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17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 OAKLAND DIVISION

20 JOHN ARMSTRONG, et al.,
 21 Plaintiffs,
 22 v.
 23 GAVIN NEWSOM, et al.,
 24 Defendants.

Case No. C94 2307 CW

**[PROPOSED] ORDER GRANTING
 MOTION TO STOP DEFENDANTS
 FROM ASSAULTING, ABUSING AND
 RETALIATING AGAINST PEOPLE
 WITH DISABILITIES AND
 REQUIRING DEFENDANTS TO
 DEVELOP A REMEDIAL PLAN**

Judge: Hon. Claudia Wilken
 Date: July 21, 2020
 Time: 2:30 p.m.
 Crtrm: TBD, Oakland

1 Plaintiffs filed a Motion to Stop Defendants from Assaulting, Abusing and
 2 Retaliating Against People with Disabilities at R.J. Donovan Correctional Facility (“RJD”)
 3 on February 28, 2020. Thereafter, Defendants continued producing and Plaintiffs
 4 reviewed documents responsive to Plaintiffs’ November 21 requests for production of
 5 documents. Plaintiffs also identified additional instances of staff abuses of incarcerated
 6 people at RJD and other facilities at CDCR. On June 3, 2020, Plaintiffs filed a Motion to
 7 Stop Defendants from Assaulting, Abusing and Retaliating Against People With
 8 Disabilities (“Plaintiffs’ Motion”), which came on for hearing before this Court on
 9 July 21, 2020 at 2:30 p.m.. The Court, having considered the parties’ pleadings, the
 10 arguments of counsel, and the entire record, GRANTS Plaintiffs’ Motion and makes the
 11 following findings:

12 This lawsuit was originally filed twenty-six years ago by incarcerated people and
 13 parolees with disabilities against the California officials with responsibility over the
 14 corrections and parole system. This Court certified Plaintiffs as representatives for a class
 15 including “all present and future California state prisoners and parolees with mobility,
 16 sight, hearing, learning, developmental and kidney disabilities that substantially limit one
 17 or more of their major life activities.” Order Granting Pls.’ Mots. to Am. Compl. and
 18 Modify the Class, Dkt. 345, Jan. 5, 1999, at 2.¹ On behalf of the class, Plaintiffs sought
 19 accommodations for their disabilities, as required under federal statutes and the United
 20 States Constitution.

21 Initially, Plaintiffs sued two divisions of the then-California Youth and Adult
 22 Corrections authority (the “Agency”). The two divisions sued had separate areas of
 23

24 ¹ The Plaintiff class was certified on January 13, 1995. On December 24, 1999, the parties
 25 stipulated to amend the class definition to include “all present and future California state
 26 prisoners and parolees with mobility, sight, hearing, learning and kidney disabilities that
 27 substantially limit one or more of their major life activities.” Stipulation and Order Am.Pl.
 28 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.

1 responsibility toward incarcerated people and parolees: The Board of Prison Terms
 2 (“BPT”) had authority over parole and parole revocation hearings, and the California
 3 Department of Corrections (“CDC”) was responsible for all other aspects of incarcerated
 4 people’s and parolees’ lives, including supervisions of parolees.² By agreement of the
 5 parties, litigation against the two divisions was initially bifurcated and proceeded on two
 6 separate tracks.

7 On September 20, 1996, this Court ordered CDC and related Defendants to develop
 8 plans to ensure that their facilities and programs were compliant with the Americans With
 9 Disabilities Act (“ADA”), 42 U.S.C. §§ 12131 *et seq.*, and the Rehabilitation Act (“RA”),
 10 and readily accessible to and usable by incarcerated people and parolees with disabilities.
 11 The order also required Defendants to develop policies to provide a prompt and equitable
 12 disability grievance procedure, to allow approved assistive aids for incarcerated people
 13 with disabilities in segregation units and reception centers, and to ensure accessibility in
 14 new construction and alterations. Remedial Order, Injunction and Certification for
 15 Interlocutory Appeal, September 20, 1996. The Court retained jurisdiction to enforce its
 16 terms. *Id.* at 5.³ Subsequent proceedings against the BPT, now the BPH, are summarized
 17 in the Court’s Order Granting Plaintiffs’ Renewed Motion to Require Defendants to Track
 18 and Accommodate Needs of *Armstrong* Class Members Housed in County Jails, Ensure
 19 Access to a Grievance Procedure, and to Enforce 2001 Permanent Injunction, Dkt. 1974,
 20 Jan. 13, 2012, at 3-5 and 6-11, *aff’d* 732 F.3d 955 (9th Cir. 2013), *cert. denied* 134 S.Ct.
 21 2725 (2014).

