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14  
15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**

18  
19 DELPHINE ALLEN, et al.,  
20 Plaintiffs,  
21 v.  
22 CITY OF OAKLAND, et al.,  
23 Defendants.

Case No. C-00-4599 TEH

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
APPOINTMENT OF A RECEIVER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Judge: Hon. Thelton E. Henderson  
Date: December 13, 2012  
Time: 10:00 a.m.  
Crtrm.: 2, 17th Floor

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  - The "intermediate measures" set forth in this Court's January 24, 2012 Order were steps taken in the right direction. But because those measures were never implemented, Defendants propose the following structure, which mirrors the intent of the January 24, 2012 Order, but goes farther and is designed to accelerate compliance. ....25
  - Defendants propose the appointment of both a Compliance Director and Assistant Chief of Constitutional Policing. This structure

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will enhance court oversight and ensure that Departmental compliance receives the attention it requires. This proposal is designed to achieve and maintain full compliance with the NSA and to produce enhanced public safety for the citizens of Oakland. (See Decl. Brann, ¶ 14.)..... 25

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**I. INTRODUCTION**

City leaders recognize that this case is at a critical juncture. They also understand that full compliance with the parties' Negotiated Settlement Agreement (NSA) must be achieved. The people of Oakland are entitled to a compliance model or approach that quickly and efficiently brings the Oakland Police Department (Department or OPD) into conformity with the remaining 10 NSA tasks. While the parties agree on the goal of full compliance, they disagree on the best approach to get there.

The appointment of a receiver is neither legally nor factually appropriate at this time and could be detrimental to the goal of NSA compliance. Plaintiffs simply have not met the heightened requirements necessary for this Court to appoint a receiver to run the Department – a move that would be unprecedented in American jurisprudence and one that Plaintiffs concede is drastic.<sup>1</sup> Moreover, the appointment of a receiver is not the appropriate remedy because a receiver who would oversee all of the Department's daily functions – including NSA tasks previously found in compliance and functions entirely unrelated to the Amended Memorandum of Understanding (AMOU) – is neither an efficient nor effective means of achieving compliance. Indeed, the Independent Monitor previously noted that the current Chief of Police Howard Jordan was appointed at a "tumultuous time" approximately one year ago, but nevertheless has shown with his executive team "dedication to the core principles relevant to the NSA," and "progress has been made with regard to looking at innovative ways to bring about change." (Ninth Quarterly Report of the Independent Monitor for the Oakland Police Department, April 30, 2012, p. 3.) In the Monitor's more recent reports, he has taken issue with OPD's latest efforts at Compliance, in part because of his disagreement with certain OPD internal

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<sup>1</sup> (See Pls.' Mot. re Appointment of Receiver (Pls.' Mot.) at 8:27-9:1 ("it is now time to take the drastic measure of putting compliance with the NSA/AMOU reforms in the hands of a receiver having the power to order the City and OPD into sustained, practice compliance").)

1 investigations and the Department's discretionary findings in cases about use of force  
 2 and other areas regarding officer performance. These are cases where law enforcement  
 3 professionals can have good faith disagreements.<sup>2</sup>

4 Defendants do not suggest that the status quo is either appropriate or acceptable.  
 5 The current monitoring system has not worked as intended, however, and Defendants  
 6 acknowledge that more aggressive and invasive assistance is necessary to effect  
 7 significant and lasting reform. In lieu of receivership, Defendants propose a viable and  
 8 more directed interim approach that they believe will help to both ensure more rapid  
 9 compliance with the outstanding NSA tasks and enhanced public safety. Defendants  
 10 propose to add two high level positions to move forward on NSA compliance: a  
 11 Compliance Director and a new Assistant Chief of Constitutional Policing. The  
 12 Compliance Director would have quasi-judicial powers to authorize and implement  
 13 changes necessary to reach full compliance with the remaining AMOU tasks. With the  
 14 full support of Chief Howard Jordan, the new Assistant Chief of Constitutional Policing  
 15 would drive the necessary change of OPD's culture to ensure compliance with the NSA.  
 16 Defendants believe this proposal would achieve the parties' goals and avoid the  
 17 inefficiencies and delay that would inevitably accompany the appointment of a receiver.

## 18 II. STATEMENT OF FACTS

### 19 A. Brief History of Negotiated Settlement Agreement

20 In 2001, the City of Oakland (City) faced misconduct allegations and pattern and  
 21 practice claims against the "Riders" officers, Oakland Police Department (OPD) and the  
 22 City. The City responded and resolved these claims. Seeing an opportunity to improve  
 23 its police department, the City agreed to adopt institutional changes in the areas of police  
 24

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25 <sup>2</sup> The Declaration of Alameda County District Attorney Nancy E. O'Malley filed herewith  
 26 takes issue with the Monitor's methodology and standards in evaluating OPD in his most  
 27 recent report on officer involved shootings, which are cases her office investigates  
 28 independently.

1 training; supervision; the establishment of early warning systems and intervention; the  
2 reporting and review of uses of force; collecting data on stop and citizen contacts; and  
3 establishing accountability mechanisms through the investigation of citizens' complaints  
4 and the imposition of discipline when appropriate. The City engaged law enforcement  
5 experts to review and assess institutional and operational changes that would best  
6 improve police operations and services. Following negotiations and with the City  
7 Council's approval, OPD proposed a business plan for making the necessary  
8 improvements and the NSA was executed and entered as an order of this Court in early  
9 2003. The NSA is comprised of 15 articles, 51 tasks and hundreds of subtasks.

10 Under the NSA, an independent monitoring team ("IMT"), selected by the parties  
11 and approved by the Court, has evaluated and monitored the City's compliance with the  
12 terms of the NSA. In the course of the IMT's 7-year tenure, the IMT reports attributed the  
13 most significant progress from January 2005 to January 2010. Reversing the City's non-  
14 compliance record and building credibility during those 5 years with the IMT and the  
15 Court was an arduous task that required sustained efforts and cooperation by the OPD  
16 and others. By March 2009, Plaintiffs agreed that OPD's "progress has demonstrated  
17 that they do have the ability and the will to achieve substantial compliance." (CMC  
18 3/26/09 at p. 3:9-10.) Plaintiffs further stated they were "impressed with the diligence and  
19 commitment shown by those OPD officers who attended the last monthly meeting. It  
20 appears as though many supervisors are ready to make a serious effort to comply with  
21 the Negotiated Settlement Agreement." (CMC 3/26/09 at p. 3:24-26.)

22 Although OPD was continuing to make progress, it was clear that not all tasks  
23 were in full compliance and many of those in compliance would not reach the one-year  
24 compliance sustainability under the terms of the NSA. In March 2009, Plaintiffs  
25 recommended a solution that "recognized OPD successes and failures and that rewards  
26 efforts." (CMC 3/26/09, p. 5.) Accordingly, in the latter part of 2009, the IMT  
27 recommended and the Court approved the expiration of the NSA and the filing of a  
28 narrower Memorandum of Understanding ("MOU"), effective January 2010 through

1 January 2012, under which only 22 of the original 51 tasks would continue to be actively  
2 monitored by a new monitoring team. After Plaintiffs' counsel and OPD selected the  
3 appropriate team, the City negotiated a contract with new monitors: the Alexandria Group  
4 of MPRI, which later changed its name to Professional Police Standards (PPS). The new  
5 contract retained the same methodology, type of compliance findings, and protocols (e.g.,  
6 sharing of information, entry/exit interviews, meetings) as the contract with the previous  
7 IMT.

