Cecillia D. Wang (*Pro Hac Vice*)
cwang@aclu.org
Nida Vidutis*
nvidutis@aclu.org
ACLU Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0775
Facsimile: (415) 395-0950

Daniel J. Pochoda
dpochoda@acluaz.org
Brenda Muñoz Furnish
bmfurnish@acluaz.org
ACLU Foundation of Arizona
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 650-1854
Facsimile: (602) 650-1376

*Application for admission *pro hac vice* forthcoming

Attorneys for Plaintiffs (Additional attorneys for Plaintiffs listed on next page)

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 **PLAINTIFFS' MEMORANDUM ON REMEDIES FOR CIVIL CONTEMPT PURSUANT TO THE COURT'S ORDER OF MAY 13, 2016**

Additional Attorneys for Plaintiffs:

Andre I. Segura (*Pro Hac Vice*)
asegura@aclu.org
ACLU Foundation
Immigrants' Rights Project
125 Broad Street, 17th Floor
New York, NY 10004
Telephone: (212) 549-2676
Facsimile: (212) 549-2654

Jorge M. Castillo (*Pro Hac Vice*)
jcastillo@maldef.org
Julia Gomez*
jgomez@maldef.org
Mexican American Legal Defense and Educational Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
Telephone: (213) 629-2512
Facsimile: (213) 629-0266

Anne Lai (*Pro Hac Vice*)
alai@law.uci.edu
401 E. Peltason, Suite 3500
Irvine, CA 92697
Telephone: (949) 824-9894
Facsimile: (949) 824-0066

James B. Chanin (*Pro Hac Vice*)
jbcofc@aol.com
Law Offices of James B. Chanin
3050 Shattuck Avenue
Berkeley, CA 94705
Telephone: (510) 848-4752
Facsimile: (510) 848-5819

Stanley Young (*Pro Hac Vice*)
syoung@cov.com
Covington & Burling LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065
Telephone: (650) 632-4700
Facsimile: (650) 632-4800

*Application for admission *pro hac vice* forthcoming

Tammy Albarran (*Pro Hac Vice*)
talbarran@cov.com
Lauren E. Pedley (*Pro Hac Vice*)
lpedley@cov.com
Covington & Burling LLP
One Front Street
San Francisco, CA 94111
Telephone: (415) 591-7066
Facsimile: (415) 955-6566

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INTRODUCTION

Sheriff Arpaio and Chief Deputy Sheridan, the two top commanders of the Maricopa County Sheriff's Office ("MCSO"), have repeatedly and willfully defied the rule of law and this Court. During the course of the underlying litigation, they spoliated evidence and violated their obligations to preserve and to produce critical evidence. They, along with co-contemnors Sands and Sousa, willfully ignored and circumvented the Court's preliminary injunction order. Since the Court issued its Supplemental Permanent Injunction (Doc. 606) in October 2013, Defendants have openly defied the Court's authority in front of subordinates, repeatedly violated the Court's discovery orders, deliberately misled the Court-appointed Monitor, and willfully subverted MCSO's internal affairs system to evade being held responsible for their misconduct. And even after they were called to account in a civil contempt proceeding, Arpaio and Sheridan continued to flout the rule of law by lying on the witness stand. At the same time, Defendants have engaged in ongoing and gross noncompliance with key provisions of the Supplemental Permanent Injunction (*see infra* at Part I).

In short, for more than eight years, Sheriff Arpaio has defied this Court and his obligations in the litigation. He has proved unwilling to comply with the law. Strong remedies are needed to protect the rights of the Plaintiff class.

LEGAL STANDARD

Plaintiffs' requested remedies are well supported by controlling case law. When defendant officials violate court orders, as has been found here, the district court has "broad power to fashion a remedy." *See Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971); *see also Brown v. Plata*, 563 U.S. 493, 511, 516 (2011); *Hutto v. Finney*, 437 U.S. 678, 690 (1978); *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977). In such cases, and even absent a finding of civil contempt, the district court may order broad injunctive measures, including imposition of detailed institution-wide policies and the transfer of control of the agency to special masters or receivers. *See, e.g.*, *Swann*, 402 U.S. at 28; *Plata*, 563 U.S. at

511; *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 859 n.18 (9th Cir. 1992); *Allen v. City of Oakland.*, No. 00-CV-4599-TEH, Order re: Compliance Director, Doc. 885 (N.D. Cal. Dec. 12, 2012) (copy attached hereto at Tab 1). As discussed below, such injunctive relief may include barring the contemnor from engaging in certain work or responsibilities until he or she demonstrates the ability to comply with court orders. *See, e.g., Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 518 (9th Cir. 1992) (citing *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965)). Remedies for civil contempt may also include compensatory damages to the victims of the violations, prospective fines that can be purged by compliance, and attorneys' fees and costs. *See, e.g., Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.*, 539 F.3d 1039, 1042-43 (9th Cir. 2008); *see also infra* Part VI.

PLAINTIFFS' PROPOSED REMEDIES

I. Enlarging the Monitor's Authority To Enforce the Court's Orders

Defendants' willful contempt on three counts is part of a larger and ongoing pattern of intentional violations of the Court's orders and Sheriff Arpaio's and Chief Deputy Sheridan's avowed resistance to the Court's authority. Findings of Fact (Doc. 1677) ("Contempt Findings") at 1-3. As a remedy for the civil contempt, the Court should grant the Monitor additional powers to command directly the implementation of measures needed to bring the MCSO into compliance with the Court's prior orders.

Defendants' egregious and continuing noncompliance with the Court's orders, including key portions of the Supplemental Permanent Injunction, poses a continuing danger to class members. The Court-appointed Monitor's Seventh Report (Doc. 1667), which covers the period from October to December 2015, demonstrates that Defendants have violated numerous deadlines in the Supplemental Permanent Injunction and that the overall pace of compliance with the Supplemental Permanent Injunction is unacceptably slow. As of the end of 2015, MCSO's Phase 1 compliance—which looks only to whether court-mandated policies and procedures have been promulgated and whether personnel have been trained on those policies and procedures—stood at only 61%, despite the passage of more

than two years since the Court issued the Supplemental Permanent Injunction. Seventh Report at 9. MCSO has reached only 38% Phase 2 compliance, which measures actual compliance with the court-mandated policies. *Id.* Moreover, the Seventh Report indicates that MCSO improved its Phase 1 compliance by only 4% over the previous quarter, and improved its Phase 2 compliance by only 1%. *Compare* Seventh Report at 9 *with* Monitor's Sixth Report (Doc. 1621) at 8. This pace is unacceptable.