22 On January 3, 2001, the CDC Defendants amended their Court Ordered Remedial
 23 Plan regarding the provision of programs and services to incarcerated people and parolees

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

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).

1 with disabilities. The *Armstrong* Remedial Plan (“ARP”) requires Defendants to ensure
 2 that incarcerated people and parolees with disabilities are accessibly housed, that they are
 3 able to obtain and keep necessary assistive devices, and that they receive effective
 4 communication regarding accommodations. The Remedial Plan also requires Defendants
 5 to include in all contracts language that requires subcontractors to comply with the ADA.

6 Plaintiffs’ counsel began monitoring compliance with the ARP around the time of
 7 its implementation, and have filed a series of enforcement motions in the years since. On
 8 January 18, 2007, in light of significant evidence of multiple violations of the Remedial
 9 Plan, the Court issued an Injunction that addressed these violations and ordered
 10 Defendants to comply with sections of the Remedial Plan. *See* Dkt. 1045.⁴ A key aspect
 11 of the 2007 Injunction was a section on accountability:

12 [Defendants, in cooperation with the Office of the Inspector General and the
 13 Receiver in *Plata v. Schwarzenegger*, shall develop a system for holding
 14 wardens and prison medical administrators accountable for compliance with
 15 the *Armstrong* Remedial Plan and the orders of this Court. This system shall
 16 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.

17 *Id.* at 7.

18 On March 22, 2012, Plaintiffs filed a Request for an Order to Show Cause and
 19 Notice of Motion and Motion for an Order Holding Defendants in Contempt of Court (the
 20 “Accountability Motion”). *See* Dkt. 2024. Plaintiffs argued in the Accountability Motion
 21 that Defendants were violating the accountability section of the 2007 Injunction by
 22 “fail[ing] to take any action to track ... reported instances of staff member non-
 23 compliance, or to refer repeated instances of non-compliance to the [Office of Internal
 24 Affairs].” *Id.* at 3.

25 _____
 26 ⁴ Plaintiffs subsequently filed enforcement motions, and the Court issued orders,
 27 addressing the lack of sufficient beds for people who need wheelchairs full-time,
 28 Dkt. 1661, the unavailability of sign language interpreters for deaf people in education and
 medical settings, Dkt. 2345, and the unlawful retention of people in administrative
 segregation due to a lack of accessible beds. *See* Dkt. 2495.

1 On August 22, 2012, this Court issued an Order Denying Motion for Contempt,
 2 Denying as Moot Motion to Strike, and Modifying Permanent Injunction. Dkt. 2180. As
 3 the Court explained in this Order, the accountability provisions of the 2007 Injunction
 4 “required Defendants to develop effective internal oversight and accountability procedures
 5 to ensure that Defendants learned what was taking place in their facilities, in order to find
 6 violations, rectify them, and prevent them from recurring in the future, without
 7 involvement by Plaintiffs’ counsel or the Court.” *Id.* at 10. The Court further explained
 8 that “investigations, including the documentation of the results, are necessary to ensure
 9 that grievances are addressed and to identify staff error or misconduct and institutional
 10 deficiencies that violate class members’ rights.” *Id.* at 11.

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

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

18 require Defends to track all allegations of non-compliance with the ARP and
 19 the orders of this Court.... This must be done regardless of the source of the
 20 allegations. The only difference is that this order also requires Defendants to
 21 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.

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

24 to ensure that allegations are investigated while memories are fresh, the facts
 25 surrounding the allegations are still in existence, and the violation can be
 26 remedied. Further, in order to reconcile disagreements between the parties
 27 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.

28 *Id.* at 18. The Court went on to hold that with referrals to the Office of Internal Affairs

1 (“OIA”) for investigation and discipline of non-complying employees, Defendants would
2 be required to “comply with the Employee Disciplinary Matrix set forth in the CDCR
3 Departmental Operations Manual, Chapter 3, Article 22.” *Id.* The Court further found it
4 necessary “to create a process for resolving disputes between the parties regarding whether
5 an incident constitutes a violation of the ARP and this Court’s orders[]” *Id.* at 19.

6 Defendants appealed the Modified Injunction. The Ninth Circuit affirmed the
7 Court’s order in all respects except with regard to the dispute resolution process. *See*
8 *Armstrong v. Brown*, 768 F.3d 975 (2014). On remand, this Court issued an order
9 addressing the Ninth Circuit opinion and mandating that Plaintiffs submit a second
10 Modified Injunction incorporating the changes required by the Ninth Circuit. *See* Order
11 Revising Modified Injunction, Dec. 5, 2014, Dkt. 2462.