8 In June 2011, the court approved the AMOU, effective January 2012 through  
9 January 2014 (or sooner), which further reduced the number of tasks that would be  
10 actively monitored to 13. (Amended Memorandum of Understanding Re: Post NSA  
11 Terms and Conditions Allowing for the Resolution of Plaintiffs' Claims for Injunctive Relief  
12 and for Dismissal of the Action (AMOU), Dock. #620, June 27, 2011, Ex. 1.) The Parties  
13 agreed that "the City has accomplished the NSA's two goals of enacting the required  
14 policies and completing training of OPD personnel on these policies [and that] . . . OPD  
15 has made significant progress in achieving practice compliance with the reforms." (*Id.* at  
16 2:25-27.) As the AMOU noted, however, additional time was needed for OPD to  
17 complete reform work; specifically, the AMOU required the City to continue working to  
18 achieve full and sustained compliance with the 13 tasks not completed under the NSA  
19 and MOU. (*Id.* at 3:8-11.)

20 **B. The January 24, 2012 Order**

21 In its January 24, 2012 Order, this Court recognized that "the Oakland Police  
22 Department is, without a doubt, better off now than when these cases were filed in 2000  
23 and 2001." (1/24/12 Order Vacating January 26, 2012 Status Conference And  
24 Conferring Additional Authority On The Monitor, Dock. #675, p. 2:6-7.) But the Court also  
25 emphasized that much significant work remained for the OPD before it achieved the  
26 promises of the parties' NSA. (1/24/12 Order, Dock. #675, p. 2:7-9.) To assist the OPD  
27 with making progress towards full compliance, the Court took the intermediate step of  
28 conferring additional authority on the Monitor, requiring, among other things, that the

1 Chief of Police consult with the Monitor on all major decisions affecting compliance with  
2 the NSA. (*Id.* at 3:13-28.) Unfortunately, that model of monitoring has not effectively  
3 assisted the City and the OPD in reaching their goal of full compliance with the NSA.

4 **C. Shortfalls with the Current Monitoring Model**

5 By April 2012 team efforts between and by the IMT and the City concluded that the  
6 OPD required a structural change in order to accelerate task compliance and to  
7 implement foundational changes needed to strengthen OPD. (Decl. Santana, ¶ 46.) At  
8 that time, the City began to formalize a request to Chief Warshaw for more robust and  
9 frequent technical assistance in areas that it acknowledged required more focused  
10 attention and assistance with problem solving in order to achieve compliance, which was  
11 never properly addressed. (*Id.*) Specifically, in May 2012, City leaders requested "real-  
12 time" audits, enhanced technical assistance, and more frequent visits from the Monitor.  
13 (*Id.*; Decl. Quan, ¶ 9.) These requests were never fully or adequately addressed. (Decl.  
14 Santana, ¶ 46; Decl. Quan, ¶ 10.)

15 Recognizing the shortfalls with the current monitoring model, in May 2012, the City  
16 proposed an OPD structural change that would have placed a full-time, on-site  
17 professional charged with guiding the Chief in his efforts to achieve NSA compliance.  
18 (*Id.*) The full time, on-site individual would work directly with the City to facilitate NSA  
19 Task completion. (*Id.*) The City was informed by or through Chief Warshaw, however,  
20 that the Court denied the City's request. (*Id.*)

21 Another flaw with the current model is that the current IMT serves as both an  
22 auditor and technical advisor/mentor. This dual function creates an inherent conflict.  
23 (Decl. Brann, ¶ 19; Decl. Santana, ¶ 38.)<sup>3</sup> A monitor is an auditor who measures  
24 performance and reports to the court, whereas a mentor/technical advisor provides  
25 advice to senior command staff on leadership, implementation of policies, procedures,

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26  
27 <sup>3</sup> Joseph Brann is a nationally recognized expert in Community Policing and Police  
28 Department Consent Decrees. (See Decl. Brann, p. 1-6, Exh. A.)

1 and reforms and supports the departmental change in culture. (Decl. Brann, ¶ 19.) The  
2 monitor must be a neutral judge of performance; the mentor must give advice and  
3 guidance and share responsibility for the outcome. (*Id.*)

4 Lastly, a breakdown in communication between the IMT and City leaders is  
5 creating an additional impediment to achieving NSA compliance. (Decl. Santana, ¶¶ 40,  
6 41; Decl. Jordan, ¶ 32.) By way of example, the Monitor and the City Administrator have  
7 not had a face-to-face meeting since May 2012, with the exception of one meeting in  
8 August which included others. (Decl. Santana, ¶ 41.) Likewise, the Monitor and City  
9 Administrator have had one telephone conversation since about the same time. (*Id.*)  
10 Additionally, following the Court's August 31, 2010 Order, the OPD has submitted 65  
11 reports to the Monitor and plaintiffs' counsel providing updates on compliance efforts.  
12 (Decl. Jordan, ¶ 4.) In these reports, the deputy chief responsible for each task provides  
13 an update on the progress or challenges for that particular task. (*Id.*) Individual tasks are  
14 audited on a regular basis and the deputy chiefs report the results of those audits and  
15 corrective action taken to address any problems. (*Id.*) Chief Jordan submits a report on  
16 the large issues facing the OPD, including issues related to the culture of the Department  
17 that may be outside of individual tasks. (*Id.*) To date, however, the Monitor has provided  
18 only minimal feedback on these reports, and has not provided OPD with *any* feedback on  
19 these reports in 2012. (*Id.*) Similarly, beginning in July 2012, the Monitor significantly  
20 reduced his communication with Police Chief Jordan. (*Id.* at ¶ 32.)

#### 21 **D. Current Compliance Status**

22 The Monitor evaluates the Department's Task compliance in two phases. First,  
23 the Department achieves Phase 1 compliance "when it has promulgated appropriate  
24 policies and trained relevant Department members or employees in their content."  
25 (Eleventh Quarterly Report of the Independent Monitor for the Oakland Police  
26 Department, Dock. #835, p. 5.) Once the Department achieves policy compliance, it then  
27 achieves Phase 2 compliance when it successfully implements the required policies. (*Id.*)  
28 Assessing Task compliance often require the Monitor to analyze multiple instances of

1 activity, in which case it bases its analysis on a review of all, or a statistically valid  
 2 sample, of the population. (*Id.* at p. 6.) For the Department to achieve compliance based  
 3 on analyses of cases, it must meet a minimum, agreed-upon standard, which ranges  
 4 from 85%-100%, or a Yes/No standard. (*Id.* at p. 6.) "In general, to achieve full  
 5 compliance, the Department must achieve both Phase 1 and Phase 2 compliance; that is,  
 6 an appropriate policy must be adopted, trained to, and operationally implemented." (*Id.*  
 7 at p. 5.)

8 The Department has successfully achieved Phase 1 compliance with all 22 of the  
 9 remaining active Tasks. (*Id.* at p. 3.) As of November 7, 2012, the Department has  
 10 achieved Phase 2 compliance with 12 of the remaining 22 Tasks. (*Id.* at p. 3.) Only 7 of  
 11 the original 51 Tasks in the NSA remain in partial compliance, 2 deferred, and 1 not in  
 12 compliance:<sup>4</sup>

- 13 • Task 2 – Timeliness of IAD cases – deferred compliance (Decl. Whent, ¶ 5);
- 14 • Task 5.18 -- Preponderance of Evidence – partial compliance (Decl. Whent, ¶ 6);
- 15 • Task 20.2 – Consistency of Supervision – partial compliance (Decl. Whent, ¶ 7);
- 16 • Task 24.2-24.3 – Use of Force Reporting – partial compliance (Decl. Whent, ¶ 8);
- 17 • Task 25.4 – Use of Force Recommendations – partial compliance (Decl. Whent, ¶
- 18 9);
- 19 • Task 30.3 – EFRB Requirements – partial compliance (Decl. Whent, ¶ 10);
- 20 • Tasks 34.2 and 34.3.1 – Stop Data – partial compliance (Decl. Whent, ¶ 11);
- 21 • Task 40 – PAS System – partial compliance (Decl. Whent, ¶ 12);
- 22 • Task 41 – Use of PAS System – not in compliance (Decl. Whent, ¶ 13); and
- 23 • Task 42 – Field Training Program – deferred compliance (Decl. Whent, ¶ 14).

