

1 JOHN L. BURRIS, STATE BAR NO. 69888

2 Law Offices of John L. Burris

3 Airport Corporate Centre

7677 Oakport Road, Suite 1120

Oakland, California 94621

Telephone: 510.839.5200

4 Facsimile: 510.839.3882

6 JAMES B. CHANIN, STATE BAR NO. 76043

7 JULIE M. HOUK, STATE BAR NO. 114968

Law Offices of James B. Chanin

3050 Shattuck Avenue

8 Berkeley, California 94705

9 Telephone: 510.848.4752

Facsimile: 510.848.5819

10 Attorneys for Plaintiffs

11
12
13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 DELPHINE ALLEN; et al;

17
18 Plaintiffs,

19 vs.

20
21 CITY OF OAKLAND, et al.,

22 Defendants.
23
24

MASTER CASE NO. C-00-4599 TEH

**PLAINTIFFS' NOTICE OF, AND MOTION
FOR, APPOINTMENT OF A RECEIVER;
MEMORANDUM OF POINTS AND
AUTHORITIES THEREON**

Hearing Date: December 13, 2012

Time: 10:00 a.m.

Courtroom: 2, 17th Floor

The Honorable Thelton E. Henderson

25
26
27
28
**REDACTED PER COURT
ORDER 10.4.12**

TABLE OF CONTENTS

I. NOTICE OF AND MOTION FOR APPOINTMENT OF RECEIVER	1
II. MEMORANDUM OF POINTS AND AUTHORITIES	1
A. INTRODUCTION	1
B. STATEMENT OF FACTS	9
1. History of the Litigation and the Adoption of the NSA	9
2. The Chronic Failure by the City and OPD to Comply with the NSA/AMOU	11
3. The Frazier Group Report on the OPD's Response to Occupy Oakland	22
a. The City's Public Release of the Frazier Group Report	22
b. The Frazier Report Confirms that the City and OPD are Failing to Practice Routine Law Enforcement Tasks That Go to the Very Heart of the Reforms	26
4. The Mounting Human Misery and Monetary Toll Resulting from the Lack of Compliance With the NSA Reforms by the City and OPD	33
a. Police Misconduct Lawsuits and Claims since 2003	33
b. Punitive Damages and Promotions	35
c. Monitoring Costs	36
d. Costs of Outside Consultants	36
5. The Detroit Consent Decree vs. Oakland's NSA: Where there is a Will, There is a Way	36
C. APPLICABLE LAW	40
1. The Court Has the Discretion to Appoint a Receiver to Enforce the NSA/AMOU	40
2. The Seven <i>Plata</i> Factors Weigh Strongly in Favor of Appointing a Receiver	42
a. There is a Grave and Immediate Threat or Actuality of Harm to Plaintiffs	42
b. The Use of Less Extreme Measures Of Remediation Has Been Exhausted Or Proven Futile	44

c. The Continued Insistence That Compliance With The Court’s Order Would Lead Only To Confrontation And Delay	45
d. There Is A Lack Of Leadership To Turn The Tide Within A Reasonable Period Time	46
e. There Is Bad Faith	46
f. Resources Are Being Wasted	48
g. A Receiver Is Likely to Provide A Relatively Quick And Efficient Remedy	49
D. CONCLUSION	50

TABLE OF AUTHORITIES

Federal Cases

<i>Batt v. City of Oakland, et al.</i> , C 02-4975 TEH	10
<i>Brown v. Plata</i> , __U.S.__, 131 S. Ct. 1910 (2011)	40
<i>Dixon v. Barry</i> , 967 F. Supp. 535 (D.D.C. 1997)	41,42
<i>Estate of Amaro v. City of Oakland, et al.</i> , 653 F.3d 808 (9 th Cir. 2011)	34
<i>Estate of Woodfox v. City of Oakland, et al.</i> , C08-04148 WHA	34
<i>Feliciano v. Burset</i> , 2010 U.S. Dist. LEXIS 127485 (D.P.R. 2010)	41
<i>Hutto v. Finney</i> , 437 U.S. 678 (1979)	42
<i>Inmates of D.C. Jail v. Jackson</i> , 158 F.3d 1357 (D.C. Cir. 1998)	41
<i>John Smith, et al. v. City of Oakland, et al.</i> , Case No. C07-6298 MHP	33
<i>Knapps v. City of Oakland</i> Case No. C-05-2935-MEJ	34
<i>Lewis v. Kugler</i> , 446 F.2d 1343, 1351-52 (3rd Cir. 1971)	40, 41
<i>Local 10, et al. v. City of Oakland, et al.</i> , Case No. C-03-2962 TEH	33
<i>Morgan v. McDonough</i> , 540 F.2d 527, 533 (1st Cir.1976)	
<i>Cert denied, McDonough v. Morgan</i> , 429 U.S. 1042 (1977)	41, 42
<i>Newman v. Alabama</i> , 466 F. Supp. 628 (M.D. Ala. 1979), <i>cert. denied</i> , 438 U.S. 915 (1978)	41
<i>Nicole White, et al., v. City of Oakland, et al.</i> , Case No. C09-05743 WHA	34
<i>Plata v. Brown</i> , 2012 U.S. Dist. LEXIS 126971 (N.D. Cal. 2012)	41
<i>Plata v. Schwarzenegger</i> , 2005 U.S. Dist. LEXIS 43796 (N.D. Cal. Oct. 3, 2005)	42
<i>Plata v. Schwarzenegger</i> , 603 F.3d 1088, 1093-94. (9 th Cir. 2010)	40
<i>Reginald Oliver, et al. v. City of Oakland, et al.</i> , Case No. C08-04914 TEH	33, 40
<i>Robinson v. Solano County</i> , 278 F.3d 1007 (9th Cir. 2002)	19

1	<i>Smith, et al. v. City of Oakland</i> , Case No. C06-07171 MJJ	34
2	<i>Shaw v. Allen</i> , 771 F. Supp. 760 (S.D. W. Va. 1990)	41
3	<i>Torry Smith, et al. v. City of Oakland</i> , C05-04045 EMC	
4	(9 th Cir. memorandum opinion, No. 08-15896)	34
5	<i>Turner v. Goolsby</i> , 255 F. Supp. 724 (S.D. Ga. 1996)	41
6	<i>Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.</i> ,	
7	443 U.S. 658, 695-96 (1979)	40
8	Federal Statutes	
9		
10	42 U.S.C. Section 1983	9

I. NOTICE OF AND MOTION FOR APPOINTMENT OF RECEIVER

To Defendants, Intervenor and to their attorneys of record, please take notice that on Thursday, December 13, 2012, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom No. 2, 17th Floor, of the United States District Courthouse, located at 450 Golden Gate Avenue, San Francisco, California, the Honorable Thelton E. Henderson, presiding, Plaintiffs will move the Court for an Order appointing a receiver who shall, acting as an agent of the Court, have authority over the City of Oakland (“City”) and City of Oakland Police Department (“OPD”) to evaluate and mandate compliance with the Negotiated Settlement Agreement (NSA)(Ex. 1) and Amended Memorandum of Understanding (AMOU)(Ex. 2).

Said motion shall be made pursuant to the equity jurisdiction of this Court, other applicable legal authorities, Plaintiffs’ memorandum of points and authorities, declaration of Plaintiffs’ counsel, evidence offered in support of the motion, oral testimony offered at the hearing, the Court file herein and any further argument and evidence that may be presented at the time of the hearing.

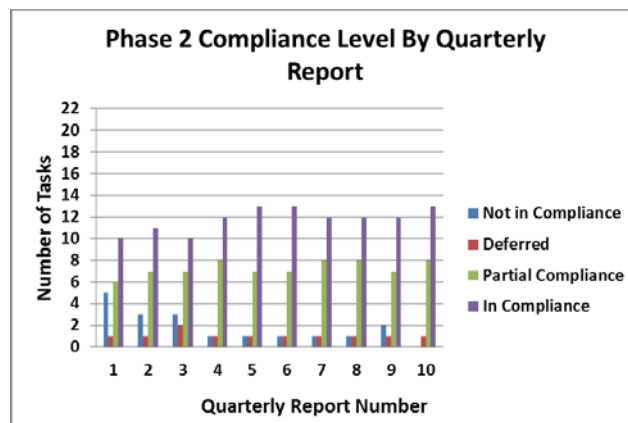
II. MEMORANDUM OF POINTS AND AUTHORITIES¹

A. INTRODUCTION

Plaintiffs are moving for the appointment of a receiver because less drastic means have failed to bring the City into compliance with reforms mandated by the NSA and AMOU for more than nine years. These reforms are not unusual or out of the mainstream. They require the City and OPD to implement and enforce contemporary, professional policing standards to ensure the OPD delivers both quality and Constitutional policing to the community. Ex. 55, Declaration of Jeffrey A. Schwartz, Ex. 1, Schwartz

¹ All Exhibits referred to herein are attached to the Declaration of Plaintiffs’ Counsel, James B. Chanin (Chanin decl.)

Expert Report, Section III, D.² These reforms were intended to prevent a recurrence of widespread civil rights violations and the infliction of egregious human suffering on Oakland citizens, the majority of whom were African Americans, that led to the commencement of this litigation. Chanin decl. The progress made by the City and OPD toward sustained, practice compliance with the NSA/AMOU has come to a virtual stand-still since the second of two Monitoring teams was appointed in January 2010:



Ex. 4, Current Monitor's Tenth Report, DKT 706, p. 81.

The evidence of the chronic failure by the City and OPD to come into practice compliance with critical NSA/AMOU mandated reforms is stunning. A Task Compliance Chart (Ex. 6, Appendix "A"), prepared by Plaintiffs' counsel, graphically demonstrates the failure to comply with critical tasks required by the NSA/AMOU by the City and OPD over the course of the past nine years. The red boxes on Exhibit 6 represent the City's lack of compliance, deferred compliance, or partial compliance with the Tasks by report; the green boxes reflect when the City was compliant with the Tasks. The Tasks covered by this chart include those which continue to present particular concerns, including Task 2

² Jeffrey A. Schwartz, Ph.D. has approximately 35 years of experience working to help troubled law enforcement and correctional agencies and has served as an expert on law enforcement and correctional issues for more than 15 years. He was one of the Plaintiffs' original subject matter experts who assisted in the drafting of the NSA, along with Walt Adkins (former Assistant, Deputy and Acting Chief of Police for the City of San Jose). Dr. Schwartz' qualifications and opinions relevant to the instant motion are contained in his expert report, which is attached as Exhibit 1 to his Declaration. Ex. 55.

(timeliness of internal affairs investigations); Task 5 (internal affairs procedures); Task 20 (span of control for supervisors); Task 24 (use of force reporting policy); Task 25 (use of force investigation and report responsibilities); Task 26 (use of force review board); Task 30 (firearms discharge board of review); Task 34 (vehicle stops, field investigations and detentions); Task 40 (purpose of personnel assessment system); and Task 41 (use of personnel assessment system). Plaintiffs' have also summarized the salient portions of the Monitor's Quarterly Reports as they relate to the Tasks shown on the Task Compliance Chart. Ex. 3. This summary shows the same concerns were raised by both independent monitoring teams about these Tasks, time and time again.³ The source material for both Ex. 3 and Ex. 6 are the Quarterly Reports that have been filed with the Court by the two monitoring teams.⁴

These compliance failures include the inability of the City and OPD to adequately perform everyday law enforcement tasks such as use of force report writing and investigation; operating an effective Internal Affairs department, including, but not limited to, considering all relevant evidence and ensuring that the outcome of investigations is based on proper evidentiary standards; tracking and

³ See, DKT Nos. 690 (Ex. 7), 673(Ex. 8), 642(Ex. 9), 625(Ex. 10), 605(Ex. 11), 591 (Ex. 12), 571 (Ex. 13), 550(Ex. 14), 536 (Ex. 15) (Current Monitor's 2-10th Quarterly Reports, Exs. 7-15); DKT Nos. 525(Ex. 16), 506(Ex. 17), 486(Ex. 18), 456(Ex. 19), 390(Ex. 20), 344(Ex. 21), 300(Ex. 22), 266(Ex. 23), 264(Ex. 24), 217(Ex. 25), 211(Ex. 26), 210(Ex. 27), and 203(Ex. 28) (First IMT's 1-14th Quarterly Reports, Exs. 16-28). The City's version of a similar chart, Ex. 5, only captures data from the first IMT's 9th Quarterly Report through the 9th Quarterly Report of the Current Monitor.

See, Ex. 46 and 47. Police Chief, Howard Jordan, also admits that the OPD has not been in full compliance with the reforms mandated by the NSA/AMOU since he became Chief of Police. Ex. 30, Jordan depo., 11:3-12:5. See also, Ex. 55, Schwartz Report, Sections II D-F; III B-C.

⁴ Plaintiffs' chart (Ex. 6(b)) and summary (Ex. 3) also include reference to issues raised in the Monitor's draft of the 11th Quarterly report, which has not yet been formally published. Plaintiffs are requested that those portions of the summary and updated compliance chart be sealed pending formal publication of the 11th report.

1 remedying systemic problems, such as racial profiling; and implementing a reliable early warning
2 system to identify problem officers so that early intervention and remedial action can be taken. See, Ex.
3 3, 6, and FN 3. The OPD's chronic failure to comply with NSA/AMOU reforms relating to these basic
4 use of force and investigation tasks (NSA Tasks 24 and 25), was confirmed in an August 14, 2012 audit
5 by the OPD's own Office of Inspector General (OIG). Ex. 29.⁵ This audit demonstrated that supervisors
6 in the OPD are only paying lip service to their duty to investigate the use of force by their subordinates
7 and that the subordinates are not receiving the training they need to be able to properly document their
8 use of force. Chief Jordan did not dispute the damning findings of this audit at his deposition. Ex., 30,
9 Jordan depo., Vol. 2, 180:23-186:1; Ex., 29, OIG Audit, pp. 5, 11-12.
10

11 These chronic deficiencies are disturbing, particularly since OPD admits the NSA/AMOU
12 reforms are not extraordinary or impossible to achieve. As former OPD Chief Anthony Batts told the
13 Court in November 2009, the tenants of the NSA are:
14

15 "[T]he things that contemporary law enforcement does today. It is the norm. It's not new; nothing
16 outside of the everyday steps that most police agencies take... I don't understand what the big
17 issue is, because this is contemporary way that law enforcement does its job. There shouldn't be
18 any excuse of it; any stepping outside of it."
19 Ex. 32, RT: 24:19-25:3, November 24, 2009.

