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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, *et al.*, Plaintiffs, v. Joseph M. Arpaio, *et al.*, Defendants.	CV-07-2513-PHX-GMS **RESPONSE IN OPPOSITION TO SHERIFF ARPAIO AND CHIEF DEPUTY SHERIDAN'S MOTION FOR RECUSAL OR DISQUALIFICATION OF THE COURT**

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INTRODUCTION

Plaintiffs respectfully submit this Response in Opposition to Sheriff Arpaio and Chief Deputy Sheridan's Motion for Recusal or Disqualification of the Court. The motion fails to meet the standards for recusal in 28 U.S.C. §§ 144 and 455, and runs afoul of the long-settled principle that rulings and judicial remarks made during the course of litigation are almost never a basis for recusal. *Liteky v. United States*, 510 U.S. 540, 550-51 (1994). The motion also fails to demonstrate actual bias or an appearance of bias. The Court's actions—questioning the movants about MSCO investigations—were proper and relevant to the ongoing contempt hearing and the question of remedies to ensure compliance with prior orders. The motion is also untimely and appears to be filed for purposes of manipulation and delay. In the words of ethics expert Professor Stephen Gillers, each of the asserted grounds for recusal "is baseless. Some are frivolous." Gillers Decl. ¶ 5. The motion should be denied.

FACTUAL BACKGROUND

The procedural history of this case is centrally relevant under the recusal standard, since the Court's actions and statements must be viewed in light of the evidence it has seen. *Liteky*, 510 U.S. at 550-51.

Evidence of Sheriff Arpaio and Chief Deputy Sheridan's Defiance of the Court

During the 18 months between the issuance of the Supplemental Permanent Injunction [Doc. 606] and the beginning of the contempt hearing on April 21, 2015, the Court saw evidence that top commanders of the MCSO, including Sheriff Arpaio and Chief Deputy Sheridan, had repeatedly violated court orders, made statements that mischaracterized and disparaged the Court's orders to MSCO personnel, and expressed defiance towards the Court's orders. Those statements are set forth in Plaintiffs' Memorandum of Law and Facts re Contempt Proceedings and Request for Order to Show Cause at 12-16 [Doc. 843], incorporated by reference here. *See also* Tr. of Status Conference (Oct. 28, 2014) at 68:25-72:20. Among other things, in August 2013, Sheriff

Arpaio stated in a letter to supporters that he "won't stand for" a Court-appointed monitor. [Doc. 843 at 15]. And during the contempt hearing, Plaintiffs introduced a video recording of a press interview in October 2013, after issuance of the Supplemental Permanent Injunction, in which the Sheriff proclaimed, "I'm an elected constitutional sheriff, and no one is going to take away my authority that I have under the Constitution." Ex. 193C; Tr. of Apr. 23, 2015 at 581:25-582:17. And in October 2014, Sheriff Arpaio made another defiant statement, telling a reporter that he would conduct the Guadalupe operation—one of the saturation patrols the Court held to have violated Plaintiffs' constitutional rights—"all over again." Tr. of Oct. 28, 2014 at 61:9-77:5; Tr. of Apr. 23, 2015 at 583:20-584:6.

Grounds for Civil Contempt

In addition, over a period of months starting in May 2014, the three charged grounds for contempt came to light. In April-May 2014, a former MCSO deputy, Charley Armendariz, who had been a key witness at trial, was arrested and subsequently committed suicide. MCSO searched Armendariz's home pursuant to a criminal warrant. The search ultimately revealed, among other things, that there was a widespread practice among MCSO personnel of recording traffic stops, that MCSO had no policy governing the recording of traffic stops, and that such recordings should have been disclosed to Plaintiffs before trial, but were not. Tr. of of Dec. 4, 2014 at 22:15-22:25. The failure to disclose the recordings before trial is one of three charged grounds for civil contempt. [Doc. 880 at 8, 18-21].

The second ground for contempt arose on May 14, 2014. During a status conference on that date, the Court ordered Sheriff Arpaio and Chief Deputy Sheridan to cooperate with the Monitor in formulating a plan to "quietly" collect the recordings of traffic stops throughout MCSO. [Doc. 880 at 22]; Tr. of May 14, 2014 Status Conference at 61 [Doc. 700]. The movants violated that court order that same day, by putting into action a plan without the Monitor's approval, and then agreeing to a different plan in

consultation with the monitor, while failing to disclose that the initial, unapproved plan had already been implemented. [Doc. 880 at 23].

The third ground for contempt came to light during the November 20, 2014 status conference when Defendants' counsel disclosed that one of the traffic stop recordings recovered by the MCSO during the Armendariz investigations demonstrated that deputies had violated the Court's preliminary injunction order. Counsel also revealed that the Court's preliminary injunction order had never been communicated to MCSO deputies. Tr. of Nov. 20, 2014 at 67:10-67:24 [Doc. 804].

Relevance of MCSO's Internal Investigations

During the same period leading to the contempt hearing, the adequacy of MCSO's internal investigation processes became a central issue. Immediately upon learning of the Armendariz investigations in May 2014, Plaintiffs raised concerns about MCSO's internal investigation process. Tr. of May 14, 2014 at 102:6-18. In September 2014, the Monitor reported serious deficiencies with MCSO's Armendariz-related internal investigations. [Doc. 795-1]. Plaintiffs also raised numerous issues with MCSO's internal investigations and gave notice of their intent to seek remedies to protect the interests of the Plaintiff class. *See* Plaintiffs' Response to the Monitor's Report at 7-10 (Oct. 21, 2014) [Doc. 753]; Tr. of Dec. 4, 2014 at 23:1-24:21 [Doc. 812].

Prior to the beginning of the contempt hearing on April 21, 2015, the Court indicated that it would not limit the scope of the evidence to liability for civil contempt, but would take evidence on the remedies needed to ensure compliance with the Court's prior orders, with a particular focus on the adequacy of MCSO's internal investigations. *See*, *e.g.*, Tr. of Mar. 20, 2015 at 11:6-12, 12:21-25, 13:1-21; Tr. of Apr. 21, 2015 at 15:19-22; [Doc. 1007]; [Doc. 880 at 25].

Questioning About Defendants' Investigations of the Court

During the contempt hearing, as during the bench trial, the Court questioned witnesses after the parties' counsel, and gave counsel an opportunity to object to

questions and to re-examine the witnesses after its examination. On April 23, 2015, the Court questioned Sheriff Arpaio, beginning with the grounds for civil contempt. The Court also questioned the Sheriff about the re-assignment of Captain Steven Bailey from the command of the Special Investigations Division, with oversight of its subunit the Human Smuggling Unit (which had been primarily responsible for the constitutional violations found after trial), to the command of the Internal Affairs unit. Tr. of Apr. 23, 2015 at 637:2-642:22. Bailey's reassignment occurred during a time when the Human Smuggling Unit was under investigation by the Internal Affairs department because of misconduct uncovered after Deputy Armendariz's arrest and death, and the apparent conflict was an issue in the litigation leading up to the contempt hearing.

The Court then questioned Sheriff Arpaio about an article that had appeared in the *Phoenix New Times* newspaper on June 4, 2014, reporting that two MCSO detectives, Brian Mackiewicz and Travis Anglin, a member of the MCSO's civilian "Cold Case Posse," Mike Zullo, and a paid confidential informant named Dennis Montgomery, were engaged in an investigation of a "bizarre conspiracy theory" that the Court and the U.S. Department of Justice were conspiring to "get" Sheriff Arpaio. Wang Decl., Ex. A. The Court questioned the Sheriff about the source of funding for the investigation and whether Captain Bailey was involved in that process. Tr. of Apr. 23, 2014 at 658:4-659:1.

During the Court's questioning of Sheriff Arpaio about the MCSO-Montgomery investigation reported in the *Phoenix New Times* article, the Sheriff testified that there was a second investigation involving the Court. The Sheriff testified that an outside investigator hired by Defendants' then-counsel had investigated an allegation that the Court's spouse had stated to a woman named Grissom that "Judge Snow wanted to do everything to make sure I'm not elected." Tr. of Apr. 23, 2015 at 654:6-655:12.

The next day, on April 24, 2015, Defendants' counsel examined Chief Deputy Sheridan about the investigations implicating the Court and the Court's spouse. After

asking defense counsel if she had any objection and emphasizing that she should interrupt with any objection, Tr. of Apr. 24, 2015 at 966:4-11, the Court joined in questioning of Chief Deputy Sheridan on the subject of Karen Grissom's allegations about the Court's spouse. In response to the Court's questions, Sheridan testified that Defendants' counsel had hired a private investigator who had interviewed Karen Grissom and her family, and that MCSO did not do anything to follow up on the investigation. *Id.* at 968:5-9. The Court then proceeded to question Chief Deputy Sheridan about the grounds for contempt, MCSO's internal affairs operations, and other matters, and finally asked Chief Deputy Sheridan about the MCSO-Montgomery investigation.

Chief Deputy Sheridan testified and stated publicly that MCSO ultimately decided not to pursue the investigation of the Grissom allegations relating to the Court's spouse. Tr. of Apr. 24, 2015 at 968:5-9; Tr. of May 14, 2015 at 10:1-24. Both Arpaio and Sheridan testified that they concluded that confidential informant Dennis Montgomery was not credible. Tr. of Apr. 23, 2015 at 650:18-25, Tr. of Apr. 24, 2015 at 961:1-11, 1002:14-15. Arpaio, however, testified that he did not know whether the Montgomery investigation was still ongoing. Tr. of Apr. 23, 2015 at 652:5-6. Documents later produced by the Defendants indicate that the MCSO-Montgomery investigation continued at least up until the eve of the contempt hearing. Wang Decl., Ex. E.

The Court directed the Sheriff to preserve all documents relating to both of these investigations. Tr. of Apr. 23, 2015 at 653:9-654:2, 655:13-17, 656:3-6, 656:25-657:2. The Court later directed that copies of the documents be produced and instructed defense counsel to review the material for attorney-client privilege, work product, and confidential information. Tr. of May 8, 2015 at 30:1-4. The Court also sua sponte raised a potential security issue about documents that Dennis Montgomery purportedly had obtained from the U.S. Central Intelligence Agency, and proposed that the Monitor and Defendants review such documents prior to disclosure to the Plaintiffs, and that defense counsel communicate with the CIA. Both Plaintiffs' and Defendants' counsel agreed to

that proposal. Tr. of May 8, 2015 at 30:25-31:15. Contrary to Defendants' assertions, the Court did not order the production of documents that may be protected by the attorney-client privilege or work product doctrine.

At the close of the four days of evidence, the Plaintiffs had not completed their case-in-chief. Prior to the evidentiary hearing, on April 7, 2015, the Court had anticipated that four days of testimony might be insufficient and tentatively set additional dates for a continuation of the evidentiary hearing, on June 16-19 and 23-26, 2015. Tr. of Apr. 7, 2015 at 32:13-23.

ARGUMENT

I. The Court's Actions During the Contempt Hearing Do Not Show Actual Bias and Are Not a Ground for Recusal

In moving to disqualify the Court based upon actual bias under 28 U.S.C. § 455(b)(1), Sheriff Arpaio and Chief Deputy Sheridan point to the Court's actions and statements during the contempt proceeding.[1] The motion therefore fails because "rulings and conduct" during litigation "almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 510 U.S. at 555; *see also In re Marshall*, 721 F.3d 1032, 1041 (9th Cir. 2013); *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012). Judicial actions or remarks in the litigation will be a ground for recusal only if "they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*,

[1] Although they do not assert it as a basis for recusal, the movants insinuate that the timing of the Court's trial ruling was "curious and problematic" because it issued nine months after the bench trial and purportedly one week before a recall petition against the Sheriff was due. Defendants' imputation of bad intent due to the time it took the Court to issue its 142-page trial ruling is unwarranted. The movants also fail to mention that the Sheriff faced a regular election six months earlier, in November 2012 (*see* http://recorder.maricopa.gov/electionarchives/2012/11-06-2012%20Final%20Summary%20Report.pdf)—a more opportune time for a court, if it had been biased, to time a ruling for improper purposes.

510 U.S. at 555; *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000). The motion entirely fails to meet this standard.

As evidence of actual bias, the motion cites only "rulings and conduct" during the contempt hearing—that the Court asked leading questions on "irrelevant matters; offered "his own testimony"; was "argumentative" with Chief Deputy Sheridan on the stand; interrupted Chief Deputy Sheridan and "challenged" his decision to use Dennis Montgomery as a confidential informant; ordered the production of documents relating to non-party Dennis Montgomery and his attorney Larry Klayman "that may be protected by the work product doctrine or attorney client privilege"; inquired into matters "unrelated to the contempt proceeding" and thereby purportedly deprived Sheriff Arpaio of his due process rights; and "improperly expanded" the Monitor's authority into purportedly irrelevant matters. These are matters that should be raised, if at all, through appeal, not through a recusal motion. *Liteky*, 510 U.S. at 555.

The motion also mischaracterizes the record. The Court questioned Sheridan about how the MCSO-Montgomery investigation was conducted in order to elicit the evidence. Tr. of Apr. 24, 2015 at 1000:19-1008:13. Nothing in the course of that examination can fairly be construed as "argumentative," as the movants claim. But even if it were true that the Court expressed hostility toward Sheridan, that would not be a ground for recusal. *See* Gillers Decl. ¶ 7.

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed toward the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not therefore recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

Liteky, 510 U.S. at 550-51. Thus, a judge's "expressions of impatience, dissatisfaction, annoyance, and even anger" during litigation are not a ground for recusal. *Id.* at 555-56.

Moreover, none of the challenged actions by the Court was erroneous, much less a ground for recusal. It is entirely proper for a court to examine witnesses and to comment on the evidence (which Sheriff Arpaio and Chief Deputy Sheridan attempt to

mischaracterize as "testifying," *see* Gillers Decl. ¶ 8). Fed. R. Evid. § 614(b). A court "should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other." *Barba-Reyes v. United States*, 387 F.2d 91, 93 (9th Cir. 1967); *see also United States v. Larson*, 507 F.2d 385, 389 (9th Cir. 1994); *United States v. Robinson*, 449 F.2d 925, 933 (9th Cir. 1971); *Hanson v. Waller*, 888 F.2d 806, 810, 813 (11th Cir. 1989) (judges may ask leading questions even in jury trial); *Ruiz v. Estelle*, 679 F.2d 1115, 1130 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982).

The Court's questions do not indicate any bias. Gillers Decl. ¶¶ 16-20. They were a proper exercise of the Court's inherent power to protect the integrity of the judicial process and ensure compliance with its prior orders, as they were relevant to Sheriff Arpaio's attitude toward the Court and compliance with the Court's orders and to the subject of MCSO's internal investigations. The *Phoenix New Times* article that the Court introduced as an exhibit indicated that the MCSO-Montgomery investigation was aimed at developing a conspiracy theory to discredit the Court during that same time period (October 2013 through April 2015) in which the movants had expressed defiance of the Court's Supplemental Permanent Injunction, in which there were numerous instances of noncompliance with the Court's orders, and leading up to the April evidentiary hearing on contempt charges and remedies. Documents later produced by the Defendants support the newspaper account that—contrary to the testimony of Arpaio and Sheridan—the MCSO-Montgomery investigation targeted the Court. Wang Decl., Ex. B, F. The documents also reveal that MCSO personnel continued to press Dennis Montgomery for results up until the eve of the contempt hearing, even though they had already concluded that he was not credible. Wang Decl., Ex. C, D, E. The evidence thus

suggested that the MCSO-Montgomery investigation might be an attempt to undermine the Court's authority rather than comply with its lawful orders.[2] This was particularly problematic in light of the Monitor's recent finding that MCSO was only 29 percent in compliance with the Supplemental Injunction despite the passage of one-and-a-half years.

The movants' allegation that the Court "requested that the U.S. Attorney function as his investigator to determine whether criminal contempt of his Preliminary Injunction had occurred" (Mot. at 7) is false. The Court invited the U.S. Attorney's Office to attend status conferences in this case so that the government would be apprised of the facts and would be in a position to make an independent determination whether to proceed with a criminal contempt prosecution, if the Court were to make a referral in the future. Tr. of Dec. 4, 2014 at 29:5-9, 29:24-30:3. Defendants did not object to the presence of a federal prosecutor or even to the Court's suggestion that relevant documents be provided to the U.S. Attorney's Office. *Id.* at 30:4-14. Moreover, Defendants themselves subsequently sought the participation of the United States Attorney's Office in their efforts to settle the contempt issues. Tr. of Feb. 26, 2015 at 32:23-34:1, 34:2-6, 34:8-17. Contrary to the movants' assertion, the U.S. Attorney's Office never declined any referral, as none has yet been made. Tr. of Mar. 20, 2015 at 28:2-6.