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24  
 25 <sup>4</sup> A more complete description of the City's status on compliance can be found in the  
 26 Declaration of Sean Whent in Support of Defendants' Opposition to Plaintiffs' Motion for  
 27 Appointment of a Receiver (Declaration Whent). Deputy Chief of Police Whent also  
 28 describes in his declaration discrepancies with the Monitor's findings regarding the status  
 of OPD compliance.

1 **E. The Frazier Report and OPD's Implementation of the Report's**  
2 **Recommendations**

3 Following the October 25, 2011 Occupy Oakland protest, the City contracted with  
4 the Frazier Group to provide an independent assessment of OPD's response to the  
5 Occupy Oakland events. (Decl. Santana, ¶ 30; Decl. Toribio, ¶ 2; Decl. Quan, ¶ 7.) The  
6 Frazier Group was asked to review OPD's response and to make recommendations for  
7 improving the Department's policies, procedures, and practices. (Decl. Toribio, ¶ 2.)  
8 Initially, the Frazier Group's draft report lacked information and contained factual  
9 inaccuracies as a result of the Group's failure to interview District Attorney O'Malley,  
10 Sheriff Ahern, and Deputy City Administrator Arturo Sanchez. (Decl. Santana, ¶ 30.)  
11 City Administrator Deanna Santana alerted the Frazier Group to these deficiencies. (*Id.* ¶  
12 32.) Ms. Santana's suggested changes did not alter the Group's findings or  
13 recommendations, nor was that ever the intention. (*Id.*) Further, Chief Frazier agreed  
14 with Ms. Santana's suggestions and made corrections to the report in coordination with  
15 the District Attorney. (*Id.*) The Frazier Group remained independent at all times. (*Id.*)  
16 The Frazier Group subsequently issued their report on June 14, 2012, which provided a  
17 critique of OPD's response to the events of October 25, 2011. Their report resulted in  
18 numerous findings and recommendations. (*Id.*)

19 OPD worked cooperatively with the Frazier Group by facilitating their review of the  
20 incident, making staff available for interviews, and seeking their insight and feedback on  
21 improvements. (Decl. Toribio, ¶ 3.) OPD incorporated the Frazier Group  
22 recommendations in subsequent internal training sessions, line ups, and other briefings  
23 held during the planning phase of several crowd events in 2012. (*Id.* at ¶ 4.)

24 OPD also incorporated many of the Frazier Group recommendations related to  
25 planning. City and allied agency personnel participate in regular meetings to ensure that  
26 everyone is operating under the same guidelines. (Decl. Toribio, ¶ 5.) OPD's Operations  
27 Section has additional meetings during the planning phase to better communicate clear  
28 strategies and tactics. (*Id.*) OPD holds focused briefings prior to events and emphasizes

1 expectations regarding the use of force, handling of citizens' complaints, documenting  
2 events, and reporting requirements. (*Id.*) In addition, OPD meets with Mutual Aid  
3 partners to discuss OPD's operations plan and Departmental policies, mission, and  
4 objectives, and to make sure they are followed. (*Id.*)

5         The Frazier Group's recommendations related to OPD's operations have also  
6 been incorporated into OPD's practices. For example, OPD's Tango Teams – which are  
7 specialized police units trained and authorized to use less lethal force for crowd control –  
8 are now better managed, supervised, and supported in the field. (Decl. Toribio, ¶ 6.)  
9 They are deployed in smaller units to ensure a smaller span of control and are assigned  
10 directly to a Platoon Lieutenant for more direct team supervision and better oversight.  
11 (*Id.* at ¶ 7.) To better track the use of less lethal munitions, OPD has implemented  
12 additional inventory and tracking mechanisms. (*Id.*)

13         Consistent with Frazier recommendations, OPD is also improving its  
14 documentation, reporting, and accountability practices by deploying more use of force  
15 investigators and report writers. (*Id.* at ¶ 10.) Having sufficient personnel to document  
16 high risk and controversial incidents helps OPD in evaluating the police response,  
17 validating appropriate police conduct, and meeting timelines for reporting and  
18 investigations. (*Id.*)

19         Significantly, OPD's improved training, planning, and operational strategies,  
20 developed through their work with the Frazier Group, are producing favorable results.  
21 The Department successfully implemented improved crowd management actions during  
22 the October 25, 2012 Occupy Oakland demonstration, during which OPD managed a  
23 large crowd of approximately 300 protestors. (Decl. Toribio, ¶ 12.) During the event, the  
24 City of Oakland Office of Emergency Services was activated to ensure coordination of  
25 city services and support OPD's public safety response. (*Id.* at ¶ 13.) OPD's response  
26 was successful and resulted in only one use of police force, two arrests, very few citizens'  
27 complaints, and no injuries to officers. (*Id.* at ¶ 14.) There were no reported acts of  
28 vandalism and OPD officers managed to intervene early and address individual criminal

1 activity in a focused manner. (*Id.*) Additionally, Chief Michael Hillman (ret.), a member of  
2 the Frazier Group, came to Oakland to observe the Department's operations of October  
3 25, 2012 and to provide OPD with feedback. (*Id.* at ¶ 15.) Chief Hillman indicated that  
4 he was impressed with OPD's operations and the level of planning that the Department  
5 had conducted. (*Id.*)

6 **F. City Leadership Is Working Together and Allocating Additional Resources to**  
7 **Spur Compliance**

8 The Mayor, Chief of Police, and City Administrator are working together as a team  
9 to provide effective leadership to advance NSA compliance, and to ensure that  
10 compliance is sustained beyond the terms of the NSA. (Decl. Santana, ¶ 14; Decl. Quan,  
11 ¶ 4.) This work includes making the civilian complaint process easier to register  
12 complaints of allegations of inappropriate police conduct, placing the OPD Office of  
13 Inspector General under the administration of City Administrator, and requesting budget  
14 allocations for recruitment, academies, training, improved technology, and crime  
15 reduction. (Decl. Santana, ¶ 15; Decl. Quan, ¶ 4.) The City Administrator and Mayor  
16 issued the City's 5-Year Financial Plan, in which they earmarked \$5 million from the  
17 general reserve fund to continue to rebuild and strengthen the OPD: two police  
18 academies per fiscal year for five years (subject to Council approval), which will result in  
19 attaining a sworn force of just over 800; up to \$5,000,000 earmarked for strategic  
20 initiatives that continue to address gaps that require focused work-plans and remedies  
21 (e.g., training, equipment, contracted services, limited-duration staffing, change  
22 management, etc.); and, they will recommend to the City Council a contract amendment  
23 for the development of a Citywide Crime Reduction Plan to strategically tie together the  
24 many intervention, prevention, and suppression resources and efforts underway within  
25 city departments. (Decl. Santana, ¶ 26.)

26 In addition, Mayor Quan even traveled to Detroit in April 2011 at the request of  
27 Chief Warshaw to learn how the Detroit Police Department tracks compliance and to  
28 consider their compliance efforts as a model for an independent Inspector General.

1 (Decl. Quan, ¶ 5.) Upon returning, the Mayor developed a model for an independent  
2 Inspector General and included funding in the mid-cycle budget. (Decl. Jordan, ¶ 22;  
3 Decl. Quan, ¶ 6.) This action allows the City to utilize staff more efficiently and provides  
4 independent assessment of investigations, policies, and practices. (Decl. Jordan, ¶ 22.)

