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and THE LOS ANGELES POLICE DEPARTMENT

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 vs.

7 CITY OF LOS ANGELES, CALIFORNIA,
8 BOARD OF POLICE COMMISSIONERS
9 OF THE CITY OF LOS ANGELES, AND
10 THE LOS ANGELES POLICE
DEPARTMENT,

11 Defendants.

) CASE No. CV 00-11769 GAF (RCx)

)
) **JOINT SUPPLEMENTAL**
) **MEMORANDUM OF POINTS**
) **AND AUTHORITIES IN**
) **SUPPORT OF THE JOINT**
) **MOTION TO TERMINATE THE**
) **CONSENT DECREE AND TO**
) **TRANSITION FULL OVERSIGHT**
) **AUTHORITY TO THE CITY**
) **DEFENDANTS; DECLARATION**
) **OF JULIE RAFFISH; EXHIBIT**

) [Filed Concurrently With Transition
) Agreement, as Revised, and Proposed
) Order]

)
) The Honorable Gary A. Feess,
) United States District Judge

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19 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF**
20 **RECORD:**

21
22 The United States of America, and the City of Los Angeles, Los Angeles
23 Board of Police Commissioners (“Commission”), and Los Angeles Police
24 Department (“LAPD” or “Department”) (collectively the “Parties”) hereby submit
25 the following Points and Authorities, Transition Agreement (as revised), and
26 Proposed Order in response to this Court’s Minute Order, dated June 15, 2009, and
27 in support of the Parties’ Joint Motion for Termination of the Consent Decree and
28 Approval of the Transition Agreement, filed with this Court on June 1, 2009.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **PRELIMINARY STATEMENT**

4
5 The Parties to this Consent Decree (“Decree”) have moved this Court for an
6 order terminating the provisions of the Decree, and entering a Transition Agreement
7 as a further order of this Court superseding the Decree, for the full and complete
8 resolution of this lawsuit. This Court retains jurisdiction over enforcement of the
9 Transition Agreement as it would over any order entered in furtherance of the
10 settlement of a lawsuit pending before the Court.

11 As the Court recognized during the June 15, 2009, status conference, “there
12 has been significant and substantial progress made in terms of the improvement of
13 the operations of the Department over the past eight years.” Further, “there’s very
14 little doubt in [the Court’s] mind that the LAPD is a more effective policing agency
15 at this point. I do think that at the same time that its policing is effective, it has had
16 its officers conform more closely to the requirements of the Constitution.” (See
17 Transcript of Proceedings, Status Conference (June 15, 2009) at 5:17-19; 6:2-7,
18 attached to Raffish Declaration as Exhibit G.) Therefore, the Parties will not use this
19 brief to discuss the Department’s accomplishments in great detail.

20 The United States, the City Defendants, and this Court’s Independent Monitor
21 have found that the City Defendants have substantially complied with the
22 terms of the Decree. The Transition Agreement, as revised, represents a final
23 resolution which is the most equitable to both Parties, as it reflects the flexibility
24 urged in institutional reform cases, and transitions full civilian oversight of the Los
25 Angeles Police Department back to the Police Commission and its Inspector
26 General, while permitting the Department to benefit from current and future best
27 practices outside the eight-year old terms of the Decree.

28 ///

1 The Independent Monitor who oversaw all facets of Department operations
2 and management under the terms of the Decree for eight years has found the City
3 Defendants in substantial compliance. Both Parties have requested termination of
4 the Decree and approval of a Transition Agreement – a request supported by the
5 Monitor, both in his Final Report and in his statement to this Court at the June 15,
6 2009, status conference.

7 The ending of the Consent Decree is important, both because it signals
8 compliance with the terms of the order, and that the reform efforts of the Los
9 Angeles Police Department can be fully recognized within the City and throughout
10 the Nation.

11
12 **I. INTRODUCTION AND BACKGROUND**

13
14 On June 1, 2009, the City of Los Angeles, Board of Police Commissioners of
15 the City of Los Angeles, and the Los Angeles Police Department (collectively “City
16 Defendants”) and the United States filed a Joint Motion and Memorandum in
17 Support Thereof to Terminate the Original Consent Decree and to Transition Full
18 Oversight Authority to the City Defendants (“Joint Motion”). On June 15, 2009, this
19 Court held a status conference regarding the Consent Decree in the above-captioned
20 matter.¹ During this status conference, the Court heard argument from
21 representatives of the City Defendants, the United States, the Police Protective
22 League (“PPL”), Community Intervenors, and a private citizen. At the request of the
23 Court, the Independent Monitor also expressed his views regarding the status of the
24 Consent Decree. At the conclusion of the status conference, the Court requested
25 further supplemental briefing from the City Defendants and the United States
26

27
28

¹ On June 9, 2009, the Court extended the Consent Decree to June 30, 2009, to ensure proper
consideration of all submitted materials and any issues raised at the June 15, 2009, status conference
hearing.