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[2] Even more troubling, as the Court noted in a post-hearing status conference, the evidence indicates that Dennis Montgomery informed MCSO personnel—with Chief Deputy Sheridan's knowledge—that he was using a database of information "harvested by the CIA and confiscated by him" in his investigation, and also purported to be tracking telephone calls between the Court, the Attorney General, the Assistant Attorney General, and the U.S. Attorney for the District of Arizona. Tr. of May 14, 2015 at 44:22-45:2, 45:10-16; Wang Decl., Ex. C, F. This implicates possible violations of federal criminal laws by MCSO personnel in the course of the MCSO-Montgomery investigation. See, e.g., 18 U.S.C. §§ 793(b)-(f) (taking or communication of documents relating to national defense); 798 (disclosure of classified information); 1503 (intimidation of federal court and obstruction of justice); 1509 (obstruction of court orders); 1924 (unauthorized removal of classified information); 2511 (intercepting electronic communications); 2701 (unlawful access to stored communications).

Further, the Court properly authorized the Monitor to investigate MCSO's "investigative operations." Overruling the Defendants' objections, the Court stated that it would not require the Monitor to give Defendants advance notice of topics of interviews, but that Defendants could contemporaneously raise any objections during any interviews and that the Court would make itself available to hear such objections. The Court further stated that the Monitor's investigations would be limited to the enforcement of the Court's prior orders. Tr. of May 14, 2015 at 53:12-56:25. There was nothing improper in these orders since they were directly relevant to enforcing compliance with the Court's prior orders.

Sheriff Arpaio and Chief Deputy Sheridan also mischaracterize the record when they allege that the Court ordered the disclosure of confidential materials that "may be" subject to the attorney-client privilege or work product immunity.[3] In fact, the Court gave the Defendants an opportunity to review documents for privilege and to produce a log prior to producing documents relating to the MCSO-Montgomery investigation, and the Court also proposed procedures to ensure that any confidential or sensitive documents would be protected from disclosure. Tr. of May 8, 2015 at 30:1-4, 30:25-31:15. Moreover, even if the Court had issued such an order, any objection should be addressed through ordinary litigation, not through a recusal motion. *Liteky*, 510 U.S. at 555.

Finally, Sheriff Arpaio and Chief Deputy Sheridan's assertion that the Court violated their due process rights by failing to give notice of its intent to question them about the MCSO-Montgomery investigations is misplaced. The Court stated clearly prior to the beginning of the evidentiary hearing that subjects relating to remedies, and

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[3] The movants also allege that the Court "apparently took evidence outside of court." Mot. at 15. In fact, the Court stated on the record that it had been informed that the Cold Case Posse "has its own funds" and asked Sheriff Arpaio whether that was "possible." Tr. of Apr. 23, 2015 at 658:1-2. Defense counsel did not object. The record reveals that the Court did not take the information at face value, but asked the Sheriff whether it was true. The Court's actions were proper. Gillers Decl. ¶ 15.

particularly relating to MCSO investigations, would be within the scope of the hearing. *See* Tr. of Mar. 20, 2015 at 11:6-12, 12:21-25, 13:1-21; [Doc. 880 at 25]; [Doc. 1007 at 2]; Tr. of Apr. 21, 2015 at 15:19-22. Arpaio and Sheridan were not unfairly surprised; they acknowledged reading the *New Times* article and were also provided a copy by the Court. Tr. of Apr. 23, 2015 at 642:17-25, 643:1-24; Tr. of Apr. 24, 2015 at 959:9-10, 959:17-18. Defense counsel made no objection to the Court's questions and indeed initiated the questioning of Sheridan on this subject.

II. Neither the Court nor the Court's Spouse Has a Disqualifying Interest

Sheriff Arpaio and Chief Deputy Sheridan argue for recusal under 28 U.S.C. § 455(b)(5)(iv), which provides for recusal when a judge, his or her spouse, or a person within a third degree of relationship to either of them, "[i]s to the judge's knowledge likely to be a material witness in the proceeding," and under 28 U.S.C. § 455(b)(1), which provides for recusal when a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." These arguments fail on the merits.

First, the movants argue that recusal is required because the Court's brother-in-law is a partner in the Washington, D.C. office of Covington & Burling (Mot. at 13), but they *expressly* waived any recusal argument when they learned of this fact in 2012. *See* [Doc. 537 (order setting status conference on issue)]; Tr. of June 29, 2012 at 5:19-7:2 (Court's offer to recuse on request of any party); *id.* at 16:6-17:2 (Defendants statement that they would be prejudiced by Court's recusal and any order vacating prior orders); [Doc. 541 (Defendants' written waiver of appeal of any recusal issue)]; [Doc. 542]. Moreover, the Court's previous ruling on the merits was correct. Gillers Decl. ¶¶ 9-10.

Sheriff Arpaio and Chief Deputy Sheridan also assert that the Court must recuse because the interests of the Court and the Court's spouse are "substantially affected by the outcome of this proceeding." Mot. at 13. The movants now insinuate that the Court's

interests are at stake because the allegations of the MCSO-Montgomery investigation—that the Court conspired with the Attorney General of the United States and others to subvert the random case assignment process—may actually be true. Mot. at 13. This assertion fails because both Sheriff Arpaio and Chief Deputy Sheridan testified that they concluded that the MCSO-Montgomery investigation was not credible and indeed was "junk." Tr. of Apr. 23, 2015 at 650:18-25; *see also* Tr. of Apr. 24, 2015 at 961:1-11, 1002:14-15. Documents relating to the MSCO-Montgomery investigation support that testimony. Wang Decl., Ex. C, D, E.

Sheriff Arpaio and Chief Deputy Sheridan further assert that recusal is required under § 455(b)(5) because the Court's spouse is a material witness. While they do not explain, presumably they assert that she is a witness on the factual issues arising from their investigation of Karen Grissom. This assertion should be rejected because Chief Deputy Sheridan testified that after a private investigator hired by their counsel interviewed Ms. Grissom and her family members in 2013, MCSO chose not to pursue the allegations. Tr. of Apr. 24, 2015 at 968:5-9; Tr. of May 14, 2015 at 10:1-24. And Defendants' own counsel, after reviewing the private investigators' report, stated that "the Grissom information is so fundamentally flawed in its substance that it likely cannot be used in a Rule 60 motion, appeal, or otherwise, without the lawyer who does so violating the federal courts rule of civil procedure and the Arizona Rules of Professional Conduct." [Doc. 1115 at 13-14 (letter from Timothy J. Casey to Joseph M. Arpaio dated Nov. 6, 2013)]. This is likely because of the numerous inconsistencies in the various statements that Karen and Dale Grissom made about their meeting with Mrs. Snow. *See* Gillers Decl. ¶¶ 4.1-4.4, 12.

Notably, in asserting the grounds for recusal for actual bias, Sheriff Arpaio and Chief Deputy Sheridan do not explicitly include Karen Grissom's allegation which—in the strongest version, appearing in her Facebook message to the Sheriff more than a year after her alleged conversation with Mrs. Snow—was that that Mrs. Snow stated that the

Court "hates" the Sheriff and "will do anything to get [him] out of office." *See* Mot. at 14-16 (grounds for assertion of actual bias based upon Court's statements and actions during contempt proceedings). But in any event, the Court's spouse is not a material witness on any issue in this litigation. Whether Mrs. Snow made the alleged statement to Mrs. Grissom is not admissible evidence of the Court's state of mind. Gillers Decl. ¶¶ 13-14. Moreover, a court has an independent and self-executing obligation under 28 U.S.C. § 455(b)(1) to recuse if it has an actual bias, and the Court has not done so here. Gillers Decl. ¶ 14.

III. No Reasonable Observer Would Perceive an Appearance of Bias

Sheriff Arpaio and Chief Deputy Sheridan move for recusal based upon 28 U.S.C. § 455(a), which requires "[a]ny justice, judge, or magistrate judge of the United States [to] disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(a) imposes an objective standard, requiring recusal when "a reasonable third-party observer would perceive that there is a 'significant risk' that the judge will be influenced by the threat and resolve the case on a basis other than the merits." *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008). The standard is applied based upon "all the relevant facts" and an examination of the record and the law. *Id.* (citing *LoCascio v. United States*, 473 F.3d 493, 496 (2d Cir. 2007)).

As an initial matter, Sheriff Arpaio and Chief Deputy Sheridan do not clearly state the basis for their motion under § 455(a), but Plaintiffs presume that it is based upon the same allegations underlying their assertions under §§ 455(b)(1) and (b)(5). The motion therefore should fail because a reasonable observer would understand that in the context of the record, as set forth above, none of the Court's conduct gives rise to any appearance of improper bias. "Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters" are generally not sufficient to warrant recusal under § 455(a). *Clemens*, 428 F.3d at 1178. Nor are "baseless personal

attacks on or suits against the judge by a party," or "quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading," or "attempts to intimidate the judge." *Id.* at 1179.

Moreover, Sheriff Arpaio and Chief Deputy Sheridan's argument under § 455(a) should fail because courts have held that a party cannot manufacture a basis for recusal. In this case, the movants appear to argue that there is an appearance of bias because they themselves launched investigations to develop proof that the Court is biased, one of those investigations (the MCSO-Montgomery investigation) was leaked to the press,[4] and the Court inquired about the news report, leading to the Sheriff's testimony about both the MCSO-Montgomery and Grissom investigations. Contrary to the testimony of Arpaio and Sheridan, the investigations were done by MCSO and MSCO's paid agents and they did attempt to call the Court's impartiality into question. Sheriff Arpaio's testimony that the MCSO-Montgomery investigation did not target the Court is contradicted by documents later produced by Defendants. Wang Decl., Ex. F. And when asked whether MCSO had investigated the Court's spouse, Chief Deputy Sheridan equivocated by answering "it depends on how you define, 'investigated your wife.'" Tr. of Apr. 24, 2015 at 967:11-14. But in fact, Chief Deputy Sheridan's complete testimony and documents produced under an order by Magistrate Judge Boyle demonstrate that the investigation was aimed at determining whether Mrs. Snow made the statement. [Doc. 1115].

Controlling cases do not require recusal in these circumstances. In cases where a party has made allegations against the Court, for example, the Ninth Circuit has held that recusal is not required. "A judge is not disqualified by a litigant's suit or threatened suit against him, … or by a litigant's intemperate and scurrilous attacks." *United States v.*

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[4] One of the documents produced by the Defendants suggests that an MCSO investigator leaked the MCSO-Montgomery investigation to the *Phoenix New Times*. Wang Decl., Ex. B.

Studley, 783 F.2d 934, 940 (9th Cir. 1986) (citing *Ronwin v. State Bar of Ariz.*, 686 F.2d 692, 701 (9th Cir. 1981); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977)). Otherwise, "defendants could readily manipulate the system … [and] force delays…. Such blatant manipulation would subvert our processes, undermine our notions of fair play and justice, and damage the public's perception of the judiciary." *United States v. Holland*, 519 F.3d 909, 915 (9th Cir. 2008); *see also United States v. Spangle*, 626 F.3d 488, 496 (9th Cir. 2010) (court properly declined to recuse after police found personal information about judge and judge's family in the defendant's car). Numerous cases have held that "a party cannot effect recusal of a trial judge by the party's own actions," such as through statements critical of the judge or accusing the judge of wrongdoing. *United States v. Cerrella*, 529 F. Supp. 1373, 1380 (S.D. Fla. 1982) (citing *United States v. Bray*, 546 F.2d 851 (10th Cir. 1976); *United States v. Garrison*, 340 F. Supp. 952, 957 (E.D. La. 1972); *United States v. Fujimoto*, 101 F. Supp. 293, 296 (D. Haw. 1951)). In *Bray*, 546 F.2d at 857-58, the Tenth Circuit rejected a recusal motion based upon the moving party's accusation that the judge had committed bribery and conspiracy. Similarly, the First Circuit held that negative statements about the court in a newspaper the moving party owned, well into the proceedings, could not require recusal because otherwise a party might manipulatively create a basis for recusal. *In re Union Leader Corp.*, 292 F.2d 381, 388-89 (1st Cir. 1961). In short, the law does not permit a party to trigger recusal at will, simply by alleging that the Court participated in a conspiracy to "get" him.

A reasonable observer with full knowledge the record of this case, and the caselaw, would not conclude that there is an appearance of bias.

IV. The Motion Should Be Denied as Untimely

The recusal motion also should be denied because it is untimely. Sheriff Arpaio and Chief Deputy Sheridan knew of Karen Grissom's allegations in August 2013, and

documents reveal that they had concluded their interviews on that issue by November 2013—almost *two years* before filing this motion. [Doc. 1115]. Defendants knew of the relationship between the Court and Keith Teel in June 2012—*three years* before filing their motion—and expressly waived any claim to recusal. And to the extent the movants now rely upon an insinuation that the allegations in the MCSO-Montgomery investigation are true, despite their repudiation, they should be foreclosed as they knew Montgomery was not credible at least by November 2014 (Wang Decl., Ex. C), seven months before filing their motion. In light of these extraordinary delays, the recusal motion should be denied as untimely. Gillers Decl. ¶¶ 9, 11-12. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (recusal motion untimely when filed seven months after assignment of case to judge and after adverse ruling); *Studley*, 783 F.2d at 939 (recusal motion filed "weeks after" conclusion of trial in which court allegedly exhibited bias was untimely).

These cases are based on the presumption that a party that delays the filing of a recusal motion is presumed to be filing the motion for purposes of manipulation, after suffering adverse rulings. *See E. & J. Gallo Winery*, 967 F.2d at 1295; *United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997); *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 913 (11th Cir. 1983) (recusal "cannot be used as an insurance policy to be cashed in if a party's assessment of his litigation risks turns out to be off and a loss occurs"). In this case, there is good reason to believe that the motion was in fact filed for manipulative purposes. Sheriff Arpaio and Chief Deputy Sheridan attempted repeatedly to avoid the evidentiary hearing on contempt by filing motions to vacate the hearing.[5] It was only after those efforts failed, after the hearing

[5] Defendants assert that the Court improperly refused to grant those motions and rejected proposed remedies that Plaintiffs had agreed to as settlement terms. Mot. at 6. This assertion on its face violates the confidentiality provision of Federal Rule of Evidence 408 and also is misleading. Plaintiffs made clear on the record that they (continued…)

brought forth clear evidence of their willful and systematic violations of the Court's orders,[6] and after the Court indicated in post-hearing status conferences that strong remedies were in order (Tr. of May 8, 2015 at 19:8-21:4), that they finally moved for recusal.[7] Moreover, after filing the recusal motion, the Defendants initially took the position that ongoing activities toward compliance with the Supplemental Permanent Injunction were stayed, contrary to the terms of the Court's far more limited stay order. Wang Decl., Ex. G; [Doc. 1120]. The timeliness requirement prevents precisely this sort of manipulation. Gillers Decl. ¶ 11.

V. The Motion Fails To Meet the Requirements for Recusal Under § 144

Finally, the recusal motion fails to meet the requirements of 28 U.S.C. § 144, which provides for reassignment of a case to another judge upon the filing of "a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor any adverse party." Section 144 provides that a party may only file one such affidavit in any case. *See also Adesanya v. West Am. Bank*, 1994 WL 56960, at *3 (9th Cir. Feb. 25, 1994) (unpub. op.) (construing recusal motion as filed under § 455 because party previously filed affidavit under § 144). Defendants Sheriff Arpaio, MCSO, and Maricopa County previously moved for the

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never agreed to any settlement. Tr. of Feb. 26, 2015 at 38:7-11, 41:20-42:24. Plaintiffs opposed Defendants' Motion to Vacate because Plaintiffs had not had an opportunity to take discovery relevant to whether Defendants' violations were deliberate, or on the adequacy of remedies [Doc. 952 at 2-4], and the Court denied Defendants' motions on that ground. [Doc. 1003, 1007].

[6] For example, the evidence developed during the contempt hearing on April 21-24, 2015 demonstrated that Chief Deputy Sheridan was not truthful with the Court-appointed Monitor about the events of May 14, 2014 underlying one of the charged grounds of contempt. Tr. of Apr. 24, 2015 at 840:10-841:15; 846:22-848:5; 850:6-11; 851:22-25; 853:20-859:19; 861:4-11; 868:19-869:6.