20 Nevertheless, the City and OPD have repeatedly failed to meet their obligation to implement and
21 enforce these everyday law enforcement tasks. As Chief Batts said, there is no excuse for it, particularly
22 after the City and OPD have been given more than nine years to come into compliance with the reforms
23 mandated by the NSA/AMOU.
24

25 ⁵ This audit found, for example, that 1) the OPD's report writing manual's instructions failed to provide
26 sufficient guidance for completing use of force reports; 2) investigators failed to document the evidence
27 they considered in reaching their conclusions and merely parroted narratives contained in the officers'
28 own reports; 3) witness officers repeatedly failed to submit reports; and, 4) there were untimely
investigations and unnecessary, multiple extensions. Ex. 29, pp. 9-15.

1 The current Monitor has identified the lack of effective supervision and documentation as well as
2 a lack of commitment by the City and OPD to achieve the reforms mandated by the NSA/AMOU, as
3 problems which have thwarted Defendant's compliance with these reforms, noting:

4 "[R]eal reform takes more than checking off compliance with predetermined tasks. The pursuit
5 may be aided by those tools, but achieving progress will require commitments not yet fully
6 recognized by the Oakland Police Department."

Ex. 4, Current Monitor's 10th Quarterly Report, July 30, 2012, p. 82.

7 This lack of commitment by high ranking City and OPD officials, which has thwarted these
8 reform efforts for more than nine years, mandate why a receiver is now required to do what City and
9 OPD officials have refused to do. Despite repeated empty promises by three City Administrators, four
10 Police Chiefs and the City's inside and outside counsel, practice compliance with important reforms
11 required by the NSA and AMOU has failed. This has occurred notwithstanding two extensions of time
12 for the City's compliance; the reduction of compliance standards at the City's request;⁶ the appointment
13 of two separate independent monitoring teams; the City's spending of thousands, if not millions, of
14 dollars on consultants and monitoring teams to help them get into compliance; numerous Orders by this
15 Court; and hundreds of hours spent in meetings and Court hearings. Chanin decl.

16
17 Rather than seize the opportunity to change the culture within the OPD by finally achieving
18 compliance with the reforms mandated by the NSA and AMOU, high ranking City and OPD officials
19 have elevated "political cover" and petty personality conflicts above fostering the leadership and
20 commitment necessary to ensure that the reforms mandated by the NSA and AMOU are finally
21 implemented and made sustainable. In the wake of the City's inability to change the culture of the OPD
22 and to fully embrace these reforms, citizens continue to be victimized and subjected to civil rights
23 violations, supervisors allow officer misconduct to continue unabated, and millions of dollars have been
24
25
26

27
28 ⁶ Ex. 20, first IMT's Tenth Quarterly Report, DKT 390, pp. 4-5.

1 paid out on police misconduct claims since 2003.⁷ Given the abysmal record of OPD misconduct from
 2 the time the NSA began, there can be little doubt that future extensions will result in more constitutional
 3 violations, at great cost to Oakland taxpayers, and cause injuries, and even death, to innocent human
 4 beings, including members of the OPD.

5 When the City's practice compliance with the NSA/AMOU was put to a real life test as a result
 6 of the OPD's confrontations with Occupy Oakland demonstrators on October 25, 2011, the City and
 7 OPD failed this test miserably, as evidenced by the scathing, independent report commissioned by the
 8 City from the Frazier Group. Ex. 33, Frazier Report.⁸ Even the City of Oakland admitted this complete
 9 failure in a press release it issued when the Frazier Group report was made public, which said, in
 10 pertinent part:

12 "An independent report commissioned by the City Administration has confirmed that the
 13 Oakland Police Department's response to the Occupy Oakland protest on October 25 last year
 14 was flawed by inadequate staffing, insufficient planning, lack of understanding of modern crowd
 management techniques, and outdated policies and protocols.

15 "...as the review and analysis of OPD's performance prior to, during, and subsequent to the
 16 October 25 Occupy Oakland event progressed, systemic shortcomings became clear. Policy and
 17 practice deficiencies surrounding leadership, accountability, communication and collaboration,
 18 technical expertise, and organizational development were not unique to October 25, or to
 subsequent Occupy Oakland events. They are systemic within the department and often
 historical and legacy influenced."

21 ⁷ The lawsuits filed as a result of OPD misconduct since the adoption of the NSA have involved
 22 numerous victims, including cases where OPD officers have subjected citizens to the use of excessive
 23 force, unreasonable searches and seizures, racially biased policing and other misconduct, that has
 resulted in death, false imprisonment, permanent injuries and ruined lives. Chanin decl.

24 ⁸ The Frazier Group is headed by Thomas Frazier. He was the Police Commissioner for the City of
 25 Baltimore, Maryland from 1994-1999, the Executive Director of the Major Cities Police Chief's
 26 Association from 2001-2010, served as a Federal Monitor for United States Department of Justice
 27 Consent Decrees in the Los Angeles and Detroit Police Departments and, prior to 1994, served in every
 28 rank through Deputy Chief in the San Jose Police Department. Ex. 37, Frazier depo., 9:18-12:11; Ex.
 33, Frazier Report, p. 115. The Frazier Group's independent report and its relationship to the City's
 failed compliance efforts is discussed more fully below.

1 Ex. 34, June 14, 2012 Press Release; Ex. 35, Santana depo., 88:21-92:17 ; Ex. 36, Quan depo., 92:11-25;
2 168:15-169:10.

3 Once again, the failure to embrace the reforms mandated by the NSA/AMOU resulted in the
4 unjustified infliction of human suffering on persons attending these events, including an Iraq war
5 veteran, Scott Olsen, who was seriously injured when he was shot in the head with a munition without
6 reported justification. Chief Frazier found it, “unsettling and not believable,” that not a single officer
7 reported the shooting or admitted seeing Mr. Olson fall to the ground after being seriously injured,
8 particularly when there were 15-25 officers were nearby. He also found the OPD’s investigation of the
9 incident “inadequate.” Ex. 33, Frazier Report, pp. 6, 10, 12, 26, 38, 62-64; Ex. 37, Frazier depo.,
10 124:17-133:5; See also, Ex. 30, Jordan depo., 79:23-80:24 (more than five OPD officers saw shooting).
11

12 Despite repeated assurances to this Court by the City and OPD that they were committed to
13 changing the culture of the OPD, OPD officers have repeatedly disparaged and resisted the NSA’s
14 reforms from the very beginning of the NSA to the present time. In fact, the prior IMT found in its very
15 first Quarterly Report in December 2003, that there was “no question” that cynicism, fear and even
16 obstructionism existed within the OPD regarding the NSA. Ex. 28, DKT 203, page viii. This culture
17 continued into December 2004, when the prior IMT reported that numerous officers, including
18 supervisory and commanding-officers, referred derisively to OPD’s collection of data under Task 34 of
19 the NSA (which is supposed to be used to track whether officers are engaged in biased policing), stating:
20

21 “Despite further simplification of the reporting forms and the Chief’s directive to commanders to
22 take measures to ensure compliance, officers and commanders continue to flout this Settlement
23 Agreement requirement. The IMT has observed numerous officers, including supervisory and
24 commanding-officers, refer derisively to OPD’s collection of stop data. *One commander even*
25 *referred to the Department’s stop data collection efforts as, ‘bullshit.’* Through lackadaisical
26 supervision and little to no accountability, OPD has fostered an environment where scores of
27 officers and their supervisors feel comfortable simply disregarding OPD policy and the
28 Settlement Agreement in this area. OPD’s continuing compliance failures are not surprising in
such an atmosphere.”

Ex. 25, DKT 217, p. 7 (Emphasis added).

1 Racially offensive materials were posted in the OPD about this Court and the Mayor during
2 Chief Batts' tenure. See, Ex. 38; Ex. 4, Current Monitor's 10th report, DKT 706, pp. 51-52; Ex. 30,
3 Jordan Depo., Vol. 2, 230:2-233:8; Ex. 35, Santana depo., 174:19-178:5. More recently, in May and
4 June of 2012, OPD supervisors also made derisive comments about the NSA reforms *to members of the*
5 *public attending OPD Citizen's Police Academy sessions*, including comments to the effect that this
6 Court has an "agenda," that the Judge overseeing this case is "a member of the SLA" (Symbionese
7 Liberation Army), and that the NSA has tied the hands of officers and interferes with the OPD's ability
8 to fight crime. Ex. 39, Decl. of Jan Gilbrecht; Ex. 40, Decl. of Nancy J. Appel.

10 Mayor Jean Quan admitted that the whole line of command of the OPD have not always bought
11 into the NSA reforms and that she heard complaints about NSA paperwork when she attends lineups at
12 the OPD. Ex. 36, Quan depo., 172:9-173:4; 201:13-202:1. Chief Jordan is also aware of resistance to
13 the NSA in the OPD. Ex. 30, Jordan depo., Vol. 1, 21:2-22:22. Clearly, the culture of cynicism, fear and
14 obstructionism regarding the NSA has continued to exist from 2003 to the present time, notwithstanding
15 the repeated promises of OPD and City officials to change the culture of the OPD and to fully
16 implement the reforms under the NSA/AMOU.

18 This case is now at a critical juncture. The current AMOU is set to expire in January 2014. If
19 the *status quo* is allowed to continue, it will be, as Yogi Berra famously said, "like déjà vu all over
20 again." Nothing will change, City officials will again make grand promises to the Court about their so-
21 called "renewed commitment" to leadership and compliance, but the result will be the same. Continued
22 reliance on the current model where the Monitor can only make assessments and recommendations,
23 without having the power to order the City and OPD to take specific action to bring them into
24 compliance with these critical tasks, will be futile. Ex. 55, Schwartz Report.

26 Therefore, Plaintiffs submit that it is now time to take the drastic measure of putting compliance
27 with the NSA/AMOU reforms in the hands of a receiver having the power to order the City and OPD
28

1 into sustained, practice compliance. Otherwise, Plaintiffs believe that if the City and OPD are given
2 further extensions to come into compliance under the current model, their organizational dysfunction
3 and lack of leadership, will doom the NSA and AMOU to failure. The inevitable result will be more
4 civil rights violations and other abuses by OPD officers, more injuries, deaths and ruined lives, and
5 additional police misconduct verdicts and settlements, which have already cost the taxpayers of Oakland
6 millions of dollars since 2003. *See*, Oakland City Attorney Annual Reports, Ex. 59. Since City and OPD
7 officials have refused to assume the leadership necessary to live up to the reforms mandated by the
8 NSA/AMOU, it is time to appoint a receiver who will take the action necessary to achieve and make
9 sustainable these reforms for the sake of the citizens of Oakland who deserve professional and
10 Constitutional policing from the OPD.

11 **B. STATEMENT OF FACTS**

12 **1. History of the Litigation and the Adoption of the NSA**

13
14 This 42 U.S.C. Section 1983 action was commenced in December 2000 in response to a pattern
15 and practice of civil rights abuses by members of the OPD who became known as the “Riders.” Chanin
16 decl. Eventually, one hundred nineteen (119) individual Plaintiffs, almost all of whom were African
17 Americans, joined the litigation. The Plaintiffs’ claims involved a litany of constitutional violations,
18 including, false arrests, unreasonable seizures, false imprisonments, the planting of evidence, excessive
19 use of force, falsification of police reports, racially biased policing and kidnapping. *Id.*

20
21 “The Riders” scandal came to light after a rookie OPD officer, Keith Batt, could not stomach the
22 outrageous acts of misconduct he witnessed as a trainee of some of the worst offenders in the OPD and
23 blew the whistle on their abuses. The Riders’ ringleader, Officer Frank Vasquez, reportedly fled the
24
25
26
27
28

1 country after the scandal came to light. Ex. 44.⁹ As a result of the Riders scandal, the Alameda County
2 District Attorney's Office reviewed cases that could be linked to this pattern and practice of police
3 misconduct. That review resulted in the dismissal of a large number of pending criminal cases and
4 numerous wrongful convictions were overturned. Chanin decl. Ultimately, the 119 individual Plaintiffs
5 who joined this suit collectively settled their damage claims with the City for \$10.5 million dollars. Id.

6
7 The City also agreed to enact and implement institutional reforms by way of a separate, non-
8 monetary settlement agreement, known as the NSA, to prevent the recurrence of the civil rights
9 violations that gave rise to this litigation and to bring the OPD into step with contemporary, professional
10 policing practices. Ex. 1, NSA. The NSA was the product of more than a year of negotiations between
11 Plaintiffs, the City, OPD and the parties' respective police policy and practice experts, including
12 Plaintiffs' current expert, Dr. Schwartz. E. 55, p. 1; Chanin decl. The NSA was entered as an Order of
13 this Court on January 22, 2003. Id. The overall objective of the NSA was to provide for the expeditious
14 implementation, initially with the oversight of an outside monitoring body, of the best available
15 practices and procedures for police management in the areas of supervision, training and accountability
16 mechanisms, and to enhance the ability of the Oakland Police Department to protect the lives, rights,
17 dignity and property of the community it serves. Ex. 1, NSA, 1:6-11; Ex. 30, Jordan depo., 11:3-12:15.

18
19 The NSA was comprised of 15 detailed articles, divided into 51 Tasks, that formed the basis for
20 the agreed upon reform program for the OPD. Id. Among the tasks included in the NSA were reforms
21 addressing problems with internal affairs investigations; supervision of officers; use of force; report
22

23
24
25 ⁹ Officer Batt's whistleblower lawsuit resulting from this scandal was removed to this Court by the City
26 of Oakland. *Batt v. City of Oakland, et al.*, C 02-4975 TEH was eventually settled for a reported
27 \$625,000. Ex. 41. Batt went on to receive the 2001 Ethical Courage Award from the Institute for Law
28 Enforcement Administration (Ex. 42) and reportedly helped solve a cold murder case involving a
Pleasanton teenager last year as a Detective for the Pleasanton Police Department. Ex. 43, Pleasanton
Patch article.