12 On December 29, 2014, the Court issued an Order Modifying January 18, 2007
13 Injunction. *See* Dkt. 2479. This Modified Injunction governs accountability for CDCR
14 staff misconduct and violations of the ARP and Court orders. Pursuant to the Modified
15 Injunction, CDCR has issued two memoranda governing CDCR’s process for reporting,
16 logging, conducting an “inquiry” into the alleged non-compliance, and investigating
17 allegations. Currently, Defendants track accountability issues through logs generated by
18 software purchased from Salesforce.

19 In 2013, the Court ordered the parties to work together to develop better means for
20 monitoring Defendants’ compliance with the ADA, the Remedial Plan, and this Court’s
21 orders. Order Regarding Monitoring, Dkt. 2344. The Court directed “the parties to meet
22 and confer, with the assistance of the court’s expert as needed, on how to resolve
23 [monitoring] ... issues and improvements that might be made on the monitoring process.”
24 *Id.* at 2.

25 Since July 2013, the parties have met regularly under the supervision and with the
26 guidance of the Court Expert to draft and refine a joint monitoring tool. The parties have
27 also conducted a number of joint audits of Defendants’ prisons for compliance with the
28 ARP and this Court’s orders. *See* CMC Statements. The thrust of both the Joint Audit

1 Process and the Accountability Memorandum and Modified Injunction are to share
2 information among the parties with the goals of ultimately having Defendants monitor
3 their own compliance and of creating a sustainable, ADA-compliant system that protects
4 the rights of *Armstrong* class members.

5 The parties' efforts to create a sustainable remedy have been undermined by an
6 epidemic of staff abuse and excessive use of force at a number of CDCR prisons. In
7 December 2015, the Office of Inspector General ("OIG") issued a report at the request of
8 the California Legislature and the Prison Law Office detailing numerous incidents of staff
9 abuses at High Desert State Prison ("HDSP").

10 By January 2018, reports of serious abuse of people with disabilities were
11 emanating from the California Institute for Women ("CIW") and Salinas Valley State
12 Prison ("SVSP"). In response to monitoring by Plaintiffs' counsel, the OIG issued a report
13 in 2019 detailing the inadequacy of CDCR's investigative process for finding and
14 remedying staff misconduct and excessive use of force.

15 These issues have regularly been reported to the Court in the parties' Case
16 Management Statements. *See, e.g.*, Dkts. 2821, 2844, 2863, 2874, 2887 & 2896. Plaintiffs
17 have presented evidence of abuse and retaliation targeted at people with disabilities at a
18 number of prisons, including HDSP, CIW, SVSP, Richard J. Donovan Correctional
19 Facility ("RJD"), California State Prison – Los Angeles County ("LAC"), California State
20 Prison – Corcoran ("COR"), Kern Valley State Prison ("KVSP"), the California Substance
21 Abuse Treatment Facility ("SATF") and California Correctional Institution at Tehachapi
22 ("CCI") (the "prisons"). These prisons, which are mostly high-security institutions, house
23 thousands of *Armstrong* class members, as well as people with serious mental illness who
24 are class members in *Coleman v. Newsom*, E.D. Cal. No. 2:90-CV-00520-KJM-DB, people
25 with developmental disabilities who are class members in *Clark v. California*, N.D. Cal.
26 No. 3:96-cv-01486-CRB; and people who CDCR has deemed as having high risk medical
27 conditions.

28 Plaintiffs have brought the instant Motion to stop officers from assaulting, abusing

1 and retaliating against people with disabilities. Plaintiffs' counsel have been notifying
2 Defendants of incidents of staff misconduct and violence at RJD and elsewhere against
3 *Armstrong* class members in tour reports and letters for four years. This issue was first
4 discussed in a Case Management Conference Statement on July 14, 2017. Dkt. 2688 at 4.

5 Plaintiffs' counsel has filed 112 declarations from people with disabilities
6 describing hundreds of discrete instances of abuse of and discrimination and retaliation
7 against people with disabilities occurring since 2016. 73 of the declarations describe abuse
8 experienced or witnessed at RJD; 29 describe similar conduct at LAC; and the remaining
9 declarations address such conduct at CCI, KVSP, SATF, and COR. The declarants
10 identify, by name, well over 100 different correctional officers who have participated
11 directly in the misconduct, including many who are identified as having participated in
12 more than one incident. The names of dozens of other officers who participated directly in
13 the misconduct are unknown to the declarants.

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

28 Staff or incarcerated people working at staff's behest have broken victims' arms,

1 wrists, ribs, legs, orbital sockets, teeth, feet, fingers, and jaws; many of the broken bones
 2 required surgical repairs. Many of the assaults by staff resulted in the victim being
 3 transported to an outside hospital for medical attention. One class member who filed a
 4 declaration died in February 2020 from injuries caused by his cell mate after staff refused
 5 his request for a cell move and instead repeatedly told him that he and his cellmate needed
 6 to “fuck or fight.”