1 (collectively “the Parties”) regarding the following issues: (1) how the Parties
2 believe that the standard set forth under Paragraph 179 of the Consent Decree has
3 been satisfied; (2) the authority to terminate the Consent Decree, and the efficacy of
4 the proposed Transition Agreement as opposed to extension of the entire Consent
5 Decree; (3) the jurisdiction of the Court under the Parties’ proposed Transition
6 Agreement; and (4) the role of Michael Cherkasky, and the rights and interests of the
7 Intervenors with respect to the Parties’ proposed Transition Agreement.

8 As the Court is aware, the gravamen of this lawsuit was a finding by the
9 United States in 2000 of a “pattern or practice” of excessive force, false arrests and
10 unreasonable searches and seizures in violation of the Fourth and Fourteenth
11 Amendments to the Constitution. (Final Report of the Independent Monitor (Final
12 Report) at 2.)

13 Today, the LAPD is a different organization. As stated in the Final Report,
14 “the changes institutionalized during the past eight years have made the LAPD
15 better: at fighting crime, at reaching out to the community, in training its officers, in
16 its use of force, in internal and external oversight, and in effectively and objectively
17 evaluating each of the sworn members of LAPD.” (Final Report at 1.) The
18 comprehensive risk management system is in place, the Department accepts and
19 investigates all citizen complaints, and the Police Commission and its Inspector
20 General (“OIG”) have been provided the necessary resources.² It is time to
21 recognize the City Defendants’ compliance with Paragraph 179 of the Decree, and as
22 counsel for the United States stated at the June 15, 2009, hearing, it is time to “give
23 the City, LAPD and OIG the chance to prove they can do this on their own.” (See,
24 Transcript of Proceedings, Status Conference (June 15, 2009) at 41:4-5, attached to
25 Raffish Declaration as Exhibit G.)

26 ///

27 _____
28 ² The Office of the Inspector General has received additional resources during the City’s budget
process for the last three consecutive fiscal years.

1 **II. THE CITY DEFENDANTS HAVE COMPLIED WITH THE**
2 **REQUIREMENT OF PARAGRAPH 179 OF THE DECREE**

3
4 The Court and the Community Intervenors have raised questions about the
5 termination of the Consent Decree and the requirements of Paragraph 179 of the
6 Decree. Paragraph 179 states:

7
8 The Court shall retain jurisdiction of this action for all purposes
9 during the term of this Agreement. The Agreement shall
10 terminate five years from the effective date without further
11 action of the Court unless DOJ makes a motion to extend the
12 term of the Agreement, which motion shall extend the term of
13 the Agreement until the resolution of such motion. Such
14 motion shall be made within 45 days prior to the expiration of
15 the term of the Agreement. If the City contests the motion, the
16 Court shall hold a hearing at which both parties may present
17 evidence to the Court before ruling on the DOJ's motion. At
18 the hearing, the burden shall be on the City to demonstrate that
19 it has substantially complied with each of the provisions of the
20 Agreement and maintained substantial compliance for at least
21 two years. For the purposes of this paragraph, "substantial
22 compliance" means there has been performance of the material
23 terms of this Agreement. Materiality shall be determined by
24 reference to the overall objectives of this Agreement.

25 Noncompliance with mere technicalities, or temporary failure to
26 comply during a period of otherwise sustained compliance, will
27 not constitute failure to maintain substantial compliance. At the
28 same time, temporary compliance during a period of otherwise
sustained noncompliance shall not constitute substantial
compliance. If the Court finds that the City has not maintained
substantial compliance for at least two years, the Court shall
extend the term of this Agreement until such time as the City
has been in substantial compliance with this Agreement for a
period of two years including that period of time that the City
had been in compliance prior to DOJ's motion. (Emphasis
added.)

1 By the very terms of Paragraph 179 of the Consent Decree, the Decree
2 terminates unless the United States makes a motion to extend the term of the Decree.
3 The United States has made no motion because it does not believe extension of the
4 term of the entire Consent Decree is warranted. Instead, the United States joins the
5 City Defendants in a motion to end the Consent Decree, as the Parties agree that the
6 overall objectives of the Decree have been met, as required by Paragraph 179.

7 Paragraph 179 is not as narrow as Community Intervenors argue. Paragraph
8 179 must be read as a whole, wherein “‘substantial compliance’ means there has
9 been performance of the material terms” of the Consent Decree, and where
10 “materiality” is “determined by reference to the overall objectives” of the Consent
11 Decree. (Consent Decree, ¶ 179.) The language of Paragraph 179 is sufficiently
12 clear to show that the test is not complete compliance with each provision. Even if
13 the language was not clear on its face, the Court should be guided by the
14 unequivocal agreement by the Parties that the standard set forth in Paragraph 179
15 has been met. While Intervenors may present evidence and arguments concerning
16 enforcement of the Consent Decree (See, Discussion, *infra.*), they do not step into
17 the shoes of the parties who negotiated the terms of the Decree, and their
18 interpretation of the meaning of “substantial compliance” should not supersede or
19 otherwise take precedence over the Parties’ own representations concerning what
20 was intended.

