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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
5

6 JOHN ARMSTRONG, et al.,
7 Plaintiffs,
8 v.
9 GAVIN C. NEWSOM, et al.,
10 Defendants.

Case No. 94-cv-02307 CW
ORDER REGARDING PLAINTIFFS'
OBJECTIONS TO DEFENDANTS'
PROPOSED PARTIAL PLAN
(Re: Dkt. No. 3177)

11
12 On September 8, 2020, the Court ordered Defendants to draft a
13 plan for achieving compliance with the Armstrong Remedial Plan
14 (ARP) and the Americans with Disabilities Act (ADA) at Richard J.
15 Donovan Correctional Facility (RJD) that included certain remedial
16 measures (the RJD Remedial Plan). See Order, Docket No. 3060.
17 Defendants drafted a proposed partial plan that addresses some of
18 the remedial measures that must be included in the RJD Remedial
19 Plan (Proposed Partial Plan). See Proposed Partial Plan, Freedman
20 Decl., Ex. A, Docket No. 3177-1.

21 Now before the Court are Plaintiffs' objections to certain
22 aspects of Defendants' Proposed Partial Plan. Docket No. 3177.
23 Defendants filed responses to Plaintiffs' objections. Docket No.
24 3183. For the reasons set forth below, the Court finds that
25 Plaintiffs' objections are well-taken and orders Defendants to
26 modify, in accordance with this order, the portions of the
27 Proposed Partial Plan to which Plaintiffs object.

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1 I. Termination Clause

2 The Proposed Partial Plan provides:

3 The provisions in the RJD Remedial Plan will
4 terminate twenty-four months following the
5 finalization of the RJD Remedial Plan.
6 Plaintiffs shall have thirty days after the
7 end of the twenty-four month period to seek
8 an extension of the RJD Remedial Plan, not
9 to exceed twelve months, by presenting
evidence to the Court that demonstrates by a
preponderance of the evidence that current
and ongoing systemic violations of the RJD
Remedial Plan exist. CDCR shall have an
opportunity to respond to any such evidence
presented before Court resolution.

10 Proposed Partial Plan at 7, Freedman Decl., Ex. A, Docket No.
11 3177-1.

12 Plaintiffs object to the inclusion of this clause in the
13 Proposed Partial Plan on the grounds that (1) it is unnecessary,
14 because Defendants retain the right under the Prison Litigation
15 Reform Act (PLRA) to move to modify or dissolve the RJD Remedial
16 Plan if they can show that it is no longer needed to correct
17 ongoing ARP or ADA violations; and (2) the clause places the
18 burden on Plaintiffs to show that the RJD Remedial Plan continues
19 to be necessary, which Plaintiffs argue is inconsistent with the
20 Court's finding that the RJD Remedial Plan must remain in place
21 until the ongoing violations of the ARP and ADA at RJD are
22 eradicated.

23 Defendants contend that the clause is appropriate because (1)
24 only some, but not all, of the remedial measures in the RJD
25 Remedial Plan will terminate at the end of the twenty-four-month
26 period¹; (2) the clause permits Plaintiffs to move to extend the

27

28 ¹ This statement is inconsistent with the plain language of
the termination clause at issue, which provides, without any

1 RJD Remedial Plan for twelve months; and (3) the clause is
2 consistent with "the spirit" of the PLRA. Docket No. 3183 at 10-
3 11.

4 Under the PLRA, any prospective relief ordered by the Court
5 is

6 terminable upon the motion of any party or
7 intervener (i) 2 years after the date the
8 court granted or approved the prospective
9 relief; (ii) 1 year after the date the court
10 has entered an order denying termination of
11 prospective relief under this paragraph; or
12 (iii) in the case of an order issued on or
13 before the date of enactment of the Prison
14 Litigation Reform Act, 2 years after such
15 date of enactment.

16 18 U.S.C. § 3626(b) (1) (A). "When a party moves to terminate
17 prospective relief under § 3626(b), the burden is on the movant to
18 demonstrate that there are no ongoing . . . violations, that the
19 relief ordered exceeds what is necessary to correct an ongoing . .
20 . violation, or both." Graves v. Arpaio, 623 F.3d 1043, 1048 (9th
21 Cir. 2010) (citation omitted).