7 Following attacks by custody staff, some *Armstrong* class members’ disabilities
 8 have become more severe, including a few for whom doctors changed the class members’
 9 disability designations to reflect higher levels of impairment. Many others’ mental health
 10 declined substantially as a result of the abuse they experienced or witnessed.

11 In addition to the untold human suffering for the direct victims, the medical care for
 12 these unnecessary injuries is all paid for by the taxpayers. This is particularly troubling in
 13 light of the strain placed on the public fisc in the time of COVID-19. Staff regularly
 14 exposed to this conduct can be traumatized, which can negatively affect their mental
 15 health, productivity, and attendance, all of which also affects the State’s strapped budget.

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

20 CDCR is well aware of this pattern. For example, at RJD, CDCR sent a strike team
 21 of investigators to conduct interviews in December 2018 with more than one hundred
 22 incarcerated people on Facility C. The associate warden who led the strike team and
 23 CDCR’s own investigators concluded that staff at RJD were targeting people with
 24 disabilities because of their disabilities, finding that “custody staff actively retaliat[e]
 25 against inmates for filing appeals or staff complaints or requesting assistance with safety
 26 concerns.” They further concluded that “within 24 hours of an inmate dropping off an
 27 appeal ... retaliation begins.” The retaliation has included assaulting complainants in
 28 places with limited visibility; arranging for incarcerated people in gangs to assault the

1 complainant; seizing a complainant's property; announcing to other incarcerated people
 2 that the complainant had a disfavored commitment offense; or announcing that the
 3 complainant was responsible for other incarcerated people not receiving programs (i.e.,
 4 televisions, dayroom, showers, etc.) Retaliation has even been leveled against staff
 5 members who participate in efforts to discipline officers.

6 Because of the violent misconduct and retaliation at CDCR prisons, incarcerated
 7 people are terrified of custody staff. To avoid becoming the next victim, people with
 8 disabilities forgo requesting from staff the disability accommodations they need to
 9 participate in CDCR programs, services and activities. The same fear causes class
 10 members to refrain from complaining, either informally or using an 1824 or 602 grievance,
 11 when staff deny them accommodations to which they are entitled. Defendants' own
 12 investigators concluded that at RJD "[t]he inmate allegations, taken as a whole, seem to
 13 describe an environment with no relief mechanism for inmates who feel mistreated by
 14 staff." As a result of custody staff's concerted efforts to stifle and punish complaints,
 15 "[i]nmates ... 'hide' within their daily routines and suffer minor abuse in order to avoid
 16 greater abuses." Declarants at other institutions, including at LAC, COR, CCI, KVSP, and
 17 SATF, expressed similar fear of staff and of repercussions for asking for help or
 18 complaining about misconduct.

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

26 [W]hat we heard was overwhelming accusations of abuse by the Officers
 27 with Sgt's and Lt's looking in the other direction. **I have never heard**
 28 **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....

1 **This is a very serious situation and needs immediate attention. If there**
2 **is any means of installing cameras immediately I would strongly suggest**
3 **it, at least in the blind spots and the back door by the gym. A review of the**
4 **appeal process, RVR's and staff complaints off that yard also needs to**
5 **take place ASAP.** (Emphasis added.)

6 Later in the email chain, the Chief Ombudsman wrote:

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

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

17 Beginning in 2017, in tour reports and letters, Plaintiffs' counsel brought to
18 Defendants' attention dozens of allegations of serious misconduct at LAC. To date,
19 Defendants do not appear to have adequately investigated the allegations. As far as
20 Plaintiffs' counsel can discern, Defendants also have not made any changes to policy or
21 practice at LAC to attempt to curb the rampant abuses.

22 Plaintiffs' counsel have also documented serious abuse and retaliation at HDSP,
23 CCI, KVSP, COR, and the SATF. Moreover, the misconduct identified by Plaintiffs'
24 counsel is very similar to the problems identified by the OIG in its 2015 report regarding
25 HDSP and the 2019 report regarding SVSP.

26 CDCR has provided scant information about its investigations of staff misconduct
27 and its decisions to impose little or no discipline on the officers who have perpetrated the
28 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.

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

13 Contrary to the spirit of the Court's orders regarding accountability and the order
14 aimed at improving monitoring in this case, Defendants have not been transparent with
15 Plaintiffs regarding the serious problems described in Plaintiffs' Motion. The August 2018
16 joint audit at RJD, conducted as part of those collaborative efforts, served as one of the
17 first moments when CDCR recognized it had a problem with staff misconduct at RJD. Yet
18 CDCR repeatedly failed to share information with Plaintiffs' counsel regarding CDCR's
19 attempts to diagnose and treat the staff misconduct epidemic at RJD and elsewhere.