1 writing; training; personnel practices; and community policing. *Id.* Most of these reforms were patterned
 2 after consent decrees that the U.S. Department of Justice had entered into with other law enforcement
 3 agencies across the United States. Chanin decl.; Ex. 55, Schwartz Report, para. I. Pursuant to the
 4 express terms of the NSA, all OPD personnel were required to strive to act in full compliance with its
 5 provisions and the NSA required that acts of non-compliance by OPD personnel would result in
 6 corrective measures, up to and including termination. Ex. 1, NSA, 3:8-10; Ex. 30, Jordan depo., 15:14-
 7 17:6.¹⁰

9 **2. The Chronic Failure by the City and OPD to Comply with the NSA/AMOU**

10 From the very beginning of the NSA to the present, the City and OPD have chronically failed to
 11 come into compliance with critical tasks mandated by these agreements and the record is replete with
 12 evidence that the City lacked the leadership, will and ability on its own to come into sustained
 13 compliance with the NSA and AMOU. See, Exs. 3 and 6; FN 3, *supra*. By the time the Court held a
 14 status conference in the case on February 14, 2005, a little over two years after the NSA was entered, the
 15 Court expressed its grave concerns about the City's lack of compliance with the NSA.¹¹ The Court
 16 stated, in pertinent part:

18 "Okay, this is going to be a difficult Status Conference. I read this [IMT] Report,

19 _____
 20 ¹⁰ The parties originally agreed that the NSA would remain in effect for five years, unless the
 21 independent monitoring team reported that an extension of time, not to exceed two years, was necessary.
 22 Chanin Ex. 1, NSA, 56:16-20. On August 20, 2003, the Court appointed the first Independent
 23 Monitoring Team ("IMT"). [DKT 200]. Due to the chronic failure of the City and OPD to come into
 24 practice compliance with critical tasks under the NSA, two extensions were later entered as Orders of
 25 the Court. [DKT Nos. 520, 620]. When the initial IMT declined to renew its contract to continue
 monitoring the NSA in the second extension period, the Court appointed Robert Warshaw and his group,
 Police Performance Solutions, as the new Monitoring team (hereinafter, Monitor), with the consent of
 both the City of Oakland and Plaintiffs' counsel in January 2010. [DKT No. 526].

26 ¹¹ Attendees at this hearing included then Oakland City Administrator, Deborah Edgerly, then Police
 27 Chief, Wayne Tucker (the successor to Chief Word); Deputy Chief, Peter Dunbar, and Captain Ronald
 28 Davis. Ex. 48, RT, p. 2.

1 and I still haven't recovered from it.

2 "I'm not given to overstatement, but I haven't seen anything like this in 25 years. This is
3 so unacceptable that I've been spending my time deciding what I can do to get the attention
4 of the defendant. This is contemptuous. I'm so angry at the slap in the face, the
5 ignoring of this decree that my question is whose responsible and how can I get them in
6 front of me? With that in mind, let's proceed with this hearing, but that's where I'm headed.

7 "And my idea is to hold a hearing. If there is any question about who has blocked this, who is
8 keeping this settlement from being implemented, I'm going to send it to a Magistrate
9 judge and have a hearing. And once I determine that, you are going to get on toward
10 contempt, and I promise you that."

11 Ex. 48, RT 4:21-12, February 14, 2005.

12 In response, representatives of the City and OPD and their counsel made a number of
13 representations to the Court to the effect that they would make progress on compliance on the NSA
14 tasks. Ex. 48, RT 11:16-18:15; 29:16-32:9; 35:7-38:4; 38:7-41:17; 46:24-49:11. By the end of the
15 hearing, the Court stated it was "heartened," but hoped that "none of this was to shine the Judge on...."
16 Ex. 48; RT 5:5-12. However, in the seven years since that status conference, all indicators point to the
17 City and OPD continuing to "shine the Judge on" and engaging in a nearly unbroken record of failing to
18 hold officers accountable for constitutional violations and misconduct. For example, the prior IMT
19 found in its Seventh Quarterly Report filed on December 7, 2005:

20 "Two audits we conducted this reporting period underscored that OPD officers
21 frequently do not report the misconduct they observe or otherwise encounter and OPD
22 does not hold them accountable for such reporting failures. Moreover, when officers
23 report they have suffered retaliation for reporting misconduct, OPD's internal
24 investigations of the alleged retaliation are too deficient to provide any level of
25 confidence that officers guilty of retaliation are held accountable.

26 "...Even in cases where OPD sustains misconduct and the investigation indicates that officers
27 observed the sustained misconduct but did not report it, OPD does not always hold the
28 officers accountable."

Ex. 24, 7th Quarterly Report, DKT 266, pp. ix-x.

The former IMT also discovered that the OPD failed to conduct investigations of 100's of
citizens' complaints and, as a result, could not hold officers accountable for their misconduct because in

1 most cases the deadline for imposing discipline had expired. Id. pp. xii-xiv; Ex. 23, 8th Quarterly report,
 2 DKT 300, p. 5. Thereafter, the OPD asked the former IMT to loosen its compliance standards, despite
 3 the fact that a 95% percent compliance standard is the norm in similar cases. Ex. 20, prior IMT's 10th
 4 Quarterly Report, DKT 390, pp. 4-5. While the IMT did lower some of the compliance standards to
 5 85% and 90% percent, the IMT refused to lower the standards further as requested by the OPD,
 6 concluding that "the goals of the NSA would have been unacceptably undermined if the IMT deemed
 7 OPD in compliance with a required practice where it was not in compliance 20% of the time." Id.
 8 Nevertheless, the City and OPD still failed to come into compliance with the NSA. For example, in its
 9 13th Quarterly Report, (Ex. 17, DKT 506, p. 5), the former IMT noted:

11 "...our recent reviews and monitoring make clear that illegitimate disciplinary decisions
 12 still do occur, lending credence to the perception among the rank and file and the community
 13 that OPD lets some officers get away with known misconduct with no discipline or little more
 14 than a slap on the wrist. These cases, even if few in number, send a powerful message that
 15 makes it difficult for the Department and City to gain the community's trust in the police
 16 department. Such cases also shake officers' confidence in OPD leadership and its
 17 commitment to the values it professes."

18 At the November 24, 2009 Status Conference, City and OPD officials addressed the Court again
 19 on the issue of compliance. For example, Chief Batts told the Court:¹²

20 "So my commitment to you, your Honor, is to make that part of the culture of this organization;
 21 to have them understand that, as a law-enforcement agency today in contemporary society today,
 22 these are the basics that we do; and that they understand from me that I am a true believer in
 23 being a guardian of the Constitution, and that that is the way that we will police from now, and
 24 hopefully to eternity as we go on. And I truly believe that."

25 Ex. 32, RT: 23:2-30:24, November 24, 2009.¹³

26 ¹² By this time, Anthony Batts had been appointed Chief of Police, replacing Chief Tucker. Chief Batts,
 27 City Administrator Dan Lindheim, the former IMT and Chief Robert Warshaw, who would become the
 28 new Monitor in January 2010, attended this hearing. Ex. 32, RT p. 2.

¹³ Mayor Jean Quan recently testified that she did not believe that Chief Batts devoted much hands on
 involvement to the NSA reforms and spent a considerable amount of time looking for another job while
 he worked for the City. Ex. 36, Quan depo., 77:24-78:11.

1 However, the prior IMT's final quarterly report filed on January 22, 2010 (Ex., 16, DKT 525),
2 reflected the continuing chronic failure by the City and OPD to come into compliance with critical tasks
3 mandated by the NSA. Despite the passage of seven years of reform efforts, the prior IMT noted in this
4 report:

5 "A number of OPD commanders, complaining about the high number of misconduct
6 complaints, have stated words to the effect of, "If we could just get our people to talk nice to
7 people, there would be fewer complaints." This is as good a synopsis of the problem, albeit
8 simplified, as any. We have seen and heard countless examples of OPD officers handling
9 potentially explosive incidents and people with incredible patience and skill. These officers,
10 and the Department's efforts to fight crime, are poorly served, and their efforts undercut, by
11 those officers at OPD who exhibit little respect or concern for the community they serve or, at
12 times, the laws they are sworn to uphold.

13 "The lack of concern for the dignity and rights of individuals is too often evident in OPD
14 searches of people, vehicles, and homes."

15 Id. at pp. 5-6.

16 When the second Monitor team, headed by Chief Robert Warshaw, was appointed with the
17 consent of all parties under the MOU on January 27, 2010, it assumed the monitoring duties in the face
18 of the daunting, prior, chronic failures by the City and OPD to come into compliance with some of the
19 most critical reforms mandated by the NSA/MOU and a culture within the OPD which was often
20 outright hostile to these reforms and the citizens they served.

21 Although counsel for the City previously told the Court at the status conference on November
22 24, 2009, that he expected the City to come into compliance with the NSA reforms within a year (Ex.
23 32, RT 35:4-1), the City was subsequently unable to come into compliance within the one year estimate
24 or even in the two year extension period agreed to by the parties. Worse, the chronic failure to comply
25 with critical NSA reforms found by the first IMT continued throughout the tenure of the second
26
27
28

1 Monitor.¹⁴ In fact, in its August 10, 2010, 2nd Quarterly Report, the current Monitor found during an
2 IPAS review that an officer who had 53 uses of force, two disciplinary actions lodged against him, a
3 motor vehicle accident and an in-custody injury—all within the same time period—was found by the
4 OPD to be not appropriate for supervisory mentoring or monitoring. Ex., 14, DKT 550. This case
5 highlighted the ongoing failure of the OPD to identify problem officers in order to properly supervise
6 and help them as required by the NSA/MOU.¹⁵

7
8 At a September 16, 2010, Case Management Conference, City and OPD officials admitted to the
9 Court that there was no excuse for their failure to comply with the NSA's reforms and that there had
10 been a failure of leadership for years that prevented the OPD from achieving compliance. For example,
11 Rocio Fierro, counsel for the City, told the Court:

12 “There’s simply no reason for the police department not to succeed. When you
13 look at the developments within police services, you can go back to the 1960s
14 and a lot of what is being asked of the Oakland Police Department is not new. It’s
frankly, not innovative.”

15 Ex. 49, RT 16:8-11, September 16, 2010.

16 Despite his rather optimistic view of compliance “for all eternity” at the prior November 24,
17 2009, status conference, Chief Anthony Batts admitted less than a year later that the OPD had “dropped
18 the ball” in reference to the NSA reform effort:

19 “We honestly, Judge, have challenges with following up and following through. We are solving
20 those. We have dropped the ball, and haven’t focused on the core issue of leadership. We are
21 changing that.”

22
23
24 ¹⁴ See, Ex. 3, Plaintiffs’ Compliance Summary; DKT Nos. 706, 690, 673, 642, 625, 605, 591, 571,550,
536 (Current Monitor’s Quarterly Reports, 4, 7-15, respectively); and Ex. 29, 8/12/12 OIG Audit.

25 ¹⁵ On August 31, 2010, the Court ordered the City to identify the specific members of the OPD
26 responsible for monitoring and reporting on the NSA task compliance efforts. The Court also warned
27 that these individuals, along with the Chief of Police, could face contempt proceedings in Court, if the
28 facts warranted it. [DKT 553]. This warning had virtually no effect on the compliance record thereafter.

Ex. 49, RT 30: 8-11, September 16, 2010.¹⁶

City Manager, Dan Lindheim, also gave a more dismal account of the City's prospects for compliance than he had at the prior status conference and suggested that the Court might need to use a heavy hand to achieve these reforms:

"There should have been ownership eight years ago. No dispute. Should have been ownership eight years ago, six years ago, four years ago. I'm observing that there wasn't. I'm not making an excuse for that. It's an observation. *To me, one of the most important things that is taking place is that there is ownership...It may require the hand of the court to some extent, heavy or otherwise...*"

Ex. 49, RT 53:19-25, September 16, 2010. (Emphasis added).

Thereafter, the City represented to the Court in a December 2, 2010 Joint Case Management Statement, that it hoped to come into substantial compliance with the remaining tasks under the NSA/MOU by December 31, 2010 – *less than a month later*. Ex. 51, Joint CMC Statement, DKT 582, 8:11-13. Not surprisingly, the City and OPD did not meet this deadline and remained out of compliance throughout the entirety of the following year. In fact, the City was out of compliance for all of 2011,

[REDACTED]

Chief Batts later resigned on October 11, 2011, reportedly stating of his tenure with the OPD, in pertinent part, "...I found myself with limited control, but full accountability."¹⁷ See, Ex. 53. Shortly

¹⁶ [REDACTED] Ex. 50.

¹⁷ Chief Jordan did not believe that former Chief Word and Chief Batts took ownership of the NSA. Of Chief Batts, Chief Jordan testified that he did not believe that the NSA had been explained to him

thereafter, the City Administrator, Ms. Santana, announced the appointment of Howard Jordan as interim Chief of Police on October 13, 2011. Ex. 54, October 13, 2011 Memo to the City Council. Ms. Santana stated that Chief Jordan was appointed because of his experience in leading compliance with the NSA reforms during the past four years, which she believed would help the City's progress toward full compliance with the NSA by January 2012. Ex. 35, Santana depo., 56:5-60:10. Ms. Santana, however, never reviewed the Monitor's prior Quarterly Reports before making this appointment, which described in great detail, the failure of the NSA compliance efforts during that same four year period. Id.

Shortly after Howard Jordan was appointed interim Chief on October 13, 2011, the "Occupy" movement came to Oakland.¹⁸ The OPD's deplorable response to Occupy Oakland demonstrations proved that it could still not put NSA/AMOU reforms into actual practice. Ex. 33, Frazier report.