22 The clause at issue, which requires the automatic termination
23 of the RJD Remedial Plan regardless of whether ongoing violations
24 of the ADA or ARP continue to take place, is inconsistent with the
25 Court's finding that the remedial measures in the RJD Remedial
26 Plan are necessary so long as violations of the ARP and ADA
27 continue to take place. See Armstrong v. Newsom, ___ F. Supp. 3d
28 ___, No. 94-CV-02307 CW, 2020 WL 5511523, at *27-29 (N.D. Cal.
Sept. 8, 2020). It also is inconsistent with the procedures for

27 exceptions, that "the provisions in the RJD Remedial Plan will
28 terminate" within twenty-four months. See Proposed Partial Plan
at 7, Freedman Decl., Ex. A, Docket No. 3177-1.

1 terminating prospective relief under the PLRA. As noted, these
2 procedures require the party seeking the termination of
3 prospective relief to move for termination, and to show that
4 termination is appropriate because there are no ongoing rights
5 violations or because the prospective relief goes beyond what is
6 necessary to correct ongoing violations. The inclusion of the
7 clause at issue in the Proposed Partial Plan or RJD Remedial Plan
8 would permit Defendants to bypass these requirements.

9 In light of the foregoing, the Court finds that Plaintiffs'
10 objections to the inclusion of the termination clause are well-
11 taken. Defendants shall remove the clause at issue from the
12 Proposed Partial Plan and all subsequent versions thereof.
13 Defendants may move to terminate the RJD Remedial Plan or any
14 portions thereof pursuant to the procedures set forth in the PLRA.²

15 II. Documents Related to Staff Complaints and Investigations

16 The Proposed Partial Plan provides:

17 CDCR will provide Plaintiffs' counsel and
18 the court expert with documents related to
19 RJD staff complaints and their subsequent
20 investigation and disciplinary process in
which the alleged victim is a class member
alleging violations of rights under the ARP
or ADA.

21 Proposed Partial Plan at 3-4, Freedman Decl., Ex. A, Docket No.
22 3177-1.

23 Plaintiffs object to this clause on the ground that it
24 requires Defendants to produce documents related to staff
25 misconduct complaints at RJD in which the alleged victim is a

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27 ² This order, which does not resolve any motion under 18
28 U.S.C. § 3626(b)(1)(A) to terminate any prospective relief, is
not an "order denying termination of prospective relief" under 18
U.S.C. § 3626(b)(1)(A)(ii).

1 class member, but only to the extent that “Defendants deem the
2 complaint to allege violations of the ARP or ADA.” Docket No.
3 3177 at 3-4. Plaintiffs argue that the Court should order
4 Defendants to produce all documents related to staff misconduct
5 complaints at RJD in which the alleged victim is a class member,
6 regardless of whether Defendants deem the complaint to allege
7 violations of the ARP or ADA, because Defendants have consistently
8 operated under an “improperly narrow view of what constitutes a
9 violation of the ADA and ARP.” Id. at 5-6. For that reason,
10 Plaintiffs argue that Defendants’ document production will be
11 underinclusive, which will hamper Plaintiffs’ ability to
12 effectively monitor Defendants’ compliance with the ARP and ADA.
13 Id. Plaintiffs also argue that Defendants will suffer no
14 prejudice by producing the documents they request because
15 “Defendants have already been providing all staff misconduct
16 complaints by class members and related investigation and
17 discipline documents, regardless of whether the incidents involved
18 violations of the ADA or ARP.” Id.; see also Freedman Decl.
19 ¶¶ 10-11, Docket No. 3177-1.

20 Defendants respond that the clause at issue is consistent
21 with the Court’s order of September 8, 2020, which requires
22 Defendants to “produce to Plaintiffs’ counsel and the court
23 expert, Mr. Swanson, on a quarterly basis, all documents related
24 to RJD staff complaints in which the alleged victim is a class
25 member and alleges violations of his or her rights under the ARP
26 or the ADA.” Docket No. 3183 at 2 (quoting Order at 5, Docket No.
27 3060). Defendants further argue that expanding their document
28 production obligations as Plaintiffs request is unnecessary to

1 ensure adequate monitoring by Plaintiffs and the court expert,
2 because the installation of cameras and increased supervisory
3 staff at RJD will help "ensure that class-members' staff
4 misconduct allegations are accurately identified as potential ADA
5 or ARP violations." Id. at 2-4.

