

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF ARIZONA

3  
4 Manuel de Jesus Ortega )  
Melendres, et al., )  
5 )  
Plaintiffs, ) CV 07-2513-PHX-GMS  
6 )  
vs. ) Phoenix, Arizona  
7 ) March 27, 2015  
Joseph M. Arpaio, et al., ) 2:01 p.m.  
8 )  
Defendants. )  
9 \_\_\_\_\_ )

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12  
13  
14  
15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE G. MURRAY SNOW

17 (Status Conference)  
18  
19  
20  
21

22 Court Reporter: Gary Moll  
23 401 W. Washington Street, SPC #38  
Phoenix, Arizona 85003  
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25 Proceedings taken by stenographic court reporter  
Transcript prepared by computer-aided transcription

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P R O C E E D I N G S

THE COURT: Thank you. Please be seated.

THE CLERK: This is civil case number 07-2513,  
Melendres v. Arpaio, on for in-court hearing.

14:01:17

Counsel, please announce your appearances.

MS. WANG: Good afternoon, Your Honor. Cecillia Wang  
of the ACLU for the plaintiffs.

THE COURT: Ms. Wang. Good afternoon.

MR. YOUNG: Stanley Young, Covington & Burling, for  
the plaintiffs.

14:01:29

MR. SEGURA: Andre Segura, ACLU, for the plaintiff.

MR. CASTILLO: Jorge Castillo, MALDEF, for the  
plaintiffs.

MR. BENDOR: Josh Bendor, ACLU Arizona, for the  
plaintiffs.

14:01:38

MR. POCHODA: Dan Pochoda, ACLU Arizona, for the  
plaintiffs.

THE COURT: Good afternoon.

MS. IAFRATE: Good afternoon, Your Honor. Michele  
Iafrate and Tom Liddy on behalf of Joseph M. Arpaio, who is  
present, and also Maricopa County Sheriff's Office.

14:01:45

THE COURT: Good afternoon.

MR. MURDY: Good afternoon, Your Honor. Craig Murdy  
on behalf of the defendant Brian Sands.

14:01:57

1 THE COURT: That's Mr. Murray?

2 MR. MURDY: Murdy.

3 THE COURT: Murdy.

4 MR. MURDY: M-u-r-d-y.

5 THE COURT: Okay. Is your appearance new in this  
6 matter?

14:02:04

7 MR. MURDY: Yes, Your Honor. I filed a notice of  
8 appearance late yesterday afternoon.

9 THE COURT: All right. Thank you.

10 MR. McDONALD: Mel McDonald, special appearance for  
11 Sheriff Joe Arpaio.

14:02:11

12 THE COURT: Good afternoon, Mr. McDonald.

13 MR. MITCHELL: Good afternoon, Judge. Barry Mitchell  
14 and Lee Stein, specially appearing for Chief Sheridan, who's  
15 here in the courtroom.

14:02:24

16 THE COURT: Good afternoon.

17 MR. BIRNBAUM: Good afternoon, Your Honor. Gary  
18 Birnbaum with Dickinson Wright, specially appearing for Deputy  
19 Chief John MacIntyre.

20 MR. WILENCHIK: Good afternoon, Your Honor. Dennis  
21 Wilenchik and John D. Wilenchik appearing for Sands, specially  
22 appearing.

14:02:37

23 MR. EISENBERG: Good afternoon, Your Honor. David  
24 Eisenberg. I'm special appearing for Lieutenant Joseph Sousa.

25 MR. DODD: Your Honor, Dane Dodd, also appearing for

14:02:52

1 Brian Sands.

2 THE COURT: In this proceeding, or specially  
3 appearing?

4 MR. DODD: Specially appearing.

5 Craig Murdy of our office --

14:03:11

6 THE COURT: You're with him?

7 MR. DODD: Yes.

8 THE COURT: Okay. You're appearing in this  
9 proceeding. Thank you.

10 Anyone else? Do we have anyone on the telephone?

14:03:19

11 DEPUTY CHIEF GIRVIN: Good afternoon --

12 MS. LAI: Good afternoon, Your Honor.

13 DEPUTY CHIEF GIRVIN: -- Your Honor.

14 MS. LAI: Go ahead.

15 DEPUTY CHIEF GIRVIN: John Girvin for the monitor and  
16 Your Honor.

14:03:29

17 THE COURT: Good afternoon.

18 DEPUTY CHIEF MARTINEZ: Raul Martinez from the  
19 monitoring team also, Your Honor.

20 MS. LAI: And for the plaintiffs, Your Honor,

14:03:41

21 Anne Lai, Hyun Byun, and paralegal Julie Romanow.

22 THE COURT: Could you repeat the last name, please.

23 MS. LAI: The last name is Julie Romanow. She's a  
24 paralegal with Covington & Burling.

25 THE COURT: All right. Thank you.

14:03:56

1 Ms. Wang, you've withdrawn your deposition subpoena to  
2 Mr. Casey?

3 MS. WANG: That's right, Your Honor. I would alert  
4 the Court and have alerted opposing counsel that we do contend  
5 that Mr. Casey is a potential fact witness in this case and can 14:04:12  
6 testify as to non-privileged matters. At this time we are  
7 pursuing other information sources and do not currently plan to  
8 depose him.

9 We are in the middle of taking depositions, though,  
10 and it may become necessary for us to take his deposition. 14:04:29  
11 We'll find out more with the additional depositions scheduled  
12 for next week and the week after.

13 THE COURT: All right. I was just asking, and thank  
14 you for the clarification, because I take it, then,  
15 Ms. Iafate, there is nothing else pending from the plaintiffs 14:04:48  
16 or from Chief Sands other than your motion for protective order  
17 with respect to the document production request from  
18 Chief Sands.