Despite the City Administrator's announcement in October 2011 that she hoped her newly appointed interim Chief of Police would make significant progress with NSA compliance by January, 2012, (Ex. 54), that did not occur as evidenced by the current Monitor's 8th Quarterly Report filed on January 17, 2012. Ex. 8, DKT 673. In that report, the Monitor found that "in our two years on task here, we have reported little measurable progress by the Department." Id. One of the more disturbing

sufficiently when he took the job and that he did not understand the tenets of the NSA, the impact and history of the NSA. Chief Jordan also testified that in the short period that Chief Batts was with OPD, the NSA was too much for him to learn and absorb. Ex. 30, Jordan depo., 25:8-28:15.

¹⁸ The Occupy movement has been described as an international protest movement directed toward social and economic inequality. Ex. 33, Frazier Report, p. 5. The first Occupy protest was Occupy Wall Street in New York City's Zuccotti Park, which began on September 17, 2011 and similar protests began taking place across in the County. Id. On October 10, 2011, a group identifying itself as Occupy Oakland began camping in front of the Oakland City Hall. Id. at p. 6. During the early morning on October 25, 2011, OPD and mutual aid personnel evicted the Occupy protesters from the location near City Hall as well as from a City park. Later that day, Occupy Oakland demonstrators clashed with OPD officers, resulting in controversial uses of force, including an incident in which a protestor, Scott Olsen, was critically injured by a police officer after he was struck in the head by a munition, now thought to have been a bean bag round. Id. at 6-7.

1 findings by the Monitor in this report was the high incidence of searches by OPD officers based on a
 2 citizen's status as a parolee or probationer and that "[t]here appears to be a potential disparate use of
 3 these searches with respect to race," since the "overwhelming number of cases we reviewed involved
 4 Blacks." Id. at page 88. The Monitor also found OPD had an unusually high number of "unfounded"
 5 Internal Affairs investigation findings. Id. at page 6.

6 Recognizing that it remained out of compliance with 12 of the remaining 22 NSA/AMOU Tasks,
 7 the City represented to the Court in a Joint Case Management Statement filed on January 19, 2012, that
 8 it was "working to overcome the factors that have delayed compliance with these specific tasks....[and]
 9 believe that recent efforts advanced under Chief Jordan will demonstrate a higher level of compliance in
 10 April 2012." Ex. 61, DKT 674.¹⁹ Despite these alleged efforts, the Monitor's Ninth Quarterly Report,
 11 filed on April 30, 2012, found that there had been an outright stagnation in the overall compliance
 12 picture and that "although progress on NSA compliance has been slow, even those advancements may
 13 have been put in doubt in the face of [Occupy Oakland] events." Id.

14 On May 1, 2012, the Court entered an Order Requiring Plan Re: Occupy Oakland Internal
 15 Affairs Investigations in response to concerns raised by the Monitor in this report [DKT 691]. The
 16 Court issued a further order on May 31, 2012, due to concerns the Court had about the OPD's
 17 investigation of officer involved shootings (OIS). [DKT 692].

18 The City and OPD continued to remain out of practice compliance with critical NSA/AMOU
 19 tasks through the Monitor's 10th Quarterly Report that was filed on July 30, 2012. The City also
 20 admitted that it has remained out of compliance with many of these tasks through August and September
 21

22
 23
 24
 25
 26 ¹⁹Exhibit 5 to this Case Management Statement, is a letter signed by Mayor Quan, City Administrator
 27 Santana, and City Attorney Parker, which stated, in pertinent part: "[Ms. Santana] is particularly grateful
 28 to [sic] the collaborative guidance that Chief Warshaw has provided her to ensure that she gets up-to-
 speed quickly and focuses on the correct priorities for achieving compliance by the OPD." [Ex. 62].

2012.²⁰ Especially in light of the Monitor's October 2, 2012 officer involved shooting report, *infra*, one of the most troubling aspects of the 10th Quarterly Report concerns the reporting and investigation of officers' drawing and pointing of firearms, which is related to NSA/AMOU Tasks 24 and 25. The Monitor found that in cases where officers failed to document their justification for this high degree of potentially lethal force, the persons on the other end of the barrel of the guns were Black, 91% of the time; and Hispanic, 9% of the time. Ex 4, p. 38. This report echoed similar findings in the current Monitor's 8th and 9th Quarterly Reports in which statistically, Black and Hispanic citizens accounted for almost all of the incidents where OPD officers pointed their guns when there was no reported justification for doing so.²¹ Another disturbing finding made by the Monitor was that supervisors were not identifying these cases during mandatory use of force investigations required by the NSA/AMOU. A reasonable inference from this evidence is that OPD officers are repeatedly subjecting people of color to biased policing and the use of excessive force without adequate justification after more than nine years of reform efforts and supervisors are failing to use due diligence to discover and investigate these incidents. See, also. Ex. 55, Schwartz report, para. III, B, 3.²²

Chief Jordan did not dispute these findings and admitted that it is an issue that needs to be addressed with supervisors and better training. Ex. 30, Jordan depo., 187:21 –198:25. He also testified that the fact that this was disproportionately occurring to Black and Hispanic citizens was troubling to

²⁰Ex. 3, Plaintiffs' compliance summary; Ex. 6, Plaintiffs' compliance chart; Ex. 4, Monitor's 10th Quarterly Report, DKT 706; Ex. 46-47, City's August and September Compliance Matrices.

²¹ According to the 9th Report, the current Monitor found that 88% and 12% of these cases, respectively, involved Black and Hispanic citizens. In the 8th Report, the current Monitor found that Black and Hispanic citizens accounted for 72% and 14% of these cases, respectively, and that Asians accounted for 14%. In all three reports, none of the cases reviewed by the Monitor involved the unjustified pointing of a firearm at a person who was White. DKT 706, 690 and 673, Exs. 4, 7-8.

²² See, e.g., *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir.2002) (en banc)(Pointing a firearm at a citizen without adequate justification may constitute excessive force under the 4th Amendment).

1 him. *Id.* City Administrator, Ms. Santana, also found these statistics disturbing, but did not believe that
2 the OPD had the capability of solving the problem without outside assistance. Ex. 35, Santana depo,
3 123:12-126:15; 129:10-13.

4 Chief Jordan admitted that the OPD has been in chronic non-compliance with Task 34, which
5 mandates that officers collect and report data concerning the persons they stop and detain so that
6 supervisors can identify trends of unconstitutional stops and racial profiling. He also testified that he is
7 aware that the data being reported by OPD officers is inaccurate and that clerical errors made while
8 manually inputting data into the IPAS system contribute to the unreliability of the system. Ex. 30,
9 Jordan depo., 200:19 – 201:14, 203:18 – 204:11.

11 The combination of evidence that 1) officers resort to the pointing of a firearm without
12 justification almost exclusively at Black and Hispanic citizens, and, 2) the OPD is failing to comply
13 with the racial profiling documentation required by NSA Task 34, supports the conclusion that the City
14 and OPD have failed to comply with reforms intended by the NSA to prevent excessive use of force and
15 racially biased policing, with the result being that minority citizens are continuing to be subjected to the
16 violation of their civil rights based on their race by OPD officers. Without the appointment of a receiver,
17 who can order the City and OPD to make the changes necessary to comply with the NSA/AMOU, OPD
18 officers will continue to inflict civil rights violations, injuries and misery on innocent human beings,
19 particularly racial minorities.²³
20
21
22
23

24 ²³ These findings are also troubling given the fact that Chief Jordan admitted that he never investigated
25 whether officers were engaged in biased policing after the Monitor raised concerns about possibly
26 racially biased parole and probation searches in previous reports, even though the Police Chief admitted
27 being concerned about these findings. Ex. 30, Jordan depo., 223:14-224:5. The utter disregard for the
28 possibility that OPD officers were still engaging in racially disparate policing, and the lack of any
investigation into whether it was occurring, is indicative of the lack of leadership necessary to make the
changes so sorely needed to the culture in the OPD.

1 These failures are also compounded by the fact that the OPD still has not complied with the
 2 IPAS reforms set forth in Tasks 40 and 41. Although Chief Jordan previously testified that he did not
 3 believe that the IPAS system needed to be replaced (Ex. 30, Jordan depo., 112:8–113:6), the City now
 4 admits that it is experiencing serious compliance problems with IPAS and plans to replace the current
 5 system. Ex. 47, [REDACTED]; Ex. 63, City Auditor’s Report, p.
 6 1, 13; Ex. 35, Santana depo., 165:1-167:14.
 7

8 Nevertheless, the City’s [REDACTED] (Ex. 47) [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]. Id. Given the abysmal failure of the City and OPD to have a working, reliable early
 12 warning system that is useful to the Department for more than nine years, taken together with the fact
 13 that they are now projecting they will not be in compliance with these Tasks until sometime in March
 14 2014 – *after the AMOU has expired*, there is simply no reason to have any confidence that the OPD will
 15 come into compliance at that late date.²⁴
 16

17 On October 2, 2012, the Monitor filed its report regarding officer OPD’s officer involved
 18 shootings. Ex. 56, DKT 744 (Redacted). This report confirms the OPD’s shocking, continuing failure to
 19 fully and fairly investigate its officers’ use of force, including in cases involving deadly force.
 20
 21
 22

23
 24 ²⁴ This is particularly true in light of the recent report by the City of Oakland Auditor, which found that
 25 the OPD had wasted \$1.87 million dollars on technology, including the Evalis system purchased to
 26 comply with Task 40, that either did not work properly or was not being used. Ex. 63, Auditor’s Report.
 27 Moreover, both Chief Jordan and the City Administrator agreed with the Auditor’s conclusion on page 1
 28 of the report, that neither OPD nor DIT were providing effective planning, oversight, or financial
 management for OPD’s technology systems. Ex. 30, Jordan Depo., 109:12–110:14; Ex. 35, Santana
 depo., 164:2-172:16.

Among the systemic problems the Monitor found with the OPD's officer involved shooting investigations included, 1) lack of an imminent threat justifying the use of deadly force; 2) lack of impartiality of the investigators; 3) failing to use the "preponderance of the evidence" standard in the investigations; and, 4) lack of timely notice of the use of deadly force to Internal Affairs. Id. at 12-13. The Monitor also found that in most cases, investigators appear predisposed to the position that the shooting is justified, and then subtly or overtly, set out to prove that premise. Id. at 16. As the Monitor notes, the OPD's authority to use deadly force comes with tremendous responsibilities, 1) to use deadly force only when necessary and in accord with legal standards, and, 2) to ensure that when deadly force is used, a determination is made that it was legally justified and within policy. Id. at 17. The Monitor found, however, that the OPD has not fulfilled these responsibilities, notwithstanding the fact that people can die as a result of an officers' unjustified use of deadly force. Id. The evidence that the OPD is conducting officer involved shooting investigations in the biased and woefully deficient manner described in this report, despite the requirements of NSA/AMOU Tasks 5, 24, 25, 26, and 30, is further evidence that the lack of leadership and the culture within the OPD are standing in the way of compliance. Worse, people have died, and will continue to die, as a result of the unjustified resort to deadly force by OPD officers unless these reforms are embraced and enforced. Since the OPD has been incapable of doing so, it is now time for the appointment of a receiver who can order the City and OPD to do what they are legally and morally required to do in cases involving the use of deadly force to ensure that more people do not die as a result of the unjustified use of deadly force by OPD officers.

3. The Frazier Group Report on the OPD's Response to Occupy Oakland

a. The City's Public Release of the Frazier Group Report

On June 14, 2012, the City and OPD published the independent report it had commissioned from the Frazier Group, which examined the OPD's response to Occupy Oakland demonstrations on October 25, 2011. This report was commissioned after the City received numerous complaints about excessive

1 force and about police tactics that were used by the OPD. Ex. 33, Frazier Report.²⁵ The result was a
 2 scathing 120 page report that confirmed that the OPD response to Occupy Oakland was not an anomaly,
 3 but the product of the lack of leadership and systemic problems that have thwarted the City and OPD
 4 from coming into compliance with critical reforms mandated by the NSA for more than nine years.²⁶

5 When the Frazier report was released, Chief Jordan, also issued a written statement,
 6 acknowledging that this report had been commissioned so that the City and OPD could learn “from an
 7 unbiased third party” and “immediately improve any operational, administrative or systemic flaws.” Ex.
 8 64, Chief Jordan’s Memo. of June 14, 2012.²⁷ The memorandum was accompanied by a chart
 9 purporting to represent the OPD progress in complying with the Frazier Group’s recommendations.²⁸
 10 *Id.* When asked about this chart at his deposition, Chief Frazier’s reaction to it was that some of the
 11 categories were “essentially contrived” and that it was easy to say something is “underway,” while
 12 making very little progress. Ex. 37, Frazier depo., 94:13–95:18. Chief Frazier’s deposition testimony
 13 was confirmed by the City’s responses to interrogatories, served on August 3, 2012, in which the City
 14
 15

16
 17 ²⁵ The scope of the Frazier Group’s work regarding Occupy Oakland is set forth on pages 86-87
 18 of its report. Ex. 37, Frazier depo., 31:17 – 34:8, Ex. 33 Frazier Report, Pages 86-87. The
 19 biographies of the members of the Frazier Group who worked on the project appear on pages
 20 15-120 of the report and all of them had law enforcement backgrounds. Ex. 37, Frazier depo.,
 21 34:19 – 35:20. The Frazier Group reviewed documents and interviewed OPD personnel and
 22 others during the course of its assignment. Ex. 37, Frazier depo., 35:21–38:7, Ex. 33, p. 100.
 23 Some of the raw notes taken Frazier Group team member, Donald K. Anders, of interviews he
 24 conducted the members of the OPD are attached to his Declaration as Ex. 2. Ex. 66.

25 ²⁶ Mayor Quan admitted that she has not voiced any disagreement with the findings of this report. Ex.
 26 36, Quan depo., 92:11-25; City Administrator, Ms. Santana, testified she agreed with all the Frazier
 27 Group’s 68 findings, except for one. Ex. 35, Santana Depo., 90:24-92:17.

28 ²⁷ As discussed supra, the publication of this report was accompanied by a Press Release in which the
 Mayor and City Administrator endorsed the Frazier Group’s report and findings. Ex. 34.