[7] Tellingly, immediately after the Court's examination of the Sheriff, his specially appearing counsel (who filed the instant motion) stated publicly that there was no basis for recusal of the Court. Wang Decl., Ex. H.

recusal of Judge Murguia through the filing of an affidavit under § 144. [Doc. 63]. While that affidavit was signed by then-Chief Deputy David Hendershott, it was done on behalf of the Defendants as parties to this litigation.

In any event, § 144 does not present any independent basis for recusal. It is settled that the same substantive and timeliness standards apply whether the statutory basis asserted is § 144 or § 455. *Liteky*, 510 U.S. at 548 (noting that § 144 "seems to be properly invocable only when § 455(a) can be invoked anyway"). The remaining distinction between § 144 and § 455 appears to be that under § 144, the motion shall be referred to a different district judge. But that is so only if the judge to whom the motion is directed first determines that the affidavit is timely and sufficient. *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980); Gillers Decl. ¶ 3. For all the reasons set forth above, the motion under § 144 should be denied.

CONCLUSION

Sheriff Arpaio and Chief Deputy Sheridan's motion to disqualify the Court should be denied.

RESPECTFULLY SUBMITTED this 12th day of June, 2015.

By: /s/ Cecillia D. Wang

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ACLU Foundation
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail as indicated on the Notice of Electronic Filing.

/s/ Cecillia D. Wang

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, *et al.*, Plaintiffs, v. Joseph M. Arpaio, *et al.*, Defendants.	CV-07-2513-PHX-GMS **DECLARATION OF CECILLIA WANG IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO SHERIFF ARPAIO AND CHIEF DEPUTY SHERIDAN'S MOTION FOR RECUSAL OR DISQUALIFICATION OF THE COURT** **[REDACTED VERSION]**

I, Cecillia D. Wang, declare as follows:

1. I am an attorney admitted to practice in California and New York and in numerous federal courts and have been admitted *pro hac vice* to represent the Plaintiffs in this matter. I am the Director of the American Civil Liberties Union Foundation Immigrants' Rights Project. I make the following declaration based on my personal knowledge, except where indicated.

2. I make this declaration in support of the Plaintiffs' Response in Opposition to Sheriff Arpaio and Chief Deputy Sheridan's Motion for Recusal or Disqualification of the Court.

3. Attached hereto as Exhibit A is a document that was introduced by the Court as Exhibit 522 during the evidentiary hearing in this matter, on April 23, 2015. It is an article by Stephen Lemons published in the *Phoenix New Times* on June 4, 2014, entitled "Joe Arpaio's Investigating Federal Judge G. Murray Snow, DOJ, Sources Say, and Using a Seattle Scammer To Do It." Exhibit A is a photocopy of the original document that was handed to me and to defense counsel by the courtroom deputy. It bears my

contemporaneous, handwritten notation of the announced exhibit number, 522.

4. On May 6, 2015, Defendants produced documents to Plaintiffs on an attorneys'-eyes-only basis. Exhibits B-F, attached hereto, were among those documents. I am submitting Exhibits B-F under seal, with redacted copies in the publicly filed version of this Declaration.

a. Attached hereto as Exhibit B is an email chain with the top-most email dated June 29, 2014, from "David Webb" to 1tick@earthlink.net, Bates-stamped MELC202132.

b. Attached hereto as Exhibit C is an email chain with the top-most email dated November 7, 2014, from Brian Mackiewicz to Larry Klayman, Bates-stamped MELC202173-75.

c. Attached hereto as Exhibit D is a December 9, 2014 email from "Mike" to detmack@gmail.com, Bates-stamped MELC202048.

d. Attached hereto as Exhibit E is an email chain with the top-most email dated April 20, 2015, from Larry Klayman to Michael Zullo, Bates stamped MELC202142-45.

e. Attached hereto as Exhibit F is a document entitled "Joe Arpaio Brief/Timeline," Bates stamped MELC199917-35.

5. Attached hereto as Exhibit G is an email chain with the top-most email dated May 27, 2015, from the Court-appointed Monitor, Robert Warshaw, to me and to Defendants' counsel Michele Iafrate and Richard Walker. Exhibit G also includes an attachment to Chief Warshaw's email, a

letter dated May 22, 2015 from Michelle Iafrate to Robert Warshaw. In the letter and in the email exchange, Ms. Iafrate took the position that the entire litigation and all actions by the Monitor were stayed pending a decision on the instant Motion to Recuse.

6. Attached hereto as Exhibit H is a true and correct copy of an article, Stephen Lemons, Arpaio's Desperation Move: Lawyers Move To Disqualify Judge Snow, *Phoenix New Times* May 22, 2015. I obtained this copy from the *Phoenix New Times* website at http://www.phoenixnewtimes.com/news/arpaios-desperation-move-lawyers-move-to-disqualify-judge-snow-7352908. The article quotes specially appearing counsel for the Sheriff in April 2015:

> I've heard comment or commentary from so-called lawyer experts, saying, "Gee, the judge should recuse himself," McDonald stated. That's ridiculous, of course he shouldn't! People suggest we should now get rid of Judge Snow. Why? It was an inquiry. It ended there. It was not any kind of a witch hunt. Case closed.

The online version of this article includes a link to an audio recording of counsel's statement.

I hereby declare that the foregoing is true and correct under penalty of perjury pursuant to 28 U.S.C. § 1746.

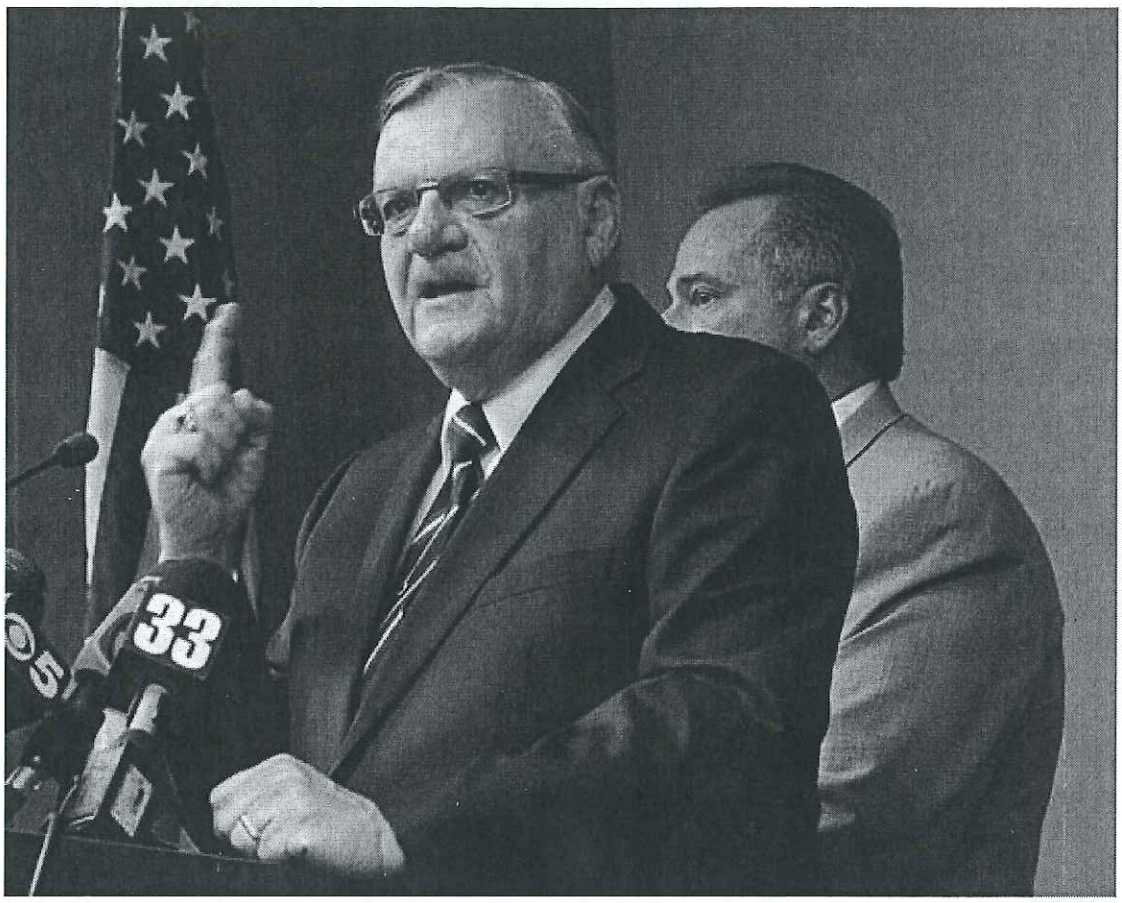
Executed at San Francisco, California this 12th day of June, 2015.

/s/ Cecillia D. Wang

Exhibit A

Joe Arpaio's Investigating Federal Judge G. Murray Snow, DOJ, Sources Say, and Using a Seattle Scammer To Do It

By Stephen Lemons
Published Wed., Jun. 4 2014 at 1:18 PM



AP Photo/Matt York

Sheriff Joe Arpaio, during a 2012 press conference about his ludicrous birther investigation

The most revealing part of Phoenix filmmaker Randy Murray's recent documentary *The Joe Show* was a strategy meeting during Sheriff Joe Arpaio's 2012 re-election campaign that included Arpaio, his top flack, Lisa Allen, Chief Deputy Jerry Sheridan, and campaign manager Chad Willems.

The group huddled in the back of a Fountain Hills restaurant to discuss how to spin Joe's negatives -- the misspending of more than $100 million, the deaths in the jails, the scores of millions in lawsuit payouts -- for the public.

At some point, Arpaio's "birther" investigation came up. You know, the one in which President Barack Obama's birth certificate gets investigated by both the Maricopa County Sheriff's Office's Cold Case Posse, a nonprofit organization, and MCSO Deputy Brian Mackiewicz, whom Arpaio flew to Hawaii as part of this snipe hunt, at a cost of nearly $10,000 to taxpayers.

Arpaio's March 2012 press conference -- in which the sheriff and the Cold Case Posse's "lead investigator," ex-used-car salesman Mike Zullo, declared Obama's birth certificate to be a forgery -- was in the planning stage when the scene was filmed.

At the mere mention of the birther investigation and the future press event, Allen and Willems practically rolled their eyes.

Willems called the birther probe "nuts."

Allen said the sheriff might as well go the press conference "in big ol' clown shoes."
Arpaio shrugged, literally.

"There ain't gonna be no damage control," Arpaio promised Willems. "You'll get more money [in campaign contributions] than you'll know what to do with."

Wilier than the cartoon coyote, Arpaio had tapped into a nationwide right-wing anti-government, anti-Obama feeding frenzy with his birther probe and with his tirades against the U.S. Department of Justice, which was investigating him for abuse of power and other issues and is now suing him in federal court.

"The DOJ is a hot item everywhere," Joe told his flunkies.

See, whenever Arpaio's never-ending political campaign sends out an e-mail blast begging for loot from Obama-haters, it reels in contributions from retired, far-right ofays all over the country.

Willems essentially admitted as much in another scene from the film.

"Now, with Arpaio going to battle with Barack Obama," Willems said, "it's meant literally millions of dollars for his campaign."

As everybody knows, Arpaio was re-elected in 2012, but the investigation into Obama's birth certificate continues apace, according to both Arpaio and Cold Case Posse "commander" Zullo.

At the beginning of May, Arpaio mentioned the birther probe during a speech before a group of Silicon Valley conservatives.

Around the same time, he appeared on *The Right Side*, a conservative cable-access show in Mountain View, California. He told host Chris Pareja that the inquiry into Obama's birth certificate was going strong.

"I'm not done with that yet," Arpaio insisted. "People think I surrendered. No . . . I'm trying to find out who's behind it now. That's the key. You can always have a crime to investigate, but I think you would like to know who did it."

The sheriff said he was after whoever created this "forged, fraudulent document," meaning a computer scan of the president's long-form birth certificate, released by the White House in April 2011.

Arpaio's statements have paralleled assurances from Zullo during periodic interviews with Florida pastor/radio host Carl Gallups that new revelations concerning the Obama birth certificate are on the way.

Critics of birthers regularly mock Zullo's vague pronouncements on Gallups' show as never resulting in any "new" finds.

Why, even the information disclosed during Arpaio's two birther-themed press conferences in 2012 were a rehash of debunked conspiracy theories.

But during a February interview with Gallups, Zullo caused an Internet kerfuffle when he told Gallups' audience that there were now two investigations: the original birther one and an offshoot of the birther probe, this one a criminal investigation.

Moreover, the second investigation was using two MCSO detectives and, presumably, county money.

"I don't know how this is all going to play out," Zullo said. "I know that [in] the criminal investigation that we're working on now, Sheriff Arpaio has dedicated resources and two full-time Maricopa County Sheriff's Office detectives."

He added, "These are seasoned pros [who] are working this. These are the guys that go hunt down the really bad guys."

Zullo promised to release "universe-shattering" results of these investigations in March, a deadline Zullo since has extended indefinitely.

Blogger Mitch Martinson of arizonaspolitics.com was the first to query the MCSO on Zullo's claim, and the first to report that Sheriff's Office spokesman Brandon Jones kinda-sorta had confirmed it.

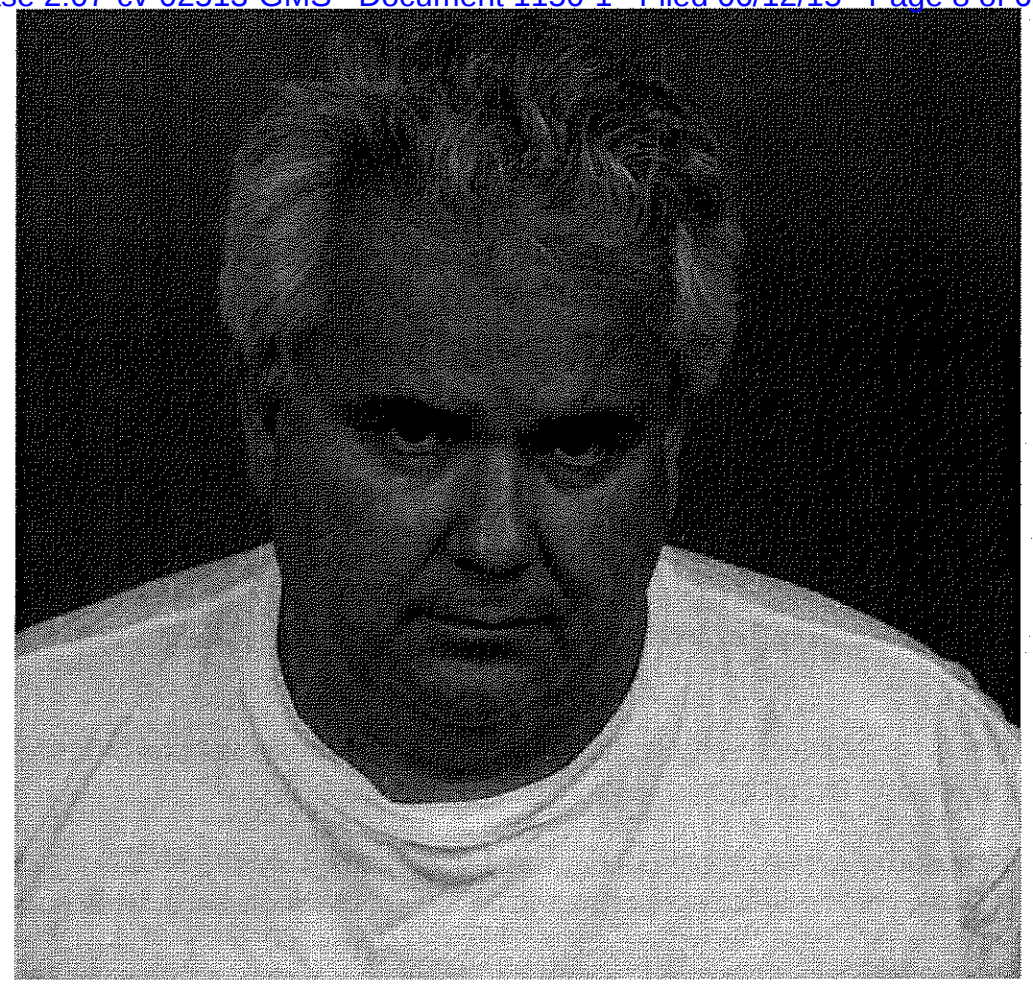
"We have two sheriff's detectives assigned to look into other issues surrounding the birth certificate," Jones told Martinson, in a blog item posted February 10. "However, they are not investigating the birth certificate issue itself."