19 MS. IAFRATE: That is correct, Your Honor.

20 THE COURT: All right. Did you have anything you 14:05:01  
21 wanted to say?

22 MS. IAFRATE: Your Honor, I filed the protective order  
23 and also analyzed the case that you recommended that we looked  
24 at. I do think that it is distinguishable from the case at  
25 hand. My moving papers and my reply that was recently filed 14:05:21



1 indicates that Mr. Sands does not have an attorney-client  
2 privilege with Mr. Casey that he can waive or assert. We heard  
3 in the courtroom the other day that --

4 THE COURT: I don't really think, and I don't mean to  
5 cut you off, but I don't think Mr. Murdy disagrees with you on  
6 that, at least he didn't brief it. 14:05:41

7 MS. IAFRATE: Well, his original subpoena and the  
8 comments that were made last week were vastly different than  
9 the paper that he recently filed, so I just wanted to make my  
10 record, Your Honor, regarding the nature of the attorney-client 14:05:56  
11 privilege, and who holds it and waives it is Sheriff Arpaio.

12 THE COURT: All right. I'm going to have some  
13 questions for you on that.

14 MS. IAFRATE: Okay.

15 THE COURT: And I will hear from Mr. Murdy. But I 14:06:08  
16 think it will be helpful for me to ask you a few questions to  
17 see if we can narrow the scope of the hearing.

18 MS. IAFRATE: Okay.

19 THE COURT: Have you provided any documents to  
20 Chief Sands in conjunction with his request? 14:06:18

21 MS. IAFRATE: In conjunction with his request, some of  
22 his request has overlapped with the plaintiff, so if I provided  
23 certain privilege logs and documents to the plaintiff, they  
24 would also apply to Mr. Sands, but specific to his request, no.

25 THE COURT: All right. Are all the responsive 14:06:46

1 documents, then, that we would be discussing documents that are  
2 listed -- the eight documents listed on your privilege log?

3 MS. IAFRATE: I think that it -- it may include more.

4 THE COURT: All right. Well, how are we supposed to  
5 discuss them if we don't have a privilege log?

14:07:09

6 MS. IAFRATE: Well, Your Honor, the procedure that I  
7 was following was that I was moving for protective order as to  
8 all documents because Mr. Sands cannot even assert that he has  
9 the privilege or that he can waive it.

10 THE COURT: Well, let's, for example, take --

14:07:33

11 Do you have the privilege log in front of you with the  
12 eight documents on it?

13 MS. IAFRATE: No, Your Honor, I do not.

14 THE COURT: Do you have an extra copy, Mr. Murdy?

15 MR. MURDY: I don't have an extra copy, but I'll be  
16 more than happy to share my copy with her.

14:08:02

17 MS. IAFRATE: Thank you.

18 THE COURT: Let's start with document number 1 in

19 which you assert a privilege. And that is a well-known

20 document, I think, to all of us, the December 23rd, 2001, 5:22

14:08:38

21 memo from Tim Casey to Chief Sands, to Chief MacIntyre, to

22 Jerry Sheridan, to Joseph Sousa, to Tom Liddy, to Eileen Henry,

23 to James Williams, correct?

24 MS. IAFRATE: Yes.

25 THE COURT: And you're asserting the attorney-client

14:08:54

1 privilege in that document.

2 MS. IAFRATE: Correct.

3 THE COURT: And --

4 MS. IAFRATE: There is one sentence, Your Honor, that  
5 has been disclosed, the first sentence. 14:08:59

6 THE COURT: I'm aware of that, but thank you for  
7 making that clear.

8 To be subject to the attorney-client privilege, a  
9 communication must be made in confidence, must it not?

10 MS. IAFRATE: Yes. 14:09:19

11 THE COURT: And it must be made to -- the privilege  
12 applies only to communications by employees of the entity,  
13 regardless of their position, when the communication concerns  
14 matters within the scope of the employee's entity duties,  
15 correct? 14:09:40

16 MS. IAFRATE: Yes.

17 THE COURT: All right. So what duties does Chief  
18 MacIntyre have that involved his receipt of this memo?

19 MS. IAFRATE: I believe that the testimony has been by  
20 Mr. Sands himself merely to let Mr. Sands and Mr. Sheridan know 14:09:52  
21 that it existed.

22 THE COURT: Well, then, it's not attorney-client  
23 privileged, is it?

24 MS. IAFRATE: Well, that would be his duty, so yes, he  
25 does have a duty. 14:10:07

1 THE COURT: Who?

2 MS. IAFRATE: You asked what Mr. MacIntyre's duty was,  
3 and it was to let Mr. Sands and Mr. Sheridan know of its  
4 existence.

5 THE COURT: So he had official duties with respect to 14:10:16  
6 the receipt of this memorandum, which was to let Mr. Sands and  
7 Mr. MacIntyre know of its existence?

8 MS. IAFRATE: You said Mr. MacIntyre. I think you  
9 meant Mr. Sheridan.

10 THE COURT: No, I didn't. I meant Mr. MacIntyre. 14:10:31

11 MS. IAFRATE: Could you repeat the question, then,  
12 please?

13 THE COURT: All right. What were Mr. MacIntyre's  
14 duties, official duties, that required him to receive this  
15 memorandum? 14:10:42

16 MS. IAFRATE: There were no official duties for  
17 Mr. MacIntyre.

18 THE COURT: All right. Then I rule that this is not a  
19 document that is subject to the attorney-client privilege, and  
20 the document must be disclosed. 14:10:51

21 With respect to document number 2, this is a 12-23-11  
22 document at 9:26 from Mr. Casey to Mr. Williams to Eileen Henry  
23 and to Tom Liddy. Now, if I remember correctly, James Williams  
24 is the bright young associate to Mr. Casey, correct?