21 While there are some subparagraphs of the Consent Decree for which
22 compliance has not been achieved for two years, consistent with Paragraph 179, the
23 City Defendants may still be found in compliance as the overall objectives of the
24 Consent Decree have been met. In fact, the Monitor recognized that, “there remain a
25 few paragraphs of the Consent Decree which have not achieved the >94%
26 compliance” The Monitor made clear, his interpretation of the standard for
27 termination of the Decree: “[F]or the most part, those paragraphs which have not
28

1 reached this level of compliance were administrative in nature,³ and the Department
2 has made significant strides toward compliance over the life of the Consent Decree,”
3 and “[a]s such, and subject to the terms of the Transition Agreement, [the Monitor]
4 recommend[s] that the Consent Decree be terminated.” (Final Report at 7 (footnote
5 12).)

6 The interpretation of Paragraph 179 advanced by the Parties is neither novel
7 nor unique. Just last month, the Ninth Circuit Court of Appeals was called upon to
8 determine whether the district court had abused its discretion in determining that
9 there had been substantial compliance with the terms of a consent decree in the
10 context of institutional reform litigation involving the Metropolitan Transportation
11 Authority (“MTA”).⁴ (Labor/Community Strategy Center, et al. v. Los Angeles
12 Metropolitan Transportation Authority, et al., 564 F.3d 1115 (9th Cir. 2009).) On the
13 eve that the decree was to expire by its own terms, the plaintiff Bus Riders Union
14 (“BRU”) moved for an extension of the decree on the grounds that the MTA had
15 failed to implement an important decree provision. (MTA, supra, at 1117.)

16 In affirming the district court’s denial of the plaintiff’s request for an
17 extension, the Ninth Circuit stated that its decision “is consistent with the principle
18 that federal court intervention in state institutions is a temporary measure and may
19 extend no longer than necessary to cure constitutional violations.” (Id. at 1123.)
20 Notably, both the Consent Decrees in MTA and in this case contain an express
21 expiration date for the court’s retention of jurisdiction, in the absence of motion by
22

23 ³ For example, in his Final Report, the Monitor includes in his discussion regarding the supervision
24 of gang units, that “the Department’s gang units have struggled to comply with the Consent Decree’s more
25 technical requirements regarding arrest, booking and charging procedures.” (Final Report at 80.) However,
26 the Monitor acknowledges that the LAPD has met the overall objective of these provisions: “While the
27 Department has struggled with some of these requirements, the Monitor has not identified any individual in
28 recent years who was selected for a gang assignment but should not have been selected.” (Final Report at
80.)

⁴ Specifically, as described by the Ninth Circuit, the district court concluded that “extension of the
decree was unnecessary because the ‘Decree did not require perfection,’” and the decree “has served its
purpose....” (MTA, supra, at 1125.)

1 the plaintiff. (See, e.g., MTA, supra, at 1120; LAPD Consent Decree, ¶ 179.) Rather
2 than making such a motion in this case, the United States, along with the City
3 Defendants, has made a Joint Motion for the Court to retain jurisdiction over the
4 United States' cause of action for those purposes set forth in the proposed Transition
5 Agreement.

6 Moreover, the City Defendants have achieved substantial compliance with the
7 Consent Decree. Here, as in MTA, “. . . perhaps every last wish and hope of the
8 decree was not achieved, but the decree accomplished its essential purposes and the
9 situation improved greatly.” (Id. at 1123.) Specifically, and strikingly similar to the
10 instant case, BRU relied upon compliance standards written into the decree for load
11 factor targets, the monitoring of which were included as provisions within the
12 decree. (Id. at 1122.) The Ninth Circuit was quick to observe that the measurements
13 advanced by BRU did not measure “compliance with the decree overall.” The Court
14 explained:

15
16 “That coarse-grained metric is useful for certain types of
17 analyses, such as determining whether there has been full and
18 absolute compliance (MTA concedes there has not been), but it
19 is not particularly helpful in measuring levels of compliance
20 below 100%, and it fails to accurately capture the extent to
21 which MTA did meet the targets during the relevant time
22 period.”

23 . . . [T]he question is whether there was substantial compliance, a
24 less precise standard that cannot be satisfied by reference to one
25 particular figure, while ignoring alternative information. Our
26 analysis requires we do more than simply count the numbers of
27 technical deviations from the decree. Instead, we must
28 determine, using a holistic view of all the available information,
whether MTA's compliance with the Decree overall was
substantial, notwithstanding some minimal level of
noncompliance.”

1 (MTA, supra, at 1122 (emphasis added).) The Parties’ rationale is consistent with
2 the Ninth Circuit’s ruling in MTA. (564 F.3d 1115 (9th Cir. 2009).)

