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18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE DISTRICT OF ARIZONA**

20 Manuel de Jesus Ortega Melendres,)
21 et al.,)

22 Plaintiff(s),)

23 v.)

24 Joseph M. Arpaio, et al.,)

25 Defendants(s).)

CV-07-2513-PHX-GMS

**RESPONSE IN OPPOSITION TO
MICHAEL ZULLO'S MOTION
FOR EXTENSION OF TIME TO
RETAIN COUNSEL**

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1 Plaintiffs oppose Mr. Zullo's motion, Dkt. 1501, for an extension of time to
2 allow him to "make arrangements with Maricopa County to pay for [him] to retain
3 counsel in this civil case."

4 Mr. Zullo, who is neither a party nor a named contemnor, now claims to have
5 located counsel of his choosing. Dkt. 1501 at 1; *see also* Dkt. 1501 at 2-3. He is
6 entitled to no further accommodation. Mr. Zullo actually has no constitutional right to
7 counsel at all in this civil case. *See, e.g., United States v. Sardone*, 94 F.3d 1233, 1236
8 (9th Cir. 1996). He certainly has no right to public financing of such counsel, and the
9 Court need not delay this case in order to allow him to try to obtain it.
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12 Mr. Zullo had ample time to obtain independent counsel, regardless of
13 financing. He states that he has been thinking about potential criminal charges since
14 June of this year. *See* Ex. A, Zullo 10/23/15 Deposition Tr.¹ at 19:3-12 (discussing Ex.
15 C, Dep. Ex. 2934). He has known since at least September 25, 2015 of the need for his
16 deposition and documents in his possession. *See* Dkt. 1415 (attaching document
17 subpoena). He has known since at least October 21, 2015 that, if he desired
18 representation for purposes of his testimony as a third party witness, he would need to
19 seek it independently of Sheriff Arpaio and MCSO. *See* Ex. A, Zullo 10/23/15
20 Deposition Tr. at 7:20-25. He does not need more time.
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25 ¹ All Exhibits referred to herein are attached to the concurrently filed Declaration of
26 Stanley Young. The Oct. 23, 2015 deposition transcript was previously provided to
27 the Court for purposes of an October 26, 2015 Telephonic Status Conference. *See*
28 Dkt. 1490. For completeness, both exhibits used at that deposition, Exs. B and C
(Deposition Exs. 2256 and Ex. 2934), are included with this filing.

1 On the other hand, Mr. Zullo's requested extension would create obstruction
2 and delay in the contempt proceeding. Mr. Zullo's correspondence with Mr.
3 Montgomery indicates that such obstruction and delay may be his goal. *See* Ex. D
4 (May 22, 2015 email chain between dwebb605@gmail.com (Dennis Montgomery) and
5 1tick@earthlink.net (Mr. Zullo), discussing delay in and potential elimination of the
6 contempt hearing (ZULLO_000125-128)). The Court should not allow Mr. Zullo to
7 continue to delay these already lengthy proceedings, which would increase costs for all
8 parties, waste judicial resources, and delay relief to class members affected by the
9 contempt.
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12 Mr. Zullo's motion also objects to the production by MCSO's and Sheriff
13 Arpaio's counsel of certain documents given to such counsel by Mr. Zullo. Dkt. 1501
14 at 2; *see also* Dkt. 1478. Plaintiffs have subpoenaed those documents from those
15 counsel. Dkt. 1482. MCSO's and Sheriff Arpaio counsel have provided a log of these
16 documents, attached as Exhibit E.
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18 Mr. Zullo may not prevent the production of these MCSO documents by
19 MCSO's counsel. Mr. Zullo has participated in the Seattle investigation only by
20 authority of Sheriff Arpaio and the MCSO. *See* Oct. 28, 2015 Tr. at 3761:1-14
21 (Mackiewicz) (“[A]s a Posse member, he [Mr. Zullo] only gets his authority through
22 me [Detective Mackiewicz], so I was not going to let a volunteer make decisions in
23 reference to a criminal investigation that was ultimately going to fall on me.”); Apr.
24 23, 2015 Tr. (Arpaio testimony) at 652:14-15 (stating that Mr. Zullo is subject to
25 Sheriff Arpaio's control); Ex. F (Aug. 5, 2015 Zullo response to ITR 80, stating that
26 Mr. Zullo participated in the Seattle investigation, which “was being conducted by
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1 MCSO and not the Cold Case Posse,” as an “individual activation” pursuant to MCSO
2 Posse Program guidelines GJ-27 (MELC662484)). MCSO paid Mr. Zullo’s expenses
3 for travel for the Seattle investigation. *See* Ex. G (Sheridan approval for payment to
4 Mr. Zullo (MELC187428)). MCSO paid for the time of Mr. Montgomery, with whom
5 Mr. Zullo conducted most of the email correspondence the production of which is now
6 is dispute. *See* Ex. H (Ex. 2085, listing payments to Mr. Montgomery). Therefore,
7 any correspondence or documents Mr. Zullo has relating to the Seattle investigation,
8 including emails and documents provided by the confidential informant Mr.
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Montgomery, are in his possession only in his capacity as a representative and agent of MCSO.