The details behind the bare percentage points are even more troubling, as Defendants have missed, by a margin of *years*, firm deadlines imposed by the Court for completion of key tasks in the Supplemental Permanent Injunction. To list only a few examples:

- Defendants were to complete an initial training for MCSO supervisors within 180 days of the effective date of the Supplemental Permanent Injunction—that is, by March 31, 2014. To date, more than two years after that court-imposed deadline, that supervisors' training has not been given. Seventh Report at 55-56.
- The Supplemental Permanent Injunction (¶ 61) provided that body-worn cameras should have been issued to all patrol vehicles that make traffic stops within two years of the effective date, or by October 2, 2015. But by the end of 2015, Defendants had only fully implemented body-worn cameras in a single patrol district, and their draft operational manual on body-worn cameras had not been approved by the Monitor. *Id.* at 85, 87-88. Moreover, Defendants went ahead and implemented a training on body-worn cameras even though the Monitor had not approved the lesson plan. After observing the training, the Monitor noted that Defendants' failure to address the Monitor's concerns in the training program may lead to failures to comply with policy in the field. Seventh Report at 58.
- Defendants are required to conduct periodic analyses of traffic stop data to determine if there are warning signs or indicia of racial profiling or improper conduct by deputies. Supplemental Permanent Injunction ¶ 64. The Monitor's Seventh Report (at 88-90) details Defendants' numerous delays and failures to provide timely information relating to this requirement. Defendants had not achieved even Phase 1 compliance by the end of 2015, violating the Supplemental Permanent Injunction's deadline for full compliance within 180 days of the effective date (¶¶ 50, 52), or March 31, 2014.

Based on these failures to comply with basic provisions of the Supplemental Permanent Injunction more than two years after the deadlines set, and the record of the contemnors' willful defiance of the Court's orders, it is clear that typical measures of remediation have proven ineffective and the existing powers of the Monitor "to assist with implementation of, and assess compliance with" the Injunction are inadequate. The

Supplemental Permanent Injunction should therefore be modified to permit the Monitor to directly command the implementation of those measures needed to bring the MCSO into compliance with the Court's orders, including but not limited to: directing MCSO personnel to take specific actions to achieve compliance, the assignment of specific individuals in or out of MCSO units charged with compliance tasks, and the expenditure of resources necessary to achieve compliance.

Courts have ordered such authority, and more, in similar circumstances, using their "broad equitable remedial powers" to enforce and effectuate their orders and judgments. *Stone*, 968 F.2d at 861. "[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance." *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *23-25 (N.D. Cal. Oct. 3, 2005) (quoting *Hutto v. Finney*, 437 U.S., 678, 690 (1979)). Indeed, under similar circumstances where an agency has failed to comply with an injunction and institutional commanders have demonstrated their lack of leadership, courts have imposed the more drastic remedy of a receivership. *See id.*; *Allen v. City of Oakland*, No. 00-CV-4599-TEH, Doc. 885, at 4-6 (giving Compliance Director expanded power over personnel decisions as remedy to police department's lack of progress on injunction, on consent of parties); *Campbell v. McGruder*, No. 1462-71 (WBB), Findings and Order Appointing Receiver, at 7-10 (D.D.C. July 11, 1995) (copy attached hereto at Tab 3) (endowing receiver with broad power to create system and procedures to ensure compliance with injunction); *United States v. Jefferson Cty.*, No. CV-75-S-666-S, Order Appointing Receiver, at 1-10 (N.D. Ala. Oct. 25, 2013) (copy attached hereto at Tab 4) (appointing receiver with power over county personnel board after finding defendant county to be in civil contempt of injunction); *Shaw v. Allen*, 771 F. Supp. 760, 764 (S.D. W. Va. 1990) (appointing receiver to "devise and implement such plans and procedures as shall be necessary to ensure that the basic privileges and rights of inmates are recognized and observed"); *Newman v. State of Ala.*, 466 F. Supp. 628, 635 (M.D. Ala. 1979); *Morgan v. McDonough*, 540 F.2d 527, 533 (lst Cir. 1976); *Wayne County Jail Inmates, et al. v. Wayne*

County Chief Executive Officer, 444 N.W.2d 549, 560–61 (Mich. Ct. App. 1989); *Crain v. Bordenkircher*, 376 S.E.2d 140, 143 (W.Va.1988).

II. Enlarging the Monitor's Authority in Internal Affairs and Discipline Matters

The Court has found that Sheriff Arpaio and his designees have subverted MCSO's internal affairs ("IA") and discipline system "to avoid accountability for themselves, their protégés, and those who have implemented their flawed policies" and continue to attempt to conceal wrongdoing. Contempt Findings ¶ 889. Plaintiffs urge that the Court order the remedies described in Paragraphs 903, 904, and 905 of the contempt findings, and that all decision-making responsibility for those categories of investigations, including discipline, be given to the Monitor.[1]

The Court should also suspend the authority of Sheriff Arpaio or any of his designees to alter in any way the findings of policy violations or disciplinary decisions with respect to any of these investigations. Permitting the Sheriff to retain that authority would likely render these investigations futile, as demonstrated above by previously mishandled investigations. Removing this authority from Sheriff Arpaio is well within the Court's inherent power to "invoke the weight of the judicial authority if state and local authorities, who have the primary responsibility for curing constitutional violations, fail in their affirmative obligations." *See Milliken*, 433 U.S. at 281 (citation omitted). "[F]ederal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights." *Stone*, 968 F.2d at 861. This includes the transfer of decision-making control to an independent authority. *See, e.g.*, *Plata*, 563 U.S. at 511; *Swann*, 402 U.S. at 28.

A. Paragraph 903: Invalidation of Past Investigations and Discipline

Plaintiffs urge that all "past investigations, disciplinary decisions, and/or grievance decisions found to be insufficient, invalid, or void" in the Court's findings should be re-

[1] If the Court is inclined to order that authority over any of these categories of investigations be placed with someone other than the Monitor, Plaintiffs respectfully request the opportunity to nominate candidates.

investigated and re-determined by the Monitor. Plaintiffs propose that all cases listed in Defendants' current spreadsheet of "Armendariz-related" IA cases, Doc. 1673-1, including those that remain open, Doc. 1674 (under seal), should be included in this category for re-investigation and re-determination. These cases were infected by the participation of Captain Bailey, who had a conflict of interest as a former commander over most of the principals in those cases and who was found by this Court to have misled the Monitor, Contempt Findings ¶ 711, and Chief Deputy Sheridan, who appointed Bailey and was the ultimate authority over all of those cases, *id*. ¶ 889. Given the numerous instances of biased-decision making, intentional manipulation, and negligent mishandling during IA investigations and disciplinary proceedings by Chief Deputy Sheridan, who remains Sheriff Arpaio's designee for IA and discipline matters, Plaintiffs have no confidence in the integrity of any of these investigations.

The process for redoing past deficient investigations and completing new investigations must be completed in a timely fashion. It has now been more than two years since much of the underlying misconduct came to light and finally resolving these IA cases is necessary to safeguard the interests of the Plaintiff class.[2] Aside from imposing discipline where warranted, an immediate, open, and thorough investigation of the misconduct is needed to root out systemic problems and to prevent recurrences of similar conduct in the future. Findings of misconduct can inform the remedies necessary to correct past practices

[2] To the extent that Defendants or any employee subject to these investigations contend that the statutory scheme set forth in Ariz. Rev. Stat. § 38-1101, *et seq*.— including the requirement that employers make a good faith effort to complete investigations within 180 days (§ 38-1110)— prevents the issuance of discipline in these cases, that argument has been rejected by this Court. Doc. 795 at 20-21. First, the statute has not prevented MCSO from issuing discipline in some IA cases beyond the 180-day period. Contempt Findings ¶ 716. And in any event, investigations conducted by an independent authority, such as the Monitor, "are not investigations conducted by an 'employer' and do not implicate the statutory protections." Doc. 795 at 20. Any discipline issued as a result of these investigations would be pursuant to this Court's inherent powers to ensure compliance with its own orders and to cure constitutional violations. Further, there is evidence that the timing on certain investigations was manipulated by MCSO officials so as to create a justification to impose no (or very minor) discipline. Contempt Findings ¶ 578. MCSO should be estopped from using such misconduct to its own benefit. *See, e.g.*, *Estate of Amaro v. City of Oakland*, 653 F.3d 808, 813-15 (9th Cir. 2011). There is no justification for preventing the issuance of discipline under the order of this Court.

and to prevent further harm to the Plaintiff class, and should be taken into consideration in any future disciplinary proceedings against deputies who are found to have violated MCSO policy or other laws. These findings would also permit Plaintiffs to seek other relief, including the exclusion of employees found to have engaged in certain misconduct from positions and responsibilities that can expose members of the Plaintiff class to wrongdoing.