20 CDCR's remedial efforts to date have been inadequate and ineffective. CDCR has
21 failed (1) to discipline officers who have engaged in misconduct; (2) to promptly
22 investigate all of the allegations of misconduct about which it was aware; (3) to install
23 cameras in all areas to which incarcerated people have access; and (4) to take any steps to
24 determine whether misconduct was occurring in areas of the prisons other than those
25 described in the declarations from class members or whether its efforts to reduce staff
26 misconduct have been successful. The few efforts CDCR has made primarily involve
27 minor changes in staffing and training. Because CDCR has refused to take the problem
28 seriously, staff misconduct continues to occur at an alarming rate.

1 The rampant misconduct in these prisons occurs, at least in part if not primarily,
2 because of systemic problems with CDCR’s existing processes for investigating and
3 disciplining staff who engage in misconduct. At RJD, despite the more than 100 instances
4 of misconduct reflected in the declarations from people with disabilities, CDCR has only
5 disciplined a handful of officers for misconduct in which the victim was an incarcerated
6 person since January 1, 2017. Furthermore, CDCR has terminated only nine officers for
7 misconduct involving an incarcerated person. Notably, all nine instances involved victims
8 who were people with disabilities (eight *Armstrong* class members and one *Coleman* class
9 member), further establishing that the most serious misconduct by officers is focused on
10 people with disabilities.

11 Plaintiffs’ experts’ review of investigation and discipline files showed that CDCR’s
12 current investigation system is not resulting in the discipline, including terminations and
13 criminal prosecutions, necessary to hold officers accountable and protect incarcerated
14 people. There are problems at every step of the process: the local inquiries conducted by
15 staff at RJD were incomplete, unprofessional, and profoundly biased against incarcerated
16 complainants and witnesses. The OIA Central Intake Unit (“CIU”)—which functions as
17 the gatekeeper for all discipline of CDCR employees—blocked many potentially
18 meritorious complaints against RJD staff from even being investigated by OIA, an issue
19 Plaintiffs have been bringing to CDCR’s attention for years. Wardens at RJD—who, like
20 all wardens in CDCR, have the authority to decide whether to find an officer has violated
21 policy and to impose discipline—exercised their discretion poorly and inconsistently. In
22 some cases, the wardens elected not to sustain allegations fully supported by the facts. In
23 others, wardens made inconsistent decisions in finding misconduct and imposing penalties
24 where the allegations of misconduct were substantially similar. The Employee
25 Disciplinary Matrix—which sets forth presumptive penalties for different types of
26 misconduct—is seriously flawed and leads to penalties that are too low for serious
27 misconduct that harms incarcerated people. Staff members accused of serious misconduct
28 were nearly always permitted to remain in positions with control over incarcerated people,

1 sometimes including their victims, and receive their salaries during the pendency of
2 investigations. Where evidence indicated that officers had engaged in criminal conduct,
3 CDCR rarely referred the cases to local prosecutors.

4 CDCR admits that the problems at RJD exist or are very likely to exist throughout
5 the system. The problems that Plaintiffs' expert identified with warden discretion, the OIA
6 Central Intake Panel, and OIA investigations are state-wide in nature. And CDCR and the
7 OIG both previously concluded that problems identified with the inquiry process at SVSP
8 likely were problems throughout the system; there is no reason, therefore, to think that the
9 problems with CDCR's discipline system identified by Plaintiffs' experts at RJD are in any
10 way limited to RJD.

11 CDCR's initiative to create a new group called the Allegation Inquiry Management
12 Section ("AIMS") housed within the Office of Internal Affairs will not solve the existing
13 problems. As it stands, misconduct related to reported uses of force allegations that do not
14 result in serious bodily injury to the incarcerated person have been excised from the new
15 process. AIMS will only conduct inquiries into misconduct if the incarcerated person
16 against whom the misconduct was perpetrated files a formal, written grievance. And
17 without better tools for gathering evidence of staff misconduct, including cameras and
18 better enforcement of reporting requirements for staff, AIMS will suffer from the same
19 problems as the current system, where allegations of staff misconduct are rejected for lack
20 of corroborating evidence and officers go undisciplined and undeterred.

21 CDCR has terminated very few officers for misconduct against incarcerated people.
22 CDCR also has not referred any officers for criminal prosecution related to misconduct
23 against incarcerated people. Furthermore, many of CDCR's investigations into
24 misconduct have been inadequate.