Later, Jones walked back his comments to Martinson, sending the blogger an e-mail, which Martinson used in a screen shot to a follow-up post.

"Mitch, I was misinformed," Jones stated. "The detectives are not working on anything regarding the birth certificate. Not even surrounding. Mr. Zullo was incorrect: They are working on other serious cases not even related."

Who were these two detectives, what were they up to, and why is Zullo, a mere posse member, privy to it?

Based on information given to me by longtime sources, the two detectives mentioned are Brian Mackiewicz, the same deputy who made a taxpayer-funded run to Hawaii in May 2012, and Sergeant Travis Anglin, once a lieutenant with the notorious Maricopa Anti-Corruption Effort who was demoted after an MCSO investigation into his private security company and its use of MCSO detectives.



Riverside County Sheriff's Department

Dennis Montgomery, in a mugshot from a 2009 arrest

My sources -- one of whom is a former detective with the MCSO's Special Investigations Division and is well-acquainted with SID and those in it -- say Anglin and Mackiewicz were involved in an odd investigation dating back to October 2013.

Moreover, they say, the deputies have used as a confidential informant a notorious scammer in the Seattle area.

What have they been investigating? According to my sources, Mackiewicz, Anglin, and the informant are focused on U.S. District Court Judge G. Murray Snow, the Justice Department, and a bizarre conspiracy theory that the DOJ and Snow have conspired to somehow "get" Joe Arpaio.

The person who purportedly convinced Arapio of this paranoid fantasy, the sources say, is computer fraudster Dennis L. Montgomery, the subject of a 2010 Playboy exposé titled "The Man Who Conned the Pentagon."

In that article, investigative reporter Aram Roston detailed how, in the wake of the 9/11 attacks, Montgomery snookered the CIA, the White House, the Department of Homeland Security, and the Air Force into believing he had software that could decode secret messages to terrorists, supposedly embedded in broadcasts of the Al Jazeera Media Network.

As crazy as this now sounds, Roston, using unsealed court documents, reported that eTreppid Technologies, the Nevada software company Montgomery co-owned, scored multimillion-dollar

contracts for computer software touted by Montgomery.

In fact, Roston wrote, the United States went to Code Orange, the DHS' second-highest terror alert, in 2003 based on data supplied to the CIA by Montgomery.

International flights were delayed, sometimes canceled, because of Montgomery's work. Based on Montgomery's "intelligence gathering," Homeland Security Secretary Tom Ridge told reporters at the time about the threat of "near-term attacks" that could "rival or exceed" those of 9/11.

"Montgomery calls the work he was doing noise filtering," Roston wrote. "He was churning out reams of data he called output. It consisted of latitudes and longitudes and flight numbers."

This data was given to then-CIA Director George Tenet, according to Roston, and "eventually ended up in the White House."

There was one big problem, Roston reported: "The communications Montgomery said he was decrypting apparently didn't exist."

Roston wrote that Montgomery's eTreppid colleagues questioned his computer skills. Company employees also claimed that Montgomery had faked demonstrations of weapons-recognition software for representatives of the U.S. military.

With the help of a "branch of the French intelligence services," the CIA finally got wise to Montgomery, realizing that there were no secret messages to bad guys in the Al Jazeera broadcasts.

Montgomery left eTreppid, wrote Roston, and went on to work for software companies backed by a wealthy heiress; to accuse Nevada Governor Jim Gibbons of taking a bribe (Gibbons later was cleared of wrongdoing); to lose big at a Rancho Mirage, California casino ($422,000 in one day); and to declare bankruptcy.

Now, Montgomery lives in Yarrow Point, Washington, a short drive from downtown Seattle.
My sources report that MCSO detectives Anglin and Mackiewicz have spent a lot of time this year in Seattle with Montgomery, who, the sources say, has convinced the sheriff that he has information suggesting an anti-Arpaio conspiracy between Judge Snow and the DOJ.

These sources say there is no report number assigned to the case, that Arpaio himself is running it, and that the investigation has been financed with funds for confidential informants, RICO funds.

Montgomery has been assigned a "confidential informant number" or "control number," the identity of which is known only to Arpaio, a few MCSO brass, and those in Special Investigations, according to my sources, who claim Montgomery has been paid about $100,000 to date by the MCSO.

The situation gives Arpaio and the MCSO a degree of deniability because the department is allowed to keep the identities of confidential informants secret in most instances.
Though there should be MCSO paperwork associated with such payments, it would show a payment to a control number, not a name.

The MCSO's official policy on "informant management" states that control numbers must be maintained in a confidential-informant log "monitored by the [Special Investigations Division] commander or his designee."

It further states that all informant files be kept in a "secured area within the SID."
The policy notes that the MCSO "will protect these sources through all available and reasonable legal means."

Such "informant files" are retained as "permanent records" of SID, "unless the division commander determines that the records may be purged."

My sources say Mackiewicz has received, to date, $50,000 in overtime pay and Zullo has gotten about $5,000 in payments.

Zullo's role is unclear, though he currently is involved in the investigation, according to these sources, as well as the perpetual birther probe.

Additionally, they say the MCSO made about a $50,000 purchase of computer equipment for Montgomery sometime this year from a store in Washington state.

According to the MCSO's policy regarding "Undercover and Investigative Funds Accountability," an expenditure of up to $6,000 for undercover and investigative work can be approved by a division commander.

Anything over $6,000 must be approved by a bureau commander.

As for funds specifically paid to confidential informants, the reins are even tighter.

Payments to a CI of more than $300 must be approved by a division commander "prior to the expenditure of the funds," according to the MCSO's informant-management policy.
The amount of money involved in detectives Anglin and Mackeiwicz's Seattle quest has raised red flags with MCSO accountants, I've been told.

These same MCSO accountants reportedly have expressed concern internally about the procurement of the computer equipment, excessive CI payments, the amount of overtime involved, and the money spent on airfare and stays in Seattle.

In several broadly worded public-records requests sent to the MCSO in February, I asked for any and all e-mails traded among the players involved, as well as any and all records regarding MCSO employees' trips to Seattle, payments of informant funds to Dennis Montgomery, and Mackiewicz's overtime requests.

In each case, I was advised by MCSO spokesman Jones that "this is an ongoing investigation . . . no records can be released at this time."

In March, I called Zullo at his home phone number. I asked him about the work he was said to be doing with Montgomery.

He claimed not to know what I was talking about. When I pressed him, he said all such inquiries should go through the MCSO.

"I have no comment to make, especially to the *New Times*," he told me before hanging up.

The opportunity to question Arpaio about the Montgomery caper came as he munched on cheese at a recent fundraiser for embattled Arizona Attorney General Tom Horne at the University Club in

Phoenix.

I asked the sheriff about Montgomery and the work that my sources tell me he has done for the MCSO.

At first, he played dumb, asking if I meant County Attorney Bill Montgomery.

"No, *Dennis* Montgomery," I replied. "The computer guy in Seattle who is helping you investigate Judge Snow and the DOJ. You are investigating Snow and the DOJ, aren't you?"

As he hit the cheese platter again, Arpaio looked over his shoulder at me with a grin. But he said nothing.

I kept after him, asking why deputies Mackiewicz and Anglin had spent so much time in Seattle.

"I dunno, maybe they like the weather up there," he said over his shoulder, "or the snow crab."

True to form, the sheriff was cagey, but there was no denial.

The ex-Special Investigations source I know tells me that the joke around Arpaio's office is that Montgomery's referred to as "Snowden," after Edward Snowden, the American computer geek responsible for a massive 2013 leak of classified documents from the National Security Agency that exposed Orwellian surveillance programs run by the U.S. government.

"[Montgomery] says he worked for the CIA on a project called Hammer [and] collected data similar to Snowden's," the source says. "[Montgomery] claims he can prove there was a conspiracy between [U.S. Attorney General] Eric Holder and Judge Snow . . . a conspiracy against Arpaio."

Montgomery, who is middle-aged and stocky with a shock of white hair, is no Snowden. Whatever you think of Snowden, at least the information he released generally has been confirmed as legitimate.

As with the gibberish Montgomery reportedly gave the CIA in the early 2000s, he has, according to my sources, produced many printouts for the MCSO that seem off point, with dates going back to 1999 and earlier.

Obviously, that's long before Arpaio took up the cause of illegal immigration, long before he was investigated or sued by the DOJ, and long before he became the subject of the ACLU's big racial profiling lawsuit *Melendres v. Arpaio*.

One source informs me that at least one underling told Arpaio recently that what Montgomery provided the MCSO is worthless, that Joe is getting played -- which caused the sheriff to erupt into a fit of anger.

When Montgomery was approached by a freelance reporter on behalf of *New Times* in April, he was nonplussed.

Montgomery came to the door of his Yarrow Point home, a cell phone at his ear, talking to someone about computer equipment.

The reporter identified himself, and Montgomery asked for a card, which the reporter presented.

"I really don't wanna talk to you," Montgomery said, ending his call.

"Okay, about Phoenix . . .," the reporter began.

"No comment," Montgomery shot back.

"Arizona . . .," the reporter started again.

"No comment," Montgomery repeated. "Who sent you up here?"

"*Phoenix New Times*," the reporter explained.

"Yeah," growled Montgomery.

"Have you done any work for Joe Arpaio?" the reporter asked.

"I, I, I have no comment," Montgomery said, moving away. "I'll call you later. I'll think about it."

Montgomery went back into his house and shut the door, ending the conversation on a mysterious note.As with Arpaio, there was no denial.

Is Dennis Montgomery Joe Arpaio's Snowden? I cannot say absolutely.

But it's not far-fetched to think that Arpaio would investigate any powerful public official. He continues to investigate the president. He and now-disbarred former County Attorney Andrew Thomas investigated Superior Court judges perceived to be thwarting their anti-undocumented-immigrant policies.

That is, it fits a pattern cultivated over his reign of more than 20 years.

Among Arpaio's bogus investigations have been:

• One targeting former Arizona Attorney General Terry Goddard for alleged bribery. The probe began in 2007 and didn't seem to end until Goddard left office.

• One that brought the 2008 indictment of then-county Supervisor Don Stapley on 118 criminal counts related to his allegedly not properly disclosing sources of income. All counts were dismissed ultimately.

• An infamous December 2009 RICO suit brought by Arpaio and Thomas against the entire Board of Supervisors, various county employees and certain Superior Court judges. Supposedly, they all were part of a conspiracy involving the county's new court tower. The suit was a disaster that finally got dismissed by Thomas himself.

• A probe resulting in the filing of false bribery charges in 2009 against former Superior Court Judge Gary Donahoe. Arpaio and Thomas ginned up these charges as retaliation against Donahoe for adverse rulings and to make Donahoe vacate a hearing that Arpaio and Thomas didn't want to take place.

And now Judge Snow, who in 2013 found the MCSO guilty of racial profiling and assigned a monitor to make certain that Arpaio was obeying court orders on reforming and re-educating deputies so that the agency does not profile Latinos or any other minority again?

As for Holder, the DOJ remains engaged in a lawsuit accusing Arpaio of abuse of power and prejudiced policing.

At age 82, the sheriff faces the ignominy of ending his law enforcement career as a disgraced political colossus.

All -- in his mind -- because of Snow and the DOJ.

Why not attempt an investigation aimed at discrediting his perceived nemeses?

Though there never will be any pink handcuffs in Snow's or Holder's future, Arpaio's racist, wing-nut supporters would consider it an act of bravery that their hero is investigating federal officials getting in the way of keeping despised Latinos in their place.

Meaning more money in the sheriff's perpetual re-election kitty and proving that bogus investigations continue to pay off.

My dream, of course, is that Snow blows a gasket and perp-walks the aged autocrat. We'll see.

Rick Anderson in Seattle contributed to this story.

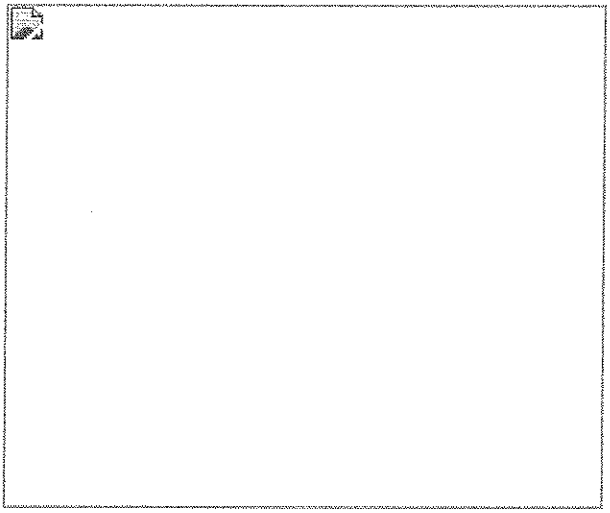


Exhibit B

REDACTED

Exhibit C

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Exhibit D

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Exhibit E

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Exhibit F

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Exhibit G

Cecillia Wang

From: Rochtopcop@aol.com
Sent: Wednesday, May 27, 2015 10:53 AM
To: Cecillia Wang; MIafrate@iafratelaw.com; rkw@azlawpartner.com
Cc: syoung@cov.com; john.m.girvin@gmail.com; luarm8@gmail.com
Subject: Re: 2015.05.26 Letter from Wang to Iafrate Walker.nrl
Attachments: 5.22.15ltrtoWarshaw.pdf

Counsel,
In light of the fact that the plaintiffs' attorneys were going to participate in our site visit of this week, I was remiss for not having shared the exchanged correspondences with all parties last week. Please accept my apologies. A letter from Ms. Iafrate that was referenced in her office's email to me of 5/22/15, at 7:27 PM, EST is attached.
Regards,
Chief W..

In a message dated 5/26/2015 6:27:48 P.M. Eastern Daylight Time, Cwang@aclu.org writes:

I neglected to copy the Monitor Team, as indicated in the text of the letter. Correcting that now.

From: Cecillia Wang
Sent: Tuesday, May 26, 2015 11:42 AM
To: Michele Iafrate (MIafrate@iafratelaw.com); rkw@azlawpartner.com
Cc: Young, Stanley
Subject: FW: 2015.05.26 Letter from Wang to Iafrate Walker.nrl

Dear Michele and Rick,

Please see the attached correspondence.

Best regards,
Cecillia

Cecillia D. Wang
Director
ACLU Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
tel: (415) 343-0775
fax: (415) 395-0950

From: TCryan@iafratelaw.com
To: rochtopcop@aol.com
CC: MIafrate@iafratelaw.com, CShehorn@iafratelaw.com, JLafornara@iafratelaw.com, knelson@iafratelaw.com
Sent: 5/22/2015 7:27:43 P.M. Eastern Daylight Time
Subj: Arpaio adv. Melendres re: correspondence from Michele Iafrate

Dear Chief Warshaw,

I have attached correspondence from Michele M. Iafrate.

Tracy Cryan, Legal Assistant to

Dawn M. Sauer and Arman R. Nafisi-Movaghar
IAFRATE & ASSOCIATES
649 N. 2nd Avenue
Phoenix, Arizona 85003
(602) 234-9775
Fax: (602) 254-9733
tcryan@iafratelaw.com

********CONFIDENTIALITY NOTICE********

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From: Rochtopcop@aol.com
To: miafrate@iafratelaw.com
CC: Luarm8@gmail.com, John.M.Girvin@gmail.com
Sent: 5/22/2015 8:38:47 P.M. Eastern Daylight Time
Subj: Next Week's Site Visit

Michele,
Thanks for your correspondence of this evening. As you are aware, we have a small contingent of my team coming to Maricopa next week for regular auditing duties as well as a community meeting. I can see nothing in the motion put before the Court today, or any Orders from the Court, that in any way mitigates the appropriateness of this prescheduled visit.
Accordingly, we will proceed as planned.
Best for the holiday weekend,
Chief W.

From: MIafrate@iafratelaw.com
To: Rochtopcop@aol.com
CC: Luarm8@gmail.com, John.M.Girvin@gmail.com
Sent: 5/22/2015 8:43:21 P.M. Eastern Daylight Time
Subj: Re: Next Week's Site Visit

You have explained to me that you are the court, you get your authority from the court and you were appointed by the court. The court is stayed from proceeding until a decision is made therefore so are you. For example all depos ordered by the court are now stayed. Therefore, so are your actions. Thanks for your attention to this new development.
Michele

From: john.m.girvin@gmail.com
To: R_Skinner@mcso.maricopa.gov
CC: rochtopcop@aol.com, Luarm8@gmail.com, miafrate@iafratelaw.com
Sent: 5/23/2015 10:53:01 A.M. Eastern Daylight Time
Subj: Site Visit This Week

Captain Skinner,

As you are aware, we have been scheduled for a brief site visit this week, and we appreciate your efforts in arranging our meetings. While we do not believe that there are any issues before the Court which would preclude such a visit, we have decided to reschedule the visit for a later date to avoid needless confrontation.

