FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO NEGRETE; WILLIAM BERGER; BRANDON HRAIZ; CRAIG TANAKA; JOSEF PHILLIPS, *Plaintiffs-Appellants*, v. CITY OF OAKLAND; POLICE COMMISSION OF THE CITY OF OAKLAND, *Defendants-Appellees.*	No. 20-16244 D.C. No. 3:19-cv-05742-WHO OPINION

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted May 10, 2021
San Francisco, California

Filed August 19, 2022

Before: J. Clifford Wallace and Daniel P. Collins, Circuit Judges, and Jed S. Rakoff,* District Judge.

Opinion by Judge Wallace;
Dissent by Judge Rakoff

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY**

Civil Rights/Jurisdiction

In an action brought by five City of Oakland police officers seeking to overturn their termination, the panel vacated, for lack of subject matter jurisdiction, the district court's judgment on the pleadings in favor of defendants and remanded with instructions to remand this case to state court.

In March 2018, the officers were involved in the fatal shooting of a homeless man. The Oakland Police Department investigated the incident, concluding that the officers' use of force was reasonable and complied with Police Department policy. The Chief of Police agreed. Separately, the Community Police Review Agency (CPRA), the investigative body of the City's civilian oversight Police Commission, investigated the incident and determined that the use of force was objectively reasonable. Finally, the incident was also investigated by the Compliance Director, an individual who is independent of the Police Department but with temporary, limited oversight over it pursuant to a consent decree (the Consent Decree) reached in a different case, *Allen v. City of Oakland*, No. C00-4599 TEH (N.D. Cal.). The Compliance Director disagreed with the Chief of Police and the CPRA, instead recommending termination of the officers for unreasonable use of

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

force. Subsequently, the Commission decided to convene a "Discipline Committee" due to the Compliance Director's disagreement with the CPRA. Following its review, the Discipline Committee agreed with the Compliance Director and directed termination. As a result, the City terminated the officers.

After their termination, the officers sought a writ of mandate and declaratory relief in state court. The officers alleged that the City and the Commission violated their obligations under the City's charter, the municipal code, and other sources of state law when the Commission assembled the Discipline Committee despite the consensus between the CPRA and the Chief of Police that there was no unreasonable use of force. The City removed the case to federal court, invoking federal question jurisdiction under 28 U.S.C. § 1331. After determining that there was no conflict between the City charter and the Consent Decree, the district court concluded that the City acted in compliance under both its charter and the Consent Decree and entered judgment in favor of the City.

The panel held that this was a case arising under state law that properly belonged in the state courts. Recognizing that under § 1331, a case can "arise under" federal law in two ways, the panel determined that it lacked subject matter jurisdiction under both branches of federal question jurisdiction.

First, the panel lacked subject matter jurisdiction under the federal cause of action branch because federal law did not create the causes of action asserted.

Plaintiffs exclusively asserted state law causes of action. The panel stated that the complaint correctly anticipated that the City, in defending against the officers' claims, would assert that the Consent Decree, an agreement overseen and enforced by the federal district court, required the City to give effect to the Compliance Director's findings in the way that it did. But even assuming that such a contention by the City would raise a federal issue, it would not establish that federal law created the officers' claims. It is settled law that a case may not be removed to federal court on the basis of a federal defense. And that remains true even if, as here, the state-law complaint explicitly sought declaratory relief with respect to the anticipated federal defense. Additionally, this action could not be characterized as equivalent to a motion under Federal Rule of Civil Procedure 60 to obtain relief from the terms of a federal consent decree, because the officers were not parties, or in privity with parties, to the *Allen* judgment, and their petition and complaint did not seek to challenge, enforce, or otherwise modify the terms of the Consent Decree or the federal court orders in *Allen*.

The panel next held that it lacked subject matter jurisdiction under the substantial federal question branch. The officers did not necessarily raise a federal issue in their petition and complaint and accordingly their claims fell outside the special and small category of state law causes of action arising under federal law. The panel rejected the parties' contentions that a federal issue was necessarily raised because the officers were attacking a federal district court's consent decree.

Here, the officers were not parties, or in privity with parties, to the *Allen* action, and they were not directly attacking the Consent Decree. Although there was a potential federal issue involving the question of how to resolve an alleged conflict between the Consent Decree and the City charter, it was not an essential element of any of the officers' claims. At most, the officers anticipated that the City would rely on the Consent Decree, but a federal issue raised in anticipation of a defense was not sufficient to establish federal question jurisdiction. Moreover, for federal question jurisdiction to extend to a declaratory judgment action, the claim itself must present a federal question independent of anything alleged in anticipation of a defense. Here, but for the federal issues identified in the officers' request for state declaratory relief, any potential federal issue would arise only as a defense to a state-created action.

Dissenting, Judge Rakoff agreed with the majority's statement of the legal conditions under which a case "arises under" federal law, but respectfully disagreed that the claims here did not meet those conditions. Because the officers' petition necessarily attacked a federal consent decree and determining the scope and meaning of the consent decree was necessary to decide this case, Judge Rakoff would hold that the officers' claims gave rise to a federal cause of action.

COUNSEL

Zachary A. Lopes (argued), Harry S. Stern, and Timothy K. Talbot, Rains Lucia Stern St. Phalle & Silver, PC, San Francisco, California, for Appellants.

Gina M. Roccanova (argued) and Yuki Cruse, Jackson Lewis P.C., San Francisco, California; Barbara J. Parker, City Attorney; Ryan G. Richardson, City Attorney; Oakland City Attorney's Office, Oakland, California; for Appellees.

OPINION

WALLACE, Circuit Judge:

In March 2018, five City of Oakland police officers were involved in the fatal shooting of a homeless man. The officers were fired for the incident, and they sought to overturn their termination in state court. The City then removed the case to federal district court, which granted judgment in favor of the City. The officers appeal from the district court's judgment.

But before we can review the district court's judgment, we must ensure that we do not exceed the scope of our subject matter jurisdiction, "*i.e.*, [our] statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Because subject matter jurisdiction "involves [our] power to hear a case," *United States v. Cotton*, 535 U.S. 625, 630 (2002), we "have an independent obligation to . . . raise and decide jurisdictional questions that the parties either overlook or elect not to press,"

Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011). "Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court," and regardless of whether the parties agree that we have jurisdiction. *Cotton*, 535 U.S. at 630. We review de novo questions of subject matter jurisdiction. *Lake v. Ohana Mil. Cmtys., LLC*, 14 F.4th 993, 1000 (9th Cir. 2021). "Even where subject matter jurisdiction is otherwise lacking, we always have jurisdiction to determine our own jurisdiction." *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 415 (9th Cir. 2018) (internal quotation marks and citation omitted). Because we lack subject matter jurisdiction and thus are powerless to adjudicate this case, we vacate the district court's judgment and remand with instructions for the district court to remand this case to state court.

I.

A.

After the fatal shooting, an investigation ensued. The Oakland Police Department (the Police Department) investigated the incident, concluding that the officers' use of force was reasonable and complied with Police Department policy. The Chief of Police agreed. Separately, the Community Police Review Agency (CPRA), the investigative body of the City's civilian oversight Police Commission (the Commission), investigated the incident and determined that the use of force was objectively reasonable. Finally, the incident

was also investigated by the Compliance Director, an individual who is independent of the Police Department but with temporary, limited oversight over it pursuant to a consent decree (the Consent Decree) reached in a different case, *Allen v. City of Oakland*, No. C00-4599 TEH (N.D. Cal.). The Compliance Director is authorized to direct disciplinary actions against officers to ensure compliance with the Consent Decree. Here, the Compliance Director disagreed with the Chief of Police and the CPRA, instead recommending termination of the officers for unreasonable use of force. Subsequently, and critically here, the Commission decided to convene a "Discipline Committee" due to the Compliance Director's disagreement with the CPRA. Following its review, the Discipline Committee agreed with the Compliance Director and directed termination. As a result, the City terminated the officers.

After their termination, the officers sought a writ of mandate and declaratory relief in state court. The officers alleged that the City and the Commission (collectively, the City) violated their obligations under the City's charter (the Charter), the municipal code, and other sources of state law when the Commission assembled the Discipline Committee despite the consensus between the CPRA and the Chief of Police that there was no unreasonable use of force. The City removed the case to federal court, invoking federal question jurisdiction under 28 U.S.C. § 1331.

The City then moved for judgment on the pleadings. The City contended that it was required to reconcile its competing obligations under the Charter, the

Consent Decree, and the district court's orders implementing the Consent Decree. The City maintained that the Commission's decision to convene the Discipline Committee to resolve the conflicting recommendations was necessary to satisfy these obligations. The officers cross-moved for judgment on the pleadings, asserting that the Consent Decree and the district court's implementing orders were not controlling because (1) they should be construed as not overriding the City's Charter obligations, and (2) to the extent that they did override the Charter, they were invalid. As to the latter point, the officers asserted that the Consent Decree could not lawfully override the Charter's requirements; nor could the City execute an agreement allowing it to violate its Charter. Reconciling the Charter's terms with the Consent Decree, the district court held that the Compliance Director, standing in the shoes of the Chief of Police, had the authority to convene the Discipline Committee. After determining that there was no conflict between the Charter and the Consent Decree, the district court concluded that the City acted in compliance under both the Charter and the Consent Decree, and it entered judgment in favor of the City.

B.

The City of Oakland, like many cities and counties in the United States, is governed by a charter. In California, the provisions of a city's charter "have the force and effect of legislative enactments." Cal. Const. art. XI, § 3(a). A charter permits the city to "make and enforce all ordinances and regulations in respect to

municipal affairs, subject only to restrictions and limitations provided in [its] charter[ ] and in respect to other matters [it] shall be subject to general laws." *Id.* § 5(a). For instance, a charter may provide "the constitution, regulation, and government of the city police force." *Id.* § 5(b). Ultimately, a "city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." *Id.* § 7.