5 Importantly, the City is also investing in a strong technology project  
6 implementation structure that results in technology goals of being able to ensure better  
7 accountability in the OPD, more professional policing and significantly increased crime  
8 fighting ability. (Decl. Jordan, ¶ 24; Decl. Santana, ¶ 27.) Specifically, the City is  
9 budgeting and planning for the following new technology systems: Computer Aided  
10 Dispatch (CAD); Records Management System (RMS); and, Personnel Assessment  
11 System (PAS). (*Id.*) A specialized Information Technology Project Manager also will be  
12 dedicated to the police department, which will maximize the effectiveness of these new  
13 technological resources. (*Id.*)

### 14 III. ARGUMENT

#### 15 A. Appointment of a Receiver Is an Inappropriate and Unsuitable Remedy.

16 Defendants are not advocating for the status quo. The law is clear, however, that  
17 the appointment of a receiver is an inappropriate and unsuitable remedy at this time.  
18 When faced with the need to remedy violations of constitutional rights or noncompliance  
19 with court injunctions, courts "must consider a range of available options, including  
20 appointment of special masters or receivers." *Brown v. Plata*, 131 S. Ct. 1910, 1929  
21 (2011). While the appointment of a receiver is a recognized equitable tool, it is an  
22 extreme measure not to be taken lightly. Indeed, "the power to appoint a receiver is a  
23 delicate one which is exercised sparingly and with caution, and only in an extreme case  
24 under such circumstances as demand or require summary relief, and never in a doubtful  
25 case." *Morand v. Superior Court*, 38 Cal. App. 3d 347, 350 (1974); *see also Lewis v.*  
26 *Kugler*, 446 F.2d 1343, fn. 18 (3rd Cir. 1971) ("[t]his broad power to fashion appropriate  
27 remedies extends from the power to issue injunctions against individual offenders and to  
28 appoint observers and special masters, to the power, *in extreme cases, to appoint*

1 receivers") (emphasis added).

2       The decision of whether to appoint a receiver is something that must be  
3 undertaken in consideration of the unique facts and circumstances of each case. *Plata v.*  
4 *Schwarzenegger*, 2005 U.S. Dist. LEXIS 43796 at \*[p.34] (N.D. Cal. Oct. 3, 2005).  
5 Courts generally consider the appointment of receivers when two preconditions have  
6 been satisfied: there is a grave and immediate threat or actuality of harm and less  
7 extreme measures have been exhausted or proven futile. *Plata v. Schwarzenegger*,  
8 2005 U.S. Dist. LEXIS 8878 at \*22 (N.D. Cal. May 10, 2005). Courts also look to five  
9 additional, related factors: (1) whether the continued insistence that compliance with the  
10 Court's orders would lead only to confrontation and delay; (2) whether there is a lack of  
11 leadership to turn the tide within a reasonable period of time; (3) whether there is bad  
12 faith; (4) whether resources are being wasted; and (5) whether a receiver is likely to  
13 provide a relatively quick and efficient remedy. *Plata v. Schwarzenegger*, 2005 U.S. Dist.  
14 LEXIS 8878 at \*22.

15       Admittedly several of the above factors exist here; however, four critical factors do  
16 not. First, while unconstitutional policing is an inherent threat, as this Court's January 24,  
17 2012 Order acknowledged, Defendants have made progress and the Department is  
18 significantly improved. Second, less extreme measures have not been exhausted or  
19 proven futile. While this Court conferred additional authority upon the Monitor as an  
20 interim step and possible solution short of a receivership, the Monitor has not fully  
21 explored or exercised these enhanced powers. And, the appointment of an individual  
22 with enhanced powers similar to those articulated in this Court's January 24, 2012 Order  
23 would provide the Department with the oversight and direction necessary to ensure  
24 compliance. Third, there is no bad faith here. Defendants acknowledge that challenges  
25 still exist and have even asked this Court, through the Monitor, for additional help and  
26 guidance. Lastly, a receiver is not likely to provide a quick and efficient remedy here,  
27 where it could take months or even years for the receiver to understand the dynamics  
28 and complexities of the Department, and even longer to bring about significant change.

1 While Defendants acknowledge the need for assistance in achieving full compliance,  
2 appointment of a receiver is not an appropriate remedy.

3 **1. The Threat of Harm Is Diminished As Defendants' Compliance Efforts**  
4 **Have Taken Hold**

5 Plaintiffs must establish that there is a grave and immediate threat or actuality of  
6 harm before this Court may resort to the appointment of a receiver. *Plata*, 2005 U.S.  
7 Dist. LEXIS 8878 at \*22. Here, Defendants have made significant progress in achieving  
8 compliance with the NSA and AMOU. As this Court noted in its January 24, 2012 Order,  
9 "the Oakland Police Department is, without a doubt, better off now than when these  
10 cases were filed in 2000 and 2001." (Jan. 24, 2012 Order, Dock. #675, at 2:6-7.) While  
11 work remains and compliance is not complete, Defendants' efforts at improvement have  
12 made a visible impact.

13 Plaintiffs assert that the alleged grave and immediate threat caused by  
14 Defendants' noncompliance is evident because "[p]olice misconduct claims and lawsuits  
15 against the City have been a rampant epidemic." (Pls.' Mot. re Receiver at 43:4-5.)  
16 Plaintiffs cite generally to the City Attorney's Annual Report for fiscal year 2010-2011 in  
17 support. However, contrary to Plaintiffs' allegations, the City Attorney's 2010-2011  
18 Annual Report ("Report") indicated that "[c]laims involving police matters dropped  
19 noticeably for the fourth year in a row." (2010-2011 Annual Report at p. 8.) The number  
20 of claims related to police matters (including vehicle accidents and personnel/labor  
21 matters) dropped from 164 in 2007-2008 to 93 in 2010-2011. (*Id.* at p. 9.) Similarly, the  
22 number of police-related lawsuits decreased, from 40 in 2007-2008, to 14 in 2010-2011.  
23 (*Id.*) Significantly, the Report notes that "[w]hile the number of infrastructure and  
24 personnel/labor lawsuits increased significantly this year, police-related lawsuits fell by  
25 more than half." (*Id.* at p. 9.) And more recently, on September 14, 2012, the Oakland  
26 City Attorney issued a mid-year report for fiscal year 2011-2012, indicating that payouts  
27 in police cases dramatically decreased from the previous fiscal year, from \$7.65 million to  
28 \$2.89 million. (Sept. 14, 2012 Mid-Year Report at p. 4.) The 2010-2011 Report credits

1 the decrease in claims and lawsuits since fiscal year 2002-2003 to the Department's  
2 implementation of "new oversight protocols and accountability reforms as a result of the  
3 *Delphine Allen v. City of Oakland* federal litigation." (2010-2011 Annual Report at p. 10.)

4 Moreover, Defendants are dedicated to achieving full compliance by addressing  
5 problematic areas of non-compliance. The Department is working to enhance training at  
6 all levels. The City has set aside approximately \$400,000 (as part of a \$2.4 mid-cycle  
7 budget amendment) for training efforts that will result in systemic change. (Decl. Jordan,  
8 ¶ 28.) OPD implemented crowd management control training and began to work on the  
9 68 recommendations put forth in the Frazier Report. (Decl. Santana, ¶ 36.) By the time  
10 the Frazier Report was issued (on June 14, 2012), 74% of its recommendations had been  
11 completed or were underway. (*Id.*) And, in the first test of the Department's  
12 implementation of those recommendations, OPD was highly successful in responding to  
13 the recent one-year anniversary of the Occupy Oakland protest on October 25, 2012.  
14 (Decl. Toribio, ¶¶ 14, 15.)

15 The City Administrator has also obtained City Council approval and funding to  
16 civilianize and re-configure the Office of the Inspector General as well as the citizen  
17 complaint intake process so that both functions are under the control of City  
18 Administration. (Decl. Jordan, ¶¶ 22, 23; Decl. Santana, ¶ 15.) This transfer of oversight  
19 will allow the City to utilize staff more efficiently, will provide for independent assessments  
20 of investigations, policies, and practices, and will enable citizens to report allegations of  
21 inappropriate police behavior to non-sworn City personnel. (Decl. Jordan, ¶¶ 22, 23.)