25 MS. IAFRATE: That is correct. 14:11:25

1 THE COURT: And Mr. Liddy, obviously an attorney for  
2 the sheriff. Who is Eileen Henry?

3 MS. IAFRATE: I believe she is Mr. Casey's paralegal.

4 THE COURT: All right. So that appears to be pretty  
5 clearly communications among attorneys, and it seems to me  
6 pretty clear that the attorney-client privilege might otherwise  
7 apply. All you've asserted is work product.

14:11:41

8 It does occur to me that in addition to the  
9 communication being sent to persons who did not have the first  
10 document that we've discussed, in addition to it being sent to  
11 persons who were not covered by the attorney-client privilege,  
12 it also occurs to me that its disclosure in this court might  
13 have been a subject matter waiver. It is, in effect, what  
14 resulted in Chief Sands, Chief Sheridan, Lieutenant Sousa, and  
15 Chief MacIntyre being subjected to civil contempt proceedings  
16 in this matter, and it does seem to me, and maybe I  
17 misperceive, that Chief Sands does have different interests  
18 than the rest of the individual defendants who you're  
19 representing here.

14:12:09

14:12:32

20 Would you agree with that?

14:12:54

21 MS. IAFRATE: I don't believe he has different  
22 interests than the others; I believe that all their interests  
23 are the same.

24 THE COURT: All right. Why does he have separate  
25 representation, then?

14:13:05

1 MS. IAFRATE: I believed that, in the best interest of  
2 representing Mr. Sands, that he should be entitled to his own  
3 attorney because he no longer works at the Maricopa County  
4 Sheriff's Office.

5 THE COURT: And it does seem to me that in this 14:13:16  
6 proceeding, whether or not it comes from Chief MacIntyre or  
7 others, there is some attempt to suggest that responsibilities  
8 were different within the department, that they belonged to  
9 other people, many people are saying Chief Sands had the  
10 ultimate responsibility, and many of your own clients, it seems 14:13:36  
11 to me, are saying that that is true.

12 Am I missing that point?

13 MS. IAFRATE: No, I believe that there is testimony  
14 from a variety of people that talk about who was responsible  
15 for what regarding HSU. 14:13:54

16 THE COURT: And so Chief Sands may have different  
17 interests, say, than Chief Sheridan in this matter.

18 MS. IAFRATE: I think that his interests would  
19 be different.

20 THE COURT: Well, he may have a different version of 14:14:06  
21 events.

22 MS. IAFRATE: He may, yes.

23 THE COURT: That requires Chief Sands, in all wisdom,  
24 to have a separate attorney.

25 MS. IAFRATE: That is why I requested it. 14:14:14

1 THE COURT: All right. So it seems to me that when  
2 the Maricopa County Sheriff's Office makes a disclosure in  
3 court about what was communicated to whom -- which you did --  
4 when you provide part of the document, which I've now ruled  
5 isn't subject to the attorney-client privilege, and when you 14:14:29  
6 later answer interrogatories indicating other people that had  
7 communications with Casey, there may be a subject matter  
8 waiver. And that subject matter waiver may go broadly enough  
9 to apply to document 2. But on the other hand, that is a  
10 document that it seems to me to be uniquely among attorneys, 14:14:52  
11 and so there may be, in fact, work product immunity that you  
12 can still assert, and there may not really be anything in the  
13 document worth much.

14 MS. IAFRATE: I believe that there is information in  
15 that document that is worth much, Your Honor, because it 14:15:07  
16 conveys amongst the attorneys representing Sheriff Arpaio and  
17 Maricopa County Sheriff's Office their client's perceptions.  
18 They are actually talking about litigation and the perceptions  
19 of their client.

20 THE COURT: All right. I appreciate that candor, and 14:15:22  
21 maybe we were going different directions. But it seems to me  
22 that maybe, in order to determine whether or not there is  
23 material that is necessary to Chief Sands to put on his case  
24 and that could overcome the work product immunity, somebody's  
25 going to have to look at this document and make that call. 14:15:40

1           It's, of course, a judge's job to look at the document  
2 and to put aside things that he or she knows that are not  
3 relevant, but I can understand the defendants being  
4 uncomfortable with me looking at this document. I'm going to  
5 be the ultimate one to make that decision.

14:15:55

6           It doesn't seem to me to be so relevant with respect  
7 to Chief Sheridan or Sheriff Arpaio, since they've already  
8 admitted contempt, but it may be relevant to Chief MacIntyre;  
9 it may be relevant to Chief Sands; it may be relevant to  
10 Lieutenant Sousa.

14:16:13

11           So I'm wondering if you have any objection if I  
12 determine that there isn't a basis under which I'm either going  
13 to categorically require that these documents be disclosed or  
14 not disclosed if I draw up at random one of the magistrate  
15 judges and have them review the document to determine whether  
16 or not there is a work product immunity that is applicable.

14:16:31

17           Do you have any objection to that?

18           MS. IAFRATE: No, Your Honor.

19           THE COURT: Do you have any objection to that,  
20 Mr. Murdy?

14:16:42

21           MR. MURDY: No, Your Honor.

22           THE COURT: Do you have any objection to that,  
23 Ms. Wang, or Mr. Young? I don't know who's speaking.

24           MS. WANG: No, Your Honor.

25           THE COURT: All right. Then if I do determine that it

14:16:49



1 would help to have an in-camera review of this document, what I  
2 will do is I will just have the clerk's office designate a  
3 magistrate judge at random, and I will ask the clerk -- or that  
4 magistrate judge to review the document to determine whatever  
5 the legal issues I determine are applicable.

14:17:06

6 But it seems to me that even if there is a work  
7 product immunity, or even if there's a subject matter waiver,  
8 there still may be a work product immunity assertion that might  
9 require a -- might require a judge to make that determination,  
10 so that's how I'll proceed with respect to that document.