The Police Department, in addition to being governed by the Charter, is subject to oversight from the district court under the terms of the Consent Decree. The City entered into the Consent Decree in January 2003 after the *Allen* plaintiffs asserted Section 1983 claims, alleging violations of their civil rights due to a pattern and practice of misconduct by the City's police force, as well as deliberate indifference by the Police Department and its officers. The Consent Decree included numerous tasks that the City and the Police Department would need to satisfy, including implementing reforms to the Police Department's policies on adjudicating and disciplining officers. In December 2012, the court approved the *Allen* parties' negotiated plan to appoint a Compliance Director, who would have authority to oversee the City's and the Police Department's implementation and execution of new policies to comply with the Consent Decree.

Specifically, the district court ordered that:

> The Compliance Director will have the authority to *direct specific actions* by the City or

> [Police Department] *to attain or improve compliance levels*, or *remedy compliance errors*, regarding all portions of the [Consent Decree] . . . , including but not limited to: . . . personnel decisions, including but not limited to . . . findings and disciplinary actions in misconduct cases and use-of-force reviews. . . .

In November 2016, the City's voters approved an amendment to the Charter titled "Measure LL," adding Section 604. Section 604 established the Commission and the CPRA to investigate claims of police misconduct. Section 604 also sets forth the procedure for investigating officer misconduct and any ensuing disciplinary determinations, as well as the Commission's oversight role over the CPRA and the Police Department. Section 604(f)(3) requires the CPRA to issue written findings after completing an investigation and propose disciplinary actions to the Commission and Chief of Police. If the Chief of Police agrees with the CPRA's findings and proposed discipline, Section 604(g)(1) provides that the Chief of Police then notifies the subject officer of the findings and the intent to discipline. However, if the Chief of Police disagrees with the CPRA's findings or proposed discipline, Section 604(g)(2) states that the Chief of Police and the CPRA shall submit their respective findings and/or proposed discipline to a Discipline Committee, consisting of three Commission members. Finally, Chapters 2.45 and 2.46 of the Municipal Code codified the investigatory and discipline determination provisions of Section 604. Once convened, the Discipline Committee is required to "resolve any dispute" between the

determinations of the Chief of Police and the CPRA, "solely on the record presented by the [CPRA] and the Chief."

In this case, the officers seek to overturn the Discipline Committee's decision to terminate them. The officers' first cause of action is a petition for traditional mandate directing the City to comply with Section 604 of the Charter and Chapters 2.45 and 2.46 of the Municipal Code. *See* Cal. Civ. Proc. Code § 1085. The officers argue that the City violated the Charter and the Municipal Code when it improperly ignored the determination of the Chief of Police and instead relied on the Compliance Director's review. In their view, the Discipline Committee lacked jurisdiction or authority to impose any disciplinary action. The officers' petition therefore requests a writ of mandate compelling the City to comply with the Charter and the Municipal Code and to exonerate formally each officer, as well as appropriate injunctive relief restraining the City from maintaining or imposing any disciplinary action on the officers.

The officers' second cause of action is a request for declaratory relief over the proper application of the statutory procedures set forth in Section 604 of the Charter and Chapters 2.45 and 2.46 of the Municipal Code. *See* Cal. Civ. Proc. Code § 1060. The officers seek a judicial declaration establishing that (1) the Committee may not assert jurisdiction to determine disciplinary action on Police Department sworn personnel based on a disagreement between the Compliance Director's and the CPRA's findings and proposed

discipline, (2) the Compliance Director's findings and proposed discipline do not stand in place of the Chief of Police's findings and proposed discipline for investigations of alleged misconduct of Police Department sworn personnel, and (3) the Committee does not have authority to review material from outside the record presented by the Chief of Police and the CPRA when making a disciplinary determination.

In the end, however, we do not have the authority to consider the merits of the officers' claims because we lack subject matter jurisdiction over this action.

II.

Federal courts are courts of limited jurisdiction that "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Removal to federal court is generally proper only when the district court has original jurisdiction. *See* 28 U.S.C. § 1441. Because the parties in this case are non-diverse, the only avenue to federal court is if the parties can establish federal question jurisdiction under 28 U.S.C. § 1331.

Under 28 U.S.C. § 1331, federal courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." "[A] case can 'arise under' federal law in two ways." *Gunn v. Minton*, 568 U.S. 251, 257 (2013) (alteration omitted). First and "[m]ost directly, a case arises under

federal law when federal law creates the cause of action asserted." *Id., citing Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). This branch—suits raising federal causes of action—"accounts for the vast bulk of suits that arise under federal law." *Id.*

Second, under the substantial federal question branch, "even where a claim finds its origins in state rather than federal law," the Supreme Court has "identified a 'special and small category' of cases in which arising under jurisdiction still lies." *Id.* at 258, *quoting Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). Specifically, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.*

For the following reasons, we lack subject matter jurisdiction under both branches of federal question jurisdiction.

A.

First, we lack subject matter jurisdiction under the federal cause of action branch. Here, the officers do not allege any cause of action expressly created by federal law. Rather, the officers exclusively assert state law causes of action—for a writ of mandate under California Code of Civil Procedure § 1085 compelling the City to comply with Section 604 of the Charter and Chapters 2.45 and 2.46 of the Municipal Code, as well

as for declaratory relief under California Code of Civil Procedure § 1060 that, notwithstanding the Consent Decree and related federal court orders, the Compliance Director's findings cannot substitute for those of the Chief of Police under the Charter and cannot give rise to the empanelment of a Discipline Committee.

To be sure, the officers' complaint correctly anticipated that the City, in defending against the officers' claims, would assert that the Consent Decree, an agreement overseen and enforced by the federal district court, required the City to give effect to the Compliance Director's findings in the way that it did. But even assuming that such a contention by the City would raise a federal issue, it would not establish that federal law *creates* the officers' claims. Such a federal ground for declining to comply with what the officers contend is the plain meaning of the Charter raises, at best, a federal defense to the officers' state law claims demanding compliance with the Charter. *See also infra* at 17–18. It is "settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987), *citing Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 12 (1983). And that remains true even if, as here, the state-law complaint explicitly seeks declaratory relief with respect to the anticipated federal defense. *See Franchise Tax Bd.*, 463 U.S. at 19, *citing*

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

In removing the case, the City relied solely on *Baccus v. Parrish*, where the Fifth Circuit held that "[f]ederal jurisdiction is proper where a claim brought in state court seeks to attack or undermine an order of a federal district court." 45 F.3d 958, 960 (5th Cir. 1995). At the outset, *Baccus* is not binding on our court. Moreover, because *Baccus* was decided prior to *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), it is not entirely clear whether *Baccus* follows the federal cause of action branch or the substantial federal question branch of federal question jurisdiction. Regardless, the notion that there is federal jurisdiction simply because purely state law claims have collateral impact on a federal decree conflicts with current Supreme Court caselaw. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 31 (2002) (rejecting the view that the All Writs Act, or notions of ancillary jurisdiction, allow removal of "a state-court case in order to prevent the frustration of orders the federal court has previously issued"); *Rivet v. Regions Bank of La.*, 522 U.S. 470, 477 (1998) (holding that, because federal claim preclusion is a defense, and not an aspect of a plaintiff's cause of action, it is "not a proper basis for removal"); *see also Energy Mgmt. Servs., LLC v. City of Alexandria*, 739 F.3d 255, 261 (5th Cir. 2014) (noting, but not deciding, the question of whether "*Baccus* is still good law in light of *Rivet* and *Syngenta Crop Protection*"). Framed at such

breadth, *Baccus* would not correspond to any recognized category of federal jurisdiction.

We have instead more narrowly recognized that, in some circumstances, a state court action may properly be characterized as asserting a disguised direct *federally created* cause of action, equivalent to a motion under Federal Rule of Civil Procedure 60, to obtain relief from the terms of a federal consent decree. *See Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 777–78 (9th Cir. 1994) (holding that district court properly "recharacterized" plaintiffs' claims as "federal claims" asserting an "independent action for relief from [a federal] judgment" on grounds of fraud, at least where plaintiffs sought to represent parties in privity with those represented in the prior judgment); *Villareal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) (recharacterizing artfully pleaded state court action as a motion under Rule 60(b)(3) to amend federal court judgment involving same plaintiff and same subject). This ground of federal jurisdiction does not apply here, because the officers are not parties, or in privity with parties, to the *Allen* judgment, and their petition and complaint do not seek to challenge, enforce, or otherwise modify the terms of the Consent Decree or the federal court orders in *Allen*. The officers' petition and complaint simply seek compliance with, and clarification of, the Charter and the Municipal Code.

Accordingly, we hold that we lack federal question jurisdiction under the federal cause of action branch because federal law does not create the causes of action asserted.

B.

Second, we lack subject matter jurisdiction under the substantial federal question branch. This branch provides that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. Jurisdiction is proper "[w]here all four of these requirements are met" because in such a case, "there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Id., quoting Grable*, 545 U.S. at 313–14.