6 The purpose of the Court's order requiring Defendants to
7 produce documents related to staff misconduct complaints involving
8 class members at RJD was to ensure that Plaintiffs' counsel and
9 the court expert are able to effectively monitor Defendants'
10 compliance with the ARP and ADA at RJD. Plaintiffs have shown,
11 and Defendants do not dispute, that Defendants have previously
12 failed, on multiple occasions, to properly identify and log
13 alleged violations of the ARP and the ADA. See Docket No. 3177 at
14 4 n.1. These prior failures had no relationship to the lack of
15 cameras or sufficient supervisory staff at RJD; they stemmed,
16 instead, from Defendants' narrow interpretation of their
17 obligations under the ARP and ADA.³ In light of Defendants'
18 repeated failures to properly identify and log alleged violations
19 of the ARP and the ADA, the Court is persuaded that Defendants'
20 document production would be underinclusive, and that Plaintiffs'
21 and the court expert's ability to monitor Defendants' compliance
22 with the ADA and ARP would be impaired, unless the Court requires
23 Defendants to produce all documents related to staff misconduct
24

25 ³ Because there is no evidence that Defendants' prior
26 failures to properly identify and log alleged violations of the
27 ARP and ADA arose from the absence of cameras or sufficient
28 supervisory staff at RJD, the Court cannot conclude that the
installation of cameras and the addition of more supervisory
staff at RJD will have any impact on Defendants' identification
or logging of alleged violations of the ARP or ADA in the future.

1 complaints at RJD in which the alleged victim is a class member,
2 regardless of whether Defendants deem the complaints to allege
3 violations of the ARP or ADA.

4 Requiring Defendants to produce these documents would not be
5 prejudicial to them. Plaintiffs have shown, and Defendants do not
6 dispute, that Defendants have previously produced documents
7 relating to staff misconduct complaints involving class members at
8 RJD, even when such documents did not involve an alleged violation
9 of the ARP or ADA.

10 Accordingly, Defendants shall modify the clause at issue to
11 state that Defendants will produce to Plaintiffs' counsel and the
12 court expert documents related to RJD staff misconduct complaints,
13 and their subsequent investigation and disciplinary process, in
14 which the alleged victim is a class member.

15 III. Documents Related to Quarterly Inmate Interviews

16 The Proposed Partial Plan provides:

17 CDCR will conduct quarterly interviews of
18 randomly selected class members at RJD.
19 These quarterly interviews will inquire as
20 to any allegations of violations of the ARP
21 or ADA. The interviewing team will be
22 trained in investigative interviewing and
23 will be comprised of ombudsmen, associate
24 wardens, captains, and sergeants from other
25 institutions during an in-person site visit
26 at RJD. The Office of Research will
27 randomly select class members to interview
28 and it will comprise five percent of the
total class members housed at RJD. The
selected class members will be interviewed
independently utilizing the questions used
by investigators in December 2018 as found
in Attachment D.

At the conclusion of the interviews, the
team will compile all interview data and
provide a written report summarizing the
findings. The report will be presented to
the Director of the Division of Adult

1 Institutions (DAI) within 30 days of the
2 conclusion of interviews. Any allegations
3 of violations of the ARP or ADA by class
4 members at RJD will be referred back to the
5 hiring authority for inquiry and notation on
6 the Armstrong Accountability Log. If a
7 Corrective Action Plan (CAP) is required
8 following the analysis of the interviews, an
9 associate warden or captain will create the
10 CAP and monitor its completion.

11 Proposed Partial Plan at 3, Freedman Decl., Ex. A, Docket No.
12 3177-1.

13 Plaintiffs object to this clause on the ground that it does
14 not require Defendants to produce to Plaintiffs or the court
15 expert the interview worksheets, any reports, any data, or any
16 corrective action plans generated as part of the quarterly
17 interview process. Docket No. 3177 at 7. Plaintiffs argue that
18 the Court should require Defendants to produce these documents and
19 data because they are "directly relevant to Defendants' compliance
20 with the RJD Injunction," and because Defendants previously
21 produced similar documents and data generated from the Bishop
22 Report interviews. Id.

23 Defendants argue that the clause is consistent with the
24 Court's order of September 8, 2020, which requires them only to
25 conduct the quarterly interviews but not to produce any documents
26 or data generated therefrom. Docket No. 3183 at 6 (quoting Order
27 at 4, Docket No. 3060). Defendants also contend that requiring
28 them to produce the documents at issue would "compromise inquiries
or investigations that arise from those interviews." Id.
Defendants further argue that, "to the extent that these
allegations are subjected to an inquiry or an investigation,
relevant documents will be produced to Plaintiffs under other
portions of the plan." Id. at 6-7.

