

2016 WL 7638469

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United States District Court, D. Arizona.

Manuel de Jesus Ortega MELENDRES, on behalf  
of himself and all others similarly situated; et al.,

Plaintiffs,

and

United States of America, Plaintiff-Intervenor,

v.

Joseph M. ARPAIO, in his official capacity as

Sheriff of Maricopa County, Arizona; et al.,

Defendants.

No. CV-07-2513-PHX-GMS

|  
Signed 12/05/2016

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#### ORDER

Honorable G. Murray Snow, United States District Judge

\*1 Pending before the Court is Defendant Joseph M. Arpaio's Emergency Motion to Suspend Proceedings Pending Resolution of Movant's Motion For Recusal of the Court and Its Monitor (Doc. 1879). For the following reasons, the motion is denied.

Defendant Arpaio's Motion requests a stay as this Court considers his second request that the Court recuse itself, and his third request that a judge assigned to this case recuse. In addition to again requesting this Court's recusal, this motion also requests that the Monitor's operations be suspended and that the Monitor be removed. The basis of the underlying recusal motion is the communications that occurred between the Monitor and this Court after January 2014, when the Court appointed the Monitor as part of the permanent injunctive relief resulting from the Sheriff's multiple and systemic violations of the constitutional rights of members of the Plaintiff class.

At a November 10 hearing following the Sheriff's filing of this second motion for recusal, Defendant Arpaio made it clear that he desired the Court to stay both its oversight of this case and the oversight of its Monitor, pending this Court's consideration of the second motion for recusal. The Court then invited the Sheriff to file this separate motion making that request.

In his motion, however, Sheriff Arpaio does not provide any adequate justification for his stay request, nor any basis for the Court to believe it arises on an emergent basis.

Sheriff Arpaio was well aware, even prior to filing his May 2015 motion for recusal, that this Court had communications with its Monitor regarding the Monitor's supervision of the injunctive relief entered against the Sheriff's office. As Sheriff Arpaio's second motion for recusal itself notes in detail, the Court indicated to the parties that it was communicating with its Monitor regarding those issues that it disclosed to the parties and which now, years later, Sheriff Arpaio claims require this Court's recusal. (Doc. 1878).

Further, in November 2014, when the Court entered an order to facilitate the Monitor's oversight of the Sheriff's PSB investigations the Court made plain in the Order that "[n]othing in this Order prevents the Monitor from communicating any information to the Court." (Doc. 795 at 18 ¶ 3). The Court contemporaneously invited the parties to make any objections to this Order that they had, (*see, e.g.*, Doc. 803 at Hr'g Tr. 27-28, 38), and, while the Sheriff did object to some aspects of the Order, he made no objections to the provisions ensuring this Court's right to communicate with its appointed Monitor. (Doc. 817 at Hr'g Tr. 7-12).

Moreover, in its order denying Sheriff Arpaio's May 2015 motion to recuse this Court, which was not based on the communications at issue here, even though the Sheriff was aware of them, the Court noted "[t]he Monitor is an agent of the court and, in this role, has communicated with the Court as necessary to oversee and coordinate Defendants' compliance with existing judicial orders on the Court's behalf." (Doc. 1164 at 20). This order was filed on July 10, 2015, but no request was made by Sheriff Arpaio to seek this Court's recusal at that time. After considerable additional oral and written discovery that occurred during the months of July, August and September 2015, the contempt and remedies hearing resumed during the months of September, October and November 2015. In those hearings the parties admitted volumes of evidence to be examined by the Court. The Court made its findings of fact in May 2016 and allowed the parties to make additional arguments prior to the issuance of its Second Supplemental Permanent Injunction in July 2016. Three months after the entry of the Order, in late October 2016, Defendant Arpaio files his second motion to recuse this Court (and now also the Monitor). He does so only after he has literally let years, millions of dollars and thousands of hours of effort go by despite his earlier knowledge concerning the basis on which he now makes his motion to recuse.

**\*2** His principal argument to justify the stay request is that when Sheriff Arpaio filed his first request to recuse this Court, on May 22, 2015, the Court stayed further action on the case pending its ruling on the recusal request. Sheriff Arpaio thus argues that the Court should follow the same practice with respect to this request.<sup>1</sup>

What this argument ignores, however, is that when Defendant Arpaio filed his first request for this Court to recuse, it was in the middle of the ongoing contempt/remedy hearings. Those hearings were set to resume in a matter of weeks. Because the motion could not be fully briefed or considered prior to the scheduled resumption of the hearing, the Court stayed the

resumption of proceedings to allow for the recusal motion to be fairly considered and ruled upon. After consideration, the Court denied the motion, and the hearings proceeded. The Sheriff then sought interim relief from the Ninth Circuit. This relief was also denied.

Here, by contrast, there is no pending resumption of hearings to determine the rights of the parties. The rights of the parties have long since been determined and a remedy has long since been entered. The only matters that may now arise involve those matters incident to the implementation of the injunctive relief that has been entered.

Further, the application of the traditional standards for stay have not been met in this case. *See, e.g., Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008).