²⁸ Prior to the issuance of the Frazier Report, Chief Jordan told Mayor Quan that he did not think the
 OPD had “done a bad job” during Occupy Oakland. Ex. 36, Quan depo., 94:18-21.

1 admitted that the extent of the implementation of the Frazier Group's recommendation was "still under
2 consideration," almost two months after the report was made public. Ex. 65, City's Response to Interrog.
3 No. 104.

4 Despite claiming that the City and OPD wanted transparency and was committed to reforms in
5 the City's press release concerning the Frazier report, (Ex. 34), communications between Chief Frazier,
6 the City Administrator and her staff preceding the formal release of the Frazier Group's report belie
7 these claims. For example, Ms. Santana sent an email to Chief Frazier asking him to send a draft of the
8 report to her alone and to ignore a request by Mayor Quan's public safety advisor, Reygan Harmon, to
9 provide the Mayor's office with a copy of the draft report.²⁹ Chief Frazier responded that he would
10 accommodate Ms. Santana's request and asked her how many copies she wanted. Ms. Santana
11 responded that she only needed one copy and that he should send it to her personal, rather than official
12 City email account. Ex. 37, Frazier depo., 144:21-148:11; Ex. 67, Emails between Ms. Santana and
13 Chief Frazier.³⁰

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 ²⁹ Under Article III, Section 305 of the Oakland City Charter, Mayor Quan is the direct supervisor of the
22 City Administrator and has the power to terminate Ms. Santana without City Council approval.

23 ³⁰ Mayor Quan testified that City officials sometimes use their personal email, rather than official email,
24 accounts because there have been "a lot of email leaks." Ex. 36, Quan depo., 109:25-110:11.

25 ³¹ [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 Mayor Quan, however, had no idea that Ms. Santana was withholding the draft of the Frazier
6 Group's report from her because of these reasons and merely thought she was not given a copy because
7 the report was not ready yet. Ex. 36, Quan depo., 108:6-13.

8 Ms. Santana and her staff also made repeated efforts to get Chief Frazier to provide them with a
9 copy of his group's draft report in Word formatting, rather than protected PDF, so that they could make
10 changes to it themselves before it was finalized. Ex. 37, Frazier depo., 153:10-167:1 ; Ex. 67,
11 Santana/Frazier emails. Ms. Santana also wanted Chief Frazier to bifurcate the report in a way that the
12 "heart and soul" of it would not be made generally available. Id. Chief Frazier declined to do either,
13 citing concerns that he wanted the Frazier Group to stay within its "ethical comfort zone." Id. Notably,
14 one of the changes Ms. Santana asked the Frazier Group to make was to delete references to the incident
15 in which Scott Olson was shot in the head with a munition, claiming that this purportedly was "not
16 within the scope" of the Frazier Group's assignment. Ex. 35, Santana depo., 107:7-109:13. As discussed
17
18

1 more fully below, the shooting of Scott Olson and the OPD's lack of accountability for that shooting
 2 clearly demonstrated that the OPD was continuing to fail to comply with use of force reporting and
 3 investigation requirements under NSA Tasks 24 and 25 and, as a result, this shooting incident was
 4 clearly germane to the Frazier Group's assignment.

5 After Chief Frazier declined to allow the City to make changes to his report or to bifurcate the
 6 report in the manner requested by Ms. Santana, he testified that he was uninvited by the City from
 7 attending the press conference he had been previously asked to attend on June 14, 2012 to coincide with
 8 the City's release of the Frazier Group's report to the public. Ex. 37, Frazier depo., 167:10–169:13. In
 9 addition, Chief Frazier has not worked for the City in any capacity since May 2012. Ex. 37, Frazier
 10 depo., 29:4–30:1.

11
 12 **b. The Frazier Report Confirms that the City and OPD are Failing**
 13 **to Practice Routine Law Enforcement Tasks that Go to the Very Heart of the Reforms**

14 An analysis of the Frazier Group's findings, as they relate to the NSA/AMOU tasks that remain
 15 out of practice compliance, clearly demonstrates that the lack of leadership, an abysmal department
 16 culture which abhors learning and change, as well systemic policy and practice shortfalls, mandate that a
 17 receiver now be appointed to ensure that the hard fought NSA/AMOU reforms are finally achieved. In
 18 fact, the Frazier Group's conclusions explain to a large degree how its organizational dysfunction has
 19 prevented the OPD from coming into compliance with the reforms mandated by the NSA for more than
 20 nine years. These include:

21
 22 “1. COMMAND TURNOVER: The Department's executive leadership team has been
 23 unstable for years. Turnover at the senior levels of Chief, Assistant Chief, and the Deputy
 24 Chiefs and Captains has been frequent. While bright and dedicated personnel have recently
 25 been appointed to fill these important positions, many do not have the formal training, and the
 breadth of experience that most departments exhibit at this level of organizational leadership.

26 “2. BENCH STRENGTH: We did not see OPD historically as a “learning organization” –
 27 one which senior leadership has placed a high value on succession planning, career
 28 development, formal training, and post-incident reviews designed to provide departmental
 members the opportunity to learn from, and to improve from, recent experiences.

1 “3. STAFFING CUTS: Substantial and cumulative budget cuts and personnel losses have
2 seriously weakened the Department. ...OPD is so busy trying to keep pace with the operational
3 requirements of daily events that they have little time or resources for strategic long-term
4 improvement. The resulting problems play out in the media on a routine basis, further
undermining the community’s confidence in its police department.”

5 Ex. 33, Frazier Report, p. 80; Ex. 37, Frazier depo., 58:5–60:2.

6 Although Chief Frazier was aware of comments by Chief Jordan to the effect that, “We need to
7 change the culture of the department,” (Ex. 37, Frazier depo., 183:1–185:17), the Frazier Group Report
8 and Chief Frazier’s testimony confirm that this change has not occurred and is unlikely to occur without
9 drastic measures being taken.

10 For example, Chief Frazier testified that there is a general sense that the OPD is not what it once
11 was and that there is a “very negative relationship” with the community. Id. He also opined that the
12 ethics of “self-regulation” seem not to be a concern, i.e., role modeling of good behavior and
13 investigation of behavior that violates written guidelines, is not effective or deemed particularly
14 important. Id. According to Chief Frazier, misbehavior is not being reported and investigated, which
15 sends a message of tacit approval throughout the rank and file. Id. Chief Frazier testified that the
16 responsibility for changing these problems lies with the Chief of Police because he has the ultimate
17 authority to create the policy, make promotions and hold a high standard. Id.

18 Further, the Frazier Group’s findings and recommendations overlap with critical tasks mandated
19 by the NSA/AMOU and provide further evidence that the City and OPD are not in practice compliance
20 with critical NSA reforms in the field or during subsequent investigations or reviews. This includes, but
21 is not limited to, appalling failures with respect to Task 5 (internal affairs complaint procedures), as well
22 as, Tasks 24 and 25 (use of force reporting, investigation and report responsibility). As shown below,
23 when these critical tasks were put to the test during Occupy Oakland, the OPD failed miserably and the
24 result was at least two people were seriously injured.

For example, the Frazier Report found that current OPD policies and practices regarding internal affairs investigations do not consistently meet current standards or preferred practices when measured against characteristics of being: assertive and thorough, willing to challenge inconsistencies, committed to reconciling incongruity, and committed to finding the facts regardless of the outcome. *Id.* at page 64, Ex. 37, Frazier depo., 95:19–98:21.³³ This finding confirms that the OPD is not in compliance with NSA/AMOU Task 5. In fact, these deficiencies mirror those found in the first IMT’s combined 4th and 5th Quarterly Report filed almost six years ago. Ex. 25, DKT No 217.

In addition, the Frazier Group heard comments from high ranking OPD officials that demonstrated that these were not isolated problems associated only with Occupy Oakland, but indicative of the culture of the OPD that has not, and will not, make thorough and unbiased internal affairs investigations of officer misconduct a priority. These comments included:

- *There is a longtime culture of not challenging subject and witness officer; and,*
- *OPD members observe tacit approval of misconduct by supervisors and commanders.*

- 
- *Internal affairs division investigators do not want to be the individual who sustains a complaint against a particular member;*
 - *Regarding a significant misconduct complaint and officer-involved criminal investigation, an interviewed ranking member said “I have little faith that IA can get it right and have even less faith that CID will do the case right. The CID investigation would be a waste of time. I do not have faith in the IA or CID process.”*

³³ The Frazier Group also found instances where personnel assigned to produce use of force reports during the Occupy Oakland events were also assigned at the same time with investigating Manual of rules and criminal violations from the same event, resulting in a direct conflict of interest. Ex. 33 at p. 64.

³⁴ Donald K. Anders was a member of the Frazier Group team. He retired from the San Jose Police Department in June, 2010 after 32 years of service.

- *[We] are approaching crisis. The organization (department) is slowly grinding to a halt. There is too much work.*
- *"This organization values popularity over integrity" (said in response to the question, "why do you feel that CID won't find any officer out of compliance with force.")*

- *The sink is overflowing but we are not turning off the faucet.*

- *We are so overwhelmed we are not able to pay the correct amount of attention to cases that need it, or once we do get to them, we are too burned out to give it the attention needed.*

Chief Frazier testified that such comments were not atypical of the information the Frazier Group received during this assignment. Ex. 37, Frazier depo., 112:3-113:5.

These problems were also known to Chief Jordan, who admitted that there had been occasions in his personal experience, where he felt investigators did not want to ask tough questions and that "to some degree," "IAD investigators do not want to be the individual who sustains a complaint against a particular member." Chief Jordan also admitted that the OPD is "approaching crisis, the organization is slowly grinding to a halt, there is too much work." Ex. 30, Jordan depo., 85:4-86:13; 87:7-88:1, 212:9-214:24.

One of the most telling parts of the Frazier Group report as it relates to the failure of the City and OPD to comply with Task 5 internal affairs reforms, is its discussion of the shooting of Scott Olson. After viewing the video of the incident, Chief Frazier was of the opinion that the incident required the OPD to assign experienced, unbiased investigators to handle this investigation. However, Chief Frazier found that the OPD internal affairs investigation did not demonstrate an ability to determine the truth in this instance. Ex. 37, Frazier depo, 175:16-176:11, Ex. 33, Frazier Report p. 52-53. Even the OPD

1 admitted to the IMT on February 13, 2012, that, with regard to Occupy Oakland investigations, they
2 “lacked the capacity to undertake an investigation of this breadth and scope.” Ex. 7, Current Monitor’s
3 9th Quarterly Report, DKT 690, p. 81.

4 In fact, Chief Frazier was of the opinion that the OPD did not make a good faith attempt to
5 determine what law enforcement officers observed, or should have observed, about what caused Mr.
6 Olsen's injury; that insufficient efforts were made to identify potential witnesses; and that the OPD
7 failed to make sufficient efforts to prevent officers who were potentially involved in the Scott Olsen
8 incident from communicating with one another. Ex. 37, Frazier depo., 179:20–182:4. It is no small
9 wonder that Ms. Santana wanted the Frazier Group to delete the Scott Olson incident from its report,
10 given the Frazier Group’s stinging indictment of the OPD’s continuing failures to comply with use of
11 force reporting and investigation reforms under the NSA. See, Ex. 35, Santana depo., 135:15-137:65.
12

13 Chief Frazier was particularly concerned about the lack of use of force reporting (a violation of
14 Task 24 of the NSA/AMOU) related to the Scott Olsen incident. Specifically, when Chief Frazier asked
15 to review the records concerning the use of less lethal munitions and chemical agents from the “Tango
16 Team” in the location where Mr. Olsen had been shot, he was told by Deputy Chief Whent that they did
17 not exist, even though each individual officer was responsible for reporting each use of less lethal
18 munitions and despite the fact that a Tango Team sergeant should have been responsible for ensuring the
19 reports were done and collected the reports. Ex. 37, Frazier depo., 117:2–119:2; 121:15–122:17.³⁵
20
21

22
23
24 ³⁵ Chief Frazier also testified about a disturbing issue that arose during a presentation Chief Hillman,
25 one of the Frazier Group members, conducted as part of a training session for every OPD member who
26 had a lieutenant rank or higher. During the presentation, Chief Hillman asked “who can tell me when
27 you cannot authorize the use of less lethal?” Chief Frazier testified that only three or four of the
28 approximately 25 people present raised their hand. This surprised Frazier, because these were the same
officers responsible for giving orders to use less lethal force. This presentation took place after October
25, 2011. Ex. 37, Frazier depo., 61:14- 63:16.

1 Use of force investigation and report responsibility under Task 25 of the NSA/AMOU was also
 2 among in the Frazier Group's serious concerns regarding the quality and breadth of the OPD's criminal
 3 investigation of the Scott Olsen incident and because it received information that the criminal
 4 investigation has been closed prematurely. In fact, the Frazier Group was so concerned about the
 5 inadequacy of the investigation of this incident that it recommended that the OPD consider a re-
 6 examination of the quality of this investigation due to the many unanswered questions that remained
 7 when it was closed. Ex. 33, Frazier Report, p. 12 and 36, 63.³⁶

8
 9 In violation of Task 25 of the NSA, the Frazier Group also found that OPD practices regarding
 10 "group reporting" or collaboration following use-of-force events do not meet current standards or
 11 preferred practices. Ex. 33, Frazier Report, p. 14. In fact, group reporting is a flagrant violation of
 12 NSA Task 25, which mandates "Separating and separately interviewing all officers who were at the
 13 scene at the time of the incident." Group reporting is also a direct violation of Department General
 14 Order K-4 (Reporting and Investigation the Use of Force). Ex. 70, DGO K-4. Chief Frazier testified
 15 that group reporting reflects negatively on the officer's credibility because it is easier to hide deficiencies
 16 when reporting about hundreds of officers. Ex. 37, Frazier depo. 131:19–134:2. Even Chief Jordan
 17 admitted that OPD practices regarding group reporting and collaboration regarding use of force events
 18 do not meet current standards or preferred practices, even though group reporting is a violation of the
 19 NSA. Ex. 30, Jordan depo., 91:16–93:22. Nevertheless, the Frazier Report confirms that group
 20
 21
 22

23
 24 ³⁶ The Scott Olsen shooting was not the only instance where the Frazier Group found significant
 25 problems with use of force reporting and investigation, which implicate Task 24 and 25 of the
 26 NSA/AMOU reforms, that resulted in a serious injury to a demonstrator during the Occupy Oakland
 27 events. The Frazier Group noted "apparent conflicts between what was reported by OPD personnel and
 28 what video imagery showed" in relation to an Occupy Oakland incident when Kayvan Sabeghi, another
 Iraqi war veteran, was seriously injured. Ex. 37, Frazier depo, 176:12-177:20, Ex. 33, Frazier Report ,
 pp. 52-53. In that case, Mr. Frazier noted that the report of OPD Officer Uu was not consistent with the
 video imagery of the encounter with Mr. Sabeghi. Id.