3 Paragraph 1 of the Consent Decree states that the parties “share a mutual
4 interest in promoting effective and respectful policing,” and that they join together in
5 entering the Consent Decree “to promote police integrity and prevent conduct that
6 deprives persons of rights, privileges, or immunities secured or protected by the
7 Constitution or laws of the United States.” The implementation of the steps to meet
8 these objectives has been met, as has been described by the Parties, the Independent
9 Monitor, and others.⁵ Neither the Parties, the Court, the Monitor, nor the Consent
10 Decree, itself, can guarantee that the objectives of the Consent Decree are failsafe.
11 However, the Parties appear before this Court, after eight years of federal court
12 oversight, agreeing that the Decree has served its purpose and that the federal court
13 is no longer necessary in the day-to-day operations of the Los Angeles Police
14 Department. (See, MTA, supra at 1122 (reference to district court’s finding that the
15 decree had served its purpose and it was no longer necessary to involve the federal
16 courts in the day-to-day operation of the Los Angeles County bus system).)

17 Over the past eight years, the LAPD has focused its efforts on transparency,
18 community outreach, proper treatment of all members of the community, quality
19 investigations, thorough auditing, consistent training, proper supervisory oversight,
20 and strengthening the role of the Police Commission and OIG. Over the past eight
21 years, the Monitor has thoroughly tracked and reported on this progress.

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23 ///

25 ⁵ See, Christopher Stone, Todd Foglesong and Christine M. Cole, *Policing Los Angeles Under a*
26 *Consent Decree: The Dynamics of Change at the LAPD*, Harvard University Kennedy School (May
27 2009)(attached as Exhibit A to Raffish Declaration) (Providing strong academic support for ending the
28 Decree, and concluding that “Both the management and the governance of the LAPD have also changed for
the better...In terms of governance, the Police Commission and the Inspector General have, in particular,
enhanced the scrutiny of the Department’s use of force, and of its handling of civilian complaints”; See
also, Exhibits B through F, attached to Raffish Declaration.

1 In his Final Report, the Monitor states:

2
3 We are pleased to report that the LAPD has substantially complied with
4 the requirements of the Consent Decree. We believe the changes
5 institutionalized during the past eight years have made the LAPD
6 better: at fighting crime, at reaching out to the community, in training
7 its officers, in its use of force, in internal and external oversight, and in
8 effectively and objectively evaluating each of the sworn members of
9 LAPD. More specifically, the LAPD has become the national and
10 international policing standard for activities that range from audits to
11 handling of the mentally ill to many aspects of training to risk
12 assessments of police officers and more. (Emphasis added.)

13
14 These past eight years have clearly shown that with the right impetus,
15 with goodwill and with a good plan, institutional reformation can be,
16 and in Los Angeles has been, achieved. Most importantly, the past eight
17 years have shown that constitutional policing can effectively coexist
18 with and, indeed, foster the primary role of the police: ensuring the
19 public safety.

20 (Final Report at 1.)

21
22 **III. THE TRANSITION AGREEMENT IS A FINAL RESOLUTION OF**
23 **THE PLAINTIFF UNITED STATES' COMPLAINT AND**
24 **SUPERSEDES THE CONSENT DECREE**
25

26 On June 15, 2001, this Court entered a Consent Decree resolving the United
27 States' claims in the aforementioned Complaint. As represented by the Transition
28 Agreement, the Parties mutually agree that the Transition Agreement represents the
understanding of the Parties and, if entered, supersedes the Consent Decree entered
in this case on June 15, 2001.

The Parties agree to termination of the Consent Decree and for the Court to
retain jurisdiction over the matter during the Transition Agreement period. The fact
that the Consent Decree sets an averment that the Consent Decree "resolves all

1 claims in the United States’ Complaint filed in this case,” does not prohibit the
2 Parties from entering into a subsequent agreement that supersedes the earlier
3 agreement. Indeed, as the Supreme Court noted in Local Number 93, International
4 Association of Firefighters, AFL-CIO C.L.C., v. City of Cleveland, et al., 478 U.S.
5 501, 522 (1986), “it is the parties’ agreement that serves as the source of the court’s
6 authority to enter . . . judgment. . . .” (See also, United States v. Armour & Co., 402
7 U.S. 673, 681-682 (1971) (emphasis in original) (footnote omitted).) This is not a
8 situation where one party is unilaterally imposing additional obligations against
9 another party, irrespective of a prior resolution of the party’s claims. (See, e.g.,
10 United States v. Ward Baking Co., 376 U.S. 327 (1964).)

11 The United States identified a similar situation in a case filed in the United
12 States District Court for the Northern District of Georgia, Rome Division, United
13 States v. CBOCS, Inc. f/k/a Cracker Barrel Old Country Store, Inc., Civ. No. 4:04-
14 CV-109-HLM,⁶ wherein the parties agreed to an “Agreed Order” that superseded the
15 Consent Order entered in the case on May 4, 2004. (Attached as Exhibit 1.) As in
16 the instant case, the defendants in CBOCS had substantially complied with the
17 majority of the provisions in the original Consent Order. Accordingly, the CBOCS
18 parties agreed that the Consent Order expired contemporaneously with the entry of
19 the revised Agreed Order. The CBOCS District Court Judge entered the Agreed
20 Order as an order of the court on May 18, 2009.