We're confident that as the legal process continues, these issues will be addressed. We will keep you abreast of any rescheduling.

Thanks again, and have a great holiday weekend.

John

Commander (Ret.) John M. Girvin
Deputy Monitor

From: MIafrate@iafratelaw.com
To: john.m.girvin@gmail.com
CC: R_Skinner@mcso.maricopa.gov, rochtopcop@aol.com, Luarm8@gmail.com
Sent: 5/23/2015 11:26:44 A.M. Eastern Daylight Time
Subj: Re: Site Visit This Week

Thank you for the update.
Michele

IAFRATE & ASSOCIATES
Attorneys at Law

Michele M. Iafrate

649 N. 2nd Ave.
Phoenix, AZ 85003
(602) 234-9775
Fax (602) 254-9733
Tax ID 20-1803233

May 22, 2015

Robert S. Warshaw
Warshaw & Associates
348 W. Wabash Drive
Sylva, North Carolina 28779

RE: *Arpaio, et al. adv. Melendres, et al.*
U.S. District Court Case No: CV07-02513-PHX-GMS

Dear Chief Warshaw:

Based on the Court's Order issued today (Doc. 1120), the *Melendres* case is stayed until a decision is made regarding the Motion to Recuse or Motion to Disqualify (Doc. 1117). Therefore, the Monitor's records requests still outstanding and the site visits scheduled are stayed as well.

Sincerely,

IAFRATE & ASSOCIATES

Michele M. Iafrate

MMI/tlc
Enclosure

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, on behalf of himself and all others similarly situated; et al. Plaintiffs, v. Joseph M. Arpaio, in his individual and official capacity as Sheriff of Maricopa County, AZ; et al. Defendants.	No. CV-07-2513-PHX-GMS **ORDER**

In light of the Motion for Recusal or Motion to Disqualify (Doc. 1117) filed this morning,

IT IS HEREBY ORDERED vacating the Status Conferences set for May 29, June 5 and June 12, 2015. The Court shall issue no further orders until the Motion is fully briefed and/or a ruling has been issued.

IT IS FURTHER ORDERED directing the parties to continue to hold the dates in June for the continued civil contempt hearings or for discovery, until further notice of the Court.

///

///

IT IS FURTHER ORDERED directing the parties to inform the Court of their intention to file responses to the Motion on or before **May 29, 2015** and submit a joint expedited schedule for responses and/or replies.

Dated this 22nd day of May, 2015.

G. Murray Snow

Honorable G. Murray Snow
United States District Judge

Exhibit H

PHOENIX New Times

ARPAIO'S DESPERATION MOVE: LAWYERS MOVE TO DISQUALIFY JUDGE SNOW

BY STEPHEN LEMONS

FRIDAY, MAY 22, 2015 | 21 DAYS AGO

Arpaio's criminal attorney Mel McDonald takes a cue from birther attorney Larry Klayman, seeks recusal of Snow

Stepl

Attorney Mel McDonald, Sheriff Joe Arpaio's personal Bruce Cutler, rode on the coattails of birther lawyer Larry Klayman Friday morning by filing a motion in Phoenix federal court to have Judge G. Murray Snow recuse himself from the contempt proceedings against the

sheriff, in the civil rights case *Melendres v. Arpaio*.

Klayman's move to intervene on behalf of Seattle computer guy Dennis Montgomery – in a bid to disqualify Snow – was shot down by both Snow and the U.S. Ninth Circuit Court of Appeals last week.

Now along comes McDonald, a former U.S. Attorney and superior court judge, swiping a page from Klayman's book, in an obvious attempt to postpone an upcoming two-week hearing in June.

McDonald even stooped to borrowing from Klayman's failed motion a declaration by Ron Rotunda, the law prof at a podunk Christian college in California.

Arpaio's attorney later told reporters that there had been no coordination with Klayman's organization Freedom Watch, but he admitted to having read Klayman's filings.

See also:
-ARPAIO'S END GAME: JUDGE SNOW SETS THE SHERIFF'S CONTEMPT HEARING FOR APRIL, BUT JOE HAS SOME TRICKS UP HIS SLEEVE
-BIRTHER LAWYER LARRY KLAYMAN RUSHES TO THE RESCUE OF ARPAIO'S "SNOWDEN"
-SNOW BLASTS ARPAIO'S "BOGUS CONSPIRACY THEORY"

McDonald announced the move Friday morning, at the beginning of a status conference before Snow. He told Snow the reason for the request had to do with the judge's inquiries into two investigations: one involving Snow's wife, the other involving the MCSO's use of Montgomery to gin up a bogus conspiracy theory involving Snow, the U.S. Department of Justice, former U.S. Attorney General Eric Holder, and others.

Snow agreed to stay all proceedings until he could decide whether or not he would grant the motion and hand off the case to another judge.

However, he noted that the defendants in *Melendres* already had an earlier judge in the case, Mary Murguia, recuse herself for cause, and that the defendants may only be allowed to have one judge so removed per case.

McDonald countered that there was no limit to the rule. He said the defendants objected to the "entire inquiry" and to the "unbridled authority" given to Snow's monitor Robert Warshaw.

Snow elicited chuckles from the audience when he observed that the defendants had the investigation into his wife Cheri Snow "for three years and did nothing about it."

Still, Snow brought an abrupt end to the hearing, leaving Arpaio's contempt trial in limbo for the moment.

Arpaio and Sheridan: Delaying the inevitable...

Plaintiffs' attorney Cecilia Wang of the ACLU called the timing of the motion "extremely suspect," and suggested the move was "an attempt to delay."

To the media outside the Sandra Day O'Connor U.S. Courthouse, McDonald denied that the surprise motion was a delaying tactic.

"They can say anything they want," he said of Wang's comment, adding, "There's no advantage in delaying the proceeding. Genuine issues were raised that we thought another judge should consider."

READ MCDONALD'S MOTION TO BOOT JUDGE SNOW FROM ARPAIO'S CONTEMPT CASE

That's a complete about-face from McDonald's statements in April, after a hearing where the investigation into Snow's wife was discussed.

That investigation involved the hiring of a private investigator by Arpaio's then-civil attorney Tim Casey to look into comments allegedly made by Cheri Snow at a Tempe restaurant in

2012.

A woman named Karen Grissom sent Arpaio a private message on Facebook in August 2013, claiming she ran into Snow's wife, who supposedly told her that Snow despised Arpaio and wanted him out of office.

READ THE FURTHER UN-REDACTED LETTER FROM FORMER ARPAIO LAWYER TIM CASEY

In a January column, I predicted this recent skullduggery by Arpaio and his legal beagles, reporting that Arpaio was investigating Snow's wife in an attempt to conflict the judge off the case.

"Even if Joe pulls the conflict-of-interest card and it fails, he would taint the April proceedings in the minds of his followers," I wrote at the time. "Judge Snow is corrupt, the sheriff's supporters will cry. Part of a plot to railroad their hero."

LISTEN TO A RECORDING OF ARPAIO'S MOUTHPIECE MEL MCDONALD IN APRIL AS HE EXPLAINS WHY THERE IS NO NEED FOR JUDGE SNOW TO RECUSE HIMSELF.

And so it goes. The MCSO investigation involving Montgomery also was an attempt to compromise the judge, part of Joe's standard operating procedure in dealing with anyone who blocks his path.

I stated as much in a June 2014 column. Snow confirmed the purpose of the Seattle investigation last week during a status conference, when he called the probe, "an attempt to construct a conspiracy involving this court."

Both Arpaio and Sheridan previously had denied under oath that they were using Montgomery to investigate a bizarro-world conspiracy involving Snow.

After Snow confirmed the purpose of the Seattle investigation in open court, sources tell me that Sheridan and Arpaio were at MCSO headquarters till the wee hours of the morning, trying to figure out how to deal with this new situation.

Snow had authorized his monitor to investigate anything to do with the Montgomery affair, one of the topics of the two-week hearing in June.

Interestingly, in April, McDonald was singing a different tune entirely to the press, after the investigation into Snow's wife was revealed.

"I've heard comment or commentary from so-called lawyer experts, saying, `Gee, the judge should recuse himself,'" McDonald stated. "That's ridiculous, of course he shouldn't! People suggest we should now get rid of Judge Snow. Why? It was an inquiry. It ended there. It was not any kind of a witch hunt. Case closed."

Casey spoke with Cheri Snow's accuser Karen Grissom by phone, ultimately concluding that "the information from Ms. Grissom lacked substance or merit."

Was it an attempt to conflict Snow out, I wondered at the time?

"No, there was no attempt to conflict him out," McDonald told me. "If someone makes a report, [the authorities] have to follow the report."

Snow recently un-redacted further portions of a 2013 letter to Arpaio from the sheriff's ex-attorney Tim Casey

of merit.

letter to Arpaio from the sheriff's ex-attorney Tim Casey concerning the statements supposedly made by Cheri Snow.

Casey looked into the statements himself, speaking with Karen Grissom by phone. He ultimately concluded that the "the information from Ms. Grissom lacked substance or merit."

But Sheridan and Arpaio demanded that more be done with the lead. So Casey hired private dick Don Vogel to interview Grissom and her family.

In a now un-redacted portion of the letter, Casey explains the following:

"I, therefore, respectfully recommend and strongly advise against any use of the Grissom information. Additionally, the Grissom information is so fundamentally flawed in its substance that it likely cannot be used in a Rule 60 motion, appeal, or otherwise, without the lawyer who does so violating the federal court's rule of civil procedure and the Arizona Rules of Professional Conduct."

You can draw two conclusions from this statement: one, the purpose of looking into Grissom's claim was to find material to use against Snow; and two, Casey realized that what they got from Grissom was too flimsy to use in court.

Arpaio's ex-consigliere Tim Casey, found the Grissom probe "fundamentally flawed in its substance."

Stepl

In May 2013, Snow found Arpaio and the MCSO guilty of widespread racial profiling, ordering an end to the unconstitutional activity.

When the parties could not agree to a list of remedies, Snow issued a final order in October 2013, dictating a laundry list of reforms to be implemented by the MCSO with the assistance of a court-appointed monitor.

In August of that year, both Arpaio and Sheridan knew this was coming down the pike.

Grissom's Facebook message during that month to Arpaio must have seemed like manna from heaven.

Arpaio and Sheridan got Casey to do their dirty work for them, but Casey didn't have the stones to go as far as they wanted.

Ironically, they got their chance during the contempt proceedings in April, when Snow asked them about the MCSO's investigations into his court and his family.

Snow was correct to inquire into both matters, as they were meant to improperly influence the court.

For instance, the Montgomery investigation began, significantly, in September or October of 2013, and was to last into late 2014.

As I've pointed out before, such investigations are standard operating procedure for Arpaio. His way of conflicting a judge or an investigation by another entity is to investigate or bring false charges against them.

It would be a dangerous precedent for Snow to concede on this point. From that point on, all it would take for Joe to escape justice is to investigate the judge seeking it.

Arpaio and his new *consigliere*, McDonald may realize the motion likely will not succeed. Meanwhile they gum up the proceedings, give pro-Joe donors a reason to give to the Joe Arpaio Defense Fund, and perhaps create an issue on an appeal.

Even if Arpaio and Sheridan were to score a new judge, that would not help them.

Look at what happened when Arpaio asked for Murguia to recuse herself because she was a Latina and had a sister who headed up the National Council of La Raza.

As a replacement, Arpaio ended up with Snow, a conservative, Mormon jurist nominated to the bench by former President George W. Bush.

In other words, be careful what you wish for, Joe.

E-mail: stephen.lemons@newtimes.com.

Update: Here is Snow's order, filed Friday afternoon:

> In light of the Motion for Recusal or Motion to Disqualify filed this morning,
>
> IT IS HEREBY ORDERED vacating the Status Conferences set for May 29, June 5 and June 12, 2015. The Court shall issue no further orders until the Motion is fully briefed and/or a ruling has been issued.

IT IS FURTHER ORDERED directing the parties to continue to hold the dates in June for the continued civil contempt hearings or for discovery, until further notice of the Court.

IT IS FURTHER ORDERED directing the parties to inform the Court of their intention to file responses to the Motion on or before May 29, 2015 and submit a joint expedited schedule for responses and/or replies.

Dated this 22nd day of May, 2015.

Honorable G. Murray Snow

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, *et al.*, Plaintiffs, v. Joseph M. Arpaio, *et al.*, Defendants.	)	CV-07-2513-PHX-GMS **DECLARATION OF STEPHEN GILLERS IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO SHERIFF ARPAIO AND CHIEF DEPUTY SHERIDAN'S MOTION FOR RECUSAL OR DISQUALIFICATION OF THE COURT**

I, Stephen Gillers, declare under the pains and penalties of perjury:

QUALIFICATIONS

1. My name is Stephen Gillers. I am a law professor at New York University School of Law, where I have taught the rules and law governing lawyers and judges ("legal ethics") and Evidence regularly since 1978. I am author of a leading casebook in the field, Regulation of Lawyers: Problems of Law and Ethics (10th ed. Aspen 2015). I have spoken hundreds of times on the subject of legal ethics at state bar and American Bar Association ("ABA") meetings nationwide, state and federal judicial conferences, and law firms and corporate law offices in the United States and abroad. I continue to do so. For more than a decade, I was active in the legal ethics work of the ABA's Center for Professional Responsibility and spent hundreds of hours yearly on this work. I was a member of the ABA's Multijurisdictional Practice Commission and its Commission on Ethics 20/20. In 2011, I received the Michael Franck Award from the ABA's Center for Professional Responsibility. In 2015, I received the American Bar Foundation's Outstanding Scholar Award. I have written widely in the area, including for academic journals and the law and popular press. Legal ethics is the primary focus of my academic

research. My background, qualifications, and experience are described in greater detail in my resume, which is attached as Exhibit A.

THE RECUSAL MOTION

2. I have read the Motion for Recusal [Doc. 1117], the Affidavit of Sheriff Arpaio [Doc. 1117-1], and the Declaration of Ronald D. Rotunda [Doc. 1117-10]. I do not have personal knowledge of the facts. Rather, I have been asked to assume the truth of the facts in Exhibit B to this Declaration. Other facts I have been asked to assume or that are in the record and relate to my opinion are referenced below.

3. The Motion relies on 28 U.S.C. §§ 144 and 455. Procedurally, so far as here relevant, they differ in this way. Section 144 requires a judge to refer a motion made under it to another judge. But that is so only if the motion is timely and sufficient. The judge who is the subject of the motion is authorized to make both determinations. *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978) (sufficiency and timeliness); *Shinault v. Foster*, No. 12-cv-00639-RBJ-BNB, 2013 WL 4550671, *1 (D. Colo. 2013) (same) (citing *Azhocar)*. Section 144's basis for recusal – personal bias or prejudice – is "identical" to the actual bias standard of § 455(b)(1). *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980).

4. The recusal motion relies on the following:

A.

4.1. Karen Grissom sent Sheriff Arpaio a Facebook message in August 2013. It said: "Judge Snow I know his wife and talked with her one day she recognized me from our childhood she told me that her husband hates u and will do anything to get u out of office. This has bothered me since last year when I saw her."

4.2. Defense counsel hired a person to investigate this information. In October 2013, Mrs. Grissom was interviewed and the interview was transcribed. She said that Mrs. Snow had approached her, *not* after "recognizing [her] from childhood," but after mistaking her for her sister Irene, whom Mrs. Snow did know.

Mrs. Grissom dated the restaurant event as "the summer or beginning of the summer" of 2012.

4.3. In her interview, Mrs. Grissom remembered Mrs. Snow's alleged comment differently than in the Facebook message. She recalled that Mrs. Snow had said, "my husband, yeah, doesn't like him [Arpaio]. He wants him out of the – out of his office. And he – anything he can do to get him out of the office." (This quote and the quote in paragraph 4.4 come from a transcript of the interviews with the Grissoms, in which each purported to recollect the substance of what Mrs. Snow allegedly said a year earlier.)