1 reporting remains a problem for the OPD, notwithstanding the fact that Task 25 has specifically
2 prohibited it since 2003.

3 Although Task 24 also includes specific mandates regarding the reporting requirements of OPD
4 personnel in the event of the use of force, the Frazier Report confirms that the OPD had serious
5 problems complying with the requirements of this task during Occupy Oakland. These problems,
6 included, but were not limited to, the failure of OPD to collect and retain use of force reports and
7 supplemental reports from mutual aid and OPD; the failure of supervisors to review use of force reports;
8 the failure to document and analyze reports concerning the use of less lethal munitions to determine
9 whether their use was reasonable and within policy; the failure to promptly report the Level 1 use of
10 force on Scott Olsen; and an unacceptable number of inadequate use of force reports. Ex. 37, Frazier
11 Report, pp. 13, 14, 37, 38, and 44. As a result of these findings, the Frazier Group recommended that
12 OPD must research and establish a comprehensive Use of Force reporting policy at both the
13 departmental and the individual levels and that the authors of the reports, supervisors, and command
14 personnel should be held accountable for their individual reviews and approvals. Id. at pp. 44-45.
15

16
17 The Frazier Group report also found that Level 1 and 2 use of force applications during Occupy
18 Oakland on October 25, 2011, had still not been evaluated by an OPD Use of Force Review Board, as
19 mandated by Task 26 of the NSA/AMOU, by the time it had completed its report, almost six months
20 after the October 25, 2011 Occupy Oakland events occurred. Ex. 33, Frazier Report, Page 42-43,
21 Findings #27-28. Such Force Review Boards are also required by OPD's DGO K-4.1
22

23 As a result of these reporting and investigation failures, the Frazier Group concluded that "OPD
24 policies regarding the reporting and investigation of levels two, three, and four use of force do not meet
25 current standards." Ex. 37, Frazier depo, 116:14-117:1. Given this evidence, there is no doubt that
26 absent drastic measures, the City and OPD will be unable on their own to change the culture and take the
27
28

1 action necessary to bring them into compliance with NSA/AMOU tasks that directly impact the lives
2 and safety of people who come into contact with the OPD.

3 **4. The Mounting Human Misery and Monetary Toll Resulting from the Lack of**
4 **Compliance With the NSA Reforms by the City and OPD**

5 **a. Police Misconduct Lawsuits and Claims since 2003**

6 Notwithstanding the reforms mandated by the NSA which should have stemmed the tide of
7 systemic civil rights violations by members of the OPD, the City of Oakland has continued to pay
8 millions of dollars as a result of police misconduct claims after 2003 in cases involving conduct not
9 dissimilar from that which gave rise to this litigation. Most of these cases involved civil rights
10 violations inflicted on African Americans and other racial minorities. Chanin decl.

11
12 Based on City of Oakland City Attorney Reports between 2002 and 2011 (Plaintiffs' Ex., 59),
13 the City paid \$31,245,672.00 for police claims and litigation during this period from City funds. The
14 City's insurance carriers paid an additional \$15.58 million for police claims and litigation during this
15 same period. As a result, between 2002 and 2011, the City Attorney's Reports show that the amount
16 paid on account of police claims and lawsuits involving the City of Oakland totaled \$46.83 million
17 dollars (\$31.25 million paid by Oakland + \$15.58 million paid by insurance carriers). Some of the civil
18 rights actions that were settled and/or went to judgment after the NSA was entered in 2003, include the
19 following:
20

21 1. *Local 10, et al. v. City of Oakland, et al.*, Case No. C-03-2962 TEH (use of excessive force by
22 OPD officers against non-violent protesters and Longshoreman that were not part of the demonstration,
23 including the use of so-called "less lethal" munitions which left some of the plaintiffs were permanent
scarring and lifelong injuries);

24 2. *Reginald Oliver, et al. v. City of Oakland, et al.*, Case No. C08-04914 TEH (repeated course
25 of conduct in which members of the OPD made intentionally false and/or misleading representations in
26 search warrant affidavits, resulting numerous illegal and destructive residential searches, false arrests
27 and false imprisonments of predominantly African American and other racial minority citizens; OPD
found nearly 2/3's of warrant affidavits in drug x-buys" contained recklessly or intentionally false
allegations);
28

3. *John Smith, et al. v. City of Oakland, et al.*, Case No. C07-6298 MHP (Repeated custom and practice by OPD officers of engaging in humiliating and intrusive strip searches of citizens in public. After the Court awarded punitive damages to some of plaintiffs, the City agreed to indemnify the officers and pay the punitive damage awards. See, e.g., Smith case, DKT 66, 8/4/2011, Ex. 72);

4. *Estate of Amaro v. City of Oakland, et al.*, Case No. C09-01019 WHA (OPD subjected decedent to excessive force, denied him medical care and engaged in a cover-up of what happened to the decedent. Not a single officer was terminated or disciplined for the use of excessive force on the decedent which led to his death. See, e.g., 9th Cir. opinion affirmed denial of defense summary judgment motion, 653 F.3d 808 (9th Cir. 2011), Ex. 73);

5. *Estate of Woodfox v. City of Oakland, et al.*, C08-04148 WHA (OPD Officer, Hector Jimenez, shot the unarmed African American decedent in the back following a traffic stop. Civil case settled prior to trial);

6. *Smith, et al. v. City of Oakland*, Case No. C06-07171 MJJ (OPD Officer, Richard Valerga, repeatedly racially profiled Asian women for traffic stops and subjected them to sexual harassment and sexual assault while on duty. Evidence showed that officers failed to complete stop data reports mandated by Task 34, which could have uncovered Officer Valerga's biased policing before a large number of women were victimized);

7. *Torry Smith, et al. v. City of Oakland*, C05-04045 EMC (African American parolee was subjected to unreasonable search and seizure, planting of evidence/false reports, false imprisonment and malicious prosecution; multi-million dollar compensatory damage verdict and punitive damages awarded. Case later settled. See, 9th Cir. opinion, No. 08-15896 and District Court file; a true and correct copy of said memorandum opinion is attached and incorporated herein by reference as Exhibit 57);

8. *Knapps v. City of Oakland* Case No. C-05-2935-MEJ (African American Plaintiff was falsely arrested and maliciously prosecuted by two OPD officers when he was trying to prevent a White resident from a board and care home from committing suicide by restraining him from running into the street. Officers assaulted the Plaintiff putting him into a carotid hold, as he was trying to explain the circumstances. Officers caused Plaintiff to be maliciously prosecuted through a state administrative hearing and criminal action, both of which resolved in the Plaintiff's favor. Following a bench trial, the Court awarded Plaintiff compensatory and punitive damages. See, Findings of Fact and Conclusions of Law, Ex. 74);

9. *Nicole White, et al., v. City of Oakland, et al.*, Case No. C09-05743 WHA (African American Plaintiff, Nicole White, suffered serious burns over a large part of her body and permanent scarring when OPD recklessly threw a flash bang grenade inside the home where she was staying without adequate justification. A second African American plaintiff also suffered injuries to a lesser degree). Chanin decl.

By comparison, the City of San Jose, a much larger City than Oakland, paid a total of \$7,976,855.06 in police related litigation since 2002. Chanin decl., Ex. 79, San Jose Public Records Act

1 Response.³⁷ Mayor Quan attributed the disparity in the large police misconduct payments by Oakland
 2 to the fact that there are a "lot of shootings," a poor relationship with the community and, in part, to the
 3 failure of the OPD to comply with NSA reforms. Ex. 36, Quan depo., 198:5-199:16.

4 Plaintiffs' police policy and practice expert, Dr. Schwartz, considered this appalling record of
 5 civil rights lawsuits and police misconduct claims in his report, finding a direct correlation between the
 6 failed NSA/AMOU reforms and the proliferation of police misconduct claims, lawsuits and settlements.
 7
 8 Ex. 55, para. II, E.

9 **b. Punitive Damages and Promotions**

10 Under California law, a public entity may, but is not required to, pay punitive damages on behalf
 11 of its employees. See, Cal. Govt. Code Section 825(b). Public entities may choose to pay punitive
 12 damages if the public entity finds that the employees were acting within the course of their employment,
 13 in good faith and "in the apparent best interests of the public entity," and the payment would be "in the
 14 best interests of the public entity." Id.

16 Chief Jordan testified that he is unaware of a single case where the City of Oakland refused to
 17 indemnify OPD officers who incurred punitive damage awards, awarded either by federal juries or at
 18 bench trials. Ex. 30, Jordan depo 229:14-230:12. Chief Jordan does not believe that reimbursing
 19 officers for punitive damage awards sends the wrong message and has even promoted officers, including
 20 Francisco Rojas, who was subject to a punitive damage award in the *Knapps* case, *supra*, despite the
 21 Court's finding that his testimony was not credible. Id.
 22
 23
 24

25 ³⁷ KTVU, in a similar study, reported that amounts paid by the City of Oakland in police related claims
 26 far exceeded the amounts paid by San Jose or San Francisco in police misconduct claims. Ex. 75,
 27 KTVU article. Per the KTVU report, Oakland paid \$57 million dollars in police related claims vs. \$28
 28 million by San Francisco and \$8.6 million by San Jose during the same time frame examined by the
 television station. Id.

1 Plaintiffs, however, contend that routinely paying punitive damages for officers who have been
 2 held liable for untruthfulness, malicious prosecution, planting of evidence and other intentional acts and
 3 promoting those officers over other qualified officers, does send the wrong message. The message it
 4 sends is that misconduct will not only be ignored, but rewarded, regardless of how outrageous it may be.

5 **c. Monitoring Costs**

6 The City admits that it has already spent \$7,204,097.46 to compensate the two Court Ordered
 7 Monitor teams since the adoption of the NSA in 2003. Ex. 31, City's Amended Response to
 8 Interrogatory No. 77.

10 **d. Costs of Outside Consultants**

11 The City also admits that it has recently spent over \$800,000 as of September 21, 2012, on
 12 consultant and investigator fees in connection with NSA/AMOU reforms and Occupy Oakland
 13 investigations. These expenditures included the Frazier Group fees, as well as other consultants hired by
 14 the City of Oakland after the Frazier Report was issued. Exs. 76-77, DKT Nos. 736-737.

16 Notwithstanding the great cost of these consultants and services, the City and OPD remain out of
 17 compliance with critical NSA Tasks. Furthermore, the City's hiring of these consultants represents a
 18 seemingly never-ending search for consultants that will agree with them, as well as their rejection of
 19 those that disagree with them, even if they have extensive law enforcement experience, such as the
 20 Frazier Group. The search for "political cover" is an outrageous waste of the City of Oakland's
 21 resources at taxpayer expense.

23 **5. The Detroit Consent Decrees vs. Oakland's NSA: Where there is a Will, There is a Way**

24 The Detroit Police Department ("DPD") and OPD both entered into comprehensive consent
 25 decrees intended to implement police department reforms. The consent decrees in both cities are subject
 26 to court monitoring and share the same monitoring team headed by Chief Robert Warshaw. The City of
 27

1 Detroit has made substantial progress in reaching final compliance with the police reforms mandated by
2 the consent decree. These advances are an illustrative counterpoint to the City of Oakland's stagnation.

3 The City of Detroit is much larger than the City of Oakland, has higher crime rates, and has
4 suffered more crippling budget problems than Oakland and almost every other city in America. The
5 City of Detroit is under two consent decrees, with 175 actively monitored tasks, while Oakland is under
6 one consent decree, with only 22 actively monitored tasks. Nevertheless, Detroit has progressed from
7 29% total Phase 2 compliance in January 2010, to 86% compliance per the 12th Quarterly Report for
8 Detroit, released October 2, 2012. Ex. 45, p. 8, 12th IMT Report for Detroit. This report highlights
9 "progress over the course of [the IMT's] twelve reports. The pattern, without a single overall decline, is
10 noteworthy, particularly against the backdrop of budgetary issues facing the Department and the City of
11 Detroit." Ex 45, 12th IMT Report for Detroit, p. 9; Ex. 78, "The People's Police Department, Why
12 federal consent decrees are working in Detroit, but not in Oakland," East Bay Express, 9.9.12.
13
14

15 The different rates of task compliance in Oakland and Detroit are significant. OPD is in Phase 2
16 compliance with only 13 (59%) of the 22 active Tasks (Exhibit 4, DKT 706). At the time of the first
17 IMT Report performed by Chief Warshaw's monitoring team (dated April 22, 2010), Oakland was in
18 compliance with 10 of the 22 active Tasks (45%). (Ex. 15, DKT 536, page 7 of the First IMT Report by
19 current Monitor). In other words, since January of 2010, Oakland has gone from 45% to 59% (10-of-22
20 to 13-of-22) Phase II compliance (full compliance) within the 22 tasks that are monitored by the IMT.³⁸
21

22 The 1st IMT report for Detroit performed by Chief Warshaw's group in January 2010 determined
23 that the Detroit Police Department was in (full) Phase 2 compliance with only 50 of the 175 monitored
24 requirements. (Ex. 83, p. 6 of 1st IMT Report for Detroit). Per the 12th IMT report released on October
25 2, 2012, Detroit has achieved full Phase 2 compliance with 95 of the 110 Use of Force requirements and
26

27
28 ³⁸ Unlike Oakland, all tasks remain under active monitoring in Detroit. Chanin decl.