Here, the officers' action does not necessarily raise a federal issue in the way that *Grable* requires. We begin with the officers' first cause of action, a writ of traditional mandate directing the City to comply with Section 604 of the Charter and Chapters 2.45 and 2.46 of the Municipal Code. The parties contend that a federal issue is necessarily raised because the officers "are attacking a federal district court's consent decree." Not so. The officers were not parties, or in privity with parties, to the *Allen* action, and they are not directly attacking the Consent Decree. Instead, the officers allege that (1) the City violated the Charter and the Municipal Code when it improperly ignored the determination of the Chief of Police and relied on the Compliance Director's review, (2) the City violated the plain language of Section 604 of the Charter in order to find a

conflict between the CPRA and the Police Department's determinations, and (3) the Discipline Committee lacked jurisdiction or authority to impose any disciplinary action. Because the express terms of Section 604 and Chapter 2.45 state that the Discipline Committee can only be established when the Chief of Police and the CPRA are in disagreement, the argument goes, the City's process of review and termination violated state law. In addition, the officers argue that under the Charter and the Municipal Code, the Chief of Police strictly means the "Chief of Police of the Oakland Police Department," and neither the Charter nor the Municipal Code grants any authority to, or mentions, the Compliance Director appointed pursuant to the Consent Decree. Indeed, the officers' prayer for relief contains no request to enforce, modify, or otherwise challenge the terms of the Consent Decree at all. In the officers' view, they should have already been "formally exonerated" when both the Chief of Police and the CPRA agreed that their use of force was lawful and within Police Department policy. The officers merely request compliance with the Charter and the Municipal Code, as well as injunctive relief restraining any disciplinary action that resulted from a process that allegedly contravenes state law.

To be sure, there is a potential federal issue involving the question of how to resolve an alleged conflict between the *Allen* Consent Decree and the Charter. Although this question would inevitably arise in this case and may involve a federal issue, it is not an issue that is *necessarily raised* within the meaning of *Grable*

because it is not an "essential *element*" of any of the officers' claims. *See Grable*, 545 U.S. at 314–15 (emphasis added). At most, it is a federal issue that may arise as a potential defense. In essence, the officers anticipate that the City will contend that the relied-upon provisions of state law conflict with, and have been displaced by, the Consent Decree, and that the City is thus required to comply with the provisions of the Consent Decree. In considering such a defense, the court would have to determine whether there is a conflict between the Consent Decree and the Charter, and if so, how to resolve that conflict.

Even assuming that these inquiries implicate questions of federal law, a federal issue raised in anticipation of a defense is not sufficient to establish federal question jurisdiction. "[T]he question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.'" *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986), *quoting Franchise Tax Bd.*, 463 U.S. at 9–10. "A defense that raises a federal question is inadequate to confer federal jurisdiction," *id.*, because whether an issue is necessarily raised depends on if it is "an essential element" of a plaintiff's claim, *Grable*, 545 U.S. at 315. Indeed, "it is now settled law" that a federal defense to a state law cause of action cannot confer federal question jurisdiction. *Caterpillar*, 482 U.S. at 393.

We next turn to the officers' second cause of action, a request for declaratory relief under California Code of Civil Procedure § 1060. Although the officers seek a judicial declaration resolving several potential federal

issues—such as establishing that the Discipline Committee may not assert jurisdiction to determine disciplinary action based on a disagreement between the Compliance Director and the CPRA, and that the Compliance Director does not stand in place of the Chief of Police for investigations of alleged misconduct of Police Department personnel—this does not alter our jurisdictional analysis.

"[F]ederal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal, when a federal question is presented by a complaint for a state declaratory judgment, but *Skelly Oil* would bar jurisdiction if the plaintiff had sought a federal declaratory judgment." *Franchise Tax Bd.*, 463 U.S. at 19, *citing Skelly Oil*, 339 U.S. at 667. Indeed, the Supreme Court has held that in enacting the federal Declaratory Judgment Act, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil*, 339 U.S. at 671. Declaratory relief "could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts." *Id.* For federal question jurisdiction to extend to a declaratory judgment action, the "claim itself must present a federal question unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Id.* at 672 (internal quotation marks and citation omitted). Thus, "*Skelly Oil* has come to stand for the proposition that if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state

created action, jurisdiction is lacking." *Franchise Tax Bd.*, 463 U.S. at 16 (internal quotation marks and citation omitted). "[W]hile *Skelly Oil* itself is limited to the federal Declaratory Judgment Act, fidelity to its spirit leads us to extend it to state declaratory judgment actions as well." *Id.* at 18. In this case, but for the federal issues identified in the officers' request for state declaratory relief, any potential federal issue would arise only as a defense to a state-created action. *Cf. id.* at 16.

In sum, because the officers do not necessarily raise a federal issue in their petition and complaint, their claims fall outside the "special and small category" of state law causes of action arising under federal law. *Gunn*, 568 U.S. at 258 (citation omitted).

III.

This is a case arising under state law that properly belongs in the state courts. We recognize our decision today does not resolve the parties' dispute and it has been nearly three years that the parties have been before federal court. But we are not free to disregard or evade the "limits upon federal jurisdiction, whether imposed by the Constitution or by Congress." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Because the district court does not have original jurisdiction, we vacate the district court's judgment and remand with instructions for the district court to remand this case to the state court from which it was improperly removed.

VACATED and REMANDED with instructions to remand to state court.

RAKOFF, District Judge, dissenting:

While I agree with the majority's statement of the legal conditions under which a case "arises under" federal law, I respectfully disagree that the claims here do not meet those conditions. Because the officers' petition necessarily attacks a federal consent decree, I would hold that their claims give rise to a federal cause of action.

It is well-settled that "[f]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). For a federal issue to be necessarily raised, it must form an "essential element" of a plaintiff's claims in the plaintiff's "well-pleaded complaint." *See Grable & Sons Metal Prods. Inc. v. Darue En'g & Mfg.*, 545 U.S. 308, 315–16 (2005). And federal jurisdiction cannot be conveyed on the basis of a federal defense, even if the defense is anticipated in the complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1978).

Here, there is plainly a federal issue that is "essential" to the officers' claims and therefore "necessarily raised." In order to prevail on their claims, the officers *must* establish that the federal consent decree did not obligate the City to adopt the procedure it did.

See Gunn, 568 U.S. at 259 (finding federal jurisdiction where a federal issue was "necessary" for the plaintiff to "prevail on his . . . claim"). Without doing so, the officers are not entitled to relief directing the City to comply with a given procedure under state law.

Determining the scope and meaning of the federal consent decree is thus necessary to decide this case. Because the officers' petition, as the majority appears to agree, also satisfies the other three *Gunn* factors, I would reach the merits of their claims.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO NEGRETE, et al., Plaintiffs, v. CITY OF OAKLAND, et al., Defendants.	Case No. 19-cv-05742-WHO **ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS** Re: Dkt. Nos. 25, 30 (Filed Jun. 12, 2020)

Four City of Oakland Police Officers and one Sergeant (collectively, the Officers) seek to overturn the decision of the Oakland Police Commission's (Commission) Discipline Committee terminating the Officers for uses of force and policy violations that led to the death of a homeless man in Oakland. The Officers argue that the City and the Commission improperly ignored the determination of former Police Chief Anne Kirkpatrick, who concluded that their uses of force were lawful and that no policy violations were committed, in favor of the contrary decision of the federal Compliance Director of the Oakland Police Department (OPD). They assert that the City and the Commission violated the plain language of the City's Charter in order to find a conflict with the determination of Commission's own investigatory body, the Community Police Review Agency (CPRA), which also concluded that the uses of force were lawful and that no policy violations were committed.

For the reasons explained below, the City's motion for Judgment on the Pleadings is GRANTED and the Officers' cross-motion is DENIED. The City acted in a way that was consistent with its rights under the Charter and its obligations under the Negotiated Settlement Agreement (NSA) and subsequent Orders entered by this court by determining that the Compliance Director's decision about discipline (overriding former Chief Kirkpatrick's decision) was the final decision of the Chief of Police. The Commission was within its rights and obligations under the City Charter to find that a conflict existed between the OPD's final decision and the CPRA's decision and to have its Discipline Committee resolve that conflict.

BACKGROUND

I. COURT SUPERVISION OF THE OAKLAND POLICE DEPARTMENT

In 2003 the City of Oakland agreed to settle a civil rights lawsuit, *Delphine Allen, et al. v. City of Oakland, et al.*, U.S. Northern Dist. Case No. C00-4599. In the *Allen* case, the plaintiffs challenged a pattern of racist and unconstitutional practices committed by individually identified officers but allegedly permitted by and indeed caused in part by OPD's alleged culture of tolerance for and indifference to such behavior. The City agreed to resolve that lawsuit through a Negotiated

Settlement Agreement (NSA) overseen and enforced by this Court.[1]

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[1] The City requests the Court take judicial notice of various Court orders entered in *Allen* and public records; the NSA entered in *Allen* (Ex. A), 1/24/2012 Order in *Allen* (Ex. B.), 12/12/2012 Order in *Allen* (Ex. C), 7/22/2014 Order in *Allen* (Ex. D), Section 503 of the City's Charter (Ex. E), Section 604 of the City's Charter (Ex. F), Agenda Report re Charter Amendment (Ex. G), Discipline Committee Report (Ex. H), and OPD MOU (Ex. H). Dkt. No. 26. The City's unopposed Request for Judicial Notice of these Court Orders and public records [Dkt. No.26] is GRANTED. The Officers request the Court take judicial notice of additional public records; Sections of Article XI of the Constitution of the State of California (Ex. A), portions of the City's Charter (Exs. B &C), NSA entered in *Allen* (Ex. D), November 2009 MOU in *Allen* (Ex. E), June 2011 Amended MOU in *Allen* (Ex. F), June 2012 Order in *Allen* (Ex. G), December 2012 Order in *Allen* (Ex. H), February 2014 Order in *Allen* (Ex. I), Section 604 of the City's Charter (Ex. J), City Attorney October 2017 Memorandum (Ex. K), City Attorney Ballot Summary (Ex. L), City Attorney Analysis (Ex. M), portion of the City's Municipal Code (Exs. N & O), City Attorney June 2018 Memorandum (Ex. P), EFRB's Report for Use of Force 18F-0067 (Ex. Q), Chief Addendum (Ex. R), DA Report, (Ex. S), CPRA Report (Ex. T), Transcript of May 2019 Police Commission hearing (Ex. U). The Officers' unopposed Request for Judicial Notice [Dkt. No. 28] is GRANTED. The Officers' unopposed Supplemental Request for Judicial Notice [Dkt. No. 35] requesting judicial notice of additional sections of the City Charter (Exs. A&B) is likewise GRANTED. At the hearing, the Court noted that it intended to take judicial notice of three additional records under the doctrine of incorporation: the Compliance Director's (i) February 19, 2019 Addendum to EFRB Report; (ii) June 12, 2019 Memorandum re Discipline; and (iii) June 27, 2019 Supplement. *See U.S. v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (judicial notice is appropriate for a document that "is central to the plaintiffs claim" and "no party questions the authenticity of the document"). No party objected to the Court taking judicial notice of these three additional records and judicial notice will be taken of them. Finally, the Officers' Request for Judicial Notice of the