4.4. Mrs. Grissom's husband Dale was also at the restaurant and was interviewed. The transcript shows that he had a somewhat different memory. He said that Mrs. Snow "says, yeah, my husband wants to get him or wants him to go down or something like that." Dale Grissom was asked whether he could remember "specifically what she … said" and he replied, "No. I don't." After some more questions that provided nothing further of substance, the interviewer asked a leading question. "But did she ever say, my husband told me he doesn't like Joe, and he wants Joe to go down, or don't you remember that." Mr. Grissom replied: "I don't remember. That may have come up, but I don't remember."

4.5. Sheriff Arpaio has known about the Grissom allegation since August 2013, but did not seek to recuse Judge Snow based on it. The defendants now claim that the restaurant encounter requires recusal under § 455(b)(5) because Mrs. Snow is "likely to be a material witness" in connection with it and because Judge Snow's "reputation" can be "substantially affected by the outcome of this proceeding." Judge Snow questioned Sheriff Arpaio about this investigation at a civil contempt hearing in April 2015.

B.

4.6. At the same hearing as the events in paragraph 4.5, Judge Snow questioned Sheriff Arpaio and Chief Deputy Sheridan regarding a second MCSO investigation, known as the "Montgomery Investigation."

C.

4.7. Judge Snow's brother-in-law, Keith Teel, is a partner in Covington & Burling, an international law firm. Covington is counsel to the plaintiffs. It is working without fee although in the event of a court award of counsel fees, it may be compensated for its time. Keith Teel will not share in any court-awarded fees. He is not working on this case. He does not practice in the area of law encompassed by this matter. He is based in Washington, D.C. The defendants have known about Mr. Teel's partnership in Covington since at least 2012 and have waived on the record a claim for recusal based on it, if any was available. Further assumptions regarding Covington are in paragraph 9.

D.

4.8. Judge Snow "took evidence" out of court because, after a lunch break, he reported that he had been told that the Cold Case Posse "has its own funds" and back in court, he asked Sheriff Arpaio whether that was possible.

E.

4.9. The Motion to Recuse at page 15 gives this further basis (with citations to Professor Rotunda's Declaration):

> Judge Snow also asked leading questions on irrelevant matters during the contempt proceeding. [*Id*. at ¶¶ 19, 21]. In addition, he gave his own testimony during the proceeding. [*Id*. at ¶¶ 22-23]. Furthermore, Judge Snow was argumentative with witness Chief Deputy Sheridan when he was on the stand. He interrupted Chief Deputy Sheridan and challenged his decision to make an informant, Dennis Montgomery, a confidential informant in an investigation unrelated to the contempt proceeding. [*Id*. at ¶ 24]. Judge Snow has also ordered the production of documents that may be protected by the work product doctrine or attorney client privilege. Those documents pertain to an attorney, Larry Klayman, and his client, Dennis Montgomery. Mr. Klayman is not an

attorney who has appeared in this case and Mr. Montgomery is not a party to this action. [*Id*. at ¶ 25].

MY OPINION

5. Each of these grounds for recusal is baseless. Some are frivolous.

6. I will start with the ground summarized in paragraph 4.9. In *Liteky v. United States*, 510 U.S. 540, 555 (1994), the Supreme Court wrote:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible…. *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short- tempered judge's ordinary efforts at courtroom administration—remain immune.

7. Nothing in the transcripts defendants and their expert quote supports a claim of bias. Judges can ask leading questions. Judges can be argumentative. They can interrupt. A court proceeding is not a tea party. If defendants wish to challenge Judge Snow's rulings, or bring claims of a denial of due process (which also infuse their motion), their remedy is appeal. *Liteky* held:

> It is enough for present purposes to say the following: First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

Id. (citation omitted).

8. With regard to the claim in paragraph 4.9 that Judge Snow "gave his own testimony," the only citation is to paragraphs 22 and 23 of the Rotunda Declaration. There the only "proof" is Judge Snow's statement that evidence did not show "collusion." This is not testimony. This is an inference the judge is entitled to make and may have to make in order to adjudicate the issues.

9. I turn now to the allegation summarized in paragraph 4.7: These facts do not support recusal as Judge Snow has amply shown in his opinions of June 19 and July 3, 2012. I could not improve on this analysis. Furthermore, Keith Teel's position has been known for three years and any objection has been waived. But defendants claim that a motion under § 455(b) cannot be waived. First, Keith Teel's status does not offend any provision of § 455(b). No interest of his will be "substantially affected" by a victory for plaintiffs as required by § 455(b)(5)(iii). Further, I am told that Covington will apply half of any fee award to the firm's out-of-pocket costs in this and other pro bono cases and donate the other half to nonprofit legal services organizations. Mr. Teel cannot be enriched by any fee award.

10. If there were a basis for recusal it would fall under §455(a), which can be waived. There is no basis for recusal under that provision either. Judge Snow's impartiality cannot reasonably be questioned based on any claim of enhancement of Keith Teel's personal reputation because of Plaintiffs' success in this litigation. Mr. Teel is a member of a large, international law firm. He works in a different practice area and in a different city. The connection between any victory for plaintiffs here and Mr. Teel's own reputation is not merely too remote to lead an objective member of the public to question Judge Snow's impartiality. It is non-existent. Any recognition or positive publicity that Covington has received or may hereafter receive for its pro bono work in this case is too remote to be of benefit to Mr. Teel personally. As Judge Snow's exhaustive research demonstrates, the situation here is insufficient to warrant recusal under § 455(a). A reasonable and objective observer

would not question Judge Snow's impartiality based on Mr. Teel's partnership in Covington.

11. Last, while it is true that a § 455(b) conflict cannot be waived, what that means is that a judge may not "accept" a waiver of a ground for recusal under §455(b) even if there is one. 28 U.S.C. § 455(e). Claims for recusal under §455(b) can be lost by inaction after the facts supporting the claim are known or reasonably should be known and no motion is made. This rule prevents a party from sitting on disqualifying information while waiting to see if the case is proceeding favorably and then invoking recusal if it is not. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992).

12. I turn now to the allegation summarized in paragraph 4.1. For the same reason – lack of timeliness – any basis to recuse Judge Snow because of his wife's alleged comment (paragraph 4.1) is lost. Knowledge of that basis was present in mid-2013. In any event, even if timely, that claim does not support recusal. A threshold problem is to identify what the alleged comment was. There are several iterations. The most damning rendition is that Mrs. Snow allegedly said that Judge Snow "hates" Sheriff Arpaio (as opposed to "doesn't like" him, the words Mrs. Grissom later used) and that "he [Judge Snow] will do anything to get him out of office."

13. It is important to be clear about what the offer of proof is here. It is this: Karen Grissom has paraphrased a statement by Cheri Snow, which purports to summarize the beliefs and intention of Judge Snow. To put it schematically: X has said that Y said that in her view Z believes something and intends to do something. But this is not proof of Judge Snow's belief nor of his intention, which is all that matters. Even if Karen Grissom accurately paraphrased what Cheri Snow said, we are left only with Cheri Snow's characterization of what she believes are Judge Snow's beliefs and intention. *Cf. General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1043 (6th Cir. 1990) (fact that opposing counsel remarked "we've got the judge in our pocket" insufficient to require § 144 referral or § 455(a) recusal).

14. What matters are Judge Snow's actual beliefs and intentions. Of course, Judge Snow knows better than anyone what these are. If indeed he does hate Sheriff Arpaio to such an extent that he cannot be impartial, which is the *Liteky* standard, he would have had a duty to recuse himself without a motion. *E. & J. Gallo Winery*, 967 F.2d at 1294. If in fact he intends to invoke his judicial powers for the ulterior purpose of causing Sheriff Arpaio to lose his office and not based on the law and the facts before him, then again he would have had a duty to recuse himself. *Id*. If a hearing were held, the defendants' offer of proof of what Karen Grissom said Cheri Snow said regarding her impressions of Judge Snow's belief and his intentions would not be admissible in evidence. They would not be relevant. Nor would Mrs. Snow's impressions be admissible in evidence even if we assume that she said what Mrs. Grissom said she said. What Cheri Snow believes is also irrelevant. Defendants have not offered admissible evidence that can support a recusal motion on this ground even if it were timely made. Moreover, Judge Snow can, in his opinion on the recusal motion, negate the inferences that defendants urge, based on the Grissoms' statements. Courts should also be cognizant of the risk of manufactured statements offered to delay a matter or recuse a judge and which are said, therefore, to require a hearing. I do not say that this has occurred here, but the danger is a reason to insist on direct (not remote) proof of the disqualifying state of mind before a court is asked to convene a separate hearing on what a judge does or does not believe.

15. The next claim summarized in paragraph 4.8 is that recusal is required because Judge Snow "took evidence." What appears to have happened is that someone told Judge Snow that the Cold Case Posse had its own funding. Judge Snow reported this information in court, on the record, and asked the Sheriff about it. That is not an example of taking evidence if that claim is meant to imply some sort of secret proceeding to gather facts. Canon 3(A)(4) of the Code of Conduct for United States Judges says: "If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of

the subject matter of the communication and allow the parties an opportunity to respond, if requested." This is exactly what Judge Snow did. Further, if the information came to Judge Snow from the monitor or an intrajudicial source, it would not be "unauthorized."

16. Last is what appears to be an allegation that by asking witnesses about two MCSO investigations – one connected to the Grissom allegation and the other about the so-called "Montgomery Investigation" – Judge Snow acted improperly. It is a bit of a challenge to understand defendants' argument here. Insofar as it is a due process claim based on an expansion without notice of the focus of the order to show cause, the remedy is appeal. *Liteky,* 510 U.S. at 555. Insofar as it is based on a claim that these matters are none of the judge's business and his inquiry is therefore legally irrelevant to the issues before the court, it is also a subject for appeal. Insofar as it is a claim that by making these inquiries, Judge Snow has evinced some personal interest in the case that reveals him unable to be impartial or appear so, it is wrong for two reasons.

17. First, the court could perceive that the conduct of these investigations had potential probative value on the issue of contempt for violation of the injunctive orders. Money spent investigating the judge would not be available to comply with the injunction. The ability to comply with a court order or the lack of it might inform any decision on contempt. The defendants may disagree with a causal linkage or evidentiary value between expenditures to investigate the judge and compliance with the injunction, but the court is free to conclude otherwise.

18. The inquiries were appropriate for a second reason. The court has inherent power to protect the independence of the court and its processes. For example, there are rules that forbid lawyers to "seek to influence a judge, juror, prospective juror, or other official of a tribunal by means prohibited by law." Ariz. Rule of Professional Conduct 3.5(a). *See also In re Enforcement of Subpoena*, 972 N.E.2d 1022, 1029 (Mass. 2012) (citations omitted) ("This court has also censured

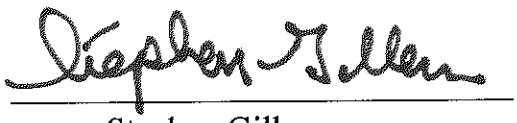
attorneys who attempted to 'pierce the confidential communications of a former law clerk and a judge in a pending matter to benefit one of the litigants.' We deemed such attempts to be 'prejudicial to the administration of justice,' which requires 'respect for the internal deliberations and processes that form the basis of judicial decisions, at very least while the matter is still pending.'").

19. A concern with conduct prejudicial to the administration of justice is heightened here, where one party is a law-enforcement agency with investigative powers far superior than those available to most litigants.

20. I don't suggest that counsel for the defendants or the defendants did anything untoward, only that the court was well within its inherent authority in asking questions about the defendants' possible investigations of the court in order to ascertain that there was no conduct prejudicial to the administration of justice.

CONCLUSION

21. The various grounds to recuse Judge Snow lack merit for the reasons stated above.



Stephen Gillers

Dated: New York, New York
June 12, 2015

Exhibit A

[February 2015]

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Evidence; Law and Literature; Media Law

PRIOR COURSES Civil Procedure, Agency, Advocacy of Civil Claims, Federal Courts

PUBLICATIONS

BOOKS AND ANTHOLOGIES:

Regulation of Lawyers: Problems of Law and Ethics (Aspen Law & Business, 10th ed., 2015). The first edition of this popular casebook was published in 1985. Norman Dorsen was a co-author on the first two editions. Stephen Gillers is the sole author of the third through ninth editions. The first four editions were published by Little, Brown & Co., which then sold its law book publishing operation to Aspen.

Regulation of Lawyers: Statutes and Standards (with Roy Simon and Andrew Perlman) (Aspen Law & Business) This is a compilation with editorial comment. The first volume was published in 1989. Updated versions have been published annually thereafter. As of the 2009 edition, Andrew Perlman has joined as a co-editor. As of 2015, John Steele is a co-editor.

Regulation of the Legal Profession (Aspen 2009). This is 400+ page book in the Aspen "Essentials" series explains ethics rules and laws governing American lawyers and judges.

Getting Justice: The Rights of People (Basic Books, 1971; revised paperback, New American Library, May 1973).

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Investigating the FBI (co-Editor with P. Watters) (Doubleday, 1973; Ballantine, 1974)

None of Your Business: Government Secrecy in America (co-Editor with N. Dorsen) (Viking, 1974; Penguin, 1975).

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Looking At Law School: A Student Guide From the Society of American Law Teachers (editor and contributor) (Taplinger, 1977; NAL, 1977; revised ed., NAL, 1984; third ed., NAL, 1990).

The Rights of Lawyers and Clients (Avon, 1979).

"Four Policemen in London and Amsterdam," in R. Schrank (ed.) American Workers Abroad (MIT Press, 1979).

"Dispute Resolution in Prison: The California Experience," and "New Faces in the Neighborhood Mediating the Forest Hills Housing Dispute," both in R. Goldmann (ed.) Roundtable Justice: Case Studies in Conflict Resolution (Westview Press, 1980).

"The American Legal Profession," in A. Morrison (ed.), Fundamentals of American Law (Oxford University Press 1996).

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(Monograph, Assoc. Bar City of N.Y., 1982).

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Numerous articles in various publications, including The New York Times, The Nation, American Lawyer, The New York Law Journal, The National Law Journal, Newsday, and the ABA Journal. See below for selected bibliography.

AWARDS

2011 Recipient, Michael Franck Award. Michael Franck Award from the ABA's Center for Professional Responsibility. The Award is given annually for "significant contributions to the work of the organized bar….noteworthy scholarly contributions made in academic settings, [and] creative judicial or legislative initiatives undertaken to advance the professionalism of lawyers…are also given consideration."

2015 Recipient of Outstanding Scholar Award from the American Bar Foundation.

VIDEOTAPES

"Adventures in Legal Ethics and Further Adventures in Legal Ethics": videotape of thirteen dramatic vignettes professionally produced and directed and raising issues of legal ethics. Author, Producer. (1994)

"Dinner at Sharswood's Café," a videotape raising legal ethics issues. Author, Producer. (1996)

"Amanda Kumar's Case," a 38-minute story raising more than two dozen legal ethics issues. Author. (1998)

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(1992) (to Norman Dorsen).

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OTHER TEACHING

Visiting Professor of Law, Harvard Law School, Winter 1988 Semester;

Adjunct Professor of Law, Yeshiva University, Cardozo Law School, Spring 1986, Spring 1987, and Fall 1988 Semesters.
Course: The Legal Profession.

Adjunct Associate Professor of Law, Brooklyn Law School, 1976-78.

PRIOR EMPLOYMENT

1973 - 1978
Private practice of law
Warner and Gillers, P.C. (1975-78)

1974 - 1978
Executive Director
Society of American Law Teachers, Inc.

1971 - 1973
Executive Director, Committee for
Public Justice

1969 - 1971
Associate, Paul, Weiss, Rifkind,
Wharton & Garrison

1968 - 1969
Judicial Clerk to Chief Judge
Gus J. Solomon, Federal District Court
for the District of Oregon, Portland, Oregon

SELECTED TESTIMONY

Testimony on "Nomination of Sandra Day O'Connor to the Supreme Court of the United States", Hearings, before the Senate Committee on the Judiciary, 97th Congress, 1st Sess., Sept. 11, 1981.

Testimony on S. 2216, "Habeas Corpus Reform Act of 1982", Hearings, before the Senate Committee on the Judiciary, 97th Congress, 2d Sess., April 1, 1982.

Testimony on H.R. 5679, "Criminal Code Revision Act of 1981",

Hearings, before the House of Representatives, Committee on the Judiciary, 97th Congress, 2d Sess., April 22, 1982.

Testimony on S. 653, "Habeas Corpus Procedures Amendment Act of 1981", Hearings, before the Senate Committee on the Judiciary, 97th Congress, 1st Sess., November 13, 1981.

SELECTED TESTIMONY (continued)

Testimony on S. 8875 and A. 11279, "A Proposed Code of Evidence for the State of New York", before Senate and Assembly Codes and Judiciary Committees, February 25, 1983.