1 The Court finds that Plaintiffs' objections are well-taken.
2 First, Defendants do not explain why or how any inquiries or
3 investigations that arise from the interviews would be negatively
4 impacted by the production to Plaintiffs of the documents and data
5 at issue. Defendants argue only that producing such documents and
6 data "may" reveal allegations of violations of the ARP or ADA
7 "that have not yet been reported, subjected to inquiry, or
8 investigated." Docket No. 3183 at 6. But the Court cannot
9 conclude that the act of revealing to Plaintiffs allegations that
10 have not been investigated would undermine any investigations or
11 inquiries, because Defendants are already required to log all
12 allegations of violations of the ARP and ADA in the accountability
13 log to which Plaintiffs have access, regardless of whether such
14 allegations have been investigated. In other words, Defendants'
15 production of the documents and data at issue should not result in
16 the revelation to Plaintiffs of any new allegations of ARP or ADA
17 violations that were not already disclosed to Plaintiffs through
18 the accountability log.

19 Further, documents and data generated from the interviews are
20 likely to be highly probative of whether Plaintiffs' rights under
21 the ARP and the ADA are being violated at RJD. Such was the case
22 with respect to the documents and data generated from the
23 interviews conducted in connection with the Bishop Report. See
24 Armstrong v. Newsom, 2020 WL 5511523, at *4-5. Defendants
25 produced the Bishop Report documents and data to Plaintiffs more
26 than a year after they were generated, and this delay, which
27 remains unexplained, prevented Plaintiffs from addressing multiple
28 alleged violations of the ARP and ADA on a timely basis. See id.

1 Like the documents and data generated from the Bishop Report
2 interviews, documents and data generated from the forthcoming
3 interviews with class members will be critical to Plaintiffs'
4 ability to effectively monitor Defendants' compliance with the ARP
5 and ADA. Therefore, as such, the Court finds that requiring
6 Defendants to produce these documents and data to Plaintiffs
7 within forty-five days of the conclusion of the interviews from
8 which they are generated is appropriate. Defendants shall modify
9 the clause at issue accordingly.

10 IV. Plan Regarding Use of Pepper Spray

11 The Proposed Partial Plan provides:

12 CDCR will develop a plan to modify its
13 policies to more effectively monitor and
14 control the use of pepper spray by RJD staff
15 with respect to class members. To develop
16 the plan, CDCR will meet with the Office of
17 Training and Professional Development and
18 the Office of Correctional Safety to review
19 current training materials, the UOF policy,
20 policy memorandums from 2014 to the present,
21 and any other documents related to the use
22 of pepper spray by RJD staff members.
23 Following the review of all relevant
24 documents, CDCR will incorporate necessary
25 updates and additional components to its
26 pepper spray policy.

27 The deployment of AVSS and BWCs present a
28 substantial modification to RJD's ability to
monitor and control the use of pepper spray.
It will provide the ability for real-time
monitoring and recording in order to conduct
investigations and after-the-fact reviews by
utilizing AVSS and BWC technology. These
new technologies will be valuable tools to
review and evaluate incidents involving UOF,
which will include incidents involving the
disbursement of chemical agents. This
additional information will aid CDCR in its
review and identification of further
potential reforms to its pepper spray
policies and training materials to more
effectively monitor and control the use of

1 pepper spray by RJD staff with respect to
2 class members.

3 Proposed Partial Plan at 6-7, Freedman Decl., Ex. A, Docket No.
4 3177-1.

5 Plaintiffs object to this clause on the ground that it does
6 not comply with the Court's order of September 8, 2020, which
7 requires Defendants to "develop a plan to modify [CDCR's] policies
8 to more effectively monitor and control the use of pepper spray by
9 RJD staff with respect to class members" and to describe this plan
10 in the RJD Remedial Plan. Docket No. 3177 at 7 (quoting Order at
11 6, Docket No. 3060). Plaintiffs argue that the clause describes
12 only a plan to make a plan, which falls short of what the Court
13 ordered. Id. Plaintiffs contend that they proposed measures to
14 better control the use of pepper spray on class members at RJD,
15 such as the weighing of pepper spray canisters after use, and the
16 modification of CDCR's policies to limit use of pepper spray "like
17 the Federal Bureau of Prisons (BOP) does," id. (internal quotation
18 marks omitted), but Defendants have not included any of their
19 proposals in the Proposed Partial Plan, id. at 8.