The NSA included 51 Tasks, with numerous subparts, that the City agreed OPD and the City would need to satisfy. It required the City to implement reforms to OPD's policies, including policies addressing adjudicating and imposing discipline on officers. *See*, *e.g.*, NSA at 24, 28, 33. It established the position of a Monitor to review the Department's compliance with the NSA's terms. *Id.* at 43-54. And it also provides that "in the event of substantial and/or chronic noncompliance with provisions of this Agreement, the Court may impose such sanctions and/or remedies as it deems just and necessary . . . " *Id.* at 54.

The NSA was extended, with its terms incorporated, by two subsequent Memoranda of Understandings; specifically, an MOU entered in 2009 and an Amended MOU in 2011. In January 2012, the court noted that "much significant work remains if the Department is ever to achieve the promises of the [ ] NSA" and directed the Department to consult with the Monitor on police officer personnel decisions, including in cases that involve lethal force. Petition, ¶ 51; January 2012 Order. The court also required a procedure to review any City decision implemented against the recommendation of the Monitor. *Id.*

In October of 2012, the *Allen* plaintiffs filed a motion seeking to place the Department into federal receivership because of the lack of progress on implementing the NSA and its Tasks. *Allen v. Oakland*, Dkt.

Performance Audit of the Oakland Police Commission and the Community Police Review Agency [Dkt. No. 38] is also GRANTED.

No. 752. The parties (including the Oakland Police Officers' Association, represented by the same counsel representing the Officers in this action) then engaged in court-led settlement discussions and agreed to the appointment of a Compliance Director in addition to the Monitor, who would be responsible for "overseeing the City and OPD's implementation and compliance with the NSA and AMOU." *Allen v. Oakland*, Dkt. No. 884-1 at 3.

On December 12, 2012, the court approved the parties' agreed settlement and established the position of Compliance Director vested with "the same rights and privileges" as the Monitor. Petition, ¶ 52; December 2012 Order 2. That Order provides:

> The Compliance Director will have authority to direct specific actions by the City or [Department] to attain or improve compliance levels, or remedy compliance errors, regarding all portions of the NSA . . . , including but not limited to: . . . personnel decisions . . . Findings and disciplinary actions in misconduct cases and use-of-force reviews . . .

Id. at 6. The December Order also made it clear that the Compliance Director had "no authority to rescind or otherwise modify working conditions referenced in the labor agreements between the City and the OPOA as those contracts relate to any member up to and including the rank of Captain." *Id.* at 7. "Working conditions" include those identified by the Meyers-Milias-Brown Act, California Government Code section 3500 et seq. ("MMBA"), the collective bargaining agreement,

and officers' "rights to arbitrate and appeal disciplinary action." *Id.*

In February 2014, the court consolidated the powers of the Compliance Director and Monitor into one position and appointed the existing Monitor, Chief Robert Warshaw, to fulfill that joint role. February 2014 Order at 2. On July 22, 2014, the court issued an Order rejecting the City Administrator's imposition of a different level of discipline on a police officer from what the Compliance Director approved. The court explained that the City Administrator's actions "violated the orders of this Court" and reiterated that "no discipline in Class I misconduct cases can be imposed absent the Compliance Director's direction or approval." Petition, ¶ 55; July 2014 Order at 1.

II. POLICE COMMISSION

In November 2016, the voters passed a Charter amendment titled "Measure LL." Petition, ¶ 16. Measure LL added a new provision to the City's Charter, Section 604, establishing the civilian Police Commission and the Commission's CPRA. Section 604(a). Section 604 sets forth the procedure for the investigation of allegations of workplace misconduct against sworn members of OPD and disciplinary determinations following such investigations. Petition, ¶ 16; Section 604(f). The CPRA, as the Commission's investigative body, was empowered to investigate public complaints alleging misconduct by sworn members of the Department. Petition, ¶ 18; Section 604(f). Upon completion

of an investigation, the CPRA must issue written findings and proposed discipline to the Commission and the "Chief of Police." Petition, ¶ 18; Section 604(f)(3).

With respect to discipline of OPD officers, Section 604 provides that if the Chief of Police agrees with the CPRA's findings and proposed discipline, the Chief of Police shall notify the subject officer of the findings and the Chief's intent to discipline. Petition, ¶ 21; Section 604(g)(1).[2] But if the Chief of Police disagrees with the CPRA's findings or proposed discipline, the Chief of Police and the CPRA "shall submit their respective findings and/or proposed discipline to a Discipline Committee," consisting of three Police Commission members. Petition, 21; Section 604(g)(2).[3] Section 604 requires

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[2] Section 604(g)(1) provides: "If the Chief of Police agrees with the Agency's findings and proposed discipline, he or she shall send to the subject officer notification of findings and intent to impose discipline. The Chief of Police may send such notification to the subject officer before IAD has begun or completed its investigation."

[3] Section 604(g)(2) states: "If the Chief of Police disagrees with the Agency's findings and/or proposed discipline, the Chief of Police shall prepare his or her own findings and/or proposed discipline which shall be submitted to a Discipline Committee comprised of three Commissioners. The City Administrator shall not have authority to reject or modify the Chief of Police's findings and proposed discipline. The Agency's findings and proposed discipline shall also be submitted to the Discipline Committee which shall review both submissions and resolve any dispute between the Agency and the Chief of Police. Based solely on the record presented by the Agency and the Chief of Police, the Discipline Committee shall submit its final decision regarding the appropriate findings and proposed discipline to the Chief of Police who shall notify the subject officer. The City Administrator shall not have the authority to reject or modify the Discipline Committee's final

the Discipline Committee to "resolve any dispute" between the determinations of the Chief of Police and the CPRA in a disciplinary proceeding. Section 604(g)(2). The Chief of Police must then deliver to the subject employees the Discipline Committee's findings and proposed discipline. Petition, ¶ 20; Section 604(g)(2).

Chapters 2.45 ("Oakland Police Commission") and 2.46 ("Community Police Review Agency") of the Municipal Code codified the investigatory and discipline determination provisions of Section 604. Petition, ¶ 24. They include the process by which investigative findings and disciplinary determinations are made either by agreement between the Chief of Police and CPRA, or in case of a conflict between the two, a determination by the Discipline Committee. Petition, ¶24.

Once the City imposes discipline on an officer, the officer has a right to invoke pre- and post-deprivation due process and administrative appeal rights to contest the discipline. Petition, 20.

III. PAWLIK SHOOTING, INVESTIGATIONS, PROCEEDINGS, AND DISCIPLINE

On March 11, 2018, the Officers responded to a "concerned resident's call about a man who was holding a firearm and situated between two residential buildings." Petition at 2. The man was later identified

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decision regarding the appropriate findings and level of discipline. The Discipline Committee shall not have the authority to conduct its own investigation."

as Joshua Pawlik. The Officers describe the pertinent facts as follows: "Upon arriving on scene and confirming that the suspect was armed with a pistol, Petitioners set a perimeter and engaged in a concerted effort to disarm the suspect and bring him into custody without incident or the need for force. After peacefully attempting to disarm the suspect, including multiple direct commands to 'get your hand off the gun,' the suspect failed to comply and instead pointed the firearm towards the officers, prompting Petitioners Negrete, Berger, Hraiz and Tanaka to discharge their firearms in self-defense, and Petitioner Phillips to fire a non-lethal (bean bag) round in self-defense." *Id.* at 2-3. Pawlik died on scene. *Id.*

Following the shooting, OPD initiated both a criminal investigation and an administrative investigation into the Officers' conduct. Both investigations concluded that the Officers' conduct was lawful and within OPD policy. Petition TT 34-35. As required by its policies, OPD convened an "Executive Force Review Board" (EFRB) comprised of OPD command officers. The EFRB also concluded that the Officers' conduct was lawful and within OPD Policy. EFRB Report, Dkt. No. 28-2, Ex. Q. Upon her review of the EFRB Report, former Chief Kirkpatrick determined that the Officer's conduct was lawful and within OPD policy. February 8, 2019, Chiefs Addendum to EFRB, Dkt. No. 28-2, Ex. R.

However, the Compliance Director saw the incident differently. He found that the Officers improperly used lethal force in violation of policy and recommended termination. *See* February 19, 2019 Addendum to EFRB

Report; June 12, 2019 Memorandum re Discipline, and June 27, 2019 Supplement. Ex. 26-1, Ex. H.

During this same general period, the shooting was investigated by the Commission's CPRA. On April 22, 2019, the CPRA concluded that the Officers' conduct was lawful and within OPD policy.[4] Dkt. No. 28-3, Ex. T.