B. Paragraph 904: New Investigations into Uninvestigated Misconduct

Plaintiffs urge that the Monitor should undertake an investigation of all uninvestigated misconduct that has been revealed to date, including incidents involving any harm to the interests of the Plaintiff class, policy violations in the handling of internal investigations, and untruthfulness during or in connection with these proceedings. This must include at a minimum, the following areas of investigation:

(1) The mishandling of internal investigations by Chief Deputy Sheridan, Captain Bailey, Sergeant Tennyson, Detective Zebro, and any other employee who the Monitor determines to have played a role in the deficient investigations. These violations include but are not limited to the manipulation of timing on investigations to influence discipline, biased decision-making, improper investigative techniques, and the deliberate or negligent mishandling of investigations.

(2) All uninvestigated incidents of untruthfulness set forth in the Court's May 13, 2016 Order, including misstatements made to the Court by Chief Deputy Sheridan (Contempt Findings ¶¶ 87, 229-30, 326, 333-39, 348, 385, 816, 823), Chief Trombi (*id.* ¶¶ 517, 521), and Captain Bailey (*id.* ¶¶ 342, 348). The handling of the 1,459 IDs by Sheridan, Bailey, and others should also be investigated.[3] *Id.* ¶¶ 294-348. Investigations must also be opened for any MCSO personnel who claimed that confiscated IDs were used for training purposes, to determine whether those statements were untruthful. *Id.* ¶ 638.

[3] To the extent that members of the Monitor team were involved in the events underlying this investigation or others, those individuals have been walled off from others on the Monitor team pursuant to pursuant to the Court's November 20, 2014 Order (Doc. 795) at 18, and should remain walled off from those members of the Monitor team with responsibility for these new investigations.

(3) Property that may have been improperly seized or inventoried and not been investigated to date. As found by the Court, "MCSO initiated investigations into only 28 of over a thousand items of personal property found at Deputy Armendariz's house." *Id.* ¶ 720. Investigations of all other improperly handled items, including IDs, license plates, drugs, weapons, credit cards, bank cards, cell phones, and money must be conducted.

(4) The mishandling of the Court's May 14, 2014 Order by Chief Deputy Sheridan and Chief Trombi. *Id.* ¶ 233.

(5) Detective Frei's mishandling of property and attempting to destroy evidence relating to his investigation. *Id.* ¶¶ 699-700.

(6) Uninvestigated possible misconduct in the IA investigation of Mary Ann McKessy's allegations about Detective Mackiewicz, including the conflict of interest in the participation of Chief Deputy Sheridan, Captain Bailey, and Sergeant Tennyson, in the investigation of their friend, and whether that conflict actually affected the IA investigation. *Id*. ¶¶ 766-825.

For incidents in which the Court's findings provide a sufficient factual basis to demonstrate a policy violation, Plaintiffs request that the Monitor determine appropriate discipline based on the Court's findings without any further investigation or delay. Employees subject to such adverse findings would still be entitled to any post-disciplinary procedures.

C. Paragraph 905: Future Investigations Relating to the Interests of the Plaintiff Class

Plaintiffs urge the Court to order that the Monitor have final approval and discipline authority in all IA cases involving policy violations bearing on issues related to this case, including all potential policy violations relating to improper detentions, racial bias, immigration enforcement, and the confiscation of property. Proper internal oversight over these matters must be undertaken by an independent authority without regard to whether the victim is a specifically member of the Plaintiff class. Because the facts found by the Court

indicate systemic problems in these areas, and because the Court has found that the Plaintiff class has been disproportionately impacted by those systemic failures, *id*. ¶¶ 888-89, all of these categories of misconduct must be given careful scrutiny to prevent future harms to members of the Plaintiff class.

For the protection of the Plaintiff class, it is critical that MCSO reform its IA and discipline process (*see infra* Part III) and that IA investigators and commanders learn to conduct investigations and disciplinary proceedings with integrity. Thus, MCSO should itself conduct these future investigations, pursuant to reformed policies, and the Monitor should have unfettered access to those investigations and proceedings; the authority to override improper actions in the course of those investigations; and the authority to re-determine findings or disciplinary measures that are inconsistent with revised policies. In order to carry out this function, the Monitor must also have the authority to guide the investigation and discipline process, including the power to: identify suspected policy violations or criminal misconduct for investigation; review and modify investigatory plans; intervene in the investigation process when necessary, for example, to require certain interviews, to order that a certain investigatory approach or technique be used, to stop problematic interviews and to provide direction on how such interviews should be conducted; direct steps necessary to ensure the disciplinary process will be completed in a timely manner; intervene in the disciplinary process, including reviewing initial findings and recommendations, and participating or giving direction in any subsequent part of the process, such as predetermination or "name clearing" hearings.

The Court's findings show that providing such powers to the Monitor is necessary to ensure that the Defendants' subversion of the IA and disciplinary process does not continue to the Plaintiff class's detriment. Notably, Sheriff Arpaio testified during the contempt hearing that he would not object to the Monitor conducting internal investigations of MCSO personnel, and that it was possible he would not object to the Monitor having the power to make final dispositions on discipline. October 1, 2015 Hearing Tr. 2037:20-2038:15,

2041:14-2042:14. And courts have imposed similar measures on a record of noncompliance. *See, e.g., Plata v. Schwarzenegger*, No. C01-1351, Order Appointing Receiver, at 4-8 (N.D. Cal. Feb. 14, 2006) (copy attached hereto at Tab 2) (giving Compliance Director power over, among other things, all personnel decisions including promotions, demotions, and disciplinary actions, as remedy to agency's lack of progress on injunction); *Allen v. City of Oakland*, No. 00-CV-4599-TEH, Doc. 885, at 4-8 (same, on consent of parties); *Campbell v. McGruder*, No. 1462-71 (WBB), Findings and Order Appointing Receiver, at 7-10 (D.D.C. July 11, 1995) (copy attached hereto at Tab 3) (endowing receiver with broad power to create system and procedures to ensure compliance with injunction); *United States v. Jefferson Cty.*, No. CV-75-S-666-S, Order Appointing Receiver, at 1-10 (N.D. Ala. Oct. 25, 2013) (copy attached hereto at Tab 4) (appointing receiver with power over county personnel board after finding defendant county to be in civil contempt of injunction); *Wayne Cty. Jail Inmates*, 444 N.W.2d at 555-56 (upholding lower court's transfer to receiver of "all authority with respect to the operation of the jail that formerly resided in the Sheriff of Wayne County" after lack of progress on injunction).