22 Further, as detailed above, the City Administrator and Mayor issued the City's 5-  
23 Year Financial Plan, in which they recommended additional funding allocations to  
24 continue to rebuild and strengthen the OPD, including two police academies per fiscal  
25 year for five years, which will result in attaining a sworn force of just over 800 (subject to  
26 City Council approval). (Decl. Santana, ¶ 26.) The Mayor and City Administrator have  
27 also earmarked \$5,000,000 from the General Purpose Fund for strategic initiatives that  
28 continue to address gaps that require focused work-plans and remedies (e.g., training,

1 equipment, contracted services, limited-duration staffing, change management, etc.).  
2 (*Id.*) They will also recommend to the City Council a contract amendment for the  
3 development of a Citywide Crime Reduction Plan to strategically tie together the many  
4 crime fighting efforts underway in Oakland. (*Id.*)

5         The City is also taking steps to procure a new technology system that will assist  
6 the Department in augmenting accountability and fighting crime, as well as dedicating a  
7 specialized technology project manager to the Department. (*Id.* at ¶ 27; Decl. Jordan, ¶  
8 24.) Acquisition of this new technology will greatly aid the OPD to augment  
9 accountability, streamline work processes, create more workload capacity, and support  
10 fighting crime in Oakland. (Decl. Santana, ¶ 27.)

11         The Department has also contracted with a consultant, Robert Wasserman, and  
12 his agency, Strategic Policy Partnership (SPP), to conduct an organizational assessment  
13 and identify systemic factors that are impeding Departmental compliance with the AMOU.  
14 (Decl. Jordan, ¶ 11.) Mr. Wasserman has had an extensive career in law enforcement  
15 and has served as a senior executive in several large American police agencies,  
16 including Dayton, Boston, and Houston. (*Id.* at ¶ 12.) In accordance with the contract,  
17 Wasserman and SPP will conduct an organizational assessment which, among other  
18 tasks, will identify the systemic factors in OPD that impede City efforts to achieve full  
19 NSA Task compliance and develop strategies for compliance and assist in implementing  
20 the strategies. (*Id.* at ¶ 13.) SPP and OPD will develop a list of action items and a  
21 strategy to implement the changes needed as identified in the organizational  
22 assessment. (*Id.* at ¶ 14.) SPP will review the effectiveness of all OPD systems with the  
23 objective of developing best professional police practices in all phases of OPD  
24 operations. (*Id.* at ¶ 15.) Specifically, SPP will assist OPD with achieving NSA  
25 compliance and will work with OPD to: (a) develop and implement crime reduction  
26 strategies; (b) assess the effectiveness of technologies supporting crime reduction and  
27 service delivery systems and make recommendations as to changes to implement best  
28 professional policing standards into all facets of OPD operations; and (c) improve

1 relationships between the police and community. (*Id.* at ¶ 16.)

2 By taking the above actions, Defendants have reduced the risk of harm. Although  
3 work remains, Defendants have implemented reforms whose impact are being realized.  
4 In this sense, the risk of harm is considerably diminished.

5 **2. Less Extreme Measures Have Not Been Exhausted or Proven Futile.**

6 The exhaustion of less extreme measures is a factor that must weigh heavily in the  
7 court's decision whether to appoint a receiver. *Plata*, 2005 U.S. Dist. LEXIS 8878 at \*22.  
8 Indeed, this is an "essential condition[ that must be] met." *Id.* Plaintiffs correctly note that  
9 this Court has attempted less extreme measures of remediation over the years, including  
10 bestowing upon the monitor enhanced powers earlier this year. However, Plaintiffs fail to  
11 acknowledge that this most recent measure was never fully implemented and the Monitor  
12 never stepped into his more involved role as was envisioned by this Court and  
13 Defendants. Because these "intermediate measures" were never fully implemented,  
14 appointment of a receiver is premature and unnecessary. Significantly, this intermediate  
15 step has yet to be exhausted or proven futile.

16 This Court conferred additional authority upon the Monitor in recognition of the fact  
17 that "something must change if full compliance is to be achieved." (Jan. 24, 2012 Order  
18 at 3:5-6.) Defendants agreed with this Court that the "intermediate measures" set forth in  
19 the January 24, 2012 Order were steps taken in the right direction and requested that the  
20 Monitor exercise his enhanced powers. However, the Monitor failed to provide the  
21 Defendants' requested level of assistance, nor did he utilize his enhanced powers.

22 Consistent with the January 24, 2012 Order, in May 2012, Mayor Quan, Chief  
23 Jordan, and City Administrator Santana requested that the Monitor provide "real-time"  
24 audits, enhanced technical assistance, and more frequent on-site visits. (Decl. Santana,  
25 ¶ 48; Decl. Quan, ¶ 9.) The Monitor agreed to provide "real-time" audits and enhanced  
26 technical support. (Decl. Santana, ¶¶ 49, 50; Decl. Quan, ¶ 9.) Four months later,  
27 Defendants finally received a one-page, non-binding report that included a single-  
28 paragraph assessment of the Department's non-compliance with three tasks. (Decl.

1 Santana, ¶ 49.) Due to the brevity of the report and the length of time that it took the  
2 Monitor to prepare this "real-time" audit, the report's usefulness and impact on  
3 compliance was minimal, if it all. (Decl. Santana, ¶ 49; Decl. Quan, ¶ 10.)

4 Similarly, the City's request for enhanced technical assistance, to date, has not  
5 been satisfactorily addressed. (Decl. Santana, ¶ 51.) Though the Monitor committed to  
6 providing enhanced technical assistance during the same May meeting, he still had not  
7 fulfilled that commitment by early July. (*Id.* at ¶ 50.) Accordingly, the City Administrator  
8 sent him an email repeating the City's requests and outlined the three tasks that needed  
9 enhanced technical assistance. (*Id.* at ¶ 50.) This was followed by a mid-July letter from  
10 Chief Jordan to the IMT, stating that the IMT should come prepared to begin this work  
11 during its August visit. (*Id.*) But during the August visit, the IMT was not prepared and  
12 the City Administrator was later informed that he had delayed the "ETA" to September.  
13 (*Id.* at ¶ 51.) To date, the IMT has not fully addressed the City's request for technical  
14 assistance. (*Id.*)

15 Defendants also wrote to the Monitor in June to ask that he exercise his additional  
16 authority and provide the Department with "detailed directives, or actions that [he]  
17 believe[s] that the City Administrator should take to advance compliance in the NSA  
18 areas identified in the January 24 court order." (Decl. Santana, Ex. D at p. 3 [June 6,  
19 2012 Ltr. to Chief Warshaw].) Defendants acknowledged the need for assistance "in  
20 helping the City remove the organizational and cultural barriers that are impeding full  
21 compliance with the NSA." (*Id.*) Defendants went so far as to propose the immediate  
22 appointment of a Special Master to "quickly and effectively implement needed reforms."  
23 (*Id.*) The City envisioned that the full time, on-site individual would work directly with the  
24 City to facilitate NSA Task completion. (Decl. Santana, ¶ 47.) The City was informed by  
25 or through Chief Warshaw, however, that the Court denied the City's request. (*Id.*)

26 Although this Court's January 24<sup>th</sup> Order called for precisely the type of affirmative  
27 assistance that Defendants need to achieve full compliance, the Monitor's failure to act  
28 on his enhanced powers and provide Defendants with specific, direct, and augmented

1 oversight has contributed to the stagnation of Defendants' compliance. The Monitor is  
2 not to blame for Defendants' inability to comply with all NSA tasks. Because the January  
3 24<sup>th</sup> Order was never fully implemented, however, it cannot be said that less-intrusive  
4 relief has been exhausted or even proven futile. Rather than take the drastic and  
5 unprecedented step of imposing a receiver over a city's police department, Defendants  
6 request that this Court fully implement an interim remedy as previously contemplated in  
7 the January 24<sup>th</sup> Order by accepting Defendants' proposed alternative to appointment of  
8 a receiver.