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28 ⁶ Because the facts and circumstances of each case are unique, this case is provided only as a procedural example wherein a consent decree was replaced by a subsequent Order.

1 **IV. A TRANSITION AGREEMENT IS CONSISTENT BOTH WITH**
2 **THE FINDING OF SUBSTANTIAL COMPLIANCE AND THIS**
3 **COURT’S EQUITABLE POWERS**

4
5 A. The City Defendants are in Substantial Compliance, and as Such, a
6 Transitional Agreement is Appropriate.

7 As discussed above, the Parties and the Independent Monitor agree the City
8 Defendants are in substantial compliance with the Consent Decree. In essence, the
9 Decree is no longer required or necessary to affect the type of changes within the
10 LAPD contemplated under the United States’ lawsuit. (See, Collins v. Thompson, 8
11 F.3d 657 (9th Cir. 1993) (Court affirmed district court order vacating consent decree
12 where no ongoing constitutional violations observed); Toussaint v. McCarthy, 926
13 F.2d 800, 802 (9th Cir. 1990), *cert. denied*, 116 L. Ed.2d 171, 112 S. Ct. 213 (1991).)

14 However, the Parties do agree that a transition period is appropriate to address
15 three subject areas and to complete the transition of oversight responsibility to the
16 OIG and Police Commission, thus ensuring full performance in these three areas.
17 This will allow the City Defendants to reaffirm to the Court and the United States
18 that the Police Commission and OIG can continue their strong and independent
19 civilian oversight of the LAPD, while still allowing for the Court to retain
20 jurisdiction and the case to remain open. This understanding appropriately belongs
21 in a separate instrument that covers only the activities to be reviewed within the
22 transition period.⁷ As such, the Parties, with agreement from the Monitor, have
23 submitted herewith a Revised Transition Agreement which focuses on the following
24 three subject areas: TEAMS II, Financial Disclosure, and Biased Policing.

25 _____
26 ⁷ The Consent Decree and the 200+ pages of Methodologies required the Independent Monitor and
27 his team to conduct comprehensive and detailed audits of nearly every substantive Decree provision for the
28 past eight years. Conversely, the purpose of the transfer of oversight authority to the OIG by way of the
Transition Agreement is to enable that Office to continue performing the daily duties and responsibilities
under the direction of the Police Commission, as well as the additional reviews described in the Agreement.

1 1. TEAMS II

2 TEAMS II has been operational for two years, and the Monitor has found the
3 LAPD in compliance with all system requirements. In fact, the Monitor moved 14
4 of the 15 TEAMS II paragraphs to “inactive” monitoring status approximately one
5 year ago, meaning they are no longer monitored. The one remaining actively
6 monitored TEAMS II paragraph (§ 46) pertains to managers and supervisors’ use of
7 the system. The LAPD has achieved compliance with all but two of the 13
8 subsections, which pertain to the timing of supervisor reviews of subordinate
9 employees. (See Final Report, Appendix D, Final Report Card re Paragraph 46 (l
10 and m) at 1.)

11 The Parties agree that TEAMS II has been integral to ensuring proper
12 supervision within the LAPD. As such, the Parties agree that the OIG should focus
13 its reviews on supervisors’ use of TEAMS II in accordance with the Transition
14 Agreement, and report its findings to the Police Commission, United States, Mr.
15 Cherkasky, and the Court.

16
17 2. Financial Disclosure

18 On February 26, 2009, the Ninth Circuit issued its decision upholding this
19 Court’s decision to deny preliminary injunctive relief to the PPL. Thereafter, on
20 March 30, 2009, the LAPD implemented the approved Financial Disclosure Program
21 Department-wide. However, because the Financial Disclosure Program was
22 implemented so close to the end of the extension period of the Decree, the Parties
23 agree that the OIG should conduct reviews of the Program’s implementation in
24 accordance with the Transition Agreement, and report its findings to the Police
25 Commission, United States, Mr. Cherkasky, and the Court.

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1 3. Biased Policing

2 The City Defendants continue to improve upon policies and measures to
3 prohibit biased policing. Prohibitions against biased policing have been reiterated
4 and incorporated into aspects of recruitment, the hiring and selection process, recruit
5 training, Department-wide in-service training, and the promotional process. (See
6 Report of the Independent Monitor for Quarter Ending December 1, 2008, pp. 25-
7 26.)