Finally, these additional new powers of the Monitor over future investigations should be set forth as an amendment to the Supplemental Permanent Injunction, and the Court should provide that Defendants must demonstrate to the Court's satisfaction that they are in compliance with sound IA and disciplinary practices. The Court should maintain jurisdiction until Defendants have demonstrated their full compliance with this provision and all others in the Supplemental Permanent Injunction, for a period of no less than three years. Supplemental Permanent Injunction ¶ 3.

III. Reforms to MCSO's Internal Affairs and Discipline Policies and Practices

This Court found that "Defendants did not make a good faith effort to fairly and impartially investigate and discipline misconduct" and misused use the IA system to "escape accountability," Contempt Findings at 2, including in the IA 2014-543 case concerning violations of the Court's preliminary injunction, *id*. ¶¶ 405-583. As a remedy for the civil

contempt, and as an exercise of the Court's authority to impose injunctive relief to protect the rights of the Plaintiff class, Plaintiffs request the following reforms to MCSO's IA and discipline policies and procedures. While the Court did not enter Plaintiffs' originally proposed remedial measures relating to IA following the trial decision in May 2013, circumstances have changed.[4] The Court's findings on systemic deficiencies in the existing policies and procedures demonstrate the need for comprehensive reforms.

A. Appointment of a New Commander of the Professional Standards Bureau and Barring Personnel Who Have Engaged in Misconduct in IA Cases from Future IA Responsibilities

The Court found that actual and apparent conflicts of interest and biases continue to permeate the MCSO's IA system. Strong reforms must be ordered, including the appointment of new, outside leadership over the Professional Standards Bureau ("PSB"), the removal of IA authority from several MCSO officials, and promulgation of new policies.

MCSO has demonstrated an inability to ensure that IA investigations are free from improper motivations to absolve employees of wrongdoing. The Court found that MCSO officials from the top down, including Sheriff Arpaio, Chief Deputy Sheridan, Chief Olson, Captain Bailey, Sergeant Tennyson, and Detective Zebro, intentionally permitted conflicts of interests and biases to enter into decision-making over IA matters, with an impact on outcomes. Contempt Findings ¶¶ 407-08, 440-455, 484-89, 660-68, 756-58, 814-25, 889.

The Court's findings show that no one currently within the MCSO hierarchy can properly oversee PSB. In order to remove the taint created by the past instances of bias and favoritism—deliberately imposed by the two commanders at the very top of the organization—and to ensure that future violations of the class members' rights are properly addressed, the Court should appoint a PSB commander who has no previous connections with MCSO, with an opportunity for all parties to nominate candidates. This reform has

[4] Plaintiffs do not believe expert testimony is necessary at this point. If, however, the Court desires to hear from an expert on specific issues or permits Defendants to present expert testimony, Plaintiffs request the opportunity to present an expert.

been used in other jurisdictions, including most recently with the New Orleans Police Department. *See* Doc. 1590-5 (New Orleans Police Dep't Decree at 95).

In addition, based on the record of clear misconduct during IA investigations, the Court should prohibit Sheriff Arpaio, Chief Deputy Sheridan, Chief Olson, Captain Bailey, Sergeant Tennyson, and Detective Zebro from having any involvement in criminal or administrative internal investigations and the disciplinary process in the category of cases subject to the Monitor's final decision-making power. Their authority to participate in these matters may be restored if they later demonstrate to the Court's satisfaction that they will not engage in further illegal subversion of the IA and discipline process. *See Whittaker Corp.*, 953 F.2d at 518 (barring defendant from engaging in business activities in which he had demonstrated illegal conduct and permitting purge of the injunction) (citing *Lance,* 353 F.2d at 592 (barring deputy sheriff from serving in law enforcement until he could demonstrate to the court that he would comply with the law)).

B. Revision of MCSO's IA and Discipline Policies and Operations Manuals

Based upon the Court's findings, it is apparent that a comprehensive review and revision to MCSO's various policies and operations manuals relating to IA investigations and the discipline process must be conducted to eliminate the deficiencies found by the Court. This review and revision should be subject to the input of all parties and the approval of the Monitor and ultimately the Court. The policy reforms should include, at a minimum:

1. Conflicts of Interest

MCSO should be required to develop policies to prevent conflicts of interest and bias from entering into all employment-related decisions, including internal investigations. MCSO personnel must be forbidden to participate in any IA investigation or disciplinary proceeding when they have a close personal relationship with the principal or a witness. MCSO must also be required to establish clear eligibility guidelines for selection of employees handling internal investigations, as either an investigator or supervisor. At a minimum, these guidelines must ensure that employees assigned to handle IA matters do not

present systematic conflicts of interest (as Captain Bailey did), have been adequately trained, have a record of good behavior and performance, and do not have a record of repeated deficiencies or policy violations. Further, PSB must be required to review the eligibility of any employee selected outside of PSB to handle IA matters.

2. Establishing Uniform IA Practices throughout MCSO

The contempt findings demonstrate that many MCSO IA cases are investigated not by PSB, but by sergeants or lieutenants in the Bureau or Division to which the principal is assigned. Contempt Findings ¶¶ 592-95. Nonetheless, MCSO has no policies to ensure that consistent practices are followed and that consistent training is given to all IA investigators across the agency. This has resulted in inconsistent and inadequate investigations. *Id.* ¶ 596 (noting that each division had different interpretations of such policies). The policy reforms must address these serious deficiencies. PSB should also be required to audit and to review substantively all internal investigations conducted by non-PSB investigators.

3. Ensuring Fair and Consistent Discipline, Including Proper Record-Keeping, Documentation, and Tracking of IA Cases

The Court also found that in IA cases related to this litigation, MCSO failed to ensure that proper and consistent discipline was imposed. For example, in IA cases it deemed to be related to this litigation, MCSO deliberately chose to count multiple separate instances of misconduct as a single instance of misconduct for purposes of assessing the employee's past disciplinary record in future discipline cases. Contempt Findings ¶¶ 510-15. And in several cases, including the 2014-542 and 2014-543 cases directly relating to this litigation, the disciplinary matrix was misapplied or manipulated in order to impose more lenient discipline. *Id*. ¶¶ 501-15, 532-37, 589. Further compounding these problems, IA investigators and supervisors were not required to and consistently failed to document the reasons for their findings or discipline decisions at any stage of the process. *See id.* ¶¶ 438, 553-55; Sept. 24, 2015 Hearing Tr. 1207.

New policies and training must ensure that decisions as to discipline are consistent, pursuant to clear policy, adequately documented, and subject to proper oversight. This includes provisions for adequate record-keeping and transparency, including written justification for all findings (Sustained, Not Sustained, Exonerated, Unfounded) and the measure of discipline. This must occur at each stage of the disciplinary process, and in particular when there is any modification of a preliminary finding of a policy violation or initial determination of discipline, or when there is a departure from the discipline matrix. In the event that any modification to the discipline decision is made, the investigator and any prior decision-making authority must be promptly notified.

Procedures must be put in place to ensure that discipline is being issued consistently and properly pursuant to the disciplinary matrix, including periodic review of disciplinary decisions.

MCSO should also adopt a policy that prevents the promotion of or salary increase for individuals under investigation, and guidelines for when disciplinary findings should bar future promotions. *See* Contempt Findings ¶¶ 499-500.