Understanding that there was a conflict between the final determination of OPD – as the Compliance Director's decision was the final department position and stood in the place of former Chief Kirkpatrick's overruled decision – and the CPRA's findings, a Discipline Committee of the Commission was formed on June 13, 2019. Dkt. No. 26-1, Ex. H. On July 9, 2019, as amended on July 15, 2019, the Discipline Committee issued its report, concluding that the Officers' uses of force were out of compliance with OPD policy and determining that termination was the appropriate discipline for each Officer. Dkt. No. 26-1, Ex. H. The Discipline Committee's conclusions were delivered to the Chief of Police. The Officers, who had been placed on administrative leave in March 2019, were terminated.[5]

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[4] The CPRA sustained a "Class 2 violation" against defendant Negrete for "failing to properly perform his duties as the DAT Supervisor" and recommended a demotion. Dkt. No. 28-3, Ex. T. The Compliance Director sustained this allegation but recommended termination. Dkt. No. 26-1, Ex. H.

[5] As explained in the parties' papers, there was a dispute over the effective date of the Officers' termination; the Officers alleged that violations of the Brown Act occurred during the

The City scheduled pre-deprivation hearings for each officer before a neutral hearing officer in accordance with *Skelly v. State Pers. Bd.*, 15 Cal. 3d 194 (1975). The Officers provided substantive responses to the *Skelly* hearing officer; arguing both that the Discipline Committee was without jurisdiction to impose discipline on the Officers and that the City did not have just cause to terminate them. Lopes Decl., Ex. E-I.

IV. THE OFFICERS' PETITION AND CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

On August 12, 2019, the Officers filed a Petition for Writ of Mandate and Complaint for Declaratory relief in Alameda County Superior Court. Dkt. No. 1-2, Ex. A (Petition). The Petition was removed by defendants to federal court on September 12, 2019 and reassigned to me as a case related to *Allen v. Oakland.* Dkt Nos. 1, 10.

In their Petition, the Officers allege that the City and Commission failed to follow the provisions of the City's Charter that established the Commission and govern the Commission's powers with respect to the investigation and discipline of OPD officers. They assert that the Commission improperly ignored Chief Kirkpatrick's findings and instead interpreted the

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Police Commission's and/or Disciplinary Committee's votes regarding discipline. *See* Dkt. No. 34-1, Ex. A. However, the Officers' counsel confirmed during the May 20, 2020 hearing that the Officers' terminations were fully effective at that point.

Compliance Director's findings to create a conflict with the CPRA's findings, thereby allowing the Commission's Discipline Committee to act to discipline and terminate the officers. The Officers seek a judicial declaration forcing the City to "comply with the statutory procedure by which Oakland police officers are investigated for allegations of workplace misconduct and disciplined as set forth in the City of Oakland's Charter and Municipal Code. Petitioners also seek a judicial declaration establishing the proper application of specified provisions of the City of Oakland's Charter and Municipal Code relative to the investigation and discipline of Oakland police officers." Petition at 1-2.

On March 23, 2020, the City and Police Commission (collectively, the City) filed a Motion for Judgment on the Pleadings. Dkt. No. 25. The City argues that: (i) it acted as required by the NSA, not in its discretion, and therefore a writ of mandamus is not appropriate; (ii) even if it did act in its discretion, it did not abuse that discretion or fail in any duty it owed the Officers; and (iii) the Petition should be stayed pending the outcome of the Officers' administrative appeals. Dkt. No. 26. The Officers oppose the City's motion and cross-move for Judgment on the Pleadings, asserting that: (i) the City violated the plain language of the City Charter and Municipal Code; (ii) the *Allen* NSA and related Orders do not excuse the City's obligation to comply with those provisions; (iii) the Officers are not required to exhaust their administrative remedies; and (iv) the Court should issue immediate injunctive relief preserving the "status quo" at the time the Petition was

filed, when the Officers contend that they were still employed by the Department. Dkt. No. 27.

LEGAL STANDARD

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) utilizes the same standard as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n.4 (9th Cir. 2011). Under both provisions, the court must accept the facts alleged in the operative pleading as true and determine whether they entitle the plaintiff to a legal remedy. *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citation omitted). Either motion may be granted only when it is clear that "no relief could be granted under any set of facts that could be proven consistent with the allegations." *McGlinchy v. Shull Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988) (citations omitted). Dismissal may be based on the absence of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F. 2d 530, 534 (9th Cir. 1984).

A plaintiff's operative pleading must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although the court

must accept as true the well-pleaded facts in the operative pleading, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper motion. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "[A] plaintiffs obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnote omitted).

DISCUSSION

The Officers argue that the NSA and subsequent Orders of this Court were not meant to and cannot impair the City's "ministerial" obligations under state law, including its obligations under the plain language of the Charter that governs when the Discipline Committee has jurisdiction to form. Under Section 604, the Officers contend that the Discipline Committee should not have formed because there was no conflict between former Chief Kirkpatrick's decision (Chief's Addendum) and the CPRA decision. They assert that under Section 604, the Discipline Committee may only resolve conflicts between the decisions of the "Chief of Police" and the CPRA, not between the decisions of the Compliance Director and the CPRA, and therefore that the Discipline Committee lacked the authority to impose discipline on the Officers. They have raised this position repeatedly with OPD, the City Attorney's

Office, and the *Skelly* hearing officer. Declaration of Zachery A. Lopes [Dkt. No. 34], Exs. A, B, D, E-I.

The legal basis for this argument is the principle that courts interpreting the language of voter initiatives, like Measure LL, must give the language its ordinary meaning as "construed in the context of the statute as a whole and the overall statutory scheme." *Robert L. v. Super. Ct.*, 30 Cal. 4th 894, 901 (2003), *as modified* (Aug. 20, 2003) (internal citations omitted). The Officers note that the term "Chief' is expressly defined as "the Chief of Police" in the enacting Municipal Code Sections, Municipal Code § 2.45.010; *see also Faulder v. Mendocino County Bd. of Supervisors*, 144 Cal. App. 4th 1362, 1371 (Cal. App. 1st Dist. 2006) ("Terms defined by the statute in which they are found will be presumed to have been used in the sense of the definition."). They contend that the voters could only have intended to confer decision-making authority on the "Chief of Police" in passing Measure LL, given that the guidance on Measure LL from the City Attorney's office explained that Measure LL allows a Discipline Committee to be formed to resolve conflicts between the decisions of the "Chief of Police" and the CPRA and that none of the ballot initiative materials or analyses presented to the voters in Oakland ever referred to the Compliance Director or the *Allen* Orders. Officers' RJN, Exs. L, M, P. In short, the Officers argue that because Section 604 and the related provisions of the Municipal Code specifically and repeatedly refer *only* to the decision of the "Chief of Police" and do not mention the Compliance Director or anyone else, much less the

Allen NSA or subsequent orders, the Compliance Director's decision could not be used to create a conflict with the CPRA decision that would give the Disciplinary Committee jurisdiction to consider the matter.

The City responds that it was within its rights and duties to harmonize its obligations under the NSA and *Allen* Orders (especially in light of the Court's 2014 Order affirming that Class I disciplinary determinations were subject to the approval of the Compliance Director) and the provisions of Section 604 of the Charter, and that its conclusion was correct that the Compliance Director's decision overruling former Chief Kirkpatrick was *the final decision* of the Chief of Police as the last word from the Department itself. The City also asserts that by agreeing to the NSA in general and to the December 2012 Order specifically, the City permissibly delegated final decision-making authority (or at least approval) on the specified types of promotions and discipline identified in the December 2012 Order to the Compliance Director in lieu of the Chief of Police, and that delegation was permissible – or at least not prohibited – by any provision in the Charter. *See*, *e.g.*, *Taylor v. Crane*, 24 Cal. 3d 442, 450 (1979) ("A city charter is construed to permit the exercise of all powers not expressly limited by the charter or by superior state or federal law."). That delegation and agreement by the City and OPD – which existed before Measure LL was passed by Oakland's voters – was not undermined by the passage of Measure LL and adoption of Section 604.

The Officers answer that harmonization is not allowed and that the December 2012 Order in *Allen*, giving the Compliance Director the ability to "direct specific actions by the City or OPD" including "personnel decisions . . . and disciplinary actions in misconduct cases and use-of-force reviews," directly conflicts with the Section 604 provisions vesting those determinations solely in the Chief of Police (with the added oversight of the Discipline Committee of the Commission if properly invoked). December 2012 Order at 6. The Officers contend that any attempt to deviate from the provisions of Section 604 would likewise run afoul of Section 104 of the Charter, which provides that all "officers and employees of the City now serving shall continue in their offices or employments until removed or replaced in the manner prescribed by the authority of this Charter."

The Officers also point to Section 503 of the Charter that provides the City Administrator with the authority, subject to other provisions in the Charter, to discipline and remove employees, except that the City Administrator may "delegate" that authority to "directors or department heads." They contend that the Compliance Director is not a director or department head or otherwise responsible to the City Administrator, and there is no evidence of any such delegation by the City Administrator to the Compliance Director. The City and Department's agreement to the December 2012 Order cannot, according to the Officers, be an implied delegation because legal "settlements" have to be approved by the City Council and the City Council is

expressly prohibited from abridging the City Administrator's disciplinary authority. *See* Charter Section 207.