56 of the 65 Conditions of Confinement requirements. (Ex. 45, p. 8 of the 12th IMT report for Detroit), and is therefore in compliance with 151 of the 175 monitored tasks.

This means that Detroit has moved into full Phase 2 compliance with 101 tasks since January 2012. OPD attained full Phase 2 compliance on only three tasks during this same period.

This evidence clearly shows that when a City, its police department, and the civilian leadership want to achieve reform, they can and have made progress under the very same Monitoring team overseeing the NSA reforms in Oakland. The evidence supports a reasonable inference that the NSA/AMOU reforms are failing in Oakland, not because of the Monitor, any issues the City claims to have with the Monitor, or resource constraints, but rather due to a lack of leadership and commitment by City and OPD officials.

The comparison of the City of Detroit's progress under its court ordered monitoring program with the use of force, internal affairs investigations, and the use of firearms, demonstrates that there are systemic problems in Oakland that are standing in the way of the City and OPD achieving true reform.

For example, according to the Monitor's 10th Quarterly Report for Detroit, the use of force rate for December 2011 was 12.5% below the January 2010 rate. (Ex. 84, p. 10, 10th IMT Report for Detroit). In addition, per the Monitor's 10th Quarterly Report for Detroit, citizen complaints have been reduced 41% over two years. The Monitor writes that "these data do suggest that, under the current Monitorship, and after a lag in time in which implementation moved forward, the reforms that have occurred in DPD based on the Consent Judgment have had a significant measureable impact." (Ex. 84, p. 10, 10th IMT Report for Detroit).

The data paints a bleaker picture for the City of Oakland. Per the 9th Quarterly Report for Oakland (Ex. 7, DKT 690, pp. 78-79), the OPD Internal Affairs Department had classified 1,039 misconduct complaints related to Occupy Oakland alone. According to the 11th Detroit IMT Report, Detroit averaged approximately 100 complaints per month over the preceding 15 months. (Chanin decl.)

Further, between April 2011 and March 2012 (i.e. one full calendar year), there were 1095 uses of force by the Detroit Police Department. During this same time period, there were 4435 uses of force by the Oakland Police Department. Id. Thus, during this year of overlapping data, OPD resorted to force more than four times as frequently as DPD. Since DPD was responsible for more than twice as many arrests than OPD during this period, but used force four times less frequently than Oakland, **DPD's use of force per arrest rate is less than 1/8th that of OPD's.**

Unlike Oakland, Detroit also has a sophisticated and fully-functional risk management system (MAS). The most recent IMT report for Detroit notes that the first test "of the [MAS] system was nothing short of a disaster." However, in the intervening period, DPD "put the necessary human resources in place and started down the path of technological improvement and, indeed, innovation. Not only has this led to compliance and avoided the need for a whole new system, the Department is now a national leader in the development and use of this critical management tool. This is an achievement particularly worthy of recognition." Ex. 45, 12th Quarterly Report for Detroit, p. 9. By contrast, the 10th IMT report for Oakland found that OPD's risk management database (PAS) remains plagued by "persistent problems." (Ex. 4, 10th IMT Report, p. 60)

The data pertaining to the drawing of firearms by DPD officers is the most compelling dimension of consent decree progress relative to the City of Oakland. Per a May 3, 2012 email from Chief Toribio, OPD had 3,623 pointing of firearms incidents in 2011 and 925 in the first quarter of 2012. Ex. 86, Toribio email. **OPD therefore averaged 909.6 pointing of firearms per quarter during this period.** By contrast, there were only **18 instances** when a Detroit Police Officer drew his firearm and acquired a target in the third quarter of 2011, **12 such incidents** in the last quarter of 2011, and **30 gun-drawing incidents in the first quarter of 2012.** (Ex. 85, 11th IMT Report for Detroit, p. 92) **DPD therefore averaged 20 gun-drawing incidents per quarter while Oakland averaged 909.6 such instances, a 45:1 ratio.**

Despite its budgetary crisis, Detroit also has a Civil Rights Integrity Bureau which is fully-functioning and is larger than the Oakland OIG. OIG has produced only two NSA audits in 2012 other than those required as part of the *Oliver v. City of Oakland*, *supra*, settlement. By contrast, the IMT reported that the CRIB unit performed six “comprehensive and accurate audits” in the previous reporting period alone. Ex. 85, 11th IMT Report for Detroit, p. 176. Detroit has a commander accountability meeting each quarter where every commander is required to account for his subordinates’ progress on compliance, crime and other performance issues. At least some of these meetings are open to the public. Oakland has no such meetings. Chanin decl.; Ex. 78, *supra*.

As Plaintiff’s expert, Dr. Schwartz, opines in his report, this is compelling evidence that the City of Detroit, a larger city with higher crime and more severe budget problems, can comply with difficult, technical consent decree tasks, provide professional, Constitutional policing to the community, and reduce use of force and citizen complaints. Oakland has been unable to do likewise, notwithstanding nine years, two monitoring teams, recommendations by the Frazier Group, multiple changes in City and OPD administrations and the expenditure of millions of dollars. Ex. 55, Schwartz report, F, III.

C. APPLICABLE LAW

1. The Court Has the Discretion to Appoint a Receiver to Enforce the NSA/AMOU

This Court possesses the authority to implement any remedies necessary to correct constitutional violations and to take broad remedial action to ensure compliance with its order. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 695-96 (1979); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1093-94. (9th Cir. 2010), *aff’d sub nom*, *Brown v. Plata*, __U.S.__, 131 S. Ct. 1910 (2011)³⁹; *Lewis v. Kugler*, 446 F.2d 1343, 1351-52 (3rd Cir. 1971). The Court’s equitable authority includes appointing a receiver. In *Plata*, the Ninth Circuit noted,

³⁹This appeal involved prison reforms in, *Coleman v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 118210 (E.D. Cal., Nov. 20, 2009).

1 “[t]here can be little question...that receiverships are recognized equitable tools available to the courts to
 2 remedy otherwise uncorrectable violations of the Constitution.” *Plata, supra.*, at 1093-94. See also:
 3 *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357 (D.C. Cir. 1998)(Jail was so recalcitrant in complying
 4 with court-ordered reforms that Court appointed a receiver).

5 The appointment of a receiver is particularly justified in cases such as this one, where suffering,
 6 loss of life and/or other civil rights violations will continue under the *status quo*. *Plata, supra*; *Feliciano*
 7 *v. Bursset*, 2010 U.S. Dist. LEXIS 127485 (D.P.R. 2010)(Noting appointment of receiver may be used
 8 due to recalcitrant failures to comply with court ordered reforms); *Dixon v. Barry*, 967 F. Supp. 535,
 9 550-554 (D.D.C. 1997) (Mental health services receiver); *Morgan v. McDonough*, 540 F.2d 527, 533
 10 (1st Cir.1976); *cert. denied sub nom*, *McDonough v. Morgan*, 429 U.S. 1042 (1977)(Public high school
 11 receiver); *Shaw v. Allen*, 771 F. Supp. 760, 762 (S.D. W. Va. 1990) (Jail receiver); *Newman v. Alabama*,
 12 466 F. Supp. 628 (M.D. Ala. 1979), *cert. denied*, 438 U.S. 915 (1978)(Prison receiver); *Turner v.*
 13 *Goolsby*, 255 F. Supp. 724, 730 (S.D. Ga. 1996)(School system receiver).
 14

15 Once appointed, a receiver may force public officials to comply with court orders. *Lewis, supra*,
 16 F.2d. at 1351-52; *Dixon*, 967 F. Supp. at 550. After a receiver is appointed, the Court may terminate or
 17 transition out of the receivership when the defendant is demonstrates compliance with court ordered
 18 reforms. See, e.g., *Plata v. Brown*, 2012 U.S. Dist. LEXIS 126971 (N.D. Cal. 2012).
 19

20 In determining whether to appoint a receiver, courts have developed a multi-pronged test which
 21 guides this decision. The test includes the following elements, the first two of which are typically given
 22 predominant weight: (1) whether there is a grave and immediate threat or actuality of harm to plaintiffs;
 23 (2) whether the use of less extreme measures of remediation has been exhausted or proven futile; (3)
 24 whether continued insistence that compliance with the Court’s order would lead only to confrontation
 25 and delay; (4) whether there is a lack of leadership to turn the tide within a reasonable period time; (5)
 26 whether there is bad faith; (6) what resources are being wasted; and (7) whether a receiver is likely to
 27
 28

1 provide a relatively quick and efficient remedy. *Plata v. Schwarzenegger*, 2005 U.S. Dist. LEXIS
 2 43796 (N.D. Cal. Oct. 3, 2005); *Dixon*, 967 F. Supp. at 550; *Morgan*, 540 F.2d at 533.

3 This Court noted when it appointed a receiver in *Plata, supra*, the Court:

4 “is not required to restrict its powers to those means that have proven inadequate, or that show
 5 no promise of being fruitful ‘[F]ederal courts are not reduced to issuing injunctions against
 6 state officers and hoping for compliance. Once issued, an injunction may be enforced.’”

7 Id. (quoting *Hutto v. Finney*, 437 U.S. 678, 690 (1979)).

8 This case is similar to *Dixon v. Barry*, 967 F. Supp. 535 (D.D.C. 1997), where the Court
 9 determined that appointment of a receiver was necessary due to the Defendants’ repeated delays and
 10 failure to comply with Court Ordered reforms relating to the delivery of community mental health
 11 services, even though the defendant argued it was recently making efforts to comply. *Dixon*, 967 F.
 12 Supp. at 540, 553. Just as the Court in *Dixon* rejected the Defendant’s belated claims of progress, so too
 13 should the Court here, given the long history of broken promises of compliance made by the City and
 14 OPD. Appointment of a receiver is now necessary to prevent further delays, lawsuits, ruined lives,
 15 injuries, deaths, a waste of money and the Court’s resources. See, Plaintiffs; Ex. 55, Schwartz Report,
 16 IX, A-C.

18 **2. The Seven *Plata* Factors Weigh Strongly in Favor of Appointing a Receiver**

19 As shown below, the seven factors that the Court may consider in deciding whether to appoint a
 20 receiver all weigh strongly in favor of the Court taking this drastic step due to the Defendant’s repeated
 21 failure to comply with the NSA/AMOU reforms for more than nine years and because there is no reason
 22 to believe that the City and OPD have the leadership and commitment to achieve these reforms at this
 23 late date.

25 **(a) There is a Grave and Immediate Threat or Actuality of Harm to Plaintiffs**

26 Based on the foregoing, there no doubt that there is a grave and immediate threat to Plaintiffs and
 27 the public at large, absent the appointment of a receiver. Since 2003, the City and OPD have failed to
 28

1 achieve practice compliance with the NSA/AMOU and the current Monitor has found that progress
2 toward compliance has stagnated. Ex. 4, current Monitor's 10th Quarterly Report, DKT 706, p. 82; Ex. 3,
3 Plaintiffs' Compliance Summary; Ex. 6, Plaintiffs' Compliance Chart; FN 3, *supra*.

4 Police misconduct claims and lawsuits against the City have been a rampant epidemic. Ex. 59,
5 Oakland City Attorney's Annual Report, FN 2010-2011. Mayor Quan attributes the disproportionately
6 high police misconduct verdicts and settlements that have been paid by the City since 2003, as compared
7 to other cities, to the fact that there are a "lot of shootings;" the poor relationship between the OPD and
8 the community; and because the City has failed to comply with the NSA/AMOU reforms. Ex. 36, Quan
9 depo., 198:5-199:16. Worse, according to the current Monitor's last three Quarterly Reports (Exs. 4,7
10 and 8), OPD officers have been pointing firearms, disproportionately and without justification, at Black
11 and Hispanic citizens, and police supervisors have failed to identify these cases in their mandated use of
12 reviews under the NSA/AMOU reforms. *Id.* While Chief Howard Jordan expressed concern about the
13 current Monitor's finding that it appeared OPD officers were singling out racial minorities for parole
14 and probation searches, Chief Jordan admits doing nothing to investigate whether OPD officers were
15 conducting these searches in a racially biased way. Ex. 30, Jordan depo., 223:14-224:5.