MCSO must also ensure that the PSB has all records of past and current investigations in an accessible format, such as a single digitally-maintained file. In order to guarantee that past discipline is properly considered during investigations, records of past investigations must be readily accessible.

PSB should also systematically track current investigations—whether conducted by PSB or the principal's assigned bureau or division—to ensure that they are being handled in a timely fashion. Sergeant Tennyson, for example, was permitted to shelve an investigation for approximately seven months without any oversight or requirement that he report periodically on the status of the investigation. Oct. 13, 2015 Hearing Tr. 2981. Similarly, Chief Rodriguez rescinded a written reprimand against Lieutenant Sousa based in part on inadequate tracking of civilian complaints. Contempt Findings ¶ 529. Policies must be promulgated to prevent these unfair practices from reoccurring.

4. Requiring Use of Best Practices in IA Investigations

The Court found that MCSO relied on flawed investigatory practices, such as conducting interviews in a manner demonstrating that the investigator had prejudged the case and aimed to exonerate the employee, conducting the investigation without adequate discovery or a complete record, and providing witnesses or principals with an opportunity to tailor statements by disclosing documents and other witnesses' statements prior to interviews. *Id*. ¶¶ 424-32, 451, 588, 609-92, 766-837; Oct. 1, 2015 Hearing Tr. 2089. MSCO must be required to amend its IA policies to set clear guidelines for investigative techniques, and for PSB supervisors to ensure that proper investigative techniques are used.

In addition, MCSO should revise its disciplinary policies to guide and to limit the discretion of commanders during the predetermination or "name clearing" and grievance processes.[5] The contempt record demonstrates that Chief Deputy Sheridan and Chief Olson changed preliminary findings of Sustained to Not Sustained and reduced discipline based upon the employee's introduction of new evidence for the first time during predetermination or name clearing hearings, or based on the employee's argument that others who were also responsible for the same policy violation had not been held accountable. *See*, *e.g.*, Contempt Findings ¶¶ 394, 434-572, 752-60. MCSO policy should be amended to prevent this.[6]

C. Training Requirements for IA Investigators and Commanders Involved the Disciplinary Process

MCSO does not provide any training on how to conduct administrative or criminal investigations, and none of the witnesses who were involved in internal investigations—including the commander of PSB and lieutenants supervising investigators—had received

[5] MCSO's use of the term "name clearing hearing"—which presupposes that the employee's name will be cleared—itself demonstrates that the discipline system is skewed in favor of the employee. The term should be eliminated in the policy revision process.

[6] For example, in administrative investigations, employees are compelled to provide statements and information. Therefore, any information maintained by the employee that bears on the matter must be disclosed during the investigation. If newly discovered evidence is introduced after the investigation, that evidence should be referred back to the original investigator to be properly considered. If an employee withholds information or seeks to introduce it in an untimely fashion, such conduct should be considered for separate policy violations.

any training from MCSO. *Id.* ¶¶ 826-37. Currently, MCSO expects employees assigned to IA investigations to simply train themselves. *See* Ex. 2790 (IA operations manual, noting that "it is the responsibility of the individuals working within the division to familiarize themselves with this manual"). MCSO must provide and require training for all individuals assigned to conduct or supervise any internal investigations.

D. Ensuring Adequate IA Investigation Capacity

MCSO witnesses testified to gross understaffing of PSB. *See* Oct. 13, 2015 Hearing Tr. 3147-49, 3159; Oct. 1, 2015 Hearing Tr. 2082, 2085. Plaintiffs request that the Monitor assess the level of PSB staffing needed to ensure the integrity of PSB-conducted IA investigations and sufficient review of IA investigations conducted by other divisions or bureaus, and that MCSO be required to increase PSB staffing accordingly.

E. Reforms to Investigations of Misconduct by MCSO Personnel that May Be Criminal in Nature

In light of the serious misconduct found by the Court in MCSO's handling of suspected criminal conduct by MCSO personnel affecting the Plaintiff class, the Court should institute reforms of such investigations. *See, e.g.*, Contempt Findings ¶¶ 602-92 (describing Sergeant Tennyson's "perfunctory whitewash" of criminal investigation); ¶¶ 646-47 (MCSO made no effort to locate potential victims of crimes, who were also members of the Plaintiff class); ¶ 750 (Tennyson's inability to identify a potential crime with respect to a missing $260)); ¶¶ 660-69 (approval of Tennyson's flawed investigatory techniques by the chain of command). MCSO must be required to establish clear policies and procedures on handling internal criminal investigations, including guidelines for deciding when to initiate criminal IA investigations and for the referral of matters for criminal prosecution. Currently, MCSO policy on internal criminal investigations constitutes only half a page. Oct. 1, 2015 Hearing Tr. 2090. Among other things, these policies must address MCSO's lack of protocols for when MCSO decides to close an internal criminal investigation or declines to refer a matter to the County Attorney, including a

requirement that such decisions must be justified and documented in writing. Contempt Findings ¶¶ 609-12; Oct. 1, 2015 Hearing Tr. 2091-92. MCSO policy must also set forth what information should be provided to the County Attorney in the event of a referral or consultation on a criminal matter, so as to ensure proper consideration of the matter for potential prosecution. Contempt Findings ¶¶ 679-83 (describing Tennyson's providing incomplete information).

The Court found that MCSO has used the pendency of a criminal IA investigation to delay the related administrative investigation, with detrimental impacts on the ability to impose discipline in the latter. Contempt Findings ¶¶ 604-05. MCSO policy should be amended to prevent this. Prompt handling of policy violations through administrative investigations is critical for internal reform. There is no valid reason for criminal and administrative proceedings to proceed *seriatim* if proper procedures are in place. An employee can be advised of the nature of each interview, receiving a *Miranda* warning prior to criminal interviews and a *Garrity* warning prior to administrative interviews. MCSO policy can provide investigators with guidelines on the proper timing of interviews in these instances and prevent the contamination of the criminal investigations with compelled statements given in administrative interviews.

IV. Modifications to the Supplemental Permanent Injunction To Address Defendants' Pattern of Noncompliance

Plaintiffs propose several additional modifications to the Supplemental Permanent Injunction to ensure that the Defendants' broad pattern of willful noncompliance ends, and to remove structural and policy obstacles to Defendants' future compliance.

A. Setting of Deadlines for Compliance with Supplemental Injunction and Implementation of Prospective Coercive Measures

As set forth above in Part I, Defendants have broadly failed to comply with the Supplemental Permanent Injunction, as well as the court orders at issue in the civil contempt proceedings. To address this pattern of noncompliance, Plaintiffs request that the Court

impose new, firm deadlines, backed by prospective fines and other coercive measures to ensure that these deadlines are not also disregarded by the Defendants.

B. Supervision Ratio

The Court's contempt findings demonstrate a systematic failure of supervision within MCSO. Contempt Findings ¶¶ 568-70, 838-49. This is a serious concern because, among other reasons, Sections IX and X of the Supplemental Permanent Injunction impose important duties on supervisors, including but not limited to: regular review of a random selection of traffic stop recordings, training on and constant use of the Early Identification System to evaluate deputies for signs of racial profiling or other unlawful activity, and review of daily activity reports by deputies. According to the Monitor's Seventh Report (at 6-7), Defendants are not in compliance with those provisions. The Monitor identified a fundamental problem reported by Patrol Division commanders and supervisors: "supervisors are finding it difficult to find sufficient time for adequate proactive supervision." *Id.* at 119. Without sufficient capacity among its supervisor ranks, there is little hope that Defendants can comply with the Court's Supplemental Permanent Injunction.