The Officers misunderstand the December 2012 Order. It implemented an agreement by the City and the Department to give the Compliance Director the last word on Class I disciplinary matters in order to avoid the alternative of potential receivership. The July 2014 Order (which addressed an attempt by the City Administrator to alter a decision on discipline agreed-to by the Compliance Director) confirmed that very understanding by all involved.[6]

The passage of Measure LL by the voters of Oakland did not change this general understanding (other than removing the ultimate role of the City Administrator in the discipline process and conferring that power on the Commission through the investigatory powers of the CPRA and the resolution process of the Disciplinary Committee). *See* Section 604(g)(2) ("The City Administrator shall not have authority to reject or modify the Chief of Police's findings and proposed discipline."). Section 604's sole mention of the Chief of Police as the decision-maker for the Department is not surprising and is understandable in a *Charter*

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[6] As the both sides repeatedly note, the December 2012 Order gives the City the opportunity to seek relief from the court if it disagrees with a determination by the Compliance Director on the matters covered by that Order. *See* December 2012 Order at C.7.(e); *see also* July 2014 Order at 1-2 ("If the City disagrees with the Compliance Director, it must follow the dispute resolution process set forth in the December 12, 2012 order.").

amendment that presumably was intended to last beyond the scope of this Court's supervision of OPD under the NSA.[7]

The Officers point to no authority that prevents the City and OPD from *agreeing* to provide the Compliance Director with powers that are not inconsistent with the Charter. While the Officers complain that the term "City" who agreed to the NSA and the December 12, 2012 Order is "vague" and does not expressly address the powers of the City Administrator or any delegation by the City Administrator, the Officers ignore that the December 12, 2012 Order was not adopted by the City Council but signed by the City Attorney on behalf of the "City" *and "*OPD," and gave discretion normally possessed by the Chief to the Compliance Director in certain defined circumstances. *See* Dkt. No. 884-1 at 1 (Proposed Order).

The Officers say that if the City genuinely believed that there was a conflict between the NSA and *Allen* Orders and Section 604 that needed to be harmonized, the City was under a duty to seek clarification or amendment of the *Allen* Orders from this court. They point to the provision of the NSA providing that:

> If there is a significant change in a state law that impairs or impedes the City's ability to implement this Agreement, then each of the

[7] The fact that Chapter 2.45 of the Municipal Code, enacted to implement the terms of Section 604 of the Charter, defined "Chief' as "Chief of Police of the Oakland Police Department" does not change the analysis for the same reasons. *See* Chapter 2.45.010.

> parties reserves the right to seek declaratory relief or other relief from the Court regarding implementation of the affected provisions of this Agreement in light of the change in state law.

NSA at 60; *see also* Petitioners' RJN, Exhs. E and F, p. 8 ("If the Court determines that a provision of the MOU is unenforceable, such provision will be severed and all other provisions will remain valid and enforceable. . . . Nothing in the AMOU shall limit the power of the Oakland City Council, the Mayor, the City Administrator, the City Attorney and the OPD from exercising their authority and satisfying their duties as set forth in the Charter and other applicable law."). They contend that these provisions recognize that court orders under the NSA did not foresee and could not bind the City's ability to implement and adhere to changes in law, including the passage of Measure LL and adoption of Section 604 making the "Police Chiefs" decision the trigger for any conflict with the CPRA's decision. Following the passage of Section 604, the Officers contend that the City was obligated to seek amendment of the *Allen* Orders (to the extent necessary) as allowed under the *Allen* NSA and subsequent orders. *See*, *e.g.*, NSA at 60 (giving parties right to seek relief from the Court if a "significant change in a state law impair or impedes the City's ability to implement" the NSA); *see also* AMOU at 8 ("Nothing in the AMOU shall limit the power of the Oakland City Council, the Mayor, the City Administrator, the City Attorney and the OPD from exercising their authority and satisfying their duties as set forth in the Charter and other applicable law.").

The provisions allowing the City to seek guidance or amendment of the NSA or subsequent Orders in light of "significant changes" in the law only apply if there are "significant changes" that impair or impede the ability of the City to satisfy both its obligations under the NSA and the court's implementing Orders and the City's Charter. The City reasonably understood that its agreed-to delegation of the Chief of Police's final decision-making authority in this instance, to the Compliance Director acting in the shoes of the Chief was not in conflict with Section 604 during the duration of this court's supervision of OPD pursuant to the NSA and subsequent Orders.[8] It could not ignore that delegation or the Orders of this court.

This is not a situation where the City has entered a contract in violation of its Charter or other binding law. Nor is it a situation where the City has agreed to a consent decree that is contrary to the City's obligations under its Charter or other binding law. The *Allen* NSA and implementing orders, in particular the December 2010 Order, agreed-to by both the City and the Department, gave the power to the Compliance Director to overrule the Chief's findings concerning discipline in defined and limited cases and in essence stand in the shoes of the Chief as the last word on discipline. There is no conflict between the limited powers given

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[8] Indeed, the Compliance Director's Addendum to the EFRP Report notes that he "rejects" the Chiefs "principal conclusions in this matter." February 19, 2019 Addendum to EFRB Report; *see also* June 27, 2019 Supplement ("I overturned the findings of Chief Anne E. Kirkpatrick").

to the Compliance Director during the time the NSA is in effect and the City Charter as amended by the voters of Oakland in creating the Commission.

In sum, the Commission was within its rights and obligations to convene its Disciplinary Committee to resolve the conflict between the CPRA's decision and the final decision of the Department, which in this instance was the Compliance Director's decision that stood in the place of the overruled determination made by former Chief Kirkpatrick. The declarations of relief sought by the Petition are unwarranted and the Petition is DENIED. I do not, therefore, need to reach the arguments put forward by the City regarding whether it had discretion to act, whether it abused any such discretion, and its request to stay this proceeding pending exhaustion of the pre and post-deprivation remedies available to the Officers under their MOU and the Police Officers Bill of Rights.

CONCLUSION

The Officers' Motion for Judgment as a Matter of Law is DENIED and the City's Motion for Judgment as a Matter of Law is GRANTED. The Clerk shall enter Judgment accordingly.

IT IS SO ORDERED.

Dated: June 12, 2020

/s/ William H. Orrick
William H. Orrick
United States District Judge

CITY OF OAKLAND [LOGO]

CITY HALL • 1 FRANK H. OGAWA PLAZA •
OAKLAND, CALIFORNIA 94612

Police Commission

TO: Lieutenant Angelica Mendoza, Office of Inspector General, Oakland Police Department

FROM: Oakland Police Commissioner Regina Jackson, Commissioner Jose Dorado, Commissioner Edwin Prather

DATE: Originally issued July 9, 2019, and amended July 15, 2019

RE: Officer Involved Shooting of Joshua Ryan Pawlik, IAD and CPRA Case No. 18-0249

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[1] BACKGROUND AND PROCEDURAL HISTORY

On April 22, 2019, the Oakland Police Commission (the "Commission") received a report from the Citizens Police Review Agency ("CPRA") containing CPRA's findings and recommended level of discipline to be imposed on individual Oakland Police Department ("OPD") Officers in regards to the Joshua Pawlik matter. The CPRA report made the following conclusions:

	Allegations	**CPRA's Findings and Recommended Discipline**
1	OPD Officer Brandon Hraiz improperly used lethal force when he shot and killed Mr. Joshua Pawlik	Exonerated
2	OPD Officer Craig Tanaka improperly used lethal force when he shot and killed Mr. Joshua Pawlik	Exonerated
3	OPD Sergeant Francisco Negrete improperly used lethal force when he shot and killed Mr. Joshua Pawlik	Exonerated
4	OPD Officer William Berger improperly used lethal force when he shot and killed Mr. Joshua Pawlik	Exonerated
5	OPD Officer Josef Phillips improperly used force when he used less lethal force on Mr. Joshua Pawlik	Exonerated
6	OPD Sergeant Francisco Negrete failed to properly perform his duties as the DAT Supervisor	Sustained Class 2 Violation – Demotion

7	OPD Lt. Alan Yu failed to properly perform his duties as the Incident Commander	Sustained Class 2 Violation – Demotion
8	OPD Officer Craig Tanaka failed to advise Communications of his rifle deployment	Not Sustained

Thereafter, in relation to OPD IAD and CPRA Case No. 18-0249, the Commission also received Compliance Director Chief Robert Warshaw's February 19, 2019 Addendum to the OPD's Executive Force Review Board Report, his June 12, 2019 Memorandum Re Discipline, and his June 27, 2019 supplemental document to his February 19, 2019 and June 12, 2019 Memoranda. Through those three documents, Chief Warshaw's report made the following conclusions standing in the place of the OPD:

	Allegations	**Chief Warshaw's Findings and Recommended Discipline**
1	OPD Officer Brandon Hraiz improperly used lethal force when he shot and killed Joshua Pawlik	Sustained Level 1 Violation – Termination
2	OPD Officer Craig Tanaka improperly used lethal force when he shot and killed Joshua Pawlik	Sustained Level 1 Violation – Termination

3	OPD Sergeant Francisco Negrete improperly used lethal force when he shot and killed Joshua Pawlik	Sustained Level 1 Violation – Termination
4	OPD Officer William Berger improperly used lethal force when he shot and killed Joshua Pawlik	Sustained Level 1 Violation – Termination
5	OPD Officer Josef Phillips improperly used force when he used less lethal force on Mr. Joshua Pawlik	Sustained Level 2 Violation – Termination
6	OPD Sergeant Francisco Negrete failed to properly perform his duties as the DAT Supervisor	Sustained Level 2 Violation – Termination
7	OPD Lt. Alan Yu failed to properly perform his duties as the Incident Commander	Sustained Level 2 Violation – 5-Day Suspension
8	OPD Officer Craig Tanaka failed to advise Communications of his rifle deployment	Not Sustained

Section 2.45.130 of the Oakland Municipal Code provides in pertinent part that "A separate Discipline Committee will be established for each Department sworn employee discipline or termination case. The Chairperson of the Commission shall appoint three (3) Commission members to serve on a Discipline Committee, and shall designate one of these three (3) Commission members as the Chairperson. The

Discipline Committee shall decide any dispute between the Agency and the Chief regarding the proposed or final findings or proposed or final level of discipline to be imposed on a Subject Officer."