8 The Department's commitment to an environment free from biased policing is
9 evident in its continued collection of stop data, significant improvements to the
10 quality and thoroughness of investigations of racial profiling allegations, by recent
11 actions taken by the Police Commission to ensure quality investigations and reviews
12 are conducted, and the implementation of in-car video systems.⁸ The City
13 Defendants and its Mayor are committed to the installation of digital in-car video
14 cameras in marked police vehicles, due to their usefulness in the investigation of
15 allegations of biased policing and for their value in the area of risk management.
16 Currently, the first phase is being implemented in 300 marked police vehicles in
17 Operations South Bureau, and funds have been allocated in the 2009/2010 City
18 budget to begin the second phase in two geographic policing areas within Operations
19 Central Bureau. As additional funds become available from either the City General
20 Fund or federal grants, cameras will ultimately be installed in all marked police
21 vehicles.

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25 ⁸ The United States' position respecting an in-car video program was explained at the June 15,
26 2009, status conference, where it was acknowledged that while such a program is an important tool to be
27 used to address biased policing and allegations of wrongdoing against officers, it "[does] not believe that's
28 the panacea to biased policing...the important issues are the substantive reviews and investigations of
biased policing complaints, and that's where [it] sees the OIG focusing his reviews during this Transition
Agreement." (See Transcript of Proceedings, Status Conference (June 15, 2009) at 20:20-25; 21:1-7,
attached to Raffish Declaration as Exhibit G.)

1 However, because some of these actions have recently occurred and because
2 of the importance of this piece of the Consent Decree, the Parties agree that the OIG
3 should conduct reviews regarding biased policing in accordance with the Transition
4 Agreement, and report its findings to the Police Commission, the United States, Mr.
5 Cherkasky, and the Court.

6
7 B. Proceeding Under a Separate Agreement is a More Equitable
8 Resolution in Light of the Substantial Compliance Demonstrated By the
9 City Defendants.

10 Courts enforcing institutional reform judicial decrees or settlements, such as
11 the one governing the City Defendants, are encouraged to apply a flexible standard
12 in determining any changes thereto. (See, generally, Rufo v. Inmates of the Suffolk
13 County Jail, et al., 502 U.S. 367, 381 (1992); Frew v. Hawkins, 540 U.S. 431, 441
14 (2004); Shakman v. City of Chicago, 426 F.3d 925 (4th Cir. 2005); In re Pearson,
15 990 F.2d 653, 658 (1st Cir. 1993) (“[N]otwithstanding the parties’ silence or inertia,
16 the district court is not doomed to some Sisyphean fate, bound forever to enforce
17 and interpret a preexisting decree without occasionally pausing to question whether
18 changing circumstances have rendered the decree unnecessary, outmoded, or even
19 harmful to the public interest”).) This is true, partly because in institutional reform
20 litigation, the court sits in equity, and must determine whether a change either
21 advanced by a party or by the court itself will provide an equitable remedy to the
22 parties involved in the litigation and others impacted by the wrongs which initially
23 gave rise to the lawsuit. (Thompson v. United States Dept. of Housing and Urban
24 Development (HUD), 404 F.3d 821 (4th Cir. 2005) (Hallmark of equity is its
25 flexibility); Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287,
26 298 (1941) (“An injunction so adjusted to a particular situation is in accord with the
27 settled practice of equity....” and “[F]amiliar equity procedure assures opportunity
28 for modifying or vacating an injunction when its continuance is no longer

1 warranted”); Frew, supra, at 442 (“The federal court must exercise its equitable
2 powers to ensure that when the objects of the decree have been attained,
3 responsibility for discharging the State’s obligations is returned promptly to the
4 State and its officials”).) In fact, in Thompson, supra, the Fourth Circuit found
5 support for this principle from the Supreme Court:

6
7 “The essence of a court’s equity power lies in its inherent
8 capacity to adjust remedies in a feasible and practical
9 way to eliminate the conditions or redress the injuries
10 caused by unlawful action. Equitable remedies must be
11 flexible if these underlying principles are to be enforced
12 with fairness and precision.”

13 (Thompson, supra, at 830, quoting Freeman v. Pitts, 503 U.S. 467, 487 (1992).)

14 Extension of the Consent Decree is not an equitable resolution when there is
15 unanimity by the Parties and the Monitor over the City Defendants’ compliance with
16 the Decree. During the June 15, 2009, hearing, a question was raised whether an
17 extension wouldn’t be easier than a new and different agreement. The Parties think
18 not, but in any event, the “easier” course is not the most equitable, nor is it
19 consistent with the established principle that federal supervision is temporary and
20 should exist no longer than necessary to cure the constitutional violations which
21 drove the litigation. (Labor/Community Strategy Center v. MTA, supra, at 21, citing
22 Bd. of Ed. Of Okla. City Pub. Sch. V. Dowell, 498 U.S. 237, 248 (1991).)

23 Proceeding under a different agreement allows the Department the flexibility
24 to improve many of the processes set “frozen in time” eight years ago within the
25 Consent Decree. While the Decree requirements, in many areas, establish the
26 minimum necessary to advance reform, those same areas describe processes which
27 are eight years old and may not reflect current best practices to address the particular
28 issue. Similarly, the current Decree does not permit *future* changes, even where the
policing community might identify a particular change as a best practices approach.