14:17:25

11 With respect to document number 3, that's a document  
12 from Tom Liddy to John MacIntyre, Brian Sands, and Eileen  
13 Henry. Again, did John MacIntyre receive that document?

14 MS. IAFRATE: Your Honor, if I just clarify one thing,  
15 you're looking at e-mail 3?

14:17:44

16 THE COURT: Yes, this is the January 4th --

17 MS. IAFRATE: So this is --

18 THE COURT: -- 3:14 p.m. from Tim Casey to Tom Liddy,  
19 John MacIntyre, Brian Sands, Eileen Henry.

20 MS. IAFRATE: Yes.

14:18:00

21 THE COURT: What reason did John MacIntyre have to  
22 receive this document?

23 MS. IAFRATE: It was to make certain that Mr. Sands  
24 and others were aware of it.

25 THE COURT: Well, Mr. Sands is an addressee on the

14:18:15

1 document.

2 MS. IAFRATE: Correct.

3 THE COURT: But he received it independently of  
4 Mr. MacIntyre.

5 MS. IAFRATE: Correct.

14:18:24

6 THE COURT: So Mr. MacIntyre's only function was to  
7 make sure Mr. Sands got it when Mr. Sands was an independent  
8 addressee?

9 MS. IAFRATE: Similar to e-mail number 1, yes, Your  
10 Honor.

14:18:34

11 THE COURT: Well, so there was no official duty that  
12 Mr. MacIntyre had with respect to the implementation of  
13 document number 1, is that correct?

14 MS. IAFRATE: We're talking about document number 3?

15 THE COURT: I'm talking -- I'm back on document  
16 number 1.

14:18:49

17 MS. IAFRATE: Correct.

18 THE COURT: And there is no official duty that  
19 Mr. MacIntyre had with respect to document number 3.

20 MS. IAFRATE: Correct.

14:18:58

21 THE COURT: Okay. Then similarly to document number  
22 1, I believe that there is no applicability of the  
23 attorney-client privilege to that document. But even if I were  
24 to determine that, it seems to me even if I were to determine  
25 that there was an attorney-client privilege applicable, why

14:19:14

1 shouldn't -- maybe it's pointless, because I don't think the  
2 attorney-client privilege applies if Mr. MacIntyre had no  
3 duties with respect to the document, but Chief Sands is an  
4 addressee on this document.

5 MS. IAFRATE: Correct.

14:19:34

6 THE COURT: And even if I accept everything else that  
7 you've said -- well briefed, as always, Ms. Iafate -- that the  
8 privilege belongs to Maricopa County, I believe in these  
9 circumstances where Maricopa County's interests and some of its  
10 other interests of its officials are adverse to Chief Sands and  
11 this is a document that Chief Sands received in the exercise of  
12 his duties, he should be entitled to look at the document, in  
13 fairness, to defend himself against allegations that he's in  
14 contempt.

14:19:50

15 It seems to me, for example, if we're going to look at  
16 the factors set forth in that Comment J to the Restatement,  
17 that all of them are met.

14:20:09

18 Do you have anything to say with respect to that?

19 MS. IAFRATE: Yes, Your Honor. Similar to  
20 Mr. MacIntyre not being a privilege-holder, neither is  
21 Mr. Sands. The Restatement Comment J, this Court --

14:20:26

22 THE COURT: Okay. So your view would be MacIntyre  
23 doesn't hold the attorney-client privilege, and neither does  
24 Sands.

25 MS. IAFRATE: Well, based on your previous rulings of

14:20:43

1 today, Your Honor, it sounds like that you are not determining  
2 that because Mr. MacIntyre does not have any official duties,  
3 then he would not share in the privilege of his office.

4 THE COURT: Yeah, well, that seems to me to be the  
5 law. Do you have a dif -- do you have cases that hold  
6 contrary?

14:21:01

7 MS. IAFRATE: I believe that as upper management of  
8 MCSO, Mr. MacIntyre's duty to make certain that people -- that  
9 Mr. Sands and Mr. Sheridan were aware of the existence of the  
10 e-mail, that that would keep it under attorney-client  
11 privilege.

14:21:16

12 THE COURT: So your view is that this e-mail could be  
13 sent to a hundred people, 99 of who -- 9 of 99 -- pardon me, 99  
14 of whom only had the responsibility to see that the one person  
15 got it, and it still would be subject to the attorney-client  
16 privilege?

14:21:32

17 MS. IAFRATE: I believe that you're extending my  
18 argument to quite --

19 THE COURT: I am extending it, I completely agree I'm  
20 extending it, but I'm trying to explore how far you think it  
21 goes.

14:21:43

22 MS. IAFRATE: How far I think it goes is to e-mail 1  
23 in Exhibit 3, because it didn't go to 100 people; it went to a  
24 chief deputy --

25 THE COURT: Well, you would --

14:22:00

1 MS. IAFRATE: -- an executive deputy --

2 THE COURT: -- agree with me, would you not, that if  
3 an e -- an attorney-client privilege, if it goes to somebody  
4 who can't claim the privilege, the privilege is lost.

5 Would you not agree?

14:22:13

6 MS. IAFRATE: The privilege is --

7 THE COURT: Lost.

8 MS. IAFRATE: Yes.

9 THE COURT: There is no privilege.

10 MS. IAFRATE: Yes.

14:22:18

11 THE COURT: And I'm asking on what basis can John

12 MacIntyre, according to you, claim that he has an

13 attorney-client privilege in the receipt of any of these  
14 documents? And if you're saying that it's only to see that

15 other people got it, I'm asking: Does that include his

14:22:31

16 supervisory responsibilities over these other people or not?