25 Notwithstanding broad agreement by CDCR's own investigators and
26 administrators, by the OIG, and by Plaintiffs' experts that cameras are critical for deterring
27 misconduct and holding accountable officers who engage in misconduct, CDCR has not
28 added any camera coverage at prisons with reports of violence and abuse. As was the case

1 in December 2018, the vast majority of CDCR prisons have no camera coverage. CDCR
2 has no plans to add an additional surveillance cameras or to require staff to wear body
3 cameras. Defendants have failed to implement other recommendations their own staff
4 made in response to the epidemic of violence and abuse at RJD, including increased
5 supervisory staff, enhanced training, a review to reduce the impact of gangs on Facility C,
6 enforcement of its policy regarding uniforms to deter officer gang activity, or issuance of a
7 corrective action plan.

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

12 Defendants had years to solve these problems on their own and failed. This crisis
13 requires CDCR to undertake robust and immediate action to address widespread violations
14 of the ADA, RA, the Constitution, and this Court's prior orders, and to end untold human
15 suffering.

16 The widespread and egregious abuse and violence at CDCR prisons documented in
17 Plaintiffs' Motion violate the ADA, the RA, and prior orders of this Court because staff are
18 hurting, permanently injuring and retaliating against people with disabilities because they
19 have disabilities. *See* 42 U.S.C. §§ 12132; *see also* Dkt. 1045, at 9.

20 The ADA also prohibits any individuals, including public entities, from retaliating
21 against people who exercise their rights under Title II. *See* 42 U.S.C. § 12203(a) ("No
22 person shall discriminate against any individual because such individual has opposed any
23 act or practice made unlawful by this chapter or because such individual made a charge,
24 testified, assisted, or participated in any manner in an investigation, proceeding, or hearing
25 under this chapter."). The evidence is overwhelming that Defendants are allowing
26 systemic attacks on people with disabilities by reason of their disabilities and retaliating
27 against them for exercising their rights under the ADA. This conduct violates the statute
28 and the Court's prior orders. *See* 42 U.S.C. §§ 12132, 12203(a); *Vos v. City of Newport*

1 *Beach*, 892 F.3d 1024, 1036-38 (9th Cir. 2018) (same); *Sheehan v. City and County of San*
 2 *Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds*, 575 U.S.
 3 600 (2015); Dkt. 1045, at 9.

4 The pervasive violence and retaliation at CDCR prisons have made *Armstrong* class
 5 members too afraid to exercise their right under the ADA, RA, ARP, and prior orders of
 6 this Court to request and receive reasonable accommodations needed to participate in
 7 CDCR programs, services, and activities. *See Updike v. Multnomah Cty.*, 870 F.3d 939,
 8 949 (9th Cir. 2017). The ADA's implementing regulations require that "[a] public entity
 9 shall make reasonable modifications in policies, practices, or procedures when the
 10 modifications are necessary to avoid discrimination on the basis of disability, unless the
 11 public entity can demonstrate that making the modifications would fundamentally alter the
 12 nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i). The Court has
 13 ordered CDCR to abide by this requirement. *See* Dkt. 1045 at 9. The Court has also
 14 ordered CDCR to provide a special grievance process for incarcerated people to request
 15 accommodations. *Id.*

16 The ADA also includes a broad anti-interference provision which makes it
 17 unlawful to coerce, intimidate, threaten, or interfere with any individual in
 18 the exercise or enjoyment of, or on account of his or her having exercised or
 19 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].
 20 42 U.S.C. § 12203(b). This provision prohibits not only retaliation against people who
 21 expressly exercise their rights under the ADA, but also conduct that has a chilling effect on
 22 others' exercise of their ADA rights. *See Brown v. City of Tucson*, 336 F.3d 1181 (9th Cir.
 23 2003); *EEOC v. Day & Zimmerman NPS, Inc.*, 265 F. Supp. 3d 179 (D. Conn. 2017).

24 People with disabilities are so afraid of becoming the next victim of staff
 25 misconduct at CDCR prisons that they refrain from requesting accommodations they
 26 require to participate in CDCR programs, services, and activities. Defendants, by
 27 tolerating such an environment, are preventing a prompt and equitable grievance procedure
 28 and interfering with Plaintiffs' ADA rights, all in violation of 42 U.S.C. § 12203(b), 28

1 C.F.R. § 35.130(b)(7)(i), 28 C.F.R. § 35.107(b), and the Court's 2007 Injunction.

2 Defendants are also in violation of this Court's Modified Injunction, Dkt. 2462,
3 regarding accountability. Defendants have failed to log and investigate many allegations
4 of non-compliance related to staff violence and abuse of people with disabilities.
5 Defendants have also failed to comply with the requirement that allegations of non-
6 compliance be logged within ten business days of Defendants' discovery of the allegation.
7 Defendants' violations of this Court's Modified Injunction have prevented them from
8 having a complete record of searchable allegations by officer and allegation type. A
9 complete accountability log would also have allowed CDCR to impose progressive
10 discipline and to engage the OIA more thoroughly in stopping the officer misconduct,
11 including through criminal referrals.