### 9 **3. Defendants Have Not Acted in Bad Faith**

10 In support of their contention that Defendants have exhibited bad faith, Plaintiffs  
11 rely on hearsay statements included in the Monitor's Combined Fourth and Fifth Quarterly  
12 Report, issued nearly eight years ago, on December 17, 2004. (Pls.' Mot. re Receiver at  
13 47:4-10.) Plaintiffs further assert that simply by virtue of Defendants' inability to achieve  
14 full compliance with all NSA tasks, Defendants have acted in bad faith. (*Id.* at 48:5-6.)  
15 While Defendants do not dispute that they have failed to achieve full compliance with the  
16 NSA and AMOU, evidence of Defendants' improved practices as a result of this lawsuit  
17 indicate that Defendants have not been acting in bad faith.

18 As discussed above, the City Attorney's Annual Report for 2010-2011 indicates a  
19 significant and steady reduction in the number of police-related claims and lawsuits, even  
20 at a time when the number of lawsuits related to other matters (namely, infrastructure,  
21 personnel, and labor) was on the rise. (2010-2011 Annual Report at pp. 8-9.) The  
22 Report attributes these positive improvements to Defendants' implementation of the  
23 protocols and reforms brought about by this lawsuit. (*Id.* at p. 10.) Such positive  
24 progress could not have been realized had Defendants not dedicated themselves to  
25 attaining compliance.

26 Plaintiffs further assert that Defendants' purported "lack of progress . . . in  
27 implementing the Frazier Group's recommendations" with respect to the Department's  
28 response to the October 25, 2011 Occupy Oakland protests is indicative of bad faith.

1 (Pls.' Mot. re Receiver at 48:4-5.) However, contrary to Plaintiffs' assertions, the  
2 Department has worked with the Frazier consultants to implement a series of  
3 recommendations to help enhance the Department's public safety responses to difficult  
4 public protest events. (Decl. Toribio, ¶¶ 5-7, 10-14.) Department commanders and  
5 officers met with the Frazier consultants to review matters pertaining to crowd  
6 intervention, crowd communication options, unity of command, and situational  
7 awareness, among other topics. (*Id.* ¶ 4.) The Department's executive team also  
8 attended training sessions provided by the Frazier consultants focusing on ways to  
9 improve crowd tactics and management. (*Id.*) OPD incorporated the Frazier Group's  
10 recommendations in subsequent internal training sessions, line ups, and other briefings  
11 held during the planning phase of several crowd events to which OPD responded this  
12 year. (*Id.*)

13 The Department has also incorporated many of the Frazier Group  
14 recommendations related to planning, including participating in regular meetings with  
15 alleged agency personnel to ensure that everyone operates under the same guidelines.  
16 (Decl. Toribio, ¶ 5.) OPD holds focused briefings for officers prior to large events and  
17 emphasizes expectations regarding use of force, handling of citizens' complaints,  
18 documenting events, and reporting requirements. (*Id.*)

19 OPD has also incorporated Frazier Group recommendations regarding  
20 Department operations by improving the incident command structure, strengthening  
21 overall command and control, and enhancing field supervision. (Decl. Toribio, ¶ 5.) For  
22 instance, OPD's Tango Teams – the specialized units trained and authorized to use less  
23 lethal force for crowd control – are now better managed, supervised, and supported in the  
24 field. They are deployed in smaller units to ensure a smaller span of control and receive  
25 more direct team supervision and oversight. (*Id.* at ¶ 6.) And to better track the use of  
26 less lethal munitions, OPD implemented additional inventory and tracking mechanisms.  
27 (*Id.*) Tango Team supervisors are now responsible for overseeing the distribution of  
28 munitions to specialized teams and for tracking their use. (*Id.*)

1 OPD also now assigns a Video Officer to the smaller deployment teams to  
2 enhance overall situational awareness of the incident. (Decl. Toribio, ¶ 9.) Having real  
3 time information about the crowd's behavior helps OPD evaluate the situation and make  
4 better command decisions about the police response needed. (*Id.*) Similarly, OPD is  
5 also deploying more use of force investigators and report writers to document high risk  
6 and controversial incidents. (*Id.* at ¶10.) This is consistent with the Frazier Group's  
7 recommendations. (*Id.*) This helps OPD to evaluate the police response, validate  
8 appropriate conduct, and meet timeliness for reporting and investigations.

9 Moreover, the Department's responses to the public protest of May 1, 2012, as  
10 well as the first year anniversary of the Occupy Oakland protest, held recently on October  
11 25, 2012, unequivocally demonstrate that Defendants have acted in good faith to  
12 implement necessary reforms. During the October 2012 Occupy Oakland demonstration,  
13 which was attended by a large crowd of approximately 300 protestors, the City's Office of  
14 Emergency Services was activated to ensure coordination of City services and support  
15 for OPD's public safety response. (Decl. Toribio, ¶¶ 12, 13.) OPD's response to the  
16 protest was successful and resulted in only one use of police force, two arrests, very few  
17 citizens' complaints, and no injuries to officers. (*Id.* at ¶ 14.) OPD commanders and  
18 officers in the field successfully diffused the hostility of the crowd and avoided physical  
19 altercations and the escalation of violence. (*Id.*) There were no reported acts of  
20 vandalism and OPD officers managed to intervene early and address individual criminal  
21 activity in a focused manner. (*Id.*)

22 Tellingly, a member of the Frazier Group who came to observe OPD's response to  
23 the October 2012 Occupy protest indicated his approval with how OPD conducted its  
24 operations. Chief Michael Hillman met with Assistant Chief of Police Anthony Toribio  
25 before the event to be briefed on operations and attend line ups. (Decl. Toribio, ¶ 15.)  
26 Chief Hillman indicated that he was impressed with OPD's operations and with the level  
27 of planning that OPD had conducted. (*Id.*) Certainly OPD's good faith efforts to  
28 implement the Frazier Group's recommendations were evident following the October

1 2012 Occupy protests.

2           Additionally, Plaintiffs' assertions that efforts by City Administrator Santana to "get  
3 the Frazier Group to alter its report . . . is also indicative of bad faith" are misleading.  
4 (Pls.' Mot. For Receiver at 47:19-23.) The Frazier Group's draft report lacked information  
5 and contained factual inaccuracies as a result of the Group's failure to interview District  
6 Attorney O'Malley, Sheriff Ahern, and Deputy City Administrator Arturo Sanchez. (Decl.  
7 Santana, ¶ 30.) City Administrator Deanna Santana alerted the Frazier Group to these  
8 deficiencies – which did not alter the Group's findings or recommendations – and Chief  
9 Frazier agreed with Ms. Santana's suggestions and made corrections to the report in  
10 coordination with the District Attorney. (*Id.* ¶ 32.) The Frazier Group remained  
11 independent at all times. (*Id.*) It was never City Administrator Santana's intention to alter  
12 the Group's findings and recommendations, nor did her communications with Chief  
13 Frazier have that effect. (*Id.*) Ms. Santana's desire to receive a complete and accurate  
14 final report can hardly be construed as bad faith.

15           Lastly, although Plaintiffs now claim that "there has been a well-documented  
16 history of bad faith in the OPD, including at supervisory and command levels," Plaintiffs'  
17 prior admissions to this Court indicate to the contrary. (Pls.' Mot. re Receiver at 47:4-5.)  
18 In March 2009, the parties filed a Joint Status Conference Statement in which Plaintiffs  
19 stated that "[t]he Oakland Police Department's progress has demonstrated that they do  
20 have the ability and the will to achieve substantial compliance." (Mar. 19, 2009 Joint  
21 Status Conf. Statement, Dock #494, at 3:9-10.) Plaintiffs further lauded the Department,  
22 stating that they were "impressed with the diligence and commitment shown by those  
23 OPD officers who attended the last monthly meeting." (*Id.* at 3:24-25.) And specifically  
24 with respect to the purported history of bad faith demonstrated by the supervisory and  
25 command levels, Plaintiffs previously represented to this Court their belief that "many  
26 supervisors are ready to make a serious effort to comply with the Negotiated Settlement  
27 Agreement." (*Id.* at 3:25-26.)