17 Is it merely a secretarial function or not? I'm asking for  
18 your clarification and I need to know an answer.

19 MS. IAFRATE: I'm attempting to give you answers to  
20 each of your questions, Your Honor.

14:22:50

21 THE COURT: I appreciate that, and you understand that  
22 I need a very specific answer to this question.

23 MS. IAFRATE: The specific answer is that the holder  
24 that can assert the privilege and waive the privilege is

25 Sheriff Arpaio and MCSO alone. Chief MacIntyre is a member of

14:23:00

1 upper management and continues to be --

2 THE COURT: The privilege doesn't even apply if Tim  
3 Casey sent it to people who have no official duty, or no  
4 official function, or no official reason to receive it, does  
5 it?

14:23:16

6 MS. IAFRATE: I hear what you're saying, and I agree  
7 with what you're saying. However, Your Honor, Mr. Sands has  
8 testified that it was sent to Mr. MacIntyre to make certain  
9 that individuals were aware of it.

10 THE COURT: Okay. And that's what you're relying on?

14:23:35

11 MS. IAFRATE: Yes.

12 THE COURT: All right. So your position would be that  
13 in light of my ruling that that wouldn't be a sufficient basis  
14 on which an entity can claim the attorney-client privilege in a  
15 document, that none of the documents that were sent to John  
16 MacIntyre would then be entitled to the attorney-client  
17 privilege.

14:23:49

18 MS. IAFRATE: Based on your rulings, yes.

19 THE COURT: All right.

20 I'm ruling right now that any document on which John  
21 MacIntyre was copied is not subject to the attorney-client  
22 privilege and must be disclosed. That's any document.

14:24:00

23 MS. IAFRATE: Well, Your Honor, could I have a point  
24 of clarification?

25 THE COURT: Um-hum. Yes.

14:24:14

1 MS. IAFRATE: There are other situations where an  
2 attorney would send Mr. MacIntyre something that was specific  
3 to him.

4 THE COURT: Well, I'm only talking --

5 MS. IAFRATE: I was assuming --

14:24:23

6 THE COURT: Please. And thank you.

7 I'm only talking about the document production request  
8 made by Chief Sands, because --

9 MS. IAFRATE: Very well.

10 THE COURT: -- that's the on -- that's the only thing  
11 we have pending.

14:24:32

12 MS. IAFRATE: Understood.

13 THE COURT: But you did indicate that there are other  
14 documents that aren't listed on your privilege log, and I want  
15 to make clear that all of those, if they're addressed to John  
16 MacIntyre, will be disclosed.

14:24:40

17 MS. IAFRATE: Just for point of clarification, I said  
18 there may be.

19 THE COURT: Okay. Thank you. So that shortens our  
20 responsibilities. But now let's go to document 4.

14:24:52

21 We've got a document from Joseph Sousa to  
22 Brett Palmer, Tim Casey, Rollie Seebert, Brian Sands, David  
23 Trombi, Eileen Henry.

24 I know who Eileen Henry is. She's Mr. Casey's  
25 paralegal, and that certainty doesn't, in my view, vitiate the

14:25:12

1 attorney-client privilege. What reason did Brett Palmer have  
2 to receive this document that you're claiming the  
3 attorney-client privilege in?

4 MS. IAFRATE: Brett Palmer and Joseph Sousa were  
5 tasked by MCSO to work with Tim Casey regarding the contents of 14:25:27  
6 this e-mail.

7 THE COURT: All right. Who's Rollie Seebert?

8 MS. IAFRATE: He was a chief.

9 THE COURT: And what role did he have in the  
10 implementation? 14:25:40

11 MS. IAFRATE: At that time, Your Honor, I would -- I  
12 would need to refresh my memory of what Chief Seebert was  
13 responsible for.

14 THE COURT: What about Brian Sands?

15 MS. IAFRATE: Brian Sands again was working with and 14:25:53  
16 was the supervisor for Joseph Sousa and Brett Palmer.

17 THE COURT: All right. And so it would be his  
18 official responsibility, then, to be aware of these things.

19 MS. IAFRATE: Yes.

20 THE COURT: How about David Trombi? 14:26:09

21 MS. IAFRATE: David Trombi likewise was a supervisor  
22 of Joseph Sousa and Brett Palmer.

23 THE COURT: All right. So he had also individual and  
24 personal responsibilities to make sure that the preliminary  
25 injunction was implemented. 14:26:24



1 MS. IAFRATE: Yes.

2 THE COURT: And he was aware of the preliminary  
3 injunction.

4 MS. IAFRATE: Well, you've had Chief Trombi come  
5 before you in this courtroom, Your Honor, and answer your  
6 questions regarding when he knew about the preliminary  
7 injunction and when he did or did not read the preliminary  
8 injunction.

14:26:32

9 THE COURT: You know, I must confess, if I had him do  
10 that, I don't remember. What did he say?

14:26:44

11 MS. IAFRATE: He said he had not read it. At the  
12 time --

13 THE COURT: That was not my preliminary injunction;  
14 that was the permanent injunction.

15 MS. IAFRATE: My apologies, Your Honor.

14:26:56

16 THE COURT: That's okay. I was in the case then and  
17 you weren't.

18 MS. IAFRATE: I was not.

19 THE COURT: So David Trombi was then aware of my  
20 preliminary injunction and he had an obligation to implement  
21 its terms.

14:27:07

22 MS. IAFRATE: Yes.

23 THE COURT: All right. Well, it seems to me that if  
24 you're going to claim the attorney-client privilege, the burden  
25 is yours to establish that the privilege is applicable, and you

14:27:22

1 can't tell me what Rollie Seebert did that has any official  
2 responsibility with respect to this communication.

3 MS. IAFRATE: Well, may I have a moment?

4 THE COURT: Sure.

5 (Pause in proceedings.)