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

18 CDCR's action and inaction not only violate the ADA, RA, and this Courts' prior
19 orders, but also the Eighth and Fourteenth Amendments to the United States Constitution,
20 further empowering this Court to order relief here. Officers' harassment, retaliation, and
21 use of egregious violence against incarcerated people, along with prison officials'
22 intransigence and willful lack of responsiveness in the face of pervasive and systemic
23 abuse of class members, demonstrate CDCR staff members' malicious and sadistic, let
24 alone deliberately indifferent, attitude toward incarcerated people. *See Farmer v. Brennan*,
25 511 U.S. 825, 833 (1994); *Hudson v. McMillian*, 503 U.S. 1, 5-6 (1992); *Chess v. Dovey*,
26 790 F.3d 961, 972-73 (9th Cir. 2015); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir.
27 1985). By failing to keep incarcerated people safe from staff abuse, CDCR also has
28 directly impeded class members' basic Fourteenth Amendment Due Process rights,

1 including, for example, their abilities to have fair hearings regarding RVRs and to prepare
 2 for Board of Parole Hearings without false RVRs leveled against them. *See, e.g., Wolff v.*
 3 *McDonnell*, 418 U.S. 539, 563-67 (1974).

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

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

12 (a) **Cameras** – Within ninety days, CDCR must purchase, install, and
 13 make operational fixed surveillance cameras at RJD, LAC, CCI, CIW, KVSP, COR,
 14 SVSP, and SATF (the “prisons”). The surveillance cameras must have both video and
 15 audio capability and cover all areas of the prisons in which incarcerated people have
 16 access, including, but not limited to, all exercise yards, housing units, sally-ports, dining
 17 halls, program areas, medical buildings, and gyms.

18 Within one-hundred-and-eighty days, CDCR must purchase and require the use of
 19 body-worn cameras for all correctional officers at the prisons.

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

27 (b) **Reforms to Staff Complaint, Investigation, and Discipline Process**
 28 – CDCR must develop a plan to reform the staff complaint, investigation, and discipline

1 process to ensure (1) that CDCR completes unbiased, comprehensive investigations into all
 2 allegations of staff misconduct in which the victim was an *Armstrong* class member, (2)
 3 that CDCR imposes appropriate and consistent discipline against employees who engage
 4 in misconduct against *Armstrong* class members, and (3) that employees who engage in
 5 criminal misconduct against *Armstrong* class members are appropriately investigated and,
 6 if warranted, referred for prosecution (“Investigation and Discipline Plan”). CDCR’s plan
 7 must also ensure that officers accused of serious misconduct are reassigned so they cannot
 8 further harm their victims.

9 (c) **Third-Party Expert Monitoring of Defendants’ Investigation and**
 10 **Discipline Plan** – The Court shall appoint an expert pursuant to Federal Rule of Evidence
 11 706 to monitor Defendants’ implementation of their Investigation and Discipline Plan.
 12 The Court’s Expert shall have access to all documents—including, but not limited to
 13 grievances, incident reports, documents from staff misconduct inquiries, documents from
 14 Institutional Executive Review Committee inquiries in which the person alleges excessive
 15 use of force or other staff misconduct, 989 forms and all supporting documents, responses
 16 of the Central Intake Unit of OIA to 989 forms, OIA investigation files, investigation
 17 reports produced by the OIA and all supporting documents, 402 and 403 forms issued by
 18 the hiring authority, notices of adverse action, and *Skelly* and State Personnel Board
 19 Documents—necessary to complete the monitoring. The Court’s Expert shall issue
 20 quarterly reports regarding Defendants’ implementation of the Investigation and Discipline
 21 Plan. Prior to the issuance of each quarterly report, the parties and the Court’s Expert shall
 22 meet and confer regarding the Court Expert’s findings for the quarter.

23 (d) **Information Sharing with Plaintiffs’ Counsel** – CDCR must
 24 produce to Plaintiffs’ counsel and the Court’s Expert all documents related to staff
 25 complaints and employee discipline at the prisons in which the alleged victim is an
 26 *Armstrong* class member, including, but not limited to grievances, incident reports,
 27 documents from staff misconduct inquiries, documents from Institutional Executive
 28 Review Committee inquiries in which the person alleges excessive use of force or other

1 staff misconduct, 989 forms and all supporting documents, responses of the Central Intake
 2 Unit of OIA to 989 forms, OIA investigation files, investigation reports produced by the
 3 OIA and all supporting documents, 402 and 403 forms issued by the hiring authority,
 4 notices of adverse action, and *Skelly* and State Personnel Board Documents. CDCR must
 5 also provide Plaintiffs' counsel with monthly, written updates regarding progress on the
 6 elements of its plan to stop staff misconduct, including data regarding staff complaints and
 7 use of force.

