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

Manuel de Jesus Ortega Melendres, et al.
Plaintiffs,
vs.
Joseph M. Arpaio, et al.
Defendants.

No. CV-07-02513-PHX-GMS
PROTECTIVE ORDER

Pursuant to the parties’ stipulation and Proposed Protective Order Re the Carve Out MCSO Archived Emails (Doc. 332), the Court finds that Plaintiffs’ treatment and use of the Maricopa County Sheriff’s Office archived “carve-out” emails shall be as follows:

RECITALS

A. Defendants Joseph M. Arpaio and the MCSO assert that on Tuesday, March 2, 2010, they learned that Maricopa County’s Enterprise Data Center Services, Office of Enterprise Technology for Maricopa County (“OET”) had been backing-up or archiving all MCSO emails since August 2008.

B. Defense counsel Timothy J. Casey and Plaintiffs’ former lead trial counsel, David J. Bodney, submitted to OET’s counsel, Thomas K. Irvine, written letters containing the names of MCSO employees believed to have sent or received emails relevant to this litigation, and whose archived emails OET was to duplicate and turn over to defense counsel Casey for review and production to Plaintiffs.

1 C. Plaintiffs' former counsel Peter Kozi nets supplied defense counsel Casey with
2 a written list containing the "key words" that Plaintiffs requested that defense counsel use to
3 cull the "universe" of MCSO archived emails pr ovided by OET down to those emails that
4 may be relevant and/or discoverable in this litigation.

5 D. Defendants represent that OET's coun sel, Mr. Irvine, provided to defense
6 counsel four (4) different hard drives cont aining the emails of the MCS O employees or
7 agents requested by counsel for the parties in th is litigation, and that these hard drives were
8 produced to defense counsel on the following dates: April 8, 2010, April 13, 2010, April 21,
9 2010, and April 30, 2010.

10 E. Defendants state that upon receipt of each hard-drive, defense counsel
11 provided the same to outside vendor and c onsulting discovery expert XACT Data Discovery
12 Consultants for electronic culling pursuant to Plaintiffs' previously supplied "key word" list.

13 F. Defendants represent that the use of Plaintiffs' key word search terms by
14 XACT narrowed the total document universe but still left a significant volume of potentially
15 responsive emails (i.e., 53 GB or over 546,000 pages of emails that contained one or more of
16 plaintiffs' "key words.").

17 G. Defense counsel and his office state they have reviewed, and as of the date of
18 this Stipulation, are continuing to review th e 546,000 pages of em ails, and producing on a
19 rolling-basis to Plaintiffs those emails that they reasonably be lieve are disco verable in this
20 case. Defense coun sel represents that m any of the em ails contained within the 546, 000
21 pages are not discoverable either in this case, or in other legal matters, due to the attorney-
22 client privilege and/or work-product privilege.

23 H. The Court has ordered, via its Order da ted July 16, 2010, and the Parties have
24 agreed, to create a "carved-out" universe of the Plaintiffs' key word list responsive MCSO
25 archived emails so that Plaintiffs may conduct an independent search of the MCS O archived
26 emails. This "carved-out" universe will be composed of the 546,000 pages of email that are
27 responsive to Plaintiffs' key word search list minus all emails that contain the nam es of
28 certain attorneys and their employees. In add ition, Defendants state they have also rem oved
emails containing the names of certain other individuals. As Defendants did not disclose the

1 list of names removed from the “carved-out” materials until July 26 , 2010, Plaintiffs
 2 continue to reserve their right to seek production of the “carve out” of the emails and
 3 documents for the individuals listed in Paragraph I under the headings for “Maricopa County
 4 Attorneys representing MCSO on various Matters”, “Maricopa County Risk Management -
 5 Managers and Adjusters” and “MCSO Legal Liaison working on Matters at the direction of
 6 County Attorneys or Outside Counsel in Defense of Pending Litigation or Anticipated
 7 Litigation Against Arpaio and/or the MCSO.”

8 I. Defendants represent the “carve-out” universe has been electronically
 9 performed by XACT, which has been asked by defense counsel Casey to electronically
 10 remove from the universe of 546,000 pages of emails any email or attachment that contains
 11 the following name or names (the headings are provided only for general identification
 12 purposes and were not included in the carve-out process):

12 Defense Counsel in Melendres

13 Tim Casey
 14 Tim J. Casey
 15 Timothy J. Casey
 16 Drew Metcalf
 17 Schmitt, Schneck, Smyth & Herrod
 18 Eileen Henry

16 Defense Counsel in Melendres/MCSO Counsel in other Litigation Matters

17 Eric Dowell
 18 Kerry Martin
 19 Asheesh Agarwal
 20 Joe Clees
 21 Michelle Ganz
 22 Alec Hilbo
 23 Ogletree Deakins, Nash, Smoak & Stewart

21 Defense Counsel for MCSO in other Litigation Matters

22 Dennis Wilenchik
 23 Mark Goldman

23 MCSO Counsel in DOJ Racial Profiling Civil Investigation and other Matters

24 Alston & Bird
 25 Robert Driscoll
 26 Bob Driscoll
 27 Laura Sierra
 28 Brian Frey

27 Maricopa County Attorneys representing MCSO on various Matters

28 Clarisse McCormick
 Andrew P. Thomas

1 Lisa M. Aubuchon
Sally W. Wells
2 Phil MacDonnell
Barnett Lotstein
3 Michael Novitsky

4 Criminal Defense Attorney for MCSO
Tom Crowe
5 Crowe & Scott

6 Office of Special Litigation Counsel Representing MCSO in other cases and Monitoring
Melendres Defense

7
8 Richard Stewart
Maria Brandon
Laurence Tinsley, Jr.

9 Maricopa County Risk Management- Managers and Adjusters

10 Peter Crowley
Rocky Armstrong
11 Edward Howard
Ted Howard
12 Jean Bowman
Jacquie Garrett
13 Bill Doppler
Marc Fredrics
14 Trisha Rough

15 MCSO Legal Liaison working on Matters at the direction of County Attorneys or Outside
Counsel in Defense of Pending Litigation or Anticipated Litigation Against Arpaio and/or
16 the MCSO

17 Mike Hall
Doris Culhane
18 Pamela Woody
Roderick Douglas
19 Mario Rodriguez

20 Maricopa County Former Conflict Counsel for the MCSO

21 David Tierney

22
23 J. With respect to the emails and documents removed (as described in Paragraph
24 I) because they contained the name of Doris Culhane, Defendants agree to produce such
25 materials to Plaintiffs on or before August 11, 2010, in a separate “carve out” to which the
26 terms of this Stipulation and Proposed Order (other than Paragraph I) shall apply.
27 Defendants also agree to provide promptly emails and documents removed for any other
28 individuals listed in Paragraph I whose testimony or documents are subsequently determined

1 to be potentially relevant to the issues raised in or arising out of Plaintiffs' motion for
2 sanctions.

3 K. Defendants state the XACT work has resulted in the carve-out universe of
4 MCSO archived emails totaling 147,357 documents (out of the original total of 158,008
5 documents that were responsive to the Plaintiffs' key word search) and 503,317 pages (out of
6 the total of 546,099 pages of documents) (the carve-out universe of documents that shall be
7 produced to Plaintiffs' counsel shall be referred to herein as "The Carve-Out MCSO
8 Archived Emails.").

9 L. The parties understand and agree that the Defendants in this case do not intend
10 to disclose, or desire to disclose, inadvertently or otherwise, any privileged emails for this
11 case, or in regards to any other pending litigation or claim or matter, by producing to
12 Plaintiffs the Carve-Out MCSO Archived Emails.

13 M. The parties understand and agree that the XACT electronic carve out of The
14 Carve-Out MCSO Archived Emails may not have fully removed, or captured for removal,
15 each and every conceivable MCSO archived email or attachment that is privileged pursuant
16 to the attorney-client privilege and/or work product doctrine privilege.

17 N. In order to preserve the Defendants' privileges in this and other litigation,
18 claims, or matters, in regards to The Carve-Out MCSO Archived Emails, this Stipulation is
19 intended to make clear that the MCSO's production to Plaintiffs in this case of The Carve-
20 Out MCSO Archived Emails: (a) does not waive any privilege, including the attorney-client
21 privilege or attorney work product privilege, in regards to any privileged document
22 inadvertently produced in The Carve-Out MCSO Archived Emails; and (b) in the event that
23 Plaintiffs, by and through their counsel are to find within The Carve-Out MCSO Archived
24 Emails any privileged, or potentially privileged documents, they shall not further read such
25 document in compliance with the applicable American Bar Association standards set forth
26 for the inadvertent disclosure of privileged documents, they shall promptly return such
27 document to defense counsel in this case, and they shall in no way attempt to use or
28 disseminate such document for any purpose whatsoever, unless Defendants determine that
the document in question is not privileged. Nothing in this Stipulation and Protective Order

1 shall waive or affect Plaintiffs' right to production of a privilege log by Defendants, or to
2 challenge any claims of privilege or protection by Defendants.

3 O. Defendants assert that some emails or documents in The Carve-Out MCSO
4 Archived Emails are irrelevant to any legal or factual issue in this litigation No. CV 07-
5 02513-PHX-GMS, and would not ordinarily even be subject to disclosure or discoverability
6 outside the unique circumstances of this litigation No. CV-07-02513-PHX-GMS.
7 Defendants further assert that some of those emails are such that third persons or entities
8 may find them of interest for their own personal or business reasons. Defendants wish to
9 avoid subjecting the authors and/or recipients of such emails to harassment, oppression,
10 and/or embarrassment by the unnecessary dissemination of such emails to third parties.

11 Based on the foregoing, the parties, by and through their undersigned counsel, hereby
12 Stipulate and Agree as follows:

13 1. Privileged emails may have been inadvertently and mistakenly included within
14 The Carve-Out MCSO Archived Emails through the preparation process used by third party
15 vendor XACT during the culling process of creating The Carve-Out MCSO Archived
16 Emails.

17 2. The production to Plaintiffs of privileged emails in The Carve-Out MCSO
18 Archived Emails, if any, shall be construed as unintentional, inadvertent, and a mistake.

19 3. The production to Plaintiffs of privileged emails, if any, in The Carve-Out
20 MCSO Archived Emails shall not be construed, and will not be construed by the Plaintiffs,
21 as a waiver of any privilege the Defendants have as to any email or document within The
22 Carve-Out MCSO Archived Emails in this case No. CV 07 -02513-PHX-GMS, or in any
23 other litigation, claim, or matter.

24 4. In the event that Plaintiffs, by and through their counsel find within The Carve-
25 Out MCSO Archived Emails any privileged, or potentially privileged, emails or documents,
26 they shall not read the email or document further and will use their best personal and
27 professional good-faith judgment and effort to comply with the American Bar Association
28 standards set forth for the handling and return of inadvertently/mistakenly disclosed
privileged documents, including but not limited to promptly returning any such privileged or

1 arguably privileged emails or documents to defense counsel in this case No. CV 07- 02513-
2 PHX-GMS, and in no way attempting to use such emails and documents or their content for
3 any purpose whatsoever in this litigation No. CV 07-02513-PHX-GMS, unless Defendants
4 determine that the email or document in question is not privileged. Nothing in the foregoing
5 shall waive or affect Plaintiffs' right to production of a privilege log by Defendants of
6 materials (including materials containing certain names identified in Paragraph I removed
7 from The Carve-Out MCSO Archived Emails) that are otherwise relevant to this litigation
8 and being withheld based on privilege, with the exception of communications between
9 Defendants and their counsel with respect to this litigation. Nor shall anything in this
10 Stipulation and Protective Order waive or affect Plaintiffs' right to challenge any claims of
11 privilege or protection by Defendants.

12 5. Subject to paragraphs 6 through 10 below, all emails and documents within The
13 Carve-Out MCSO Archived Emails produced by Defendants in this action No. CV 07-
14 02513-PHX-GMS shall be considered confidential, and used for purposes of this action only
15 and for no other purpose, and shall not, without leave of the Court in No. CV 07-02513-
16 PHX-GMS, or agreement of the parties, be disclosed to any person or entity other than this
17 Court (under seal), the parties to No. CV 07-02513-PHX-GMS, their counsel and staff,
18 experts and consultants, and court reporters engaged to transcribe depositions in this case.

19 6. Plaintiffs may seek to remove the blanket confidentiality designation for
20 particular documents within The Carve-Out MCSO Archived Emails by seeking agreement
21 of Defendants or, if necessary, by moving the Court in No. CV 07 -02513-PHX-GMS. The
22 parties agree to first exchange written communication seeking the joint and voluntary
23 agreement to remove the confidential designation for any document from The Carve-Out
24 MCSO Archived Emails. If the parties are unable to come to agreement, the parties agree to
25 mutually cooperate and bring the dispute to the Court's attention promptly pursuant to its
26 discovery policies. If permitted by the Court, the Plaintiffs shall file a motion and describe
27 with specificity the particular documents for which they seek to remove the confidential
28 designation. Defendants shall then be required to submit their Response setting forth the
good cause for maintaining the confidential status of the documents pursuant to the Federal

1 Rules of Civil Procedure. Defendants shall bear the burden of proof to justify confidential
2 status. Once the confidentiality designation has been removed as to a particular document,
3 that document shall no longer be subject to the terms of this Stipulation and Protective Order.

4 7. The disclosure by counsel for a party to No. CV 07-02513-PHX-GMS of The
5 Carve-Out MCSO Archived Emails to experts or consultants retained by the disclosing
6 counsel, or to court reporters engaged to transcribe depositions in this case, shall not
7 constitute a violation of, or a waiver of the protections afforded by this Stipulation and
8 Protective Order so long as the person to whom disclosure is made has executed an Affidavit
9 in the form attached hereto as Exhibit "A".

10 8. In the event The Carve-Out MCSO Archived Emails themselves, or the
11 contents of The Carve-Out MCSO Archived Emails are to be identified, discussed or
12 disclosed during a deposition taken in No. CV 07-02513-PHX-GMS of any person, the
13 deponent shall be required to acknowledge on the record, before any identification,
14 discussion or disclosure of The Carve-Out MCSO Archived Emails occurs that he or she has
15 been advised of, and has agreed to be bound by, the terms of this Stipulation and Protective
16 Order. However, the foregoing requirements shall not apply to any documents that appear,
17 on their face, to have been sent or received previously by the deponent. In addition, it shall
18 be Defendants' responsibility to advise MCSO employees or agents of, and seek their
19 agreement to, the instant Stipulation and Protective Order, prior to their depositions.

20 9. All portions of any deposition transcript taken in No. CV 07-02513-PHX-GMS
21 wherein The Carve-Out MCSO Archived Emails themselves, or the contents of The Carve-
22 Out MCSO Archived Emails are identified, discussed, or disclosed, may also be designated
23 by Defendants as "CONFIDENTIAL" and shall be subject to the terms of this Stipulation
24 and Protective Order and the procedures provided by paragraph 6 above.

25 10. In the event that counsel for a party wishes to identify, discuss, or disclose The
26 Carve-Out MCSO Archived Emails, or the contents of the same, during the course of pre-
27 trial or trial proceedings, he or she shall, prior to each identification, discussion or disclosure
28 make reference to the confidential nature thereof to the Court and to counsel for the other
parties; and counsel for the other parties may at any time, or after such identification,

1 discussion, or disclosure, move the Court that The Carve-Out MCSO Archived Emails or the
 2 contents of the same be filed under seal with this Court and be subject to the terms of this
 3 Stipulation and Protective Order. Nothing in this agreement is intended to, nor will prevent,
 4 any party from using The Carve-Out MCSO Archived Emails at pre-trial hearings or at trial
 5 in CV 07-02513-PHX-GMS; but merely provides that the submission of The Carve-Out
 6 MCSO Archived Emails into the records shall be done in a manner consistent with this
 7 Stipulation and Protective Order and with the intent of protecting The Carve-Out MCSO
 8 Archived Emails from being obtained by third parties by simply obtaining copies of unsealed
 9 exhibits or court transcriptions in CV 07-02513-PHX-GMS.

10 11. In the event No. CV 07-02513-PHX-GMS or the contents of the same are
 11 identified, discussed, or disclosed, are filed electronically or otherwise or are otherwise
 12 deposited with the Clerk of this Court in CV 07-02513-PHX-GMS, such materials shall be
 13 filed or deposited in a sealed envelope bearing the following designation:

14 **“CV 07-02513-PHX-GMS CONFIDENTIAL: THE CONTENTS**
 15 **OF THIS ENVELOPE ARE NOT TO BE SCANNED AND ARE**
 16 **SUBJECT TO A PROTECTIVE ORDER OF THIS COURT**
 17 **AND SHALL NOT BE SHOWN TO ANY PERSONS OTHER**
 18 **THAN A JUDGE OF THIS COURT OR AN ATTORNEY IN**
 19 **THIS CASE OR BY COURT ORDER”**

20 12. The parties agree that they shall not, in the presence of the jury should a jury
 21 trial be permitted in this case, comment on the reasons or motivation for designating The
 22 Carve-Out MCSO Archived Emails as “confidential” without first having obtained a ruling
 23 from the Court to do so. Nothing in the foregoing shall operate as an acknowledgement or
 24 admission by Plaintiffs that a jury trial may be permitted in this case.

25 13. This Stipulation and Protective Order shall be binding throughout and after
 26 final adjudication of No. CV 07-02513-PHX-GMS including but not limited to, final
 27 adjudication of any appeals and/or interlocutory relief.

28 14. Within thirty (30) days after final adjudication of No. CV 07-02513-PHX-
 GMS, the Plaintiffs shall return to counsel for the defendants The Carve-Out MCSO
 Archived Emails or within thirty (30) days after final adjudication of this action, counsel
 then having possession, custody or control of The Carve-Out MCSO Archived Emails shall
 verify the complete destruction of the same by executing and mailing to defense counsel an

1 Affidavit in the form attached hereto as Exhibit “B”.

2 15. Notwithstanding the date upon which the Court enters this Stipulation and
3 Protective Order, this Stipulation and Protective Order shall become effective and binding
4 upon each of the parties to No. CV 07-02513-PHX-GMS, and each of their undersigned
5 counsel, on the date each party executes same.

6 16. Nothing in this Stipulation and Protective Order shall be construed to prevent
7 the Court in No. CV 07-02513-PHX-GMS from disclosing any facts relied upon by it in
8 making or rendering any finding, ruling, order, judgment or decree of whatever description.

9 17. This Stipulation and Protective Order applies only to the documents within The
10 Carve-Out MCSO Archived Emails. Nothing in this Stipulation and Protective Order shall
11 apply to documents or information previously produced, disclosed or exchanged, or to
12 documents being produced by Defendants in a series of rolling productions to be concluded
13 by August 11, 2010.

14 18. This Stipulation and Protective Order may be executed in one or more
15 counterparts in which case all executed counterparts and each of them shall be deemed to be
16 one and the same instrument. A complete set of original executed counterparts shall be filed
17 with this Court.

18 19. Each of the parties to No. CV 07-02513-PHX-GMS and each of their
19 undersigned counsel acknowledge that they have executed this Stipulation and Protective
20 Order voluntarily, are authorized to do so, and that the terms and provisions of this
21 Stipulation and Protective Order have been read and understood by them.

22 **IT IS SO ORDERED.**

23 Dated this 5th day of August, 2010.

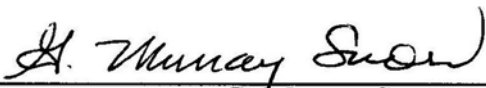
24 
25 _____
26 G. Murray Snow
27 United States District Judge
28

EXHIBIT A

AFFIDAVIT OF _____

STATE OF _____)
COUNTY OF _____) ss:

Before me, the undersigned Notary Public _____, in and for said County and State, personally appeared _____, who after first being duly sworn, states as follows:

1. My name is _____. I am over the age of 18 years and am a resident of _____ County, _____. I make this Affidavit based upon my personal knowledge, and I am competent to testify to the matters stated herein.

2. I am aware that a Protective Order has been entered in C V 07-02513-PHX-GMS regarding The Carve-Out MCSO Archived Emails. A copy of that Protective Order has been shown to me, and I have read and understood its contents.

3. By signing this Affidavit, I promise that I will use the materials and contents of The Carve-Out MCSO Archived Emails for the purpose of assisting counsel for a party to CV 07-02513-PHX-GMS in the adjudication of that action and for no other purpose.

4. By signing this Affidavit, I also promise that I will not communicate, disclose, discuss, identify, or otherwise use materials or the contents of The Carve-Out MCSO Archived Emails pursuant to the above-described Protective Order with, to, or for any person or entity other than the Court in CV 07-02513-PHX-GMS, a party to CV 07-02513-PHX-GMS, counsel for a party to CV 07-02513-PHX-GMS, including other counsel, paralegals, and clerical staff employed in his or her office, persons permitted by the above-described Protective Order to attend deposition taken in the above-described civil action, and persons or entities assisting such counsel who have executed an affidavit in the same form as this Affidavit.

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5. By signing this Affidavit, I also promise that I will not copy, transcribe, or otherwise reproduce, or cause to be copied, transcribed or otherwise reproduced, by any means whatsoever, The Carve- Out MCSO Archived Emails except to the extent which I am directed to do so by counsel for a party to CV 07-02513-PHX-GMS, in which case all such copies, transcriptions, or reproductions shall be made solely for my own use in connection with my work in the above matter. I further promise at the conclusion of this case to deliver upon request all materials (originals and copies) of The Carve-Out MCSO Archived Emails to the counsel who originally directed that said materials be provided to me.

6. I agree and consent to personal and subject matter jurisdiction in the United States District Court for the District of Arizona.

Further Affiant sayeth not.

Affiant

Subscribed and sworn to before me,
this ____ day of _____, 2010.

Notary Public