14:28:22

6 MS. IAFRATE: Thank you, Your Honor, for that moment.

7 Mr. Seebert was the director of training, and this  
8 e-mail relates to training -- training based on the Court's  
9 preliminary injunction. Therefore, Mr. Seebert would have a  
10 role in knowing about these training scenarios, because he was  
11 the head of training.

14:28:42

12 THE COURT: All right. So Mr. Seebert knew about the  
13 preliminary injunction?

14 MS. IAFRATE: To be candid with you, Your Honor, I've  
15 not spoken to Mr. Seebert.

14:28:58

16 THE COURT: And he knew then that there was to be an  
17 implementation of the preliminary injunction?

18 MS. IAFRATE: He knew that training scenarios  
19 regarding the preliminary injunction were occurring and he was  
20 to help implement them.

14:29:15

21 THE COURT: And presumably he knew that they were  
22 never implemented.

23 MS. IAFRATE: I would assume.

24 THE COURT: All right. Let me ask, then, with respect  
25 to that same document -- and we're talking about Restatement

14:29:32

1 73, the three factors set forth in Comment, is it F there? --  
2 again, Mr. Sands was a recipient of this e-mail, was he not?

3 MS. IAFRATE: Could you say that again? Sorry.

4 THE COURT: Mr. Sands was a recipient of this e-mail.

5 MS. IAFRATE: He was.

14:29:59

6 THE COURT: And he received it in the course of his  
7 official responsibilities with the MCSO.

8 MS. IAFRATE: Yes.

9 THE COURT: And if he's now being subjected to what  
10 amounts to a civil prosecution for civil contempt, this  
11 information would be quite useful to him in defending against  
12 that assertion, would it not?

14:30:12

13 MS. IAFRATE: It may be. Or it may be harmful to him.

14 THE COURT: It may be. I grant that completely. But  
15 he wants it.

14:30:29

16 And the third category, I think, is that other than  
17 the use for which he intends to put it --

18 Let me get the exact language.

19 -- the agent must show -- which would be  
20 Chief Sands -- that production would create no material risk of  
21 prejudice or embarrassment to the organization beyond such  
22 evidentiary use as the agent may make of the communication.

14:30:49

23 So it seems to me that the agent, Chief Sands, is  
24 entitled to make use of the communication, and that doesn't  
25 count if it prejudices or embarrasses the organization. There

14:31:09

1 has to be some other sort of prejudice or embarrassment to the  
2 organization.

3 And where in fact we have Sheriff Arpaio and Chief  
4 Deputy Sheridan who've already admitted that they're in civil  
5 contempt, where is that? 14:31:29

6 MS. IAFRATE: Well, Your Honor, Mr. Sands is a former  
7 employee.

8 THE COURT: Sure.

9 MS. IAFRATE: And so a former employee must  
10 demonstrate no material risk of prejudice to the organization,  
11 which is MCSO. 14:31:36

12 THE COURT: Well, no material prejudice to the  
13 organization, MCSO, beyond such evidentiary use that the agent  
14 may make of the communication. If I authorize, pursuant to  
15 this, Chief Sands can see those documents, I may well condition 14:31:53  
16 that disclosure on him not using it for any purpose other than  
17 this litigation.

18 MS. IAFRATE: The concern that I have, Your Honor, is  
19 that we heard last time we were in your courtroom Mr. Sands'  
20 two attorneys stand up and waive the privilege as to everything 14:32:13  
21 and anything that they possibly can. That concerns me  
22 regarding the risk of prejudice to the organization.

23 THE COURT: Well, I understand that, but it seems to  
24 me that I can also privilege -- or I can also condition its  
25 disclosure on his non-disclosure, can't I? 14:32:32

1 MS. IAFRATE: I believe that that is a possibility  
2 that you have.

3 THE COURT: Ms. Wang.

4 MS. WANG: Your Honor, it's our understanding that  
5 this particular e-mail is part of a longer chain of e-mails,  
6 and that there may be other recipients as a result of that, and  
7 so plaintiffs would ask at a minimum that this -- the full  
8 chain be submitted for in-camera review by the magistrate.

14:32:40

9 THE COURT: Well -- okay. But before we get there,  
10 and I want you to know and I'm going to disclose on the record,  
11 I have not reviewed this document. But it has apparently been  
12 disclosed to the monitor, and as a result, already been given  
13 to Chief Sands.

14:33:05

14 Last week I indicated that there was a request made  
15 for documents and other things from the monitor that I was not  
16 going to authorize the monitor giving over his work  
17 impressions, but I was going to authorize him to give anything  
18 that he'd received from MCSO, any of his raw work product and  
19 the interviews to the parties, and that's what happened last  
20 week. It's my understanding that that disclosure to the  
21 monitor included this document. I haven't read the document, I  
22 haven't seen it, I haven't looked at it, but it is my  
23 understanding that this document has already been disclosed.

14:33:20

14:33:39

24 Do you have a separate understanding, Ms. IafRATE?

25 MS. IAFRATE: I do have a separate understanding that

14:33:55

1 confirms your concern. Because Ms. Wang was kind enough to  
2 alert me that pursuant to the documents that they requested  
3 from the monitor, that there was a group that she believed I  
4 was asserting the privilege, and she notified me of that fact.

5 THE COURT: All right.

14:34:14

6 MS. IAFRATE: So your chronology of events does sound  
7 accurate.

8 THE COURT: All right. Well, then have you reviewed  
9 this yet, Mr. Murdy?

10 MR. MURDY: I have not, Your Honor.

14:34:23

11 THE COURT: All right. I'm going to require you to  
12 set it aside if you're going to assert that the disclosure was  
13 inadvertent.