16 In addition, based on the August 2012 audit conducted by the OIG, as well as the Monitor's
17 recent report on Officer Involved Shootings (OIS), there is compelling evidence that supervisors are
18 giving lip service to use of force investigations, including investigations involving the use of deadly
19 force. Ex. 29, OPD OIG Audit; Ex. 54, current Monitor's October 3, 2012 OIS Report Ex. 54, DKT 744
20 (redacted). This means that there is an immediate and very grave risk that OPD officers will resort to
21 the use of unjustified deadly force and escape administrative or criminal consequences for causing the
22 death of an innocent human being. Given the evidence that Black and Hispanic citizens are being
23 subjected to a disproportionate number of times officers point their firearms at people without reporting
24 justification for this extreme degree of force, these racial minorities face a grave and immediate risk that
25

1 they will be shot, intentionally or even accidentally, by OPD officers who draw their guns on them
2 without sufficient justification. Despite this evidence, neither the City Administrator, nor Mayor, knew
3 how many people had been shot by OPD officers in 2011, or whether anyone had been shot in the back,
4 even though both the Mayor and City Administrator promised the Court in January 19, 2012, that they
5 both intended to monitor the OPD more closely. Ex. 62, January 19, 2012, letter signed by Mayor Quan,
6 City Administrator Santana and City Attorney, which was Exhibit 5 to the parties Joint CMC Statement
7 filed January 19, 2012 CMC Statement.
8

9 The potential for the use of unnecessary deadly force is but one of the many grave and
10 immediate risks confronting Plaintiffs and the general public due to the failure of the City and OPD to
11 comply with the NSA/AMOU reforms. As noted in the Frazier Report, Ex. 33, *supra*, Scott Olson was
12 also shot in the head with a so-called, “less lethal” munition during the Occupy Oakland demonstration
13 on October 25, 2011, and despite mandatory use of force reporting and investigation requirements under
14 the NSA/AMOU reforms, not a single officer reported shooting Mr. Olson or even seeing him fall to the
15 ground after he was shot. Ex. 33, Frazier Report, pp. 6, 10, 12, 26, 38, 62-64; Ex. 37, Frazier depo.,
16 124:17-133:5. In addition, the Frazier Group found that throughout the course of the Occupy Oakland
17 demonstrations on October 25, 2011, multiple OPD officers and supervisors had violated policies and
18 tasks which are subject to NSA/AMOU reforms, including by engaging in group reporting as well as the
19 failure to report and investigate the use of force in violation of Tasks 24 and 25 of the NSA/AMOU. Ex.
20 33, Frazier Report. As a result, there is a grave and immediate danger that OPD officers will continue to
21 flaunt compliance with these reforms, putting Plaintiffs and Oakland citizens at grave risk of injury or
22 death. Ex. 55. Schwartz Report, III, A-D.
23
24

25 **(b) The Use Of Less Extreme Measures Of Remediation Has**
26 **Been Exhausted Or Proven Futile**
27
28

1 Despite more than nine years of court ordered monitoring, the City and OPD are still chronically
2 failing to comply with critical NSA/AMOU reforms. The Court has repeatedly attempted to impose less
3 extreme measures of remediation, including identification of persons responsible for meeting reforms,
4 mandatory reporting requirements and giving enhanced powers to the monitor. Nevertheless, the City
5 and OPD have continued to remain out of compliance, even ignoring recommendations given to them by
6 their own “independent” and “unbiased” investigator, Thomas Frazier. Plaintiffs’ expert, Dr. Schwartz
7 opines that the continuation of the current model will not result in any meaningful compliance with the
8 NSA/AMOU reforms and that an appointment of a receiver is necessary to bring the Defendant into
9 compliance with the NSA/AMOU. See, Ex. 55, Schwartz Report, IV A-R.

11 **(c) The Continued Insistence That Compliance With The Court’s Order Would Lead Only**
12 **To Confrontation And Delay**

13 At status conferences and case management hearings in 2005, 2009 and 2010 (See, Reporter’s
14 Transcripts, Exs. 32, 48, and 49), and in case management statements and letters (Ex. 51, 61 and 87) to
15 this Court over the past nine years, City and OPD officials have repeatedly made failed promises to this
16 Court that they would make a commitment to comply with the NSA/AMOU. Since the beginning of the
17 NSA in 2003, there have been four police chiefs, three city administrators, and countless other city
18 officials, OPD members and employees, that have been obligated to ensure that the NSA reforms were
19 not only implemented, but made sustainable. Despite all of their collective years of experience,
20 education, training and knowledge about law enforcement and/or municipal government affairs, none of
21 these City and OPD officials and employees have been successful in bringing the City and OPD into
22 practice compliance with the NSA reforms.
23

24 Given these failures, there is no reason to believe that the [REDACTED]
25 [REDACTED] (Ex. 47), is anything but a pipe dream. There is a sorry trail of broken promises made
26 to the Court such as the City’s promise in a Case Management Statement filed on December 2, 2010
27
28

(Ex. 51), that it expected to be in compliance by December 31, 2010, less than a month later; former City Administrator Deborah Edgerly's statement to the Court, on February 14, 2005, that she had a six month plan for achieving compliance the technology required by Tasks 40 and 41, formally referred to as PIMS (Ex. 48, RT 28:21-31:4); Chief Batts' pledge of an "eternity" of compliance at the status conference on November 24, 2009. Ex. 32, RT 23:2-30:24. If past is prologue, and it surely will be, the current monitoring model, without the appointment of a receiver, will undoubtedly result in more failed promises, more lives destroyed or lost, and the continued waste of taxpayer money by the City and OPD. See, Ex. 55, Schwartz Report, V, A-G.

(d) There Is A Lack Of Leadership To Turn The Tide Within A Reasonable Period Time

City and OPD officials have expressly admitted to this Court over the years that the lack of leadership has caused them to fail to comply with the NSA/AMOU reforms. *See, e.g.*, Ex. 49, RT 30:8-11; 53:19-25; Ex. 48, RT 35:7-36:1. The current Monitor in its 10th Quarterly Report filed on July 30, 2012, also attributed a lack of commitment by OPD to these reforms as one of the reasons why compliance has been thwarted. Ex. 4, p. 82. The Frazier Group, hired as an "unbiased" third party to investigate the OPD's response to Occupy Oakland, also found that a lack of leadership was responsible for the culture in the OPD which is resistant to change, learning and succeeding. *See, e.g.*, Ex. 33, Frazier report, p. 7. Plaintiffs' police policy and practice expert, Dr. Schwartz, also opines that the tide will not be turned in a reasonable period of time because of the long legacy of a lack of leadership in the City and OPD. Ex. 55, Schwartz Report, VI, A (1)-(13).

When one compares the compliance experience under the Detroit's consent decrees with Oakland's experience under the NSA, it becomes obvious that the reason that Detroit is succeeding, while Oakland is not, is due to the leadership and commitment of Detroit city and police officials to reform their police department for the benefit of the public they serve. A receiver should be appointed

1 in this case due to the lack of leadership and commitment by City and OPD officials to comply with the
2 NSA/AMOU reforms.

3 **(e) There Is Bad Faith**

4 Since the beginning of the NSA in 2003 to the present day, there has been a well-documented
5 history of bad faith in the OPD, including at supervisory and command levels, in reference to the NSA
6 reforms. This has ranged from a commander calling Task 34 stop data requirements, “bullshit,” to the
7 posting of derogatory and racist depictions of this Court and Mayor in a prominent location in the OPD,
8 to supervisors boldly disparaging the NSA and this Court to citizens attending its civilian police
9 academy, and outright hostility by OPD members to the NSA reforms. *See, e.g.*, Ex. 25, DKT 217, p. 7.
10

11 Furthermore, the chronic failure to comply with use of force reporting and investigation NSA
12 Tasks by line officers, as well as supervisors, indicates that there is a culture in the OPD which both
13 practices and tolerates the bad faith refusal to comply with these reforms. Despite evidence that officers
14 are engaging in racial profiling and biased policing with respect to searches, and the pointing of and use
15 of firearms, no investigation has been undertaken by the OPD to determine whether officers were
16 engaging in racially biased policing and the conduct continues unabated. Ex. 30, Jordan depo., 187:15–
17 198:25; 223:14-224:5.
18

19 Moreover, the efforts by the City Administrator to get the Frazier Group to alter its report,
20 including by arguing that the Scott Olson shooting incident was somehow outside the scope of the
21 Frazier Group’s work – work that was intended to be an unbiased and transparent investigation of the
22 OPD’s response to Occupy Oakland – is also indicative of bad faith which merits the appointment of a
23
24
25
26
27
28

1 receiver at this juncture.⁴⁰ This is especially true when the evidence strongly suggests that City and
2 OPD officials are more concerned with political cover, than achieving lasting reform.

3 In addition, as noted by Plaintiffs' police policy and practice expert (Ex. 55, Schwartz report, VI
4 A-H), the documented strong resistance and opposition to the NSA/AMOU reforms; the lack of progress
5 by the OPD in implementing the Frazier Group's recommendations (Ex. 37) and the lack of progress in
6 achieving the reforms, is also indicative of bad faith on the part of City and OPD officials. Therefore, a
7 receiver should be appointed due to the history of bad faith that has stalled compliance heretofore.
8

9 **(f) Resources Are Being Wasted**

10 Millions of taxpayer dollars have been wasted by the City and OPD as they continue to drag their
11 feet in complying with the NSA/AMOU tasks. This has included millions spent on technology that does
12 not work or is not being used as evidenced by the recent City Auditor's report; millions more on police
13 misconduct verdicts and settlements since 2003; and still millions more on consultants and monitoring
14 fees. In fact, the City is spending money on consultant after consultant, trying to get an answer they like,
15 rather than listening to the advice they have already been given by the Monitor, Frazier Group and
16 countless others. Plaintiff's expert, Dr. Schwartz, also notes in his report that had OPD come into
17 compliance within the first five years of the NSA, the City would have saved considerable amount of
18
19

20 _____
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28

1 money on the need for Court Monitoring of the NSA, lawsuits and police-related services connected to
 2 the NSA reforms. Ex. 55, VIII A-E. There is no doubt that if the current model is allowed to continue
 3 and a receiver is not appointed, millions more of dollars of taxpayer money will continue to be wasted
 4 by the City and OPD, lives will be lost and innocent people will continue to be victimized as a result of
 5 the OPD's abject failure to comply with these reforms. Therefore, a receiver should be appointed to
 6 help avoid the continued waste of resources caused by the chronic failure to comply with the
 7 NSA/AMOU by the City and OPD.

9 **(g) A Receiver Is Likely To Provide A Relatively Quick And Efficient Remedy**

10 The main advantage the appointment of a receiver would have, over the current role of the
 11 Monitor, is that the Court has the discretion to grant a receiver powers that the current Monitor does not
 12 have. This includes the authority to take whatever action is necessary to ensure implementation of the
 13 Court's remedial orders. See, e.g., *Washington v. Washington State Commercial Passenger Fishing*
 14 *Vessel Assoc.*, 443 U.S. at 695-96. In this way, a receiver would be able to issue enforceable commands
 15 to the City and OPD to take the action necessary to comply with the NSA/AMOU reforms, unlike the
 16 current model where the Monitor cannot order the City and OPD to comply with the NSA/AMOU.⁴¹

18 Dr. Schwartz opines in his report that a receiver is now necessary to cure the failure of the OPD
 19 and City to comply with the NSA reforms. Ex. 55, IX A-C. In particular, Dr. Schwartz opines that the
 20 advantages of a receiver are obvious. A receiver would be in a position to insist upon immediate
 21 corrective action, including with respect to ensuring that actual progress is made on reforms, such as
 22 IPAS. Id. Dr. Schwartz is also of the opinion that a receiver, unlike the current model, would be able to
 23 take immediate action to correct negative attitudes about the NSA and cure deficiencies with firearms
 24

26 ⁴¹ Counsel for Plaintiffs and the Intervenor, OPOA, are currently having discussions about the
 27 relationship of a receiver to the rights of OPOA members and the OPOA. In the event an agreement is
 28 reached on this issue between the parties, Plaintiffs expect that an appropriate stipulation will be filed at
 that time and will be submitted to the Court for its approval.

1 policies , internal affairs practices, use of force report writing and investigation problems. Id. In some
 2 circumstances, Dr. Schwartz opines that a receiver would be crucial because they would have the
 3 authority to mandate resources be used to achieve compliance, which could avoid delays that have
 4 plagued the reform efforts heretofore. Id.

5 Therefore, Plaintiffs submit that a receiver should be appointed to work with the City, OPD,
 6 Monitor and Plaintiffs' counsel to solve compliance problems; to issue directives and orders to force the
 7 City and OPD to take all necessary action to finally achieve the NSA/AMOU reforms; and to make
 8 these reforms sustainable and a real benefit to the citizens of Oakland. Therefore, Plaintiffs submit that
 9 a receiver would be a relatively quick, efficient remedy.
 10

11 **D. CONCLUSION⁴²**

12 Based on the foregoing, and the additional oral testimony Plaintiffs will present at the time of the
 13 hearing, Plaintiffs respectfully request that the Court grant Plaintiffs' motion and to appoint a receiver
 14 who shall have the power to bring the City and OPD into compliance with the NSA and AMOU.
 15 Plaintiffs also respectfully request that the AMOU be extended indefinitely, until such time as the City
 16 and OPD comply with these reforms, even if that time exceeds the current expiration date of the AMOU
 17 in January 2014.
 18

19 Dated: October 4, 2012

20 Attorneys for Plaintiffs:

21	22	23	24	25
	/S/	/S/	/S/	
	James B. Chanin	John L. Burris	Julie M. Houk	

26 ⁴² Since Plaintiffs will present testimony at the hearing, they intend to file proposed Findings of Fact and
 27 Conclusions of Law following the hearing to incorporate the testimony, unless otherwise ordered by the
 28 Court to file said document before the hearing. Plaintiffs are, however, submitting a proposed order
 contemporaneously with this Motion.

APPENDIX - A
TASK COMPLIANCE CHART

Full Phase 2 Compliance

Task	original due date	1st IMT 1st Report	1st IMT 2nd Report	1st IMT 3rd Report	1st IMT Combined 4th & 5th Report	1st IMT 6th Report	1st IMT 7th Report	1st IMT 8th Report	1st IMT 9th Report	1st IMT 10th Report	1st IMT 11th Report	1st IMT 12th Report	1st IMT 13th Report	1st IMT 14th Report	2nd IMT 1st Report	2nd IMT 2nd Report	2nd IMT 3rd Report	2nd IMT 4th Report	2nd IMT 5th Report	2nd IMT 6th Report	2nd IMT 7th Report	2nd IMT 8th Report	2nd IMT 9th Report	2nd IMT 10th Report
2. Timeliness Standards & Compliance with IAD Investigations	6/15/ 2004	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
5. Complaint Procedures for IAD	6/15/ 2004	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
20. Span of Control for Supervisors	8/14/ 2003	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
24. Use of Force Reporting Policy	7/20/ 2004	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	YES	YES	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
25. Use of Force Investigation & Report Responsibilities	7/20/ 2004	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	YES	NO	YES	NO	NO	NO	NO
26. Use of Force Review Board	7/20/ 2004	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	YES	YES	YES	YES	YES	NO
30. Firearms Discharge Board of Review	7/20/ 2004	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	YES	YES	NO	NO	NO	NO	NO
34. Vehicle Stops, Field Investigation & Detentions	8/25/ 2003	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
40. Purpose of Personal Assessment System	6/28/ 2005	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	YES	NO	NO	YES	YES	YES	NO	NO	NO
41. Use of Personal Assessment System	6/28/ 2005	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	NO	NO	NO	NO	NO	NO	YES

Key

NON-COMPLIANCE
PARTIAL
COMPLIANCE,
OR DEFERREDFULL PHASE 2
COMPLIANCE