In accordance with the above-listed conflicting findings and proposed discipline by CPRA and Chief Warshaw, on June 13, 2019, the Commission established a Discipline Committee (the "Committee") consisting of Commission Chair Regina Jackson, Commissioner Jose Dorado and Commissioner Edwin Prather. Chair Jackson was designated the Chair of the Committee.

The Committee conducted meetings on July 1, 2, 5, 7 and 9, 2019 to consider all of the issues at hand regarding the charge of the Committee as discussed below.

[2] THE CHARGE OF THE DISCIPLINE COMMITTEE

Based on the findings and proposed discipline from CPRA and Chief Warshaw, the Committee identified the following issues before it:

	Allegations	Status
1	OPD Officer Brandon Hraiz improperly used lethal force when he shot and killed Joshua Pawlik	Both the violation and discipline, if any, is to be determined by the Committee

2	OPD Officer Craig Tanaka improperly used lethal force when he shot and killed Joshua Pawlik	Both the violation and discipline, if any, tis o be determined by the Committee
3	OPD Sergeant Francisco Negrete improperly used lethal force when he shot and killed Joshua Pawlik	Both the violation and discipline, if any, is to be determined by the Committee
4	OPD Officer William Berger improperly used lethal force when he shot and killed Joshua Pawlik	Both the violation and discipline, if any, is to be determined by the Committee
5	OPD Officer Josef Phillips improperly used force when he used less lethal force on Mr. Joshua Pawlik	Both the violation and discipline, if any, is to be determined by the Committee
6	OPD Sergeant Francisco Negrete failed to properly perform his duties as the DAT Supervisor	The Committee need only consider proposed discipline
7	OPD Lt. Alan Yu failed to properly perform his duties as the Incident Commander	The Committee need only consider proposed discipline
8	OPD Officer Craig Tanaka failed to advise Communications of his rifle deployment	The Committee need not consider

[3] UNIVERSE OF MATERIALS AVAILABLE TO THE COMMITTEE

In order to conduct its review, the Committee received and reviewed: the CPRA Investigative File; the

CID Investigative File; the Internal Affairs Division Investigative File, including all video evidence and witness interviews; the Executive Force Review Board (EFRB) Report; the Supplemental IAD report based on the direction of the EFRB; the Imaging Forensics Report; OPD Chief Anne E. Kirkpatrick's Addendum to the EFRB Report; Chief Warshaw's Addendum to the EFRB Report; and the Chief Warshaw's Discipline Determination Memorandum.

The Committee also requested additional clarification and information from CPRA, specifically, Karen Tom, the CPRA Interim Director at the time the Pawlik report was filed. It should be noted that Ms. Tom refused to speak directly to the Committee and would only answer questions through the current Interim Director, Mike Nisperos.

[4] THE COMMITTEE'S FACTUAL STATEMENT AND FINDINGS

The Committee finds the following incontrovertible facts: The officer-involved shooting (OIS), on March 11, 2018, of Mr. Pawlik involved the report of a man sleeping, unconscious or otherwise "passed out" and located on a walkway between two houses at 922 and 928 – 40th Street. The 911 call was received at 6:17 p.m. The man was later identified as Joshua Pawlik. Mr. Pawlik was described as also as having a handgun in his hand. Upon their arrival at the scene, OPD officers observed Mr. Pawlik and believed him to be sleeping or unconscious and under the influence of alcohol, while

grasping a handgun. A Designated Arrest Team (DAT) was established to arrest Mr. Pawlik. The DAT set up a perimeter to clear the area of any citizens and a Bearcat armored vehicle was called to the scene.

Sergeant Negrete created a plan for Mr. Pawlik. Officers would challenge Mr. Pawlik if he woke up prior to the Bearcat's arrival and order Mr. Pawlik to drop the firearm. If the Bearcat was available to Officers, Sergeant Negrete planned that sirens and announcements would be made to Mr. Pawlik. If Mr. Pawlik was not responsive to sirens or announcements, Officers would deploy bean bags to Mr. Pawlik's shins and then potentially tazers to get Mr. Pawlik to surrender or wake up.

Once the Bearcat arrived at 7:04 p.m., the vehicle was parked at an angle next to the sidewalk in front of Mr. Pawlik. Several officers took positions on the Bearcat, using the Bearcat as cover, with their weapons drawn. From this position, Officers engaged with Mr. Pawlik. They attempted to rouse him with loud verbal commands. No sirens or loud noises were used. Instead, Officers yelled to Mr. Pawlik several times to "get your hand off the gun" and "don't move." In coming to consciousness, Mr. Pawlik lifted his head a couple of times and attempted to sit up by using his right elbow. At that point, at approximately 7:06 p.m., Sergeant Negrete and Officers Hraiz, Tanaka, Berger and Phillips fired upon Mr. Pawlik killing him.

The Committee finds that the most essential piece of evidence in its review and analysis to be the video

from the Portable Digital Recording Device (PDRD) of OPD Sergeant Webber.[1] The Committee also finds that the PDRD video speaks for itself. From their vantage point on top of the Bearcat, Officers engaged with Mr. Pawlik in an attempt to wake him. Officers shined a bright light on Mr. Pawlik in an apparent attempt to view Mr. Pawlik more clearly, but also to blind and confuse Mr. Pawlik. The PDRD video confirms that Mr. Pawlik's response to Officers attempting to rouse him was to act consistently as a man who was sleeping, unconscious or drunk and being startled and awoken from his slumber. In coming to consciousness, Mr. Pawlik lifted his head more than one time but was unsuccessful in other movements. Mr. Pawlik eventually attempted to sit up by using his right elbow. The PDRD video also confirms that at no time did Mr. Pawlik raise the handgun towards the officers or otherwise in a threatening manner towards Officers. Mr. Pawlik attempted to raise his head and sit up by using his right elbow for leverage. It was this movement that apparently caused Sergeant Negrete and Officers Hraiz, Tanaka, Berger and Phillips to fire upon Mr. Pawlik killing him.

The Committee does not find persuasive Officer testimony that Mr. Pawlik lifted moved or pointed the handgun in a threatening manner towards Officers. The PDRD video clearly shows that Mr. Pawlik did not

[1] The Committee recognizes the foresight of Sgt. Webber who very smartly and appropriately placed his PDRD on top of the OPD's Bearcat armored vehicle prior to the unfolding of the OIS.

lift, move or point the handgun in a threatening manner towards the Officers.

The Committee also finds instructive the PDRD's recording of Officer Berger's statement to Officer Phillips: "If that gun moves . . . bag him". This statement shows, at minimum, Officer Berger's desire to fire a bean bag at Mr. Pawlik based on any movement, not just threatening movement, or at worst, Officer Berger's desire to shoot a rifle round at Mr. Pawlik killing him. This line of thinking was inconsistent with Sergeant Negrete's plan to deploy bean bags to Mr. Pawlik's shins should Mr. Pawlik continue to be unresponsive.

The PDRD video also clearly shows that Officers provided conflicting statements to Mr. Pawlik such as "don't move" and "move your hand away from the gun". However, the conflicting statements were not controlling as it appears that Mr. Pawlik was not able to comprehend what was being told him after having been awoken from his sleep or unconsciousness.

[5] THE COMMITTEE'S FINDINGS

OPD Officer Brandon Hraiz (Star 9285)

The Committee finds that Officer Hraiz discharged his rifle resulting in the death of Mr. Pawlik. This use of force was out of compliance with OPD policy and the allegation that Officer Hraiz violated MOR 370.27 – 1f Use of Physical Force – Level 1 is SUSTAINED.

The Committee concludes that TERMINATION is the appropriate discipline.

OPD Officer Craig Tanaka (Star 9484)

The Committee finds that Officer Tanaka discharged his rifle resulting in the death of Mr. Pawlik. This use of force was out of compliance with OPD policy and the allegation that Officer Tanaka violated MOR 370.27 – 1f Use of Physical Force – Level 1 is SUSTAINED.

The Committee concludes that TERMINATION is the appropriate discipline.

OPD Sergeant Francisco Negrete (Star 8956)

The Committee finds that Sergeant Negrete discharged his rifle resulting in the death of Mr. Pawlik. This use of force was out of compliance with OPD policy and the allegation that Officer Berger violated MOR 370.27-1f Use of Physical Force – Level **1** is SUSTAINED.

The Committee also finds that Sergeant Negrete failed in his supervision of other officers in violation of MOR 285.00-1 Supervisors-Authority and Responsibilities, Class I. The allegation against Sergeant Negrete in that regard is sustained.

The Committee concludes that TERMINATION is the appropriate discipline.

OPD Officer William Berger (Star 9264)

The Committee finds that Officer Berger discharged his rifle resulting in the death of Mr. Pawlik. This use of force was out of compliance with OPD policy and the

allegation that Officer Berger violated MOR 370.27 – 1f Use of Physical Force – Level 1 is SUSTAINED.

The Committee concludes that TERMINATION is the appropriate discipline.

OPD Officer Josef Phillips (Star 9446)

The Committee finds that Officer Phillips discharged his bean bag gun resulting in a use of force against Mr. Pawlik. This use of force was not in compliance with OPD policy and the allegation that Officer Phillips violated MOR 370.27-1h Use of Physical Force – Level 2 is SUSTAINED.

The Committee concludes that TERMINATION is the appropriate discipline.

OPD Lieutenant Alan Yu (Star 8605)

Both CPRA and Chief Warshaw found that the allegation that Lieutenant Yu failed to properly perform his duties as the Incident Commander in violation of MOR 234.00-2 Command Officers – Authority and Responsibilities, Class II as SUSTAINED.