Plaintiffs therefore propose that Paragraph 84 of the Supplemental Permanent Injunction be modified to require a supervisor-to-deputy ration of 1:8. While the Court rejected this same proposal from Plaintiffs at the time the Supplemental Permanent Injunction issued in October 2013 (*compare* Proposed Consent Order (Doc. 1667) at 41 *with* Supplemental Permanent Injunction ¶ 84), circumstances have changed. The contempt findings and the Monitor's Seventh Report indicate that the 1:12 ratio is inadequate to secure compliance with Defendants' obligations under Sections IX and X of the Supplemental Permanent Injunction.

C. Policies and Practices on Civilian Complaints

The Court made numerous detailed findings that MCSO's complaint-intake process is inadequate because it does not reliably track complaints, personnel are not trained on how to handle complaints, and the process lacks consistency and accountability. *See* Contempt

Findings ¶¶ 850-67. Relatedly, the Court found that MSCO's discipline process does not adequately categorize and address civilian complaints. *Id.* ¶¶ 852, 859-61; *see also id.* ¶¶ 863-65. Based upon these findings, the Supplemental Permanent Injunction should be modified to require that MCSO's policies relating to the intake and handling of civilian complaints, including their treatment in the internal affairs and discipline system, must be revised to address these systemic deficiencies, and that MCSO must provide training to all sworn-side supervisors and deputies on the amended policies. Further, the Court should set a firm deadline for compliance with the policy and training requirements.

The new policies should guarantee that MCSO maintains accurate and complete data regarding the number, nature, and status of all complaints, from initial intake to final disposition. To ensure that all complaints are received and logged, each deputy should carry complaint forms and informational brochures on how to file complaints, and an uninvolved supervisor should be available to receive complaints made at the scene of a traffic stop or incident. MCSO should ensure the public can easily file complaints in English or Spanish by mail, online, or through a free, 24-hour hotline. An ombudsman's office should be created to take complaints; it should be housed *outside* of the MCSO but be physically located in Maricopa County. Finally, anonymous complaints and third-party complaints should also be accepted. To discourage officers from retaliating against complainants or failing to properly log complaints, MCSO should also have an anti-retaliation policy that contains disciplinary measures. All of these measures will assist in making sure that *all* complaints are received, processed, and investigated. *See id.* ¶ 852.

As soon as a complaint is received by MCSO, complainants should receive a reference number and be able to track the status of their case over the phone or online. This will ensure transparency and allow complainants to confirm that deputies have properly logged complaints. *See id.* ¶¶ 857-89. MCSO should also institute a "testers" program where auditors submit complaints by posing as civilians in order to determine whether

officers are routinely entering complaints into the system and assigning complaints reference and IA numbers. *Id*. ¶ 857.

In addition, all civilian complaints—not just those categorized by a Bureau or Division commander as implicating major discipline—should be immediately forwarded to the PSB upon receipt by anyone in MCSO, and an IA number should be generated. This measure will ensure that civilian complaints are thoroughly investigated and that complaints are not miscategorized at the very outset. *See id.* ¶¶ 859-61.

Finally, in revising its complaint intake policy, MCSO should engage an independent vendor to conduct a study to assess barriers that prevent civilians from filing complaints, and provide a plan to further amend the complaint-intake policy that addresses those barriers. Once the complaint-intake policy is amended, the County should fund a public information campaign to inform the community about how to file complaints with MCSO and how to track their complaints. Nonprofit agencies can be engaged to host complaint drives and liaise with hard-to-reach communities.

D. Funding for Outreach Activities of the Community Advisory Board

Plaintiffs request that the Court order Defendants to provide for annual funding for outreach activities of the Community Advisory Board ("CAB"). The contempt proceedings have generated a great deal of community concern and eroded community trust in MCSO. The CAB currently consists of volunteer members with no funding for advertising and facilities that would permit them to gather and to disseminate information to the broader community about these contempt proceedings and the ongoing compliance process.

V. Compensation for Victims of Defendants' Violations of the Preliminary Injunction

The Court found that "at least hundreds of members of the Plaintiff class … have been injured by the Contemnors' past failures to take reasonable steps to implement this Court's preliminary injunction." *Id.* ¶ 879. Although the Court has suggested that compensation might be better handled through separate proceedings, *id.* ¶ 881, Plaintiffs

respectfully submit that the immediate implementation of a claims compensation system is warranted and will simplify the process, reduce costs, and ensure maximum access to compensation to the broadest number of victims. This Court unquestionably has the power to order compensation as a remedy for civil contempt. *See Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 958-59 (9th Cir. 2014).

Plaintiffs have conducted substantial research on models for victim compensation. After meeting and conferring, they and Defendants ("the Parties") have reached agreement on many aspects of a proposed compensation system. A document outlining the agreed-to measures and contested measures proposed by either of the Parties is attached at Tab 5a.

The County and individual contemnors should be jointly liable for the costs of implementing the compensation system. *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) ("Municipal liability under section 1983 attaches . . . where 'a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'") (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality opinion)). Sheriff Arpaio should also be *personally* liable (jointly and severally with the County and other contemnors) for compensating persons who were detained as a result of his deliberate decision not to comply with the preliminary injunction. Because of his primary role in the contempt, Sheriff Arpaio should be required to deposit $300,000 of his personal funds by July 1, 2016, to provide initial funding for a notice and outreach program (*see infra* Part V.B.2) and for compensation to victims of his contempt. He should not be reimbursed with public funds, although Maricopa County will be liable in case of his nonpayment pursuant to its municipal liability obligations. The County, Arpaio, and other contemnors, Chief Sheridan, former Chief Sands, and Lieutenant Sousa, should be jointly and severally liable for all costs of compensation including those beyond the initial fund of $300,000.

A. Uncontested Features of the Compensation System

The Parties largely agree that the Court should adopt a claims process that compensates victims for their unlawful detention and, in some cases, for collateral physical harm, lost wages, and emotional distress. Following are some of the key features of the joint proposal:

(1) **Appointment of an Administrator**: The Court should appoint BrownGreer PLC, an independent, experienced firm, to design and to implement the claims compensation process.

(2) **Notice and Outreach:** BrownGreer should develop and implement a targeted, culturally-appropriate notice and outreach campaign to identify victims of the Defendants' contempt and to publicize the claims compensation process.

(3) **Opt-In Structure**: Victims' participation in the scheme will be voluntary. Claimants who are eligible and participate will waive and extinguish any right they might otherwise have to obtain relief for the same conduct through any other avenue. The rights of those who do not participate in the claims process will not be affected.

(4) **Award Process**: Each claimant will have a 12-month window to apply and must establish by a preponderance of the evidence that he or she is entitled to compensation. Once a prima facie case of detention in violation of the preliminary injunction, Defendants will have an opportunity to offer rebuttal evidence, including credible testimonial evidence. BrownGreer will be responsible for evaluating the credibility of any evidence and the competency of witnesses. The Court should set an award schedule for unlawful detentions based on the length of detention and authorize BrownGreer to determine reasonable compensation for other harms proximately caused by such detentions.

