includes the above provisions, Defendants will be required to begin the transfer out of RJD of any *Armstrong* class member who wishes to transfer, and the closure of RJD to intake of *Armstrong* class members, until such time as a plan is developed. Once a plan is adopted and benchmarks for compliance with the plan are agreed on, if Defendants fail to meet the benchmarks, Plaintiffs' counsel can move the Court to initiate the transfer out of RJD of any *Armstrong* class member who wishes to transfer, and the closure of RJD to intake of *Armstrong* class members, until such time as Defendants begin to follow their plan.

4. These remedies are all consistent with the Prison Litigation Reform Act's requirement that the Court's orders be narrowly drawn, extend no further than necessary to correct the violation of a federal right, and be the least intrusive means necessary to correct the violation. *See* 18 U.S.C. § 3626(a)(1)(A). Anything short of these remedies will not put an end to Defendants' ongoing and pervasive violation of *Armstrong* class members' rights at RJD and other prisons. Given CDCR's failure to adequately address the staff misconduct crisis at RJD and other prisons over the past three-plus years, the specificity of the remedies is appropriate. *See Armstrong v. Brown*, 768 F.3d 975, 985-86 (9th Cir. 2014).

IT IS SO ORDERED.

DATED: _____, 2020

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Honorable Claudia Wilken
United States District Judge