14 MS. IAFRATE: Yes, Your Honor.

15 THE COURT: All right. So please, Mr. Murdy, set it  
16 aside and do not look at the document.

14:34:30

17 MR. MURDY: Absolutely.

18 THE COURT: All right. Then we'll determine whether  
19 or not the disclosure to the monitor constituted a waiver.

20 And really, it seems to me that that may be irrelevant  
21 under 73j if I'm going to allow it to be disclosed pursuant to  
22 certain conditions, but, Ms. Wang, you apparently want to be  
23 heard on that?

14:34:41

24 MS. WANG: No, Your Honor. I just wanted to state on  
25 the record that we also received, I believe, the same

14:34:57

1 production from the monitor team, and I noticed that Tim  
2 Casey's name appeared on this e-mail chain as well as another.  
3 I did not look further at those documents and did alert  
4 Ms. Iafrate. We're awaiting her response on whether she --  
5 what she intends to do. 14:35:16

6 THE COURT: I guess -- and we need to handle this  
7 rapidly, because I really -- we're moving towards a hearing, I  
8 realize. But I guess two or three things I need to have you do  
9 for me, Ms. Iafrate. In addition to claiming that disclo --  
10 setting forth your case that disclosure was inadvertent, I 14:35:30  
11 would ask you if in fact this document was part of a larger  
12 e-mail chain included to others. It seems to me that you may  
13 well have no attorney-client privilege in the document. So I'd  
14 ask you to disclose all the persons who in any part of that  
15 e-mail chain would have received this document. 14:35:50

16 MS. IAFRATE: Understood.

17 THE COURT: All right. Thank you. When can I ask you  
18 to disclose that to the Court by?

19 Here's the only reason why I'm asking. I want to  
20 package up everything that a magistrate judge might have to 14:36:03  
21 look at so that he or she will have the whole package and can  
22 understand it all in the best context that we can give them.  
23 And I would rather do that rapidly, and I'm sure that all the  
24 parties would have it done rapidly.

25 When can you have that done by? 14:36:17

1 MS. IAFRATE: Tuesday.

2 THE COURT: All right. Please do it by Thursday. And  
3 I'll hold my order until at least I've heard from you, so that  
4 I can lay out with respect to whether or not I think -- well,  
5 let me ask you this. 14:36:30

6 When you disclose all the persons that -- the maximum  
7 number of persons that would have received this document, I  
8 think it's your obligation to establish that the  
9 attorney-client privilege applies --

10 MS. IAFRATE: I agree. 14:36:42

11 THE COURT: -- and so you're going to have to set  
12 forth why it is, what function this person received this  
13 document for.

14 MS. IAFRATE: Very well.

15 THE COURT: Okay. 14:36:52

16 MS. WANG: Your Honor, I'm sorry to interrupt.

17 Ms. Iafrate indicated there may be other documents on  
18 which defendants are asserting the attorney-client privilege.  
19 We would ask that she identify all such documents, include them  
20 for the Court's review. 14:37:06

21 THE COURT: I think that's appropriate, Ms. Iafrate.  
22 Any problem having that done by Tuesday?

23 MS. IAFRATE: No, Your Honor.

24 THE COURT: All right. So now we're looking at  
25 document number 5, which is a document from Tim Casey to Tom 14:37:14



1 Liddy, Eileen Henry. Again, those are all clearly attorneys.  
2 And it just apparently forwards Joseph Sousa's e-mail regarding  
3 MCSO training based on the Court's 12-23-11 order. Again  
4 you've asserted attorney-client work product privilege.

5 It seems to me that unless there is a subject matter 14:37:38  
6 waiver, which there may be, those are both good privilege  
7 assertions, so may be something I'll want to hand over to the  
8 monitor -- or not to the monitor, to the magistrate judge to  
9 take a look at. But I'll have to think about that and review  
10 it carefully. 14:37:56

11 Meantime, you're representing to me that there were no  
12 other recipients of this document?

13 MS. IAFRATE: Correct.

14 THE COURT: Okay. Anything else that you wanted to  
15 say on that, Ms. Iaftrate? 14:38:05

16 MS. IAFRATE: On the one that we just discussed? No.

17 THE COURT: The next document is from Tim Casey to Tom  
18 Liddy, Eileen Henry, and James Williams. Again, those are all  
19 attorneys. But again, there was cc'd on this document Brian  
20 Sands, David Trombi, Rollie Seebert, Brian Jakowinicz -- 14:38:30

21 MS. IAFRATE: Jakowinicz.

22 THE COURT: Thank you, Jakowinicz. I appreciate that.  
23 -- and John MacIntyre.

24 Did John MacIntyre have any official duties with  
25 respect to this? 14:38:47

1 MS. IAFRATE: No.

2 THE COURT: All right. Then that needs to be  
3 disclosed.

4 And again, the next document was sent to John  
5 MacIntyre. Does he have any official duties with respect to  
6 that? 14:38:56

7 MS. IAFRATE: No.

8 THE COURT: Then that document needs to be disclosed.

9 And the final document was also sent to John  
10 MacIntyre, and did he have any official duties relating to the  
11 notice of interlocutory appeal? 14:39:06

12 MS. IAFRATE: No, Your Honor, but could I just, for  
13 the record, assert that my original argument I would make again  
14 and again regarding these, with the understanding that you've  
15 already made your determination? 14:39:22

16 THE COURT: Yeah. And I guess I just want to be sure  
17 that I understand what you're saying. There weren't any  
18 official duties he had.

19 MS. IAFRATE: Correct.

20 THE COURT: He just had a secretarial responsibility  
21 to make sure that they got this document, that somebody else  
22 got this document. 14:39:30

23 MS. IAFRATE: That they were made aware of the  
24 existence of the document, yes.

25 THE COURT: But he had no supervisory 14:39:42

1 responsibilities over the people that he was required to make  
2 sure saw the document?