8 (e) **Data Collection and Early Warning System** – CDCR must
 9 immediately develop an effective, electronic system to track all incidents at the prisons,
 10 including use of force, staff misconduct complaints, fights between incarcerated people,
 11 rule violations, injuries suffered by incarcerated people, suicide attempts, cell extractions,
 12 medical emergencies, found contraband, vandalism, escapes and escape attempts, and fires
 13 by date, time, location, staff involved, incarcerated people involved, and whether the
 14 incarcerated people are *Armstrong* class members. The tracking system should include
 15 data from CDCR's Electronic Health Record regarding use of force injuries and fatalities
 16 and injuries and fatalities that are not consistent with the victim's health or age or the
 17 information provided. CDCR should work with the Receiver in *Plata v. Newsom*, No.
 18 4:01-cv-01351 (N.D. Cal) and the Special Master in *Coleman v. Newsom*, Case No. 2:90-
 19 cv-00520-KJM-DB (E.D. Cal.), through the coordination process to ensure medical
 20 tracking is robust and health care workers feel safe.

21 (f) **Staffing** – CDCR must significantly increase supervisory staff on all
 22 watches on all yards at the prisons. CDCR must create non-uniformed positions in each
 23 housing unit fully empowered to supervise correctional staff in those units, with a focus on
 24 improving the relationships between uniformed staff and incarcerated people.

25 (g) **Training** – CDCR must develop and implement Human Rights, de-
 26 escalation, and cultural training for all custody, mental health, and medical staff to include
 27 discussion of reporting requirements, whistleblowing, non-retaliation, and treatment of
 28 incarcerated people as patients.

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

7 (i) **Anti-Retaliation** – CDCR must put an end to retaliation against class
8 members and staff who report staff misconduct and must ensure complainants’ safety.

9 (j) **Other Remedies** – CDCR must create a policy requiring that all
10 pepper spray canisters be weighed before and after use. CDCR must review and
11 reconsider all RVRs discussed in the declarations of incarcerated people filed in support of
12 this Motion to determine if the charges were false and whether the individuals were
13 afforded due process. CDCR must create a policy requiring monitoring, for a period of
14 ninety days following a person filing a staff complaint, of the person’s conduct and
15 treatment to ensure staff are not engaging in retaliation. CDCR must create policies
16 requiring that staff collect the names of all staff and incarcerated person witnesses to all
17 uses of force and that medical staff document fully and report suspicious injuries to
18 incarcerated people.

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

27 (l) **Suspension of State Law** – If any provisions of state law interfere
28 with CDCR’s ability to enact remedies necessary to remedy the violations of the ADA,

1 RA, ARP, the Constitution, and orders of this Court, CDCR must request a court order
2 suspending those provisions if necessary to achieve these purposes.

3 2. Within forty-five days of this Order, after reviewing comments from
4 Plaintiffs' counsel, Defendants shall issue the plan in final form and implement its
5 provisions forthwith. Defendants must present drafts of all plans, policies, and procedures
6 developed pursuant to this Order to Plaintiffs' counsel at least fifteen days in advance of
7 the deadlines. Both parties must make all possible efforts to resolve any disagreements as
8 to their adequacy. Defendants shall ensure that staff with sufficient authority to amend and
9 approve procedures attend all meet-and-confer sessions. In the event that disagreements
10 cannot be resolved, Defendants shall implement the procedures as written on the date
11 ordered and Plaintiffs' counsel shall file objections with the Court. The Court will rule on
12 the objections and issue orders and amended procedures as necessary.

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

22 4. These remedies are all consistent with the Prison Litigation Reform Act's
23 requirement that the Court's orders be narrowly drawn, extend no further than necessary to
24 correct the violation of a federal right, and be the least intrusive means necessary to correct
25 the violation. *See* 18 U.S.C. § 3626(a)(1)(A). Anything short of these remedies will not
26 put an end to Defendants' ongoing and pervasive violation of *Armstrong* class members'

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1 rights. Given CDCR's failure to adequately address the staff misconduct crisis at RJD and
2 other prisons over the past three-plus years, the specificity of the remedies is appropriate.
3 *See Armstrong v. Brown*, 768 F.3d 975, 985-86 (9th Cir. 2014).

4 IT IS SO ORDERED.

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6 DATED: _____, 2020

7 Honorable Claudia Wilken
8 United States District Judge
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