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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Manuel de Jesus Ortega Melendres, et al.,)

No. CV-07-2513-PHX-GMS

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Plaintiffs,

ORDER

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vs.

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Joseph M. Arpaio, et al.,

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Defendants

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Pending before this Court is Defendants’ Motion for An Order To Show Cause and
17 Allowing Defendants’ Leave to Take Additional Discovery (Doc. 337) and Maricopa
18 County’s Motion to Strike Sheriff’s Motion For Order to Show Cause and For Leave to Take
19 Additional Discovery (Doc. 350). For the reasons set forth below, Defendants’ Motion for
20 An Order to Show Cause is denied, and the County’s Motion to Strike Sheriff’s Motion is
21 denied as moot.

22

BACKGROUND

23

The pertinent facts pertaining to this motion are set forth in affidavits provided by the
24 parties in support of, and in response to, the above motions. They include the affidavits of
25 Timothy J. Casey, Stacey Marie Haggart, and Shelly L. Bunn. Certain additional affidavits
26 filed previously in this matter, such as the affidavits of Jack McIntyre, Manuel Madrid, Dot
27 Culhane, Joseph Sousa, Brett Palmer and a separate affidavit of Timothy J. Casey also
28 provide relevant facts and also have been reviewed by this Court in deciding the present

1 motion. Because the facts attested to in the affidavits that are relevant are not seriously
2 disputed, and seem to be consistent with each other, the Court assumes their accuracy.

3 In this class action, Plaintiffs challenge certain operations of the Maricopa County
4 Sheriff's Office ("MCSO") as being subject to, or influenced by, racial profiling. It was
5 originally brought almost three years ago in December 2007. Although the Sheriff and the
6 MCSO are the present defendants in this action, Plaintiffs originally also named Maricopa
7 County as a Defendant. All Defendants were originally represented by Tim Casey of
8 Schmitt, Schneck, Smyth & Herrod, P.C.

9 When the lawsuit was originally filed in December 2007, Mr. Casey had
10 communications with the MCSO concerning documents and evidence that it should retain
11 in light of the lawsuit. On July 21, 2008 Plaintiffs' new counsel sent to Mr. Casey a
12 litigation hold letter that further outlined categories of documents pertaining to the operations
13 of the Sheriff's office that, in light of this litigation, the MCSO was required to maintain.
14 Plaintiffs also filed a contemporaneous public records request with the MCSO to obtain the
15 same material.¹

16 Mr. Casey, in his turn immediately forwarded the Plaintiff's litigation hold letter to
17 Deputy Chief Jack McIntyre of the MCSO to implement the litigation hold. Mr. Casey also
18 copied Jean Bowman and Christopher Keller with his e-mail to Deputy Chief McIntyre.
19 Deputy Chief McIntyre, however, neglected to pass along the instruction to secure and
20 preserve the specified documents within the MCSO.

21 Plaintiffs formally requested documents in a Rule 34 document request on February
22 25, 2009. On March 11, 2009, Maricopa County obtained separate counsel in this action.
23 Mr. Casey remained counsel for the MCSO in the action. As discovery continued, Plaintiffs

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25 ¹ The affidavit of Dot Culhane sets forth the MCSO's efforts to comply with the
26 public records request under Arizona law. As this court determined in its order of February
27 12, 2010, however, based on the initial deposition testimony of Sheriff Arpaio and Officer
28 Madrid, and the affidavits of Lieutenant Joseph Sousa and Sergeant Brett Palmer, no
litigation hold of such documents was effectively communicated within the MCSO. Doc.
261.

1 inquired as to the apparent lack of certain categories of documents in response to its previous
2 requests. They were assured by MCSO that all responsive documents had been provided.
3 On September 10, 2009, Plaintiffs again inquired as to the apparent lack of certain categories
4 of documents in response to its previous requests.

5 Shortly, thereafter, the parties filed a stipulation to dismiss Maricopa County from this
6 litigation, and the County was in fact dismissed.