3 MS. IAFRATE: Correct.

4 THE COURT: All right. Then yes, I determine that  
5 there is no attorney-client privilege in documents that have  
6 been sent to Chief MacIntyre for any of the ones that we've  
7 discussed. And if in fact an additional document, any have  
8 been sent to Chief MacIntyre, unless you can tell me that he  
9 had official responsibilities, they need to be disclosed.

14:39:51

10 MS. IAFRATE: Very well.

14:40:08

11 THE COURT: Okay. That, I think, only leaves three  
12 documents, and so that's all my order will discuss. But I'll  
13 wait until Tuesday, because you may have additional documents,  
14 and I've asked to you provide that clarification with respect  
15 to the fifth document.

14:40:36

16 MS. IAFRATE: Very well.

17 THE COURT: Anything else you wanted to say on this,  
18 Ms. Iafrate?

19 MS. IAFRATE: Not that's not in my written papers to  
20 you, Your Honor.

14:40:49

21 THE COURT: I have read those carefully, all of them.  
22 Thank you for your briefing.

23 Mr. Murdy, we haven't let you speak. I think we  
24 probably need to hear from you.

25 MR. MURDY: Good afternoon, Your Honor. With regard

14:41:10

1 to the procedure the Court's outlined, we're comfortable with  
2 that procedure with regard to document number 2, which involved  
3 the client's perceptions. With regard to the work product,  
4 we're worried about the attorneys' mental impressions. I don't  
5 know that reference to the client's perceptions it necessarily  
6 falls within the scope of the work product privilege. 14:41:31

7 THE COURT: That may be so, but it does seem to me  
8 that it can also wrap up with an attorney's impressions. It's  
9 just going to require an in-camera review, wouldn't you think?

10 MR. MURDY: That's fine. We're comfortable with that. 14:41:45

11 And with regard to the other doc -- the other two  
12 documents, if you're going to have an in-camera review, we're  
13 comfortable with that as well.

14 THE COURT: All right. Anything else?

15 MR. MURDY: No. 14:41:53

16 THE COURT: Thank you. Ms. Wang, anything from you?

17 MS. WANG: No, Your Honor, just to clarify what is  
18 probably already clear. The documents the Court has just  
19 ordered to be disclosed to Chief Sands I believe also fall  
20 within the Court's discovery order and should be provided to  
21 plaintiffs. 14:42:04

22 THE COURT: Yes, there is no attorney-client privilege  
23 that attaches; there is no work product immunity that attaches.  
24 They must be provided to plaintiffs as well.

25 I'm not sure, Ms. Wang, that that would apply to any 14:42:20

1 documents, if any, that I require that Chief Sands be given  
2 access to with respect to what we'll call the Rule 73  
3 Restatement, because those are matters that he received under  
4 the -- under the scope of the larger attorney-client privilege,  
5 and I'm not sure that even if he can see and review those 14:42:37  
6 documents in fairness under the circumstances, that's going to  
7 necessarily require waiver to show those documents to the  
8 plaintiff.

9 MS. WANG: Understood, Your Honor. I would note that  
10 if Chief Sands uses such documents to refresh his recollection 14:42:52  
11 for testimonial purposes that I believe under the rules of --  
12 Federal Rules of Evidence, number 612, we would at that point  
13 be able to --

14 THE COURT: Yeah, we'll deal with all that as it -- as  
15 it comes. 14:43:08

16 MS. WANG: Yes, sir.

17 THE COURT: Just wanted to make clear what -- where we  
18 now stand.

19 Are there any other issues that since we're all  
20 together I can be of any assistance on? 14:43:15

21 MR. YOUNG: Yes, Your Honor. For the last couple  
22 weeks we have been writing to defendants' counsel about  
23 document production issues and interrogatories. This was the  
24 subject of my declaration that was filed last week.

25 We have not received responses to those. The hearing 14:43:33

1 is coming up. I know Your Honor would prefer to have telephone  
2 conferences, and I would like to ask Your Honor how you would  
3 prefer that we address those issues.

4 THE COURT: Well, I do prefer to have telephone  
5 conferences, because I think we can just resolve matters much 14:43:47  
6 more quickly that way, so here's what we'll do.

7 I did read your letter last week, Mr. Young, and I  
8 read the attachments to it, so I'm somewhat aware of some of  
9 the issues, but they're not really fresh on my mind. I think  
10 that what I would ask you to do is within a day or two contact 14:44:07  
11 Ms. Iafrate. Make your best good faith effort to resolve these  
12 things. If you don't receive satisfaction, then you and  
13 Ms. Iafrate get on the phone, give me a call, and I will set up  
14 within a day or so an informal conference and I'll rule. I'll  
15 hear both sides and I will rule on whether or not -- whether 14:44:24  
16 and what needs to be disclosed, and that way, we won't have to  
17 wait on this weekly status conference kind of a thing.

18 If in fact the public would like to hear those  
19 conferences, they're entitled to hear them. I usually don't go  
20 to the trouble of holding them out here, but I can put on a 14:44:40  
21 bridge out here and we can do them telephonically here.

22 MR. YOUNG: I'll talk with Ms. Iafrate about those  
23 issues.

24 THE COURT: All right.

25 MR. YOUNG: Thank you, Your Honor. 14:44:50

1 THE COURT: All right.

2 Anything else?

3 MS. IAFRATE: Not from the defense, Your Honor.

4 THE COURT: All right.

5 MS. WANG: No, Your Honor. Thank you.

14:44:56

6 THE COURT: Thank you all.

7 (Proceedings concluded at 2:44 p.m.)

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C E R T I F I C A T E

I, GARY MOLL, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 31st day of March, 2015.

s/Gary Moll