(5) **No Appeal Rights:** Although claimants and Defendants may request reconsideration by BrownGreer if they disagree with the initial determination, by availing themselves of this process, claimants agree they shall have no further recourse to this Court or any other tribunal to challenge BrownGreer's determination.

B. Plaintiffs' Proposed Provisions for Claims Compensation System

The Court should adopt Plaintiffs' proposals on the issues that remain in dispute. Without such measures, there will be a substantial risk that members of the Plaintiff class will not be aware of the availability of compensation and will be prejudiced in their ability to obtain just compensation.

1. Scope of Relief

All persons detained by MCSO in violation of the preliminary injunction should be eligible to participate in the claims process. *See* Ex. 5a at II.B-C. Defendants contend that compensation should only be available to those detained on traffic stops, but the preliminary injunction applied more broadly. *See*, *e.g.*, Contempt Findings ¶ 158 ("HSU continued its workplace enforcement and other operations . . . in violation of the preliminary injunction").

Further, individuals who were detained in violation of the preliminary injunction after the Court's Order of May 24, 2013 should be eligible to participate in the compensation plan.[7] The Court made "[t]he preliminary injunction entered by this Court on [December] 23, 2011 . . . permanent" by subsequent orders. Supplemental Permanent Injunction ¶ 58. To the extent Defendants contend that there were no such detentions after May 2013, they will not be harmed by imposition of this measure.

2. Budget for Notice and Outreach Campaign

The Court should set a budget of $200,000 to conduct the type of outreach campaign that has the best chance of reaching class members who were subjected to illegal detentions. This amount is needed to secure advertising on radio stations with the largest Latino audiences and maximize the chances of reaching individuals who were detained. This

[7] Though the Court is correct that Plaintiffs did not present examples of post-2013 violations as part of the contempt hearings (Contempt Findings ¶ 878), Plaintiffs cannot exclude the possibility that MCSO has engaged in wrongful detentions on the basis of suspected unlawful immigration status after that date. Indeed, at least one document disclosed to the Monitor after the contempt hearing raises that concern. It appears that in December 2015, an MCSO deputy improperly prolonged a traffic stop of a Plaintiff class member solely to inquire about an ICE administrative warrant, which is not based upon probable cause to believe a crime has been committed. *See* Pls.' Comments on Monitor's Draft Seventh Quarterly Report (Doc. 1667-1) at 2-3.

outreach is all the more essential because Defendants have not undertaken independent efforts to locate individuals harmed by violations of the preliminary injunction, and they failed to document all immigration detentions. Contempt Findings ¶ 159. The $100,000 proposed by the County will not suffice to notify potential claimants,

3. Base Payment for Wrongful Detentions

Plaintiffs propose that successful claimants receive no less than a base amount of $1,500 for an unlawful detention and, when detention exceeded one hour, $1,000 for each additional 20 minutes of detention past the first hour. Defendants' proposed base amounts do not provide adequate compensation for the willful contempt.[8] Plaintiffs' proposed base payment schedule is consistent with damages recorded in similar cases.

4. No Cap on Awards for Special Harms

Defendants contend that special damages for individuals who were injured or suffered emotional distress should be subject to a cap. The Court should reject that contention. Courts routinely award compensatory damages for physical harm and emotional distress.[9] BrownGreer has sufficient experience and understanding of the range of awards for physical harm and emotional distress and can assess the individual circumstances as they are presented. An arbitrary cap is unwarranted and is likely to leave victims of Defendants' contempt with inadequate compensation. Similarly, there should be no cap on compensation for economic harms, such as lost wages and out-of-pocket expenses, caused by Defendants' contempt. Such awards are entirely appropriate, and courts routinely award such damages.[10]

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[8] *See* Tab 6 detailing awards granted by courts and settlement amounts for similar detentions.

[9] *See, e.g., Johnson v. Hale*, 13 F.3d 1351 1352 (9th Cir. 1994); *United Steelworkers of Am. v. Milstead*, 705 F. Supp. 1426, 1439-40 (D. Ariz. 1988) (awarding plaintiffs $10,000 and $17,750 in compensatory damages for unlawful detention, including for emotional distress and physical injuries).

[10] *See Kamal v. City of Santa Monica*, 221 F.3d 1348, 2000 WL 576433, at *1, n.3 (9th Cir. 2000); *O'Neill v. Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1998); *see also* 22 Am. Jur. 2d Damages § 158 (2016).

5. Detentions by ICE or Border Patrol Should Be Compensated

Class members should receive compensation for all injuries proximately caused by Defendants' contempt. *Zelman v. Stauder*, 466 P.2d 766, 768-69 (Ariz. Ct. App. 1970) (describing proximate cause standard); *Shelburg v. City of Scottsdale Police Dep't*, No. CV-09-1800-PHX-NVW, 2010 WL 3327690, at *9 (D. Ariz. Aug. 23, 2010) (noting that more than one person may be liable for proximately causing an injury). The contempt hearing revealed that at least some of these detentions occurred as a result of Sheriff Arpaio's "back-up plan" to offer detainees to Border Patrol that *ICE had declined to take. See* Contempt Findings ¶ 40. In other cases, MCSO may have transferred individuals to ICE or Border Patrol custody only to see them released once a federal officer had a chance to review the case and determine detention was not appropriate. In both situations, MCSO's responsibility for the initial time in federal detention is clear and BrownGreer should be able to consider that detention and any harms arising therefrom as part of the damages award. Failure to compensate victims for such injury would leave them with a grossly inadequate remedy for MCSO's disobedience of the preliminary injunction.

6. Attorneys' Fees for Successful Claimants

Plaintiffs' desire is that the compensation claims system be non-adversarial and user-friendly. But to the extent that Defendants will contest claims or challenge awards made by BrownGreer, Defendants will no doubt be represented by counsel. To ensure claimants have a fair opportunity to obtain compensation, the claims system should provide for reasonable attorneys' fees, not to exceed a total of $750 or the amount of the award, to a prevailing claimant. This will fairly compensate class counsel assisting claimants in this process, and will help claimants to obtain separate counsel if desired. *See Inst. of Cetacean Research*, 774 F.3d at 958-59.

VI. Attorneys' Fees and Costs

Plaintiffs' seek an award of reasonable attorneys' fees and costs for (1) the litigation of the instant civil contempt proceeding; and (2) past and future work to monitor and to

secure Defendants' compliance with the Court's Supplemental Permanent Injunction. An award of fees and costs is warranted on three grounds. First, Plaintiffs should be entitled to an award of attorneys' fees and costs under 42 U.S.C. § 1988(b) as the prevailing party in this civil rights action, and as the prevailing party in the civil contempt proceeding.

Second, this Court has the discretion to award attorneys' fees as a remedy for the civil contempt, in order to coerce future compliance and to compensate the Plaintiffs for the contemnors' past noncompliance. *Perry v. O'Donnell*, 759 F.2d 702, 704 (9th Cir. 1985). Indeed, the Ninth Circuit has held that fees may be awarded even in cases in which the contempt has not been willful, to compensate the movant for the cost of bringing the contempt to the Court's attention. *Perry*, 759 F.2d at 705. Here, the contemnors' willful and repetitive violations detailed in the contempt findings (which the contemnors refused to admit prior to the contempt hearing) have required Plaintiffs to expend substantial resources in litigating the contempt proceeding, and Plaintiffs should be compensated.

Third, even if there were no finding of civil contempt, and particularly on the record of Defendants' failures to comply with numerous provisions of the Court's Supplemental Permanent Injunction and other orders, *see supra* at Part I, the Court should award fees for Plaintiffs' past and future work in monitoring the Defendants' activities to ensure that they comport with the Court's Supplemental Permanent Injunction and other orders. As an initial matter, Paragraph 157 of the Supplemental Permanent Injunction already provides that Defendants should pay Plaintiffs' fees and costs "incurred as a result of having to initiate litigation to secure enforcement, should Plaintiffs prevail in such litigation." Even if that provision was intended to apply only to "in-court" work, circumstances have now changed.[11] Defendants' systematic and willful noncompliance with multiple court orders, which have come to light after the Supplemental Permanent Injunction, warrants an award not just for

[11] The Supreme Court has held that with respect to attorneys' fees provisions, the term "litigation" can encompass fees incurred in monitoring post-judgment compliance even if it does not involve "courtroom" work, so long as it "was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom." *Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 557-58 (1986).

prevailing in in-court "litigation," but also for monitoring and securing Defendants' compliance with the Court's orders, including but not limited to review of proposed policies, trainings, and other documents; correspondence with the Defendants concerning compliance issues; and participation in meetings with the Monitor and/or Defendants related to compliance.

The Ninth Circuit has held that fees may be awarded to a prevailing § 1988 plaintiff fees for post-judgment work monitoring compliance with injunctions and other court-ordered obligations. *Balla v. Idaho*, 677 F.3d 910, 914 (9th Cir. 2012) (injunction); *Prison Legal News v Schwarzenegger*, 608 F.3d 446, 452 (9th Cir. 2010) (consent decree); *Keith v. Volpe*, 833 F.2d 850, 855-57 (9th Cir. 1987) (settlement agreement); *see also Del. Valley Citizens' Council*, 478 U.S. at 557-59 (affirming fee award under Clean Air Act for post-judgment work monitoring defendant's compliance and construing Clean Air Act provision to be consistent with fees cases under § 1988).[12] Indeed, in *Balla*, the Ninth Circuit affirmed the district court's award of attorneys' fees to plaintiffs' class counsel for work on a contempt motion that was denied (on mootness grounds because Defendants complied after the filing of the contempt motion), and more generally for monitoring compliance with a permanent injunction.[13] 677 F.3d at 914-15. In light of this Court's findings that Sheriff Arpaio and Chief Deputy Sheridan and others at MCSO willfully and deliberately violated numerous court orders, expressed defiance of court orders to subordinates at MCSO, and repeatedly made false statements on the witness stand in this civil contempt proceeding, an award of attorneys' fees is warranted to compensate the Plaintiffs for the substantial resources they have expended to hold Defendants accountable for their past noncompliance (including but not limited to the three counts of civil contempt). Going forward, an order providing for the

[12] That some of the foregoing cases concerned consent decrees or settlement agreements does not affect their applicability here, as the Ninth Circuit focused on whether the plaintiffs' monitoring work caused the defendants "to fulfill their *obligations* 'more speedily and reliably.'" *Prison Legal News*, 608 F.3d at 451 (quoting *Keith*, 833 F.2d at 857) (emphasis added).

[13] *Balla* was decided under the fee provision of the Prison Litigation Reform Act, which places additional restrictions on § 1988's fee standard. *See* 677 F.3d at 918.

payment of fees to the Plaintiffs for this work will help to ensure that Defendants comply in the future with the Court's orders, by providing Plaintiffs with adequate resources to monitor closely for recurrences of noncompliance and by putting coercive pressure on the Defendants to comply. Plaintiffs have had to expend substantial funds and attorney time, even hiring additional staff, specifically to enforce Defendants' compliance with this Court's orders.

Plaintiffs intend to file an application for attorneys' fees and costs relating to the civil contempt proceedings and to past work monitoring Defendants' compliance with the Supplemental Permanent Injunction by June 24, 2016, and request leave to submit periodic applications for attorneys' fees and costs for compliance work in the future, until the Defendants are finally deemed by the Court to be in compliance. *See Balla*, 677 F.3d at 915 (noting appellate jurisdiction to review "[p]eriodic fee awards for monitoring compliance with a final judgment"). The County and contemnors should be jointly and severally liable.

VII. Inadequacy of Remedies for Civil Contempt and Future Remedies

Even if the Court adopts all of the foregoing requested remedies, the Plaintiff class will not achieve full relief for the Defendants' repeated and willful contempt of court. It is unlikely that all victims of Sheriff Arpaio's deliberate violations of the preliminary injunction order can be located and compensated. And as the Court has found, there can be no doubt that evidence of further violations of the rights of the Plaintiff class has been irretrievably lost through the Defendants' discovery violations, spoliation of evidence, and willful defiance of the Court's discovery-related orders.

In addition, the Court has found that Sheriff Arpaio and Chief Deputy Sheridan "made multiple intentional misstatements of fact while under oath" in the contempt hearing, Contempt Findings at 3, ¶ 326; that Sheridan made intentionally false statements to the Monitor about two different subjects, *id.* ¶¶ 229-30; and that Sheridan, Captain Bailey, and defense counsel Michele Iafrate made or caused a deceptive statement to the Monitor in violation of a court order, *id.* ¶ 348.

Under these circumstances, and in light of the Court's specific findings that the contemnors willfully violated the Court's orders, a referral should be made to the United States Attorney, to investigate Sheriff Arpaio and Chief Deputy Sheridan for criminal contempt (18 U.S.C. §§ 401, 402) and possibly for other violations of federal law including perjury (18 U.S.C. § 1621), obstruction of justice (18 U.S.C. § 1509), and making of false statements to the Court-appointed Monitor (18 U.S.C. § 1001).

Finally, Plaintiffs believe that the Court's findings (¶¶ 342-48) warrant an order directing Captain Bailey and defense counsel Michele Iafrate to show cause why they should not be held in civil contempt and, as to Ms. Iafrate, why she should not be referred to the State Bar for disciplinary proceedings.

CONCLUSION

Plaintiffs respectfully request that the Court issue an order imposing the foregoing remedies against Defendants and the individual contemnors, as a remedy for the civil contempt and in the exercise of the Court's inherent authority to enforce compliance with its orders to protect the Plaintiff class.

By: /s/ *Cecillia D. Wang*

Cecillia D. Wang (*Pro Hac Vice*)
Andre I. Segura (*Pro Hac Vice*)
Nida Vidutis*
ACLU Foundation
Immigrants' Rights Project

Daniel Pochoda
Brenda Muñoz Furnish
ACLU Foundation of Arizona

Anne Lai (*Pro Hac Vice*)

Stanley Young (*Pro Hac Vice*)
Tammy Albarran (*Pro Hac Vice*)
Lauren E. Pedley (*Pro Hac Vice*)

Covington & Burling, LLP

Jorge M. Castillo (*Pro Hac Vice*)
Julia Gomez*
Mexican American Legal Defense and Educational Fund

James B. Chanin (*Pro Hac Vice*)

Attorneys for Plaintiffs

*Applications for admission pro hac vice forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, 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.

Dated this 27th day of May, 2016.

/s/ *Cecillia D. Wang*