Testimony before A.B.A. Commission on Women in the Profession, Philadelphia, February 6, 1988.

Testimony on the nomination of William Lucas to be Assistant Attorney General for Civil Rights, before the Senate Committee on the Judiciary, 101st Congress, 1st Sess., July 20, 1989.

Testimony on the nomination of Vaughn Walker to be United States District Judge for the Northern District of California, before the Senate Committee on the Judiciary, 101st Congress, 1st Sess., November 9, 1989.

PUBLIC LECTURES (partial list)

Tabor Lecture, Valparaiso University School of Law, April 12, 2007. This event consisted of two lectures. A public lecture was entitled "Here's the Gun: A Lawyer's Responsibility for Real Evidence." The Bench and Bar lecture, which will be published in the school's law review, is entitled "Virtual Clients: An Idea in Search of a Theory (With Limits)."

Paul M. Van Arsdell, Jr., Memorial Lecture, University of Illinois, College of Law, March 7, 2005: "Do Lawyers Share Moral Responsibility for Torture at Guantanamo and Abu Ghraib?"

Howard Lichtenstein Distinguished Professorship of Legal Ethics Lecture Series, "In Praise of Confidentiality (and Its Exceptions)," delivered at Hofstra University School of Law, November 12, 2003.

Henry J. Miller Distinguished Lecture, Georgia State University College of Law, May 11, 1988. "Protecting Lawyers Who Just Say No."

First Annual South Carolina Bar Foundation Lecture, April 9, 1992, University of South Carolina Law School, Columbia, South Carolina. "Is the Legal Profession Dead? Yearning to Be Special in an Ordinary Age."

Philip B. Blank Memorial Forum on Attorney Ethics, Pace University

School of Law, April 8, 1992. "The Owl and the Fox: The Transformation of Legal Work in a Commodity Culture."

Speaker on Judicial Ethics, ABA Appellate Judges' Seminar and Flaschner Judicial Institute, September 29, 1993, Boston, Massachusetts.

PUBLIC LECTURES (continued)

Baker-McKenzie Ethics Lecture, Loyola University Chicago School of Law, October 13, 1993, Chicago, Illinois ("Bias Issues in Legal Ethics: Two Unfinished Dramas").

The Sibley Lecture, University of Georgia School of Law, Athens, Georgia, November 10, 1993 ("Telling Stories in School: The Pedagogy of Legal Ethics").

Participant, "Ethics in America" series (to be) broadcast on PBS 2007, produced by Columbia University Seminars on Media and Society.

Participant, "Ethics in America" series, broadcast on PBS February and March 1989, produced by Columbia University Seminars on Media and Society.

Participant, "The Constitution: That Delicate Balance, Part II" series, broadcast on PBS February and March 1992, produced by Columbia University Seminars on Media and Society.

Lecturer on legal ethics and allied subjects in the U.S., China, Vietnam, Hong Kong, Camboia, Singapore, Colombia, Guam, Ireland, France, and at hundreds of seminars, CLE events, and conferences organized by private law firms, corporate law departments, the District of Columbia, Second, Fourth, Sixth, Ninth and Federal Circuit Judicial Conferences; American Bar Association; Federal Bar Council; New York State Judiciary; New York City Corporation Counsel; American Museum of Natural History; Practicing Law Institute; Law Journal Seminars; state, local and specialty bar associations (including in Oregon, Nebraska, Illinois, New York, New Jersey, Pennsylvania, Rhode Island, Vermont, and Georgia); corporate law departments; law schools; and law firms.

LEGAL AND PUBLIC SERVICE ACTIVITIES

Member, ABA 20/20 Commission, 2009- 2013 (appointed by the ABA President to study the future of lawyer regulation).

Chair, American Bar Association Center for Professional Responsibility, Policy Implementation Committee, 2004-2008 (Member 2002-2010).

Member, American Bar Association Commission on Multijurisdictional Practice, 2000-2002.

Consultant, Task Force on Lawyer Advertising of the New York State Bar Association (2005).

LEGAL AND PUBLIC SERVICE ACTIVITIES (cont.)

Retained by the New Jersey Supreme Court, in connection with the Court's review of the lawyer disciplinary system in New Jersey, to provide an "analysis of the strengths and weaknesses of California's 'centralized' disciplinary system" and to "report on the quality, efficiency, timeliness, and cost effectiveness of the California system...both on its own and compared with the system recommended for New Jersey by the Ethics Commission." Report filed December 1993. Oral presentation to the Court, March 1994.

Reporter, Appellate Judges Conference, Commission on Judicial participation in the American Bar Association, (October 1990-August 1991).

Member, David Dinkins Mayoral Transition Search Committee (Legal and Law Enforcement, 1989).

Member, Committee on the Profession, Association of the Bar of the City of New York (1989-1992)

Member, Executive Committee of Professional Responsibility Section, Association of American Law Schools (1985-1991).

Chair, 1989-90 (organized and moderated Section presentation at 1990 AALS Convention on proposals to change the ABA Code of Judicial Conduct).

Counsel, New York State Blue Ribbon Commission to Review Legislative Practices in Relation to Political Campaign Activities of Legislative Employees (1987-88).

Administrator, Independent Democratic Judicial Screening Panel, New York State Supreme Court (1981).

Member, Departmental Disciplinary Committee, First Judicial Department (1980 - 1983).

Member, Committee on Professional and Judicial Ethics, Association of the Bar of the City of New York (1979 - 1982).

BAR MEMBERSHIPS STATE:

New York (1968)

FEDERAL:

United States Supreme Court (1972);
Second Circuit (1970);
Southern District of New York (1970);
Eastern District of New York (1970)

LEGAL EDUCATION J.D. cum laude, NYU Law School, 1968
Order of the Coif (1968)
Dean's List (1966-68)
University Honors Scholar (1967-68)

PRELEGAL EDUCATION B.A. June 1964, City University of New York (Brooklyn College)

DATE OF BIRTH November 3, 1943

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12. Statewide Study of Sanctions Needed for Lawyers' Misconduct, New York Law Journal, June 6, 1985.

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14. Proposed Model Rules Superior to State's Code, New York Law Journal, October 21, 1985.

15. Five Ways Proposed to Improve Lawyer Discipline in New York, New York Law Journal, January 8, 1986.

16. Poor Man, Poor Lawyer, New York Times, February 28, 1986.

17. Proposals To Repair Cracks in Ethical Legal Behavior, New York Law Journal, April 17, 1986.

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24. Amending the Ethics Code - Conflicts of Interest, Screening, New York Law Journal, November 12, 1986.

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53. Conflict of Laws: Real-World Rules for Interstate Regulation of Practice, ABA Journal (April 1993) at 111.

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55. Generation Gap, ABA Journal (June 1993) at 101. (On the use of a boycott in response to the Colorado anti-gay initiative.)

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Exhibit B

Ortega Melendres v. Arpaio

Statement of Facts Relevant to Motion for Recusal

The History of this Litigation

1. This class action litigation began with the filing of a First Amended Complaint in this action, on September 5, 2008. The lawsuit alleged that Sheriff Arpaio and the Maricopa County Sheriff's Office ("MCSO") were engaged in a pattern and practice of race discrimination in violation of the Fourteenth Amendment and illegal detentions in violation of the Fourth Amendment. In summary, the Plaintiffs alleged that the MCSO unconstitutionally singled out Latinos for traffic stops and detained Latinos without a valid legal justification, because of Sheriff Arpaio's policies targeting suspected undocumented immigrants.

2. This case was assigned to the current Court on July 22, 2009 [Doc. 144], after the previous district judge assigned to this case, the Honorable Mary H. Murguia, recused herself based on a potential appearance of bias, on Defendants' motion [Doc. 138]. Since then, in the six years that this Court has presided over this litigation, it reviewed both parties' motions for summary judgment and the voluminous supporting documentation, and on December 23, 2011 issued an order granting Plaintiffs' motion for class certification, partially granting both parties' motions and granting a preliminary injunction. [Doc. 494].

3. The Court presided over a seven-day bench trial that began on July 19, 2012 and ended on August 2, 2012.

4. On May 24, 2013, the Court issued a 142-page order with Findings of Fact and Conclusions of Law and a permanent injunction based on findings that the Defendants had violated the Fourth and Fourteenth Amendment rights of the Plaintiff class. [Doc. 579]. The Court also specifically found a violation of the December 23,

2011 preliminary injunction in that class members continued to be detained on the basis solely of knowledge or suspicion of unlawful presence in the United States.

5. On October 2, 2013, the Court issued a detailed Supplemental Permanent Injunction. [Doc. 606]. Prior to that ruling, the Defendants had consented to the great majority of the remedies in the Supplemental Permanent Injunction. *See* Parties' Joint Report Regarding Status of Consent Decree Negotiations [Doc. 592, 592-1 (color-coded remedies proposal indicating areas of agreement and provisions separately proposed by only one party)].

6. The Court of Appeals affirmed this Court's preliminary injunction order and the trial ruling. *Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). The Court of Appeals also affirmed the Supplemental Permanent Injunction with the sole exception that it found one provision which permitted the Court-appointed Monitor the authority to consider "disciplinary outcomes for *any* violations of departmental policy," not to be narrowly tailored to addressing the constitutional violations found after trial– and remanded to the district court for further tailoring. *Ortega Melendres v. Arpaio*, Nos. 13-16285, 13-17238, 2015 WL 1654550, at *10 (9th Cir. Apr. 15, 2015). All of the Court's substantive rulings were based upon voluminous evidence and careful application of the law, and Defendants do not now contend otherwise.

Defendants' History of Post-Judgment Non-Compliance Leading to Contempt Proceedings

7. During the period between the Court's issuance of the Supplemental Permanent Injunction on October 2, 2013, and the beginning of the contempt hearing on April 21, 2015, the Court saw evidence that Defendants and top commanders of the MCSO, including Sheriff Arpaio and Chief Deputy Sheridan, had repeatedly violated numerous court orders and made repeated statements that mischaracterized and disparaged the Court's orders to MSCO personnel. The history of those statements is set

forth in Plaintiffs' Memorandum of Law and Facts re Contempt Proceedings and Request for Order to Show Cause at 12-16 [Doc. 843]. *See also* Tr. of Status Conference (Oct. 28, 2014) at 68:25-72:20. Among other things, on August 6, 2013, Sheriff Arpaio stated in a letter to supporters that he "won't stand for" a Court-appointed monitor. [Doc. 843 at 15]. And during the contempt hearing, Plaintiffs introduced a video recording of a press interview in October 2013 in which the Sheriff proclaimed, "I'm an elected constitutional sheriff, and no one is going to take away my authority that I have under the Constitution." Ex. 193C and Tr. of Apr. 23, 2015 Hr'g at 578:25-579:8 and 581:25-582:17.

8. In late April and early May 2014, a former MCSO deputy, Charley Armendariz, who had been a key witness during the 2012 trial, was arrested and subsequently committed suicide. MCSO searched Armendariz's home pursuant to a criminal warrant. The results of that search ultimately revealed, among other things, that there was a widespread practice among MCSO personnel of recording traffic stops, that MCSO had no policy governing the recording of traffic stops, and that such recordings should have been disclosed to Plaintiffs before trial, but were not. Tr. of Dec. 4, 2014 Hr'g at 22:15-22:25.

9. Plaintiffs expressed the view that the recordings, and other evidence of Deputy Armendariz's misconduct found in the search of his home, were material to issues in the case, including the adequacy of MCSO's supervision, discipline, civilian complaint, and internal investigations procedures. Tr. of Dec. 4, 2014 Hr'g at 23:1-24:21 [Doc. 812]. The failure to disclose the recordings before trial is one of three charged grounds for civil contempt. Order to Show Cause at 18 [Doc. 880].

10. The second ground for contempt arose on May 14, 2014. During a status conference on that date, the Court ordered Sheriff Arpaio and Chief Deputy Sheridan to cooperate with the Monitor in formulating a plan to "quietly" collect the recordings of

traffic stops throughout MCSO. Order to Show Cause at 22 [Doc. 880]; Tr. of May 14, 2014 Status Conference at 25-27 [Doc. 700]. The movants violated that court order that same day, by putting into action a plan without the Monitor's approval, and then agreeing to a different plan after consultation with the monitor, while failing to disclose that the initial, unapproved plan had already been implemented. Order to Show Cause at 23 [Doc. 880].

11. The evidence developed during the contempt hearing on April 21-24, 2015 demonstrated that Chief Deputy Sheridan was not truthful and entirely forthcoming with the Monitor about the events of May 14, 2014. Tr. of Apr. 24, 2015 Hr'g at 840:10-841:15; 846:22-848:5; 850:6-11; 851:22-25; 853:20-859:19; 861:4-11; 868:19-869:6.

12. On September 20, 2014, the Court-appointed Monitor wrote a memorandum to the Court containing an assessment of MCSO's investigations following Deputy Armendariz's arrest and death. [Doc. 795-1 (redacted version filed Nov. 20, 2014)]. The Monitor reported numerous serious deficiencies with the MCSO's internal investigation of Armendariz and other MCSO personnel and that MCSO had not been responsive to various requests of the Monitor.

13. On October 21, 2014, Plaintiffs filed a Response to the Monitor's Report [Doc. 753] seeking remedies for the Defendants' pretrial discovery violations and new injunctive relief based upon the information disclosed in the aftermath of Armendariz's arrest and death. Among other issues, Plaintiffs noted the clear deficiencies in MSCO's discipline and internal investigations processes and provided notice that they would seek new injunctive relief to address those deficiencies. [Doc. 753 at 7-10].

14. During a status conference on October 28, 2014, the parties and the Court addressed the Monitor's report on MCSO's internal investigations that had been triggered by the Armendariz incident. During that status conference, Plaintiffs first raised the subject of contempt. Tr. of Oct. 28, 2014 Status Conf. at 72:15-20. The October 28,

2014 status conference also addressed, among other things, another defiant statement by Sheriff Arpaio to a reporter to the effect that, notwithstanding the fact that he did not contest its unconstitutionality, he would conduct the Guadalupe operation "all over again." *Id.* at 61:9-77:5; Tr of Apr. 23, 2015 Hr'g at 583:20-584:6.

15. The third ground for contempt came to light for Plaintiffs during the November 20, 2014 status conference when then-counsel for the Defendants, Thomas Liddy, disclosed to the Court and to Plaintiffs that one of the traffic stop recordings recovered by the MCSO during the Armendariz and related investigations demonstrated that deputies had violated the Court's preliminary injunction order. Mr. Liddy also revealed that the Court's preliminary injunction order had never been communicated to MCSO deputies. Tr. of Nov. 20, 2014 Status Conf. at 67:10-67:24 [Doc. 804].

16. Plaintiffs filed a Request for Order To Show Cause on January 8, 2015, requesting that the Court initiate civil contempt proceedings. [Doc. 843].

17. Defendants and the movants individually filed briefs denying liability for contempt. [Doc. 860].

18. By order dated February 12, 2015, the Court granted Plaintiffs' request, issued the order to show cause and set an evidentiary hearing for April 21-24, 2015. [Doc. 880].

Defendants' "Settlement" Offers and Motion to Vacate the Contempt Hearing

19. On March 17, 2015, Defendants and Chief Deputy Sheridan filed an Expedited Motion to Vacate Hearing and Request for Entry of Judgment, admitting liability for civil contempt on the three grounds charged in the Order to Show Cause and providing a list of proposed remedies for their contempt. [Doc. 948]. Despite the admission of liability, the Motion to Vacate Hearing did not describe how the violations of the Court's orders had occurred, and the Defendants' statements, in the motion and in court, attempted to portray the violations as mere mistakes.

20. On March 19, 2015, Plaintiffs filed a response to that motion, opposing the request to vacate the contempt hearing on the grounds that Defendants had not yet provided full discovery on why and how they violated the Court's orders, and that material issues of fact that were crucial for determining the proper remedies for the contempt remained unresolved.[1] [Doc. 952 at 3].

21. On March 20, 2015, the Court denied the Defendants' motion to vacate the contempt hearing on the grounds asserted by Plaintiffs. Tr. of Mar. 20, 2015 Status Conf. at 8:14-17.

22. On April 10, 2015, Defendants filed another motion to vacate the contempt hearing that was substantively identical to the first. [Doc. 1003].

23. The Court also denied that motion. [Doc. 1007].

The Role of the United States Attorney's Office

24. During the November 20, 2014 status conference, the Court stated that it was researching the distinction between civil and criminal contempt and indicated that if at the end of a civil contempt proceeding, the Court were to determine that it could not find appropriate civil remedies, it intended to make a referral to the United States Attorney's Office for criminal contempt proceedings. Tr. of Nov. 20, 2014 Status Conf. at 39:19-23 [Doc. 804]

[1] Plaintiffs stated during the status conference on February 25, 2015 that they had engaged in an initial exchange of ideas about settlement (which the parties agreed would be confidential under Federal Rule of Evidence 408), but that more conferring would be required before Plaintiffs would proceed with mediated settlement discussions. Tr. of Feb. 25, 2015 Status Conf. at 38:7-11, 41:20-42:24. Plaintiffs later opposed Defendants' Motion to Vacate because Plaintiffs had not had an opportunity to take discovery relevant to the adequacy of remedies.

25. At its next conference with the parties, on December 4, 2014, the Court indicated that it had invited a representative from the United States Attorney's Office to be present "because if we proceed with the civil contempt proceedings there are, at least to some extent, possible criminal ramifications to those proceedings, and I want . . . to . . . keep [the United States Attorney's Office] apprised." Tr. of Dec. 4, 2014 at 29:5-9. The Court stated that if, in the future, it decided to refer Sheriff Arpaio or others for criminal contempt proceedings, either the federal government or an appointed special prosecutor would have to prosecute such a criminal contempt proceeding, pursuant to Federal Rule of Criminal Procedure 42. The Court stated that it had given notice to the United States Attorney's Office and invited a representative to be present in order to ensure that the office would have "an opportunity to evaluate whether this is something you feel comfortable handling if it comes your way, and whether or not you wish to pursue it or whether or not you wish to tell me that if I'm going to pursue it, I need to find somebody else to pursue it." *Id.* at 29:24-30:3. The Court indicated it would provide information to the United States Attorney's Office under seal and gave the parties an opportunity to object to that procedure. Defendants affirmatively stated that they had no objection. *Id*. at 30:4-14.

26. The Court stated that it had not reached any conclusion as to whether it would make a criminal referral but noted that the Sheriff had retained specially appearing counsel to defend against any such criminal proceeding. *Id*. at 24:22-25:2.

27. On January 30, 2015, the Defendants filed a Request for Rule 16 Settlement Conference and proposed "structured settlement discussions among the parties and with the Court." [Doc. 867 at 2].

28. During a status conference on February 26, 2015, the Defendants brought up the subject of settlement discussions and indicated that the parties had met and conferred. Tr. of Feb. 25, 2015 Status Conf. at 32:23-34:1. In response, the Court stated

that if the parties sought a global resolution of all contempt issues, it would be "wise" to confer with the United States Attorney's Office. *Id*. at 34:2-6. Defendants stated that they had already conferred with the United States Attorney's Office, and that they were attempting to work out the "mechanics" of that settlement process, and that Defendants were seeking a global settlement of civil and criminal contempt issues. *Id*. at 34:8-17.

29. Ms. Strange of the United States Attorney's Office was present and indicated that there might be policy impediments to the federal government's participation in any court-mediated settlement discussion as Defendants were seeking. *Id.* at 35:7-16.

30. On March 10, 2015, the United States Attorney's Office filed a Notice Regarding Participation in Settlement Negotiations. [Doc. 924]. The United States Attorney's Office indicated that because no criminal contempt referral had been made, it would decline to participate in any settlement discussions.

31. During a status conference on March 20, 2015, Assistant United States Attorney Lynette Kimmins stated that the United States has an interest in ensuring enforcement of court orders, and that the United States Attorney's Office "has not declined a request or referral of an appointment as a prosecutor for the potential criminal contempt proceeding, should that referral be made." Tr. of Mar. 20, 2015 Status Conf. at 28:2-6.

The Scope of the Evidentiary Hearing

32. Prior to the April 21-24, 2015 evidentiary hearing, the Court indicated that it would not limit the scope of the evidence to the three grounds for civil contempt, but would take evidence on the remedies needed to ensure compliance with the Court's prior orders. See Tr. of Mar. 20, 2015 Status Conf. at 11:6-12, 12:21-25, 13:1-21; [Doc. 880 at 25]; [Doc. 1007]. In particular, at the outset of the evidentiary hearing, the Court stated that "[t]he adequacy of the MCSO's self-investigation still remains very much an item of

possible relevance in this hearing as it pertains to relief that I might grant to plaintiffs." Tr. of Apr. 21, 2015 Hr'g at 15:19-22.

Questioning About Defendants' Investigations Implicating the Court

33. Consistent with its practice throughout the contempt hearing and at the bench trial of this matter in July and August 2012, after the parties had completed their examinations, the Court questioned witnesses and gave the parties an opportunity to re-examine witnesses after its examination.

34. On April 23, 2015, the Court conducted an examination of Sheriff Arpaio, beginning with the grounds for civil contempt. The Court also questioned the Sheriff about the re-assignment of Captain Steven Bailey from the command of the Special Investigations Division, with oversight of its subunit the Human Smuggling Unit (which had been primarily responsible for the constitutional violations found after trial), to the command of the Internal Affairs unit. Tr. of Apr. 23, 2015 Hr'g at 637:2-642:22. This reassignment of Captain Bailey occurred during a time when the Human Smuggling Unit was under investigation by the Internal Affairs department because of misconduct uncovered after Deputy Armendariz's arrest and death, and the apparent conflict was an issue in the litigation leading up to the contempt hearing.

35. The Court then questioned Sheriff Arpaio about an article that had appeared in the *Phoenix New Times* newspaper on June 4, 2014, reporting that two MCSO detectives, Brian Mackiewicz and Travis Anglin, a member of the MCSO's civilian "Cold Case Posse," Mike Zullo, and a paid confidential informant named Dennis Montgomery, were engaged in an investigation of a "bizarre conspiracy theory" that the Court and the U.S. Department of Justice were conspiring to "get" Sheriff Arpaio. [Ex. 522]. Arpaio testified that the article's statement that the Court was under investigation was not true. Tr. of Apr. 23, 2015 Hr'g at 647:4-7. As set forth below, that testimony was later contradicted by other evidence.

36. The Court questioned the Sheriff about the source of funding for the investigation.[2] *Id.* at 658:4-659:1.

37. During the course of the Court's questioning of Sheriff Arpaio on the subject of the investigation reported in the *Phoenix New Times* article, the Sheriff brought up a second investigation involving the Court. The Sheriff testified that an outside investigator hired by Defendants' then-counsel, Tim Casey, had investigated an allegation that the Court's wife had stated to a woman named Karen Grissom that "Judge Snow wanted to do everything to make sure I'm not elected." Tr. of Apr. 23, 2015 Hr'g at 654:6-655:12.

38. The next day, on April 24, 2015, Defendants' counsel, Ms. Iafrate, examined Chief Deputy Sheridan about the investigations implicating the Court and the Court's wife. After asking Ms. Iafrate if she had any objection and emphasizing that she should interrupt with any objection, Tr. of Apr. 24, 2015 Hr'g at 966:4-11, the Court joined in questioning of Chief Deputy Sheridan on the subject of Karen Grissom's allegations about the Court's wife.

39. In response to the Court's questions, Sheridan testified that Tim Casey had hired a private investigator who had interviewed Karen Grissom and her family, and that

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[2] The record demonstrates that when Sheriff Arpaio resumed the witness stand after a lunch break, the Court stated that it "was told over lunch" that the Cold Case Posse (which had been involved in the Dennis Montgomery investigation) "has its own funds" and asked Sheriff Arpaio whether that was "possible." There is no indication in the transcript about how the Court obtained the information or whether it had sought the information, and defense counsel did not inquire in its re-direct examination. As the parties know, the Court does have communications with its Monitor and the Monitor's staff. The Sheriff initially responded that he was not sure whether the source of funding was seized "RICO" funds or general funds. *Id.* at 658:25-12. Upon further questioning by the Court, the Sheriff then testified that the Cold Case Posse is an independent § 501(c)(3) organization and raises its own funds. *Id.* at 658:13-18.

MCSO did not do anything to follow up on the investigation. *Id.* at 968:5-9. The Court then proceeded to question Chief Deputy Sheridan about the grounds for contempt, MCSO's internal affairs operations, and other matters, and finally asked Chief Deputy Sheridan about the MCSO-Montgomery investigation.

40. The Court also questioned Chief Deputy Sheridan about documents produced by MCSO that indicated that Captain Bailey, contemporaneously with his reassignment from the Special Investigation Division to the Internal Affairs unit, had directed or approved the destruction of evidence that the Human Smuggling Unit appeared to have illegally seized from members of the Plaintiff class, and that Defendants had improperly withheld from Plaintiffs, before trial. Tr. of Apr. 24, 2015 Hr'g at 981:13-985:24.

41. Chief Deputy Sheridan testified and stated publicly that MCSO ultimately decided not to pursue the investigation of the Grissom allegations relating to the Court's spouse. Tr. of Apr. 24, 2015 at 968:5-9; Tr. of May 14, 2015 at 10:1-24.

42. Both Arpaio and Sheridan testified that they concluded that confidential informant Dennis Montgomery was not credible. Tr. of Apr. 23, 2015 Hr'g at 650:18-25, Tr. of Apr. 24, 2015 Hr'g at 961:1-11, 1002:14-15. Arpaio, however, testified that he did not know whether the Montgomery investigation was still ongoing.[3] Tr. of Apr. 23, 2015 Hr'g at 652:5-6.

43. During his questioning of Arpaio, the Court directed the Sheriff to preserve all documents relating to both of these investigations. Tr. of Apr. 23, 2015 Hr'g at 653:9-

[3] Documents produced by the Defendants (and to be filed under seal with Plaintiffs' response) indicate that in fact the MCSO-Montgomery investigation continued at least up until the eve of the contempt hearing.

654:2, 655:13-17, 656:3-6, 656:25-2. He directed that copies of the documents be produced and instructed defense counsel to review the material for attorney-client privilege, work product, and confidential information. Tr. of May 8, 2015 Status Conf. at 30:1-4. The Court also sua sponte raised a potential security issue about the existence of documents that Dennis Montgomery purportedly had obtained from the U.S. Central Intelligence Agency, and proposed that the Monitor and Defendants review such documents for security issues prior to disclosure to the Plaintiffs, and that defense counsel communicate the existence of such documents to the CIA. Both Plaintiffs' and Defendants' counsel agreed to that proposal. Tr. of May 8, 2015 Status Conf. at 30:25-31:15.

44. At the close of the four days of evidence, the Plaintiffs had not completed their case-in-chief. Prior to the evidentiary hearing, on April 7, 2015, the Court had anticipated that four days of testimony might be insufficient and tentatively set additional dates for a continuation of the evidentiary hearing in June 2015. Tr. of April 7, 2015 Status Conf. at 32:13-23.

Post-Hearing Proceedings

45. During a status conference on May 14, 2015, the Court addressed the subject of the MCSO-Montgomery investigation, noting that documents produced by MCSO indicated that the investigators attempted to construct an alleged conspiracy that supposedly involved the Court, a former law clerk to the Court, the Attorney General of the United States, the Assistant Attorney General in charge of the Criminal Division of the U.S. Department of Justice, the former mayor of Phoenix, and the former executive chief of the MCSO. Tr. of May 14, 2015 Status Conf. at 44:7-21. The Court further noted that the documents indicated that Dennis Montgomery purported to use a database of information "harvested by the U.S. Central Intelligence Agency and confiscated by him" in his investigation, and also purported to be tracking telephone calls between the

Court, the Attorney General, the Assistant Attorney General, and the U.S. Attorney for the District of Arizona. *Id.* at 44:22-45:2, 45:10-16.

46. The Court also noted that the documents from the MCSO-Montgomery investigation appear to allege that the Court was in contact with the Department of Justice about this litigation, that the random selection process of the Court was subverted so that the case would be reassigned to this Court after the recusal of Judge Murguia, and that the Court ordered the tapping of MCSO's phones. *Id.* at 45:10-46:2.

47. The Court noted that Sheriff Arpaio and Chief Deputy Sheridan had acknowledged that the Montgomery materials were not credible. Tr. of May 14, 2015 Status Conf. at 46:7-14. The Court also alluded to the fact that the documents contradicted witness testimony—an apparent reference to Sheriff Arpaio's testimony that the MCSO-Montgomery investigation did not implicate the Court's partiality. Tr. of May 14, 2015 Status Conf. at 46:23-24. The Court then pointed out that the Monitor's last report had found that MCSO was only 29 percent in compliance with the Supplemental Injunction despite the passage of one-and-a-half years (*id*. at 47:8-11), and that during the compliance period, the Defendants and that MCSO had apparently diverted resources away from compliance with the Court's orders and toward investigations designed to discredit the Court (*id*. at 46:23-7).

48. The Court also explained why the MCSO-Montgomery investigation is relevant to the pending contempt proceeding. First, the Court noted that the MCSO-Montgomery investigation was also linked to contempt issues through the participation of Captain Steve Bailey, who was reassigned from the Special Investigations Division, where he was responsible both for the Human Smuggling Unit and for oversight of confidential informants, to the command of the internal affairs unit. *Id.* at 48:4-49:7. The Court then stated:

> This evidence may thus tend to demonstrate that the MCSO attempted to keep all matters pertaining to this case, its speculative investigations into this Court, and to the investigations triggered by the unfortunate death of Deputy Armendariz, in the hands of a relative few people who may not have been working to implement this Court's order in good faith. Further, it may tend to demonstrate that contemptuous actions that have been noticed by this Court in its order to show cause … were part of a pattern of knowing defiance rather than mere inadvertence. This may affect necessary remedies for members of the plaintiff class in civil contempt. It is for these reasons that the Seattle [*i.e.*, MCSO-Montgomery] operations materials may be relevant to this action.

Id. at 49:8-21.

49. The Court then proposed that the Monitor be authorized to investigate MCSO's "investigative operations." After Defendants objected on the ground that they wanted advance notice of the topics of any investigations by the Monitor, the Court stated that it would not require the Monitor to give advance notice of topics of interviews, but that Defendants could contemporaneously raise any objections during any interviews and that the Court would make itself available to hear such objections. The Court further stated that the Monitor's investigations would be limited to the enforcement of the Court's prior orders. Tr. of May 14, 2015 Status Conf. at 53:12-56:25.

The MCSO-Montgomery Documents

50. The MCSO-Montgomery documents indicate that Dennis Montgomery believed that MCSO personnel were responsible for leaking information about the MCSO-Montgomery investigation to *Phoenix New Times* reporter Stephen Lemons. The documents also reveal that, contrary to the testimony of Sheriff Arpaio and Chief Deputy Sheridan, MCSO personnel specifically directed Dennis Montgomery to produce information about the Court. Further, the documents indicate that by November 2014, MCSO personnel had concluded that Dennis Montgomery's information was completely false. The documents indicate that notwithstanding MCSO's conclusion that Montgomery was not credible, the MCSO-Montgomery investigation continued at least through the time of the contempt hearing on April 21-24, 2015 and that MCSO was still

attempting to obtain results from that investigation. (These documents were produced to Plaintiffs on an attorneys'-eyes-only basis and will be submitted under seal.)

The Court's Brother-in-Law

51. In 2012, prior to the trial in this matter, the Court set a status conference so that the parties could be heard on the possible basis for recusal based on the fact that his brother-in-law, Keith Teel, was a partner in the Washington, D.C. office of Covington & Burling, and that firm's representation of the Plaintiffs in this case. [Doc. 537] At the June 29, 2012 status conference, the Court offered to recuse upon the request of any party and indeed offered to vacate all of its orders entered after the appearance of the Covington & Burling firm in this litigation, including the preliminary injunction order of December 23, 2011. Tr. of June 29, 2012 Status Conf. at 5:19-7:2.

52. Defendants affirmatively urged the Court not to recuse, stating that "the Court's impartiality in this case cannot be reasonably questioned by the defendants … [or] any reasonable and fair-minded person," that "recusal is neither warranted nor desirable" and indeed stating the Defendants' position that it would be "unfairly prejudicial" to them if the Court's prior orders were vacated. *Id.* at 16:6-2.

53. After the status conference, Defendants filed a written waiver of "all appeal issues regarding only the Court's potential bias, impartiality, and/or conflict of interest as set forth in the Court's Order dated June 19, 2012 (Dkt#537)." [Doc. 541].

54. After hearing from the parties, the Court did not merely rely upon the parties' joint request that the Court not recuse, but issued a detailed opinion applying the recusal standards in 28 U.S.C. § 455. [Doc. 542].