First, the Sheriff has not established that he is likely to prevail on the merits. As the Sheriff himself concedes, this Court is bound by Ninth Circuit law that requires that recusal motions be rejected if they are not timely asserted. (Doc. 1896 at 4 n.2) ("We acknowledge that this Court is bound by the Ninth Circuit's contrary view [that recusal motions must be rejected if not asserted in a timely fashion.]") *See, e.g., E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (holding that movants are required to raise recusal issues at the earliest possible time following discovery of their potential grounds); *see also First Interstate Bank of Ariz. N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 988 n.8 (9th Cir. 2000) (holding that "recusal issues must be raised at the earliest possible time after the facts are discovered").<sup>2</sup> This is especially true when the late-assertion of recusal comes in situations like the present case, where litigants sit on known information while the court makes intervening rulings and "complain[s] only after receiving an adverse decision." *White v. Nat'l Football League*, 585 F.3d 1129, 1141 (9th Cir. 2009). That is what the Sheriff has done here.

To the extent that Sheriff Arpaio argues in his emergency motion that he is only seeking that this court recuse itself from future decisions regarding the implementations of its two supplemental injunctive decrees, that argument is misleading. As the Sheriff's own recusal motion notes: "[T]his motion does not request that the Court *vacate* any of its prior decisions. Movants have contemporaneously requested leave to file a separate motion seeking discovery into the full scope and content of the Court's *ex parte* communications, so that Movants may determine whether such vacatur is warranted." (Doc. 1878 at 2). Because the Sheriff cannot obtain the recusal of this court

or the vacation of its orders when it did not timely seek such recusal, however, he cannot seek to achieve discovery into a matter that he has forfeited the opportunity to timely raise. The Sheriff cannot achieve through misdirection what the law otherwise prohibits.

\*3 Thus, even if Sheriff Arpaio were to establish as a matter of law that the Court cannot appoint and communicate with a Monitor as a post-trial remedy to cure what were found to be the Sheriff's pervasive constitutional deprivations of members of the Plaintiff class, the Sheriff concedes that the Court is obliged to follow Ninth Circuit law regarding late-filed recusals. Thus, he has not established that he is likely to prevail on the merits.

Second, Sheriff Arpaio fails to establish the likelihood of irreparable injury. The status quo for the last three years has been monitor oversight of this case. The Sheriff assures this Court that he will continue to be fully and actively engaged in the implementation of this Court's two supplemental injunctive decrees should the Court suspend its oversight and that of the Monitor. Based on the record of Sheriff Arpaio's compliance in this case, the Plaintiffs are entitled to take no confidence in such assurances and, as their responses indicate, they do not. Further, if it is Sheriff Arpaio's intent to fully implement the Court's decrees, it is unclear how the Court or the Monitor's continuing supervision would in any event prejudice him in the few interim weeks it will take this Court to review the Sheriff's motion in light of the three years that such oversight has existed absent any objection by him. The Sheriff has acknowledged to the Court the recent assistance of the Monitor as it pertains to his own reports showing continuing systemic bias within the MCSO, and offers no assertion that such assistance resulted in its harm. (Doc. 1890 at Hr'g Tr. 27-28).

Sheriff Arpaio nevertheless argues that he will be prejudiced by any question that may arise in the implementation of either decree by the possibility of any communication that the Monitor may have had with the Court during the last three years. In light of the Sheriff's delay in bringing the motion, the uncontested evidence that has since been developed, and the inaccurate generality of the Sheriff's assertion that any communication between the Court and the Monitor would require recusal on any implementation decision, this Court declines to grant a blanket suspension of both the Courts and the Monitor's oversight responsibilities pending its ruling on the recusal motion.

Third, as the Court's findings of fact and supplemental decrees establish, the Plaintiff class in this case has been the victim of substantial and ongoing deprivations by the Sheriff. In light of the nature and extent of such deprivations, Plaintiffs and Plaintiff-Intervenors are entitled to the Court and Monitor's ongoing supervision to ensure the Sheriff's compliance. Further, the public interest lies in ensuring such compliance, especially in light of the Sheriff's failure to earlier seek the relief he now claims to be essential and emergent.

**IT IS THEREFORE ORDERED** Denying Sheriff Arpaio's Emergency Motion to Suspend Proceedings Pending Resolution of Movant's Motion For Recusal of the Court and Its Monitor (Doc. 1879).

#### All Citations

Not Reported in Fed. Supp., 2016 WL 7638469

#### Footnotes

<sup>1</sup> Because Defendant Arpaio's first request to recuse this Court was the second request for recusal it filed in this action pursuant to 28 U.S.C. § 144 (he had previously filed for Judge Murguia's recusal using the same statute), that statute, by its very terms, did not apply to the Sheriff's Motion to recuse this Court filed in May 2015. (See Doc. 1164 at 38).

<sup>2</sup> He asserts the argument only to preserve it for reconsideration only by the Ninth Circuit en banc or the United States Supreme Court. (See Doc. 1896 at 4 n.2).

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