28           Thus, the history of this case sufficiently demonstrates that while Defendants have

1 fallen short with respect to compliance, it is not because of bad faith or improper motives.  
2 There is simply no evidence before this Court that Chief Jordan, the current OPD  
3 Command Staff, the Mayor, and the City Administrator are not fully invested in achieving  
4 full compliance with the goals of the NSA and enhanced public safety. Indeed, all  
5 evidence indicates to the contrary.

6 **4. Appointment of a Receiver Would Cause Undue Delay in Achieving**  
7 **Compliance**

8 The appointment of a receiver should be considered where it is likely to provide a  
9 “relatively quick and efficient remedy.” *Plata*, 2005 U.S. Dist. LEXIS 8878 at \*22.  
10 Plaintiffs suggest that a receiver could provide a quick fix here because a receiver could  
11 have powers to take whatever action is necessary to reach compliance. (Pls.’ Mot. re  
12 Receiver at 49:12-13.) However, Plaintiffs’ cursory explanation fails to address the  
13 significant “ramp up” time that would be involved should the court appoint an outside  
14 receiver to assume control over the entire Oakland Police Department, as well as the  
15 time spent on functions previously deemed compliant or not a subject of this lawsuit.  
16 Here, a more targeted approach to achieving compliance – one where an individual  
17 assumes control over only those tasks out of compliance – would result in a quicker and  
18 more efficient remedy than a receivership.

19 A receivership can be an appropriate remedy in instances where there are  
20 significant and systemic flaws that pervade an entire organization. That is not the case  
21 here, where Defendants have been found in compliance with 29 of the 51 original NSA  
22 tasks, and where both this Court and the Plaintiffs have acknowledged Defendants’  
23 progress. (See Jan. 24, 2012 Order & Mar. 19, 2009 Joint Status Conf. Statement.) It  
24 would be inappropriate and counterproductive to bring in an outsider to run the entire  
25 Department, as Plaintiffs request, just to ensure that Defendants achieve Phase 2  
26 compliance with the remaining 10 tasks.

27 Progress would be further delayed while a receiver spent precious time learning  
28 about functions unrelated to the non-compliant tasks, yet essential to the day-to-day

1 administration of the Department. For instance, the Department must follow strict  
2 procedures for transporting detainees and citizens, work with criminal justice system  
3 stakeholders to track disposition of criminal cases, ensure compliance with community  
4 policing work requirements, and rotate assignment of command staff. None of these  
5 essential functions are tasks under the AMOU, yet a receiver with oversight over the  
6 entire Department would be responsible for ensuring their proper functioning. Simply put,  
7 the appointment of a receiver would not advance this Court's, Plaintiffs', and Defendants'  
8 objectives to achieve compliance without delay.

9 **B. Appointment of a Receiver Would Have Serious, Unintended Consequences**  
10 **on the City of Oakland**

11 Appointment of a receiver would not only result in delayed compliance, but could  
12 likely cause complacency and further resistance to bringing about the necessary changes  
13 that are at the heart of the organizational transformation that is being sought. (Decl.  
14 Brann, ¶ 15.) To effect significant and lasting reform, police department culture must  
15 change from within. (*Id.*; Decl. Chaleff, ¶ 6.<sup>5</sup>) Cultural change can only occur, however, if  
16 sworn personnel at every level understand that the mandate for change comes from the  
17 highest levels of the command structure, especially the Chief of Police. (Decl. Brann, ¶  
18 15; Decl. Chaleff, ¶ 6.) When there is frequent turnover in senior command and  
19 inconsistency in management accountability, as with the appointment of a receiver, those  
20 who are opposed to the change often believe they can simply outlast department leaders  
21 and their policies or that those policies will be changed or abandoned in the future. (Decl.  
22 Brann, ¶ 15.) Moreover, appointment of a receiver could delay OPD in achieving  
23 compliance and provoke resistance from some sworn personnel. (Decl. Chaleff, ¶ 8.)

24 The Department has suffered considerable turnover in senior command staff in

25 \_\_\_\_\_  
26 <sup>5</sup> Gerald Chaleff is the Special Assistant for Constitutional Policing to the Chief of Police  
27 in Los Angeles with extensive experience with the Consent Decree in Los Angeles.  
(Decl. Chaleff, ¶ 1-5.)

1 recent years, especially at the rank of Chief of Police. (Decl. Bran, ¶ 16.) Such turnover  
2 is detrimental to bringing OPD into compliance with the NSA. (*Id.*) Chief Jordan, while  
3 having spent his career in the OPD, has held his current rank for just over one year.  
4 (Decl. Jordan, ¶ 1.) As demonstrated by the declaration of Joseph Brann, if a receiver is  
5 appointed, it will be seen by sworn personnel as yet another sign of uncertainty and a  
6 lack of commitment. (Decl. Brann, ¶ 16.) This is exactly the kind of atmosphere that  
7 impedes compliance with the NSA. (*Id.*)

8         The appointment of a receiver could also have unintended fiscal ramifications for  
9 the City. Oakland's City Charter requires that the City have a balanced budget each  
10 year. (See Decl. Scott Johnson Supp. Defs.' Opp'n Re Pls.' Receivership Mot. (Decl.  
11 Johnson), ¶ 4.) If a receiver were appointed with the authority to exercise broad powers,  
12 particularly with respect to the expenditure of City funds, the City could likely be forced to  
13 increase revenues and decrease expenditures (including cutting City programs and  
14 services) to compensate for the receiver's expenditures. (*Id.*) This is because there is  
15 very little room, if any, for reductions in City spending. In the last six years, the City has  
16 cut its workforce by 20% and employees from all bargaining groups have made  
17 concessions. (*Id.* at ¶ 5.) Because of the tenuous nature of the City's finances –  
18 including two revenue ballot measures with near-future sunset provisions and the  
19 expiration of employees' concessions – it is likely that if this Court appoints a receiver,  
20 the City would need to draw on its reserves to maintain a balanced budget. (*Id.*)

21         In all likelihood, the appointment of a receiver would subject the City to a  
22 downgrade of its credit rating. The City's current credit rating is in the "AA" category.  
23 (Decl. Johnson, ¶ 6.) However, a downgraded credit rating could place the City on  
24 "negative watch" status and would impact the interest rate at which the City could borrow  
25 for any new debt issuance. (*Id.* at ¶ 7.) By paying a higher interest rate, it would cost the  
26 City more to borrow money. (*Id.*) Further, the City would have to disclose the  
27 appointment of a receiver – regardless of the extent of the receiver's powers – to all City  
28 investors and potential borrowers. (*Id.* at ¶ 8.) Such a disclosure could dissuade

1 potential investors from investing in the City due to the uncertain impact of a receiver on  
2 the City's finances. (*Id.*) The City's current investors could also question whether the  
3 City has the ability to re-pay its current debt service on outstanding bonds. (*Id.*)

4 **C. Appointment of a Compliance Director With Authority to Direct the**  
5 **Department's Compliance Efforts And An Assistant Chief of Constitutional**  
6 **Policing to Focus Exclusively on Compliance and Constitutional Policing Is**  
7 **A More Appropriate Remedy**

8 The "intermediate measures" set forth in this Court's January 24, 2012 Order were  
9 steps taken in the right direction. But because those measures were never implemented,  
10 Defendants propose the following structure, which mirrors the intent of the January 24,  
11 2012 Order, but goes farther and is designed to accelerate compliance.

12 Defendants propose the appointment of both a Compliance Director and Assistant  
13 Chief of Constitutional Policing. This structure will enhance court oversight and ensure  
14 that Departmental compliance receives the attention it requires. This proposal is  
15 designed to achieve and maintain full compliance with the NSA and to produce enhanced  
16 public safety for the citizens of Oakland. (See Decl. Brann, ¶ 14.)