1 As observed by the Fourth Circuit regarding the reversal of the district court's denial
2 of the city defendants' motion to vacate a consent decree:

3 "The public interest and considerations based on the allocation
4 of powers within our federal system require that the district
5 court defer to local government administrators who have the
6 primary responsibility for elucidating, assessing, and solving
7 the problems of institutional reform, to resolve the intricacies of
8 implementing a decree modification (citation omitted)... In
9 short, concerns of federalism should factor strongly into the
10 court's analysis."

11 (Shakman, supra, at 932, quoting O'Sullivan v. City of Chicago, 396 F.3d 843, 868
12 (4th Cir. 2005).)

13 Additionally, should the Court extend the Decree, every provision of the
14 Decree would remain subject to objection by Intervenors, irrespective of whether the
15 City Defendants had demonstrated compliance therewith and whether the provision
16 at issue was active or passive, under the oversight of the Monitor, the Commission
17 or its Inspector General. That is highly inequitable to the Parties when there is
18 agreement that the standard for substantial compliance under Paragraph 179 has
19 been satisfied.

20 Moreover, deference to United States' interpretation of Paragraph 179 that the
21 Consent Decree should be terminated protects the ability of the United States to
22 continue meaningful dialogue with other municipalities and agencies concerning the
23 benefits of settlement versus litigation brought pursuant to 42 U.S.C. Section 14141.
24 Extension of this Consent Decree, against the urging of the United States, the City
25 Defendants and the Independent Monitor, all intimately involved in the process,
26 sends a powerful message that even where reform has occurred, and even some
27 expectations exceeded, these municipalities may not be released from their consent
28 decrees even where all the parties agree the requirements have been fulfilled. Such a
result would clearly be inequitable to the City Defendants and the United States.

1 Finally, the Court should consider the comments of its Independent Monitor
2 and the United States related to the effect of an extension of the existing Consent
3 Decree on the membership of the LAPD and the leadership of the City of Los
4 Angeles. For some, the Decree came during their tenure with the Department; for
5 the nearly half of the current sworn membership who entered the Department within
6 the last eight years – they have only known employment for an agency operating
7 under federal monitorship. While the Consent Decree represents reform, the Decree
8 as everyone has come to know it also represents a time when the Department was
9 unable to manage itself or its membership in a constitutionally permissible manner.
10 An extension of *that* Consent Decree, following all of the hard work and
11 commitment to reform achieved by the men and women of the LAPD, would be, to
12 many, a repudiation of all of that good work. In response to this Court’s question, to
13 terminate the Decree as requested by the Parties is, as represented by the Monitor,
14 “symbolic.” It represents and affirms that the City Defendants have “performed the
15 material terms” of the Agreement and “the overall objectives” of the Agreement, and
16 that this Court recognizes that fact.

17
18 **V. THE OPERATION OF A TRANSITION AGREEMENT WILL**
19 **PRESERVE THE JURISDICTION OF THIS COURT, THE**
20 **INVOLVEMENT OF MR. CHERKASKY AND THE STATUS OF**
21 **INTERVENORS**

22
23 **A. The Approval of a Transition Agreement Will Permit the Court to**
24 **Retain Jurisdiction Over the Agreement.**

25 As discussed, *supra*, the Transition Agreement serves as a further order of this
26 Court for the full and complete resolution of this lawsuit. As such, this Court retains
27 jurisdiction over enforcement of the Transition Agreement as it would over any
28 order entered in furtherance of the settlement of a lawsuit pending before the court.

1 (See, Thompson, supra, at 830 (Court’s ability to change its orders springs from
2 inherent equitable power over own judgments); See also, United States v. City of
3 Miami, 2 F.3d 1497, 1509 (11th Cir. 1993) (“[A] district court’s decision on a request
4 to terminate or modify a consent decree is an exercise of that court’s equitable
5 power....”).)

6 The Parties jointly agree that the Court will retain jurisdiction over the
7 Transition Agreement. To ensure there is no ambiguity as to the Court’s
8 jurisdiction, the Parties have added the language from Paragraph 179 of the Consent
9 Decree to the Transition Agreement, which states: “[t]he Court shall retain
10 jurisdiction of this action for all purposes during the term of this Agreement.” (See,
11 Transition Agreement, Section II.G.) It is not the intent of the Parties to attempt to
12 limit the jurisdiction or role of this Court.

13
14 B. As Responsibility for Oversight of the LAPD Transfers to the Police
15 Commission and its Office of the Inspector General, Mr. Cherkasky
16 Will Continue to Play an Important Role.

17 There is consensus among the Parties, as well as the Intervenors and the
18 Monitor, that oversight and monitoring should be returned to the Police Commission
19 and its Inspector General. Consistent with that belief, the proposed Transition
20 Agreement focuses on the obligations of the Inspector General.