7 On September 30 and October 20, 2009, Plaintiffs again wrote Defendants inquiring
8 whether they had received all the documents responsive to their litigation hold. The matter
9 again came up before the Court at the pretrial scheduling conference that occurred on
10 October 21, 2009. At that time, Defense counsel again indicated that Defendants had
11 produced all responsive documents in their possession to Plaintiffs. At that time, this Court,
12 in light of the already-protracted nature of this case, imposed a limited schedule in which
13 additional discovery could be accomplished.

14 Six days later, on October 27, 2009, in the deposition of Sergeant Manny Madrid a
15 supervisor in the Human Smuggling Unit (“HSU”) of the MCSO, Plaintiffs learned that
16 Defendants had been destroying the statistic sheets of individual officers that were involved
17 in the special enforcement operations. These statistic sheets were subject to the July 2008
18 litigation hold. Because Sergeant Madrid also testified to not being aware of a litigation
19 hold, and of further deleting e-mails from his system that may have been subject to that hold,
20 counsel for Defendants thereafter began working with Chief Brian Sands and the Deputy
21 Chief of MCSO’s Technology Bureau, Shelly Bunn to retrieve the deleted e-mails to the
22 extent possible.

23 On November 5, 2009, Chief Bunn e-mailed Jon Carder at Maricopa County’s Office
24 of Enterprise Technology (“OET”) with a request to “[p]lease provide email for the following
25 Sheriff’s Office employees. The request is for an attorney.” The names of six MCSO
26 employees was attached. As the resulting e-mail chain between Chief Bunn and Mr. Carder
27 illustrates, Chief Bunn never set forth the facts pertaining to the need to resurrect files that
28 had been the subject of a litigation hold delivered to the MCSO a year and a half earlier and,

1 on which, the MCSO had failed to act and which were subsequently deleted. She only
2 discussed the need “to retain” the e-mail of specified employees. Chief Bunn further failed,
3 on follow-up inquiry by the OET, to designate the scope of the material needed pursuant to
4 the original litigation hold, or that the litigation hold resulted from the present lawsuit.

5 On November 20, 2009, Plaintiffs filed a request for sanctions in this lawsuit based
6 principally upon Sergeant Madrid’s deposition testimony. Defendants responded on
7 December 11, 2009. In Defendants’ response they included the affidavits of Lieutenant
8 Sousa and Sergeant Palmer, both of whom indicated that they had deleted e-mails that may
9 have pertained to suppression operations and that they had never been instructed to maintain
10 these e-mails as a part of a litigation hold or otherwise.

11 When he was deposed later that month in December 2009, Sheriff Arpaio further
12 indicated that he had maintained an immigration file that had not been disclosed, nor was he
13 aware that any such documents were subject to a litigation hold in this lawsuit.

14 On February 4, 2010, this Court held a hearing pertaining to the motion for sanctions.
15 Wade Swanson, the Director of Maricopa County Office of General Litigation Services, was
16 present. During that hearing this Court reviewed with Defendants the requirements it would
17 impose on Defendants to ascertain that all available responsive documents that could be
18 retrieved would be retrieved. This Court ordered Defendants to provide Plaintiffs with: “(1)
19 a description under oath of the steps Defendants have taken to recover all responsive
20 communications from their information management system and its back-ups; . . . (4) the
21 inherent limitations on Defendants search for documents that are imposed by Defendants
22 document retention systems; and (5) the components in that system.”

23 On March 2, 2010, OET informed the MCSO that it had, pursuant to a litigation hold
24 in another matter, backed up all of MCSO’s files since August 2008, apparently including
25 those sought in the litigation hold in this case.

26 Contemporaneously with discovering this information pertaining to the separate
27 litigation hold, MCSO requested from this Court leave to file a Motion for an Order to Show
28 Cause why Maricopa County should not be held in contempt for its failure to earlier disclose

1 the documents. The Court authorized the filing of the motion which was filed in August,
2 2010.