17 Defendants propose that the Compliance Director will be a salaried, full-time, on-  
18 site position. The Compliance Director will have full responsibility and authority for  
19 implementing all actions necessary to bring the Department into full compliance with the  
20 NSA and AMOU. Defendants believe that the Compliance Director must be someone  
21 with a record and reputation of strong administrative, organizational, and developmental  
22 skills, a collaborative leadership style, police executive experience, and is suited to guide  
23 the Department to compliance and this case to conclusion. Defendants anticipate  
24 identifying specific candidates to serve as the Compliance Director before the December  
25 13<sup>th</sup> hearing in this matter and its experts have offered to assist the Court should it  
26 choose to engage in a broader search for candidates.

27 While having enhanced power, unlike a receiver, the Compliance Director will not  
28 have complete control over the entire Department as requested by Plaintiffs. Such  
control is not necessary here, where Defendants have already been found to be

1 compliant with 29 of the original 51 tasks included in the NSA. Rather, the role of the  
2 Compliance Director will be to focus on the tasks that remain. It would be  
3 counterproductive and unwarranted at this stage in these proceedings to appoint a  
4 receiver to oversee functions already deemed to be constitutionally compliant. To effect  
5 real and immediate change, the Compliance Director must be able to focus on the  
6 remaining Departmental deficiencies.

7 Under Defendants' proposal, the Compliance Director will have the authority to  
8 enforce compliance with the AMOU and to adopt measures necessary to achieve prompt  
9 compliance. The Defendants would be expected – and indeed obligated – to implement  
10 the Compliance Director's directives. In the event of a significant disagreement between  
11 either party and the Compliance Director as to a material issue, a meet and confer  
12 process would be initiated. This Court would be the final arbiter of all disputes.

13 The Compliance Director will have the authority to modify Department policy,  
14 procedures, and practices, to institute reforms, and to oversee the expenditure of  
15 necessary resources, if required, to ensure compliance. The Compliance Director would  
16 provide timely substantive feedback and direction to the Department on best practices,  
17 including how to improve compliance and correct deficiencies with the remaining AMOU  
18 tasks. The Compliance Director may conduct expedited audits, beta testing, and other  
19 reviews of compliance. When the Compliance Director discerns a problem inhibiting  
20 compliance, he or she would immediately communicate the problem to the Chief of Police  
21 and provide a remedial plan.

22 Further, the Compliance Director would be authorized to review and evaluate  
23 Departmental personnel decisions (including promotions, engagement of consultants,  
24 assignments, and disciplinary actions in misconduct cases), tactical initiatives that could  
25 impact the NSA and AMOU compliance, procurement of equipment, including software,  
26 or other resources intended to secure or maintain NSA and AMOU compliance, and  
27 Departmental programs or initiatives relating to NSA tasks or objectives. Defendants  
28 also envision the Compliance Director having the authority to mandate that the

1 Department take a specific course of action as he or she deems appropriate with respect  
2 to the above decisions made by the Department.

3 Defendants' proposed Compliance Director's primary objective is to bring the  
4 Department into compliance with the remaining provisions of the AMOU, that is not to say  
5 that the Compliance Director would not have the authority to implement necessary  
6 reforms that would indirectly impact those remaining provisions, including training and  
7 mentoring of command staff. Further, the Compliance Director would also have the  
8 authority to evaluate any systemic impediments to compliance, including the  
9 Department's organizational culture and operations, including leadership, structure,  
10 staffing levels, and support and operational systems. Should the Compliance Director  
11 identify any such systemic barriers, Defendants will be required to work with the  
12 Compliance Director to remedy and remove the barriers.

13 The appointment of a Compliance Director to the role envisioned above is not  
14 intended to replace the role of a Monitor. It is critical that Defendants' progress toward  
15 full compliance with the remaining tasks be monitored and evaluated so as to provide the  
16 parties and the Compliance Director with an accurate assessment of the status of  
17 compliance efforts. To ensure clear delegation of authority, however, the Monitor's duties  
18 must be focused solely on auditing and reporting; the Monitor shall not provide technical  
19 assistance, advice, instruction, or recommendations absent the Compliance Director's  
20 request. In other words, the duties to instruct and direct compliance steps will reside  
21 solely with the Compliance Director. If the Compliance Director chooses to consult with  
22 the Monitor on these (or other) issues, he or she may do so.

23 To ensure lasting change, however, it is essential that an internal OPD position be  
24 created in addition to the external role of the Compliance Director. To that end, the City  
25 Administrator is prepared to create a new high-level position within the Department,  
26 similar to the position held by Gerald Chaleff in the Los Angeles Police Department  
27 following the imposition of a consent decree over the LAPD. (Decl. Chaleff, ¶ 2.) This  
28 individual would be someone coming from outside of the Department who has the

1 respect and confidence of the community and the full support of Chief Jordan. (*Id.* at ¶  
2 6.) This Assistant Chief of Constitutional Policing would be tasked with ensuring  
3 implementation of the remaining AMOU tasks and would complement the Compliance  
4 Director's efforts. The creation of an internal position dedicated to ensuring compliance  
5 is essential given that the Chief of Police has myriad responsibilities and obligations and  
6 needs additional resources to dedicate to compliance. (Decl. Brann, ¶ 17.)

7         While Defendants have believed for some time that the creation of an external  
8 position dedicated to ensuring compliance is the most efficient and effective means of  
9 achieving compliance, the City has been unable to unilaterally implement such a change  
10 with respect to the Compliance Director. (See Decl. Santana, ¶ 47, Ex. D [6/6/12 Ltr to  
11 Chief Warshaw].) Oakland's City Charter prohibits the transfer of authority or delegation  
12 of power by any public officer, including by the city administrator, mayor, or chief of  
13 police.<sup>6</sup> (See The Charter of the City of Oakland (City Charter), Art. V, § 503; *see also*  
14 City Charter, Art. VI, § 600 ("All departments or other administrative agencies so created  
15 shall be administered by the City Administrator or by a department head or other officer  
16 appointed by and responsible to him/her"); *see also Thompson Pacific Const., Inc. v. City*  
17 *of Sunnyvale*, 155 Cal. App. 4th 525, 539 (2007) ("powers conferred upon public  
18 agencies and officers which involve the exercise of judgment or discretion are in the  
19 nature of public trusts and cannot be surrendered or delegated to subordinates in the  
20 absence of statutory authorization"). Thus, while the City is unable to implement the  
21 mechanism that it believes will bring about lasting reform and ensure constitutional  
22 policing, Defendants recognize this Court's equitable powers to order such a remedy.

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26 <sup>6</sup> The creation of the Assistant Chief of Constitutional Policing position does not raise  
27 similar concerns.

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**IV. CONCLUSION**

Defendants acknowledge the long and somewhat disappointing history of this case. But the past cannot be changed and instead, this case is at a critical juncture now whereby this Court must decide the best path forward toward reaching compliance. As this Court and Defendants have previously acknowledged, more help is needed to ensure swift reform. However, appointment of a receiver is not appropriate here, where Defendants have made progress toward compliance with the NSA and the Department is significantly improved as a result; where less intrusive relief has not been exhausted or proven futile; where City leadership has acted in good faith to implement needed reforms; and where a receiver is not likely to bring about swift change. A receiver would not provide the sort of targeted assistance that the Department needs to reach compliance. Moreover, appointment of a receiver could have the unintended consequence of creating instability and resistance within the Department to the NSA.

While a receiver is not an appropriate remedy, Defendants believe the appointment of an external Compliance Director coupled with a new internal Assistant Chief of Constitutional Policing, both of whom would be dedicated to achieving compliance with the NSA, will lead to swift and sustained reform. City leadership is committed to improving the Department and is asking for this Court's assistance in reaching the parties' and this Court's goals of full compliance.

DATED: November 8, 2012

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DATED: November 8, 2012

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