The Committee concludes that a DEMOTION is the appropriate discipline.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DELPHINE ALLEN, et al., Plaintiffs, v. CITY OF OAKLAND, et al., Defendants.	MASTER CASE FILE NO. C00-4599 TEH ORDER RE: COMPLIANCE DIRECTOR (Filed Dec. 12, 2012)

Nearly ten years after the parties agreed to a consent decree that was to have been completed in five years but that remains incomplete, the Court was scheduled to hear Plaintiffs' motion to appoint a receiver. After reviewing Defendants' opposition to Plaintiffs' motion, it became clear that Defendants did not dispute many of the issues raised by Plaintiffs, including Plaintiffs' conclusion that Defendants would be unable to achieve compliance without further intervention by this Court. The Court ordered the parties to meet and confer to attempt to reach agreement on how this case should proceed and, following the parties' request, referred this case to a magistrate judge for settlement.

Magistrate Judge Nathanael Cousins held a series of in-person and telephonic settlement conferences that culminated in the filing of a jointly proposed order on December 5, 2012. The parties were able to reach an agreement for additional oversight by a Court appointee who will have directive authority over Defendants relevant to the Negotiated Settlement Agreement

("NSA") and Amended Memorandum of Understanding ("AMOU").[1] The Court now approves the parties' agreement as modified below and therefore VACATES the hearing scheduled for December 13, 2012.

IT IS HEREBY ORDERED that:

A. Appointment of a Compliance Director

1. The Court will appoint a Compliance Director whose mission will be to bring Defendants into sustainable compliance with the NSA and AMOU. As the Court's agent, the Compliance Director will report directly to the Court and will not act as the agent of any party to this action or any other entity or individual.

2. The Compliance Director will have the same rights and privileges as have already been agreed to and/or ordered with respect to the Monitor, including those relating to testifying in this or other matters, confidentiality, and access to information and personnel. Likewise, the Compliance Director shall not be retained by any current or future litigant or claimant in a claim or suit against the City and its employees.

3. The parties will meet and confer and attempt to make a joint recommendation to the Court regarding the selection of the Compliance Director. If they are not able to agree, the parties will each recommend candidate(s) to the Court for consideration. The parties' recommendations, including descriptions of the

[1] The NSA and AMOU were entered as orders of this Court on January 22, 2003, and June 27, 2011, respectively.

candidates' qualifications for the position, shall be filed under seal on or before **December 21, 2012**. The selection of the Compliance Director rests solely within the Court's discretion, and the Court will not be limited to the parties' recommendations, whether separate or joint.

4. The Compliance Director will be a full-time position based in Oakland for a minimum of one year and at least until Defendants have achieved full compliance with the NSA and AMOU. The Compliance Director will serve until this case is terminated or until otherwise ordered by the Court. Any party may petition the Court to remove the Compliance Director for good cause.

5. The City will pay the costs of the Compliance Director and all costs related to the Compliance Director's work, including the cost of providing commensurate support services and office space. The Compliance Director's salary will be established by the Court upon appointment, and the Compliance Director will receive benefits commensurate with comparable City officials, such as the City Administrator and Chief of Police. The Court expects the City to reach a prompt compensation agreement with the Compliance Director upon appointment. If an agreement or any payment is unduly delayed, the Court will order the City to pay the Compliance Director, as well as the Monitor, through the Court's registry.

6. The AMOU will remain in effect except to the extent it conflicts with this order. This includes the

requirement that a task will not be removed from active monitoring until Defendants have demonstrated substantial compliance for at least one year.

B. Role of the Monitor Upon Appointment of the Compliance Director

1. The requirement in the January 24, 2012 order for consultation with the Monitor will terminate upon appointment of the Compliance Director. However, Defendants will not implement any of the types of changes or actions identified in the January 24, 2012 order without the Compliance Director's direction or approval.

2. Unless otherwise ordered, the Monitor's duties and responsibilities will otherwise remain unchanged and will stay in effect until this case is terminated. These duties include the continuation of the Monitor's quarterly reports, drafts of which will be provided simultaneously to the Compliance Director and the parties.

3. The Monitor and the City shall meet and confer concerning compensation to be paid to the Monitor for work performed after the current AMOU termination date of January 22, 2014. If they cannot reach agreement, the matter will be resolved by the Court. If any payment is unduly delayed, the Court will order the City to pay the Monitor, as well as the Compliance Director, through the Court's registry.

4. The Compliance Director and the Monitor will be independent positions that report only to the Court and not to each other. However, the Court expects the Compliance Director and the Monitor to work closely and in consultation with each other. Thus, for example, any technical assistance or informal advice provided by the Monitor to Defendants should include the Compliance Director whenever possible, and the Compliance Director should consult with the Monitor on all major decisions.

C. Duties of the Compliance Director

1. Within 30 days of his or her appointment, the Compliance Director will file a remedial action plan ("Plan") that both addresses deficiencies that led to noncompliance and explains how the Plan will facilitate sustainable compliance with all outstanding tasks by December 2013 or as soon thereafter as possible. In developing the plan, the Compliance Director will consult with the Monitor, Plaintiffs, the Mayor, the City Administrator, the Chief of Police, and the Oakland Police Officers' Association ("OPOA"). The Compliance Director will work closely and communicate regularly with the Chief of Police, the Chief's staff, and other relevant City personnel to implement the Plan. The Plan will include:

a. A proposed budget, to be included as part of the Oakland Police Department ("OPD") budget, that is mutually agreed to by the Compliance Director, the Mayor, the City Administrator, and the Chief of

Police for the fiscal year based on proposed expenditures for task compliance.

b. A plan for the oversight, acquisition, and implementation of a personnel assessment system ("IPAS") that provides a sustainable early-warning system that will mitigate risk by identifying problems and trends at an early stage. The Compliance Director will ensure that all parties are fully informed about both the procurement of new technology and how that technology will be used to identify problems and trends to ensure that officers are provided the requisite assistance at the earliest possible stage.

c. Strategies to ensure that allegations made by citizens against the OPD are thoroughly and fairly investigated.

d. Strategies to decrease the number of police misconduct complaints, claims, and lawsuits.

e. Strategies to reduce the number of internal affairs investigations where improper findings are made. This includes strategies to ensure that investigators apply the correct burden of proof, as well as strategies to ensure that complaints are not disposed of as "unfounded" or "not sustained" when sufficient evidence exists to support that the alleged conduct did occur.

f. A list of persons responsible for each outstanding task or specific action item. This requirement shall supersede the requirement for Defendants to file updated lists of persons responsible with the Court.

The above list of requirements is not exhaustive. Likewise, the parties have agreed that tasks related to the following areas are key to driving the sustained cultural change envisioned by the parties when agreeing to the NSA and AMOU: collection of stop data, use of force, IPAS, sound management practices, and the quality of investigations by the Internal Affairs Division. These areas are covered by Tasks 5, 20, 24, 25, 26, 30, 34, 40, and 41. The Court agrees that the identified tasks are of utmost importance but, unless otherwise ordered, expects full and sustainable compliance with all NSA tasks.

2. Within 60 days of his or her appointment, the Compliance Director will file a list of benchmarks for the OPD to address, resolve, and reduce: (1) incidents involving the unjustified use of force, including those involving the drawing and pointing of a firearm at a person or an officer-involved shooting; (2) incidents of racial profiling and bias-based policing; (3) citizen complaints; and (4) high-speed pursuits. In developing these benchmarks, the Compliance Director will consult with the Monitor, Plaintiffs, the Mayor, the City Administrator, the Chief of Police, the OPOA, and, as necessary, subject-matter experts to ensure that the benchmarks are consistent with generally accepted police practices and national law enforcement standards.

3. Beginning on May 15, 2013, and by the 15th of each month thereafter, the Compliance Director will file a monthly status report that will include any substantive changes to the Plan, including changes to persons responsible for specific tasks or action items, and

the reasons for those changes. The monthly status reports will also discuss progress toward achieving the benchmarks, reasons for any delayed progress, any corrective action taken by the Compliance Director to address inadequate progress, and any other matters deemed relevant by the Compliance Director. These monthly reports will take the place of Defendants' bi-weekly reports, which shall be discontinued after May 15, 2013.

4. Prior to filing any documents with the Court, the Compliance Director will give the parties an opportunity to determine whether any portions of the documents should be filed under seal. Requests to file documents under seal must be narrowly tailored and made in accordance with Civil Local Rule 79-5.

5. The Compliance Director may, at his or her sole discretion, develop a corrective action plan for any task for which the Monitor finds Defendants to be out of compliance. As part of any such plan, the Compliance Director will determine the nature and frequency of future internal compliance testing for that task.

6. The Compliance Director will have the power to review, investigate, and take corrective action regarding OPD policies, procedures, and practices that are related to the objectives of the NSA and AMOU, even if such policies, procedures, or practices do not fall squarely within any specific NSA task.

7. The Compliance Director will have the authority to direct specific actions by the City or OPD to attain or improve compliance levels, or remedy

compliance errors, regarding all portions of the NSA and AMOU, including but not limited to: (1) changes to policies, the manual of rules, or standard operating procedures or practices; (2) personnel decisions, including but not limited to promotions; engagement of consultants; assignments; findings and disciplinary actions in misconduct cases and use-of-force reviews; the discipline or demotion of OPD officers holding the rank of Deputy Chief and Assistant Chief; and the discipline, demotion, or removal of the Chief of Police; (3) tactical initiatives that may have a direct or indirect impact on the NSA or AMOU; (4) procurement of equipment, including software, or other resources intended for the purpose of NSA and AMOU compliance; and (5) OPD programs or initiatives related to NSA tasks or objectives. The Compliance Director will have the authority to direct the City Administrator as it pertains to outstanding tasks and other issues related to compliance and the overall NSA and AMOU objectives. Unless otherwise ordered