20 Defendants respond that they are "working to develop a
21 sustainable and effective policy," and that they will "incorporate
22 necessary updates and additional components to [CDCR's] pepper
23 spray policy" after they review "all relevant documents." Docket
24 No. 3183 at 7. Defendants imply that they could conclude, after
25 reviewing "all relevant documents," that modifications to CDCR's
26 existing pepper-spray policies are not necessary, as Defendants
27 state that "the partial remedial plan is comprehensive" and "the
28 other remedial measures will serve to monitor and control the use

1 of pepper spray at RJD.” Id. Defendants also contend that
2 adopting Plaintiffs’ proposals would not be “viable.” Id. at 8-9.
3 According to Defendants, (1) the weighing of canisters would be
4 burdensome and would not provide helpful information as to whether
5 pepper spray was misused, because the amount of pepper spray
6 necessary each time will vary depending on the weather, location,
7 and distance from the target; and (2) adopting the BOP’s pepper
8 spray policy by imposing a strict limit on the amount of pepper
9 spray that a CDCR officer is allowed to use in an uncontrolled
10 use-of-force situation is not workable, because a strict limit
11 would not allow sufficient discretion to the officer to “ensure
12 immediate compliance.” Id. Finally, Defendants contend that
13 CDCR’s pepper-spray policy for a controlled use-of-force setting
14 is already substantially similar to the BOP’s, as CDCR restricts
15 the number of permissible pepper-spray bursts to two and limits
16 the duration of each burst to three seconds. Id. at 9 (noting
17 that the BOP limits the use of pepper spray to two bursts of two
18 seconds each).

19 The Court concludes that Defendants are not in compliance
20 with its order of September 8, 2020, which requires them to
21 develop and include in the RJD Remedial Plan a plan to “modify”
22 CDCR’s policies “to more effectively monitor and control the use
23 of pepper spray by RJD staff with respect to class members.” See
24 Order at 6, Docket No. 3060. Defendants have provided no
25 meaningful explanation for why they failed to draft a plan as the
26 Court ordered, nor have they stated when they expect to finish
27 reviewing the documents they claim to need to review before they
28 can make modifications to CDCR’s existing pepper spray policy.

1 Further, the Court is not persuaded by Defendants'
2 explanation for why, in their view, it would be inappropriate to
3 limit the number and duration of permissible pepper-spray bursts
4 during an uncontrolled use-of-force incident involving class
5 members at RJD, as Plaintiffs propose. Defendants contend that
6 Plaintiffs' proposed limits would deprive officers of the
7 discretion they need to gain control of an uncontrolled situation,
8 and would ignore the fact that the amount of pepper spray needed
9 varies depending on the weather, location, and distance from the
10 target. But BOP officers presumably face similar safety risks as
11 CDCR officers, and they also presumably experience variations in
12 the weather, location, and distance from the target, as CDCR
13 officers do. Yet, the BOP prohibits its officers from delivering
14 more than two bursts per incident, and from delivering any burst
15 that is longer than two seconds, regardless of whether the setting
16 is controlled or uncontrolled. See Freedman Decl., Ex. D at 4,
17 Docket No. 3177-1.

18 Within seven days of the date this order is filed, Defendants
19 shall send to Plaintiffs and the court expert a version of the
20 Proposed Partial Plan that includes a plan to "modify" CDCR's
21 policies "to more effectively monitor and control the use of
22 pepper spray by RJD staff with respect to class members." See
23 Order at 6, Docket No. 3060. Defendants also shall provide to
24 Plaintiffs and the court expert a detailed and supported
25 explanation for why adopting Plaintiffs' proposed limits on the
26 number and duration of bursts that can be used on class members at
27 RJD in uncontrolled settings would be unworkable. The parties
28 shall then meet and confer and try to reach an agreement as to the

United States District Court
Northern District of California

1 pepper-spray plan, which shall then be included in the latest
2 version of the RJD Remedial Plan. If the parties are unable to
3 reach an agreement as to the pepper-spray plan, Plaintiffs may
4 file a new set of objections.

5 V. Installation of Surveillance Cameras

6 Plaintiffs argue that Defendants stated for the first time in
7 their response to Plaintiffs' objections that the audio-visual
8 system at RJD would be "tentatively" deployed by April 5, 2021,
9 even though Defendants were required pursuant to a stipulated
10 order to implement the system "no later than March 8, 2021." See
11 Docket No. 3188 at 5 (citing Stipulation and Order ¶ 2, Docket No.
12 3144). Plaintiffs request that the Court order Defendants to
13 implement the system at RJD no later than April 5, 2020.

14 Defendants have neither sought nor received leave of Court to
15 modify the March 8, 2021, deadline that the Court previously
16 imposed for the installation of the audio-visual system at RJD.
17 Consistent with Plaintiffs' request, however, the Court orders
18 Defendants to implement the system no later than April 5, 2021.
19 Defendants shall modify the Proposed Partial Plan accordingly.

20 IT IS SO ORDERED.

21 Dated: January 20, 2021



22 CLAUDIA WILKEN
23 United States District Judge
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