21 At the hearing on this matter, the Court requested clarification regarding Mr.
22 Cherkasky’s role during the term of the proposed Transition Agreement. In
23 consultation with Mr. Cherkasky, the Parties have agreed to the addition of the
24 following language to the Transition Agreement:

25
26 In addition to submitting copies of the reviews to the Court, as
27 outlined below, the City Defendants shall also submit copies of
28 any such reviews to Michael Cherkasky. Mr. Cherkasky has

1 agreed to serve as a consultant to the United States, LAPD and
2 the Court, and will review any such submissions on a *pro bono*
3 basis. Mr. Cherkasky shall have full and direct access to the
4 LAPD and its employees, and may submit his own
5 recommendations to the Department, Police Commission, OIG,
6 United States, or Court as he deems necessary. (See, Transition
7 Agreement, Section II.G.)

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C. Intervenors Retain All Rights Under the Transition Agreement as Possessed Under the Consent Decree.

This Court has, consistent with the law, invited the participation of the Intervenors, both through submission of written briefs and participation during hearings. Such participation is both appropriate and not disputed by the Parties. However, participation is not without limitation. (Local No. 93, International Assoc. of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, et al., supra, 478 U.S. at 529 (“...while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent”).) In the instant case, the positions advanced by Community Intervenors should not be *expanded* to prevent the Parties from entering into an agreement which would complete the resolution of the Plaintiff’s claims brought in the underlying lawsuit. Such an expansion would effectively serve as a “veto” by the Intervenors of such a proposed settlement, which is disallowed. (Local 93, supra, at 529 “[I]t has never been supposed that one party – whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes...”)

As represented by counsel for the United States during the June 15, 2009, hearing, the lawsuit would remain open until such time as Defendants satisfactorily performed under the terms of the agreement. (See, Transcript of Proceedings, Status Conference (June 15, 2009) at 18:15-19, attached to Raffish Declaration as Exhibit G.) In that respect, the Parties agree that the Intervenors would retain the same

1 rights and level of involvement as they possess under the Decree, limited to the
2 scope of such agreement.

3 To avoid any ambiguity, the Parties have agreed to explicitly include a
4 number of provisions in the Transition Agreement addressing the Intervenors' rights.
5 Specifically, the Parties added the following provision:

6
7 Nothing in this Transition Agreement is intended to: (a) alter
8 the existing collective bargaining agreement between the City
9 Defendants and the LAPD bargaining units; or (b) impair the
10 collective bargaining rights of employees in those units under
11 state and local law. Moreover, nothing in this Transition
12 Agreement is intended to alter the rights of the organizations
13 and individuals currently identified as Intervenors in the above-
14 captioned matter. The PPL and Community Intervenors shall
15 continue to retain any and all rights and interests in the matter
16 that existed during the pendency of the Consent Decree,
17 including the right to present its views on the Transition
18 Agreement and to have them fully considered by the Court in
19 conjunction with the Court's decision regarding the entry of this
20 Transition Agreement. (See, Transition Agreement, Section
21 II.D.)

22 In addition, to the extent the PPL argues that the financial disclosure
23 provisions of the Transition Agreement affect its rights and interests in its separate
24 cause of action against the City Defendants in PPL v. City of Los Angeles, et al.,
25 Case No. 2:08-cv-00784 GAF-RC, the Parties have agreed to add the following
26 provision to the Transition Agreement:

27 The Parties recognize and acknowledge that the matter of PPL
28 v. City of Los Angeles, et al., Case No. 2:08-cv-00784 GAF-
RC, specifically relates to the City Defendants' implementation
of the financial disclosure program required under Paragraph
132 of the Consent Decree and proposed under Section III.C. of
the Transition Agreement. To the extent that the PPL action
results in a substantive change to the current financial

1 disclosure program, the Parties agree to modify the Transition
2 Agreement accordingly. (See, Transition Agreement, Section
3 III.C.3.)

4 Further, to the extent that the PPL raises concerns about the confidentiality of
5 information disclosed under the terms of the Transition Agreement, the Parties have
6 agreed to add the following provision to the Transition Agreement:

7
8 All documents provided to any person or Party under the terms
9 of this Agreement shall be maintained in a confidential manner,
10 and shall not be disclosed to any person or entity other than the
11 Court, either under seal or in a manner which would not
12 otherwise constitute a disclosure of privileged information, as
13 protected under either State and/or federal law. (See, Transition
14 Agreement, Section IV.D.)

15 Because the Transition Agreement does not impair, limit, or change the rights
16 and interests of the Intervenors as they existed during the pendency of the Consent
17 Decree, the Parties request the entry of the Transition Agreement.

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1 **VI. CONCLUSION**

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3 For the reasons stated herein, the Parties respectfully request that the Consent
4 Decree be terminated, as provided in the Order filed herewith, and that the (Revised)
5 Transition Agreement also submitted herewith be entered as an Order of the Court.
6

7 DATED: June 22, 2009 Respectfully submitted,
8

9 FOR THE PLAINTIFF, THE UNITED STATES OF AMERICA:
10

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14

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