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2 **NOT FOR PUBLICATION**

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Manuel de Jesus Ortega Melendres, et. Al.,) No. 07-02513-PHX-GMS

10 Plaintiff,

ORDER

11 vs.

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13 Joseph M. Arpaio, et. al.,

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Defendant.

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16 Pending before the Court is Defendants' *Touhy* Motion to Compel the United States
17 Department of Homeland Security (and/or the United States Immigration and Customs
18 Enforcement) To Produce Two Documents And Tender Five Witnesses For Deposition and
19 Defendants' Separate Motion to Extend the Fact-Discovery Cut-Off Date For the Limited
20 Purpose of Conducting DHS/ICE-Related Deposition Discovery. (Dkt. # 247). After
21 consideration, the Motion is granted in part, denied in part, and deferred in part.

22 The Court grants that part of the Defendants' Motion that seeks to extend fact
23 discovery deadlines for the purpose of deposing the five witnesses identified in Defendants'
24 *Touhy* request and/or obtaining their testimony concerning the two documents that
25 Defendants seek in that same *Touhy* request. New specific deadlines will be established
26 during the Court's status conference with the parties scheduled to occur on March 19, 2010.
27 Although it does appear to the Court that the Motion to Extend could have been asserted with
28 more alacrity, Defendants have, nevertheless, timely sought the extension given the various

1 reversals in the position of the United States Government with respect to the discovery
2 sought by Defendants in this case.

3 At any rate, it appears that the discovery deadlines must be extended so that Plaintiffs
4 can evaluate the additional discovery to be provided by the Defendants, and the extent to
5 which still additional discovery may be necessary in light of the unavailability and/or
6 destruction of documents in the Defendants' possession. And, while the Court does not
7 believe that Defendants should benefit from an extension that their own conduct has
8 necessitated, Defendants' request for extension to provide for the discovery they timely
9 sought in their *Touhy* Motion has merit in its own right, and a short extension will allow both
10 Plaintiffs and Defendants to maximize their ability to best present the merits of their relative
11 positions to the Court at trial, which is in the best interest of the parties and the public.

12 In its Response to Defendants' *Touhy* Motion, the United States indicates that it has
13 provided the documents sought in the Motion and has agreed to provide its two current
14 agents for deposition, and assist, to the extent feasible, in providing its three former agents
15 to be deposed in this matter. To the extent that Defendants seek such relief in their Motion,
16 therefore, the Motion is moot. Nevertheless, the United States indicates that it does not agree
17 to provide the current or former agents to testify at deposition until it has reviewed
18 documents (it indicates approximately 38,000), prior to the depositions to ensure that the
19 deponents do not testify to information that may be protected as law enforcement sensitive.
20 Further, prior to the occurrence of the depositions, Defendants' counsel agreed to provide "a
21 more detailed description of the areas of inquiry to assure" that the witnesses would not be
22 questioned about privileged or protected areas. Thus, the United States indicates that the
23 deposition of the current or former agents could not be scheduled prior to April 2010.

24 Contrary to the Defendants assertion in their Reply, there is nothing in the Response
25 of the United States that indicates it intended to voluntarily provide to the Defendants the
26 38,000 documents that it needed to review prior to scheduling the depositions of the five
27 agents. Nor is there anything to suggest to this Court that Defendants *Touhy* request to the
28 United States was broad enough to cover those documents. Thus, the United States is under

1 no current obligation to provide the 38,000 documents to the parties in this litigation unless
2 it has otherwise agreed to do so.

3 Nor does the United States in its Response agree to waive the more detailed
4 description of areas of deposition inquiry that Defense Counsel agreed to provide. Therefore,
5 the parties and the United States may arrive at a deposition schedule for the five agents
6 identified in Defendants' *Touhy* Motion prior to the March 19th status conference. Indeed
7 the Court suggests that they do so. But the Court will not require the United States to
8 schedule the depositions for a date prior to receiving the "more detailed description of areas
9 of inquiry" by the Defendants, or the review of the additional documents that it deems
10 necessary. While the Court does not intend to provide the United States with more than a
11 reasonable amount of time to accomplish such tasks, and will set such a deadline at the
12 March 19 status conference, it will not set a date by which such tasks will be completed prior
13 to the March 19 status conference between the parties and the United States. The Court does,
14 however, Order that Defendants provide the "more detailed description of cases of inquiry
15 prior to March 19.

16 To the extent that the Motion requests that the Court order that the five former
17 government agents be provided at trial, the Court defers a ruling on this part of the Motion
18 until the depositions have been taken and relevant and admissible testimony of the agents has
19 been identified. Therefore,

20 **IT IS HEREBY ORDERED:**

21 1. Granting the Motion to extend fact discovery deadlines for the purpose of
22 deposing the five witnesses identified in Defendant's *Touhy* request and/or obtaining their
23 testimony concerning the two documents that Defendants seek in that same *Touhy* request
24 only;

25 2. Denying the *Touhy* Motion to the extent that it is moot; and

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