3 ANALYSIS

4 In its Response and Separate Motion to Strike, the County asserts that this is a matter
5 that should be resolved between the MCSO and the County pursuant to separate county
6 dispute resolution procedures. It further asserts that the MCSO misrepresents to the Court
7 MCSO's awareness and use of the OET within the County to place litigation holds on
8 categories of information relating to other matters that would have provided responsive
9 information in this case, but had never been explored by the MCSO. The Court need not
10 address these arguments to deny the MCSO's motion.

11 The motion invites this Court to take up a collateral dispute between the MCSO and
12 the County, which has been a non-party to this action for over a year, regarding which entity
13 between them should bear the budgetary expense of retaking depositions in this matter
14 necessitated by the MCSO's deletion of electronic files that were retained by the County in
15 other litigation.

16 Nevertheless, in its motion, the MCSO offers no reason for this Court to conclude that
17 the County was aware, prior to February 4, 2010, of the scope of MCSO's deletion of
18 documents that were the subject of a litigation hold in this lawsuit, and that were
19 independently in the County's possession. It offers no affidavit or suggestion that admissible
20 evidence exists that would demonstrate that the MCSO communicated to the County the
21 scope of its need to provide documents that were subject to a litigation hold that the MCSO
22 never implemented, and the scope of the needed recovery effort. Shelly Bunn's indication
23 to OET that the MCSO needed the e-mails of specified employees was not sufficient to put
24 OET on notice that any recovery of past e-mails, let alone a recovery of a year and a half,
25 was being requested. The MCSO offers no suggestion that the County would have been
26 independently aware of the scope of MCSO's destruction of documents prior to February 4,
27 2010.

28 The Court will not exercise its contempt power to hold the County in contempt based

1 on the MCSO's argument that the County was under an obligation in this matter to
2 independently research files held pursuant to a separate litigation hold, in response to non-
3 specific document production requests by Plaintiffs for MCSO documents in this matter a
4 year earlier. Although the Plaintiffs requested documents of all Defendants "relating to
5 MCSO's crime suppression operations," the MCSO offers no credible suggestion that the
6 County was in contempt for not searching the documents that it was holding pursuant to a
7 separate litigation hold in another matter, especially when its MCSO co-defendants
8 presumably had the documents, had a greater ability to identify them, and had indicated to
9 Plaintiffs that such documents had been fully provided.

10 Even assuming that Mr. Swanson was aware of the separate litigation hold when he
11 attended this Court's hearing on February 4, as well as the scope of the documents requested
12 in this matter, OET informed the MCSO of the existence of the separate documents within
13 a month. Seeing as the MCSO was itself still in the process of seeking to discover the extent
14 of document destruction and the possibilities of restoration at that time, this is not a sufficient
15 delay, under the circumstances, on which the Court would exercise its contempt power, nor
16 would a more timely response have prevented the need to redepose the witnesses involved.

17 Even accepting all reasonable inferences in favor of the movant, the MCSO provides
18 no convincing suggestion that there is any discoverable evidence and thus any reason to
19 permit further discovery on an issue that is collateral to this litigation, and which has already
20 commanded considerable time and generated considerable affidavit testimony which does
21 not, on the whole, support MCSO's request to hold collateral contempt hearings or additional
22 discovery. As the County points out, should there be an issue as to whether the County
23 should reimburse the MCSO for the economic sanctions to be entered against the MCSO in
24 this case, including the costs of redepositing witnesses, the MCSO may pursue such relief
25 pursuant to the procedures set forth by Maricopa County.

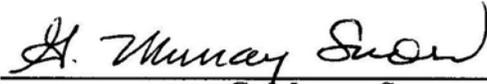
26 **IT IS THEREFORE ORDERED** denying Defendants' Motion for An Order To
27 Show Cause and Allowing Defendants' Leave to Take Additional Discovery (Doc. 337).

28 **IT IS FURTHER ORDERED** denying as moot Maricopa County's Motion to Strike

1 Sheriff's Motion For Order to Show Cause and For Leave to Take Additional Discovery
2 (Doc. 350).

3 DATED this 23rd day of November, 2010.

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G. Murray Snow
United States District Judge