Mr. Zullo cannot rely on his personal Fifth Amendment or other privileges to prevent MCSO from producing MCSO’s own documents. *See, e.g., Bellis v. United States*, 417 U.S. 85, 88 (1974) (an individual cannot rely upon his personal Fifth Amendment privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally); *Matter of Witness Before Grand Jury*, 546 F.2d 825, 827 (9th Cir. 1976) (same); *Matter of Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 476 (3d Cir. 1979) (same).

Even if Mr. Zullo could assert a Fifth Amendment privilege to attempt to preclude MCSO’s counsel from producing the documents, he has not done so here. The proponent of a Fifth Amendment privilege is required to make *some* showing that the privilege is properly claimed. *Matter of Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d at 477. Mr. Zullo has not made that showing, either at his October 23, 2015

1 deposition, *see* Ex. A (transcript), or in his motion (Dkt. 1501). Rather, Mr. Zullo
2 voluntarily turned over documents to counsel that he knew to be representing MCSO
3 (even if he thought that they also represented him). Mr. Zullo had previously turned
4 over to the Court's Monitor (through MCSO) other similar documents. *See, e.g.*, Ex. I
5 (summary of ITR responses, MELC1334929-35, listing Zullo responses to ITR 8 at
6 MELC1334930-33).² Production of the documents at issue, consisting of pre-existing,
7 voluntarily created emails and other documents from the Seattle investigation, would
8 not involve testimonial self-incrimination and would therefore not implicate Mr.
9 Zullo's Fifth Amendment rights. *Fisher v. United States*, 425 U.S. 391, 408-411
10 (1976); *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977).

13 Nor can Mr. Zullo assert that the documents are subject to any attorney-client
14 privilege. Sheriff Arpaio's counsel do not represent Mr. Zullo. Oct. 27, 2015 Tr. at
15 3478:25-3479:11; Oct. 26, 2015 Tr. at 9:9-12; 11:22-11. Mr. Zullo's statement that
16 Sheriff Arpaio's counsel previously told him that they also represented him does not
17 affect his, Sheriff Arpaio's and Sheriff Arpaio's counsel's obligations to produce
18 documents in response to the pending subpoenas and court orders. Mr. Zullo surely
19 knew that he could not have an attorney-client privilege with Sheriff Arpaio's and
20 MCSO's attorneys as against Sheriff Arpaio and MCSO themselves, and that Sheriff
21 Arpaio and MCSO had obligations to disclose MCSO's own documents under this
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25 ² Mr. Zullo's more recent production of documents to MCSO's counsel that had not
26 been provided to the Monitor demonstrates that his earlier production was incomplete
27 and that MCSO's compliance with the Court's previous orders was, yet again,
28 deficient.

1 Court's orders.

2 *United States v. Hubbell*, 530 U.S. 27 (2000), is distinguishable and does not
3 govern this case, as the segment quoted by Mr. Zullo at Dkt. 1501, p. 3, makes clear.
4 This case does not involve “incriminating documents that the [party seeking
5 production] is unable to describe with reasonable particularity”, and it does not involve
6 documents produced “pursuant to a grant of immunity” and being used “to prepare
7 criminal charges” against the person producing them. The production of MCSO’s
8 documents by MCSO’s attorneys does not constitute testimonial self-incrimination by
9 Mr. Zullo and implicates no Fifth Amendment concerns.
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12 For all these reasons, Mr. Zullo’s motion for extension should be denied, and
13 the documents that are the subject of Dkt. 1478 and 1482 should be ordered produced.³
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16 RESPECTFULLY SUBMITTED this 30th day of October, 2015.

17
18 By: /s/ Stanley Young

19 Cecillia D. Wang (*Pro Hac Vice*)
20 Andre I. Segura (*Pro Hac Vice*)
21 ACLU Foundation
22 Immigrants’ Rights Project

23 Daniel Pochoda

24 _____
25 ³ Pursuant to the Court’s Order of this date, Dkt. 1502, Plaintiffs are filing this
26 Response at the close of business today. Pursuant to the Court’s October 26, 2015
27 Order, Dkt. 1490, Mr. Zullo was given until this same day to file a motion for
28 protective order. If Mr. Zullo files a further paper today on the issue of the documents
that raises additional issues not raised in Dkt. 1501, Plaintiffs reserve the right to file a
further paper in response on November 2, 2015, as allowed by the October 26, 2015
Order.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2015 I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing and caused the attached document to be served via the CM/ECF System on all counsel of record.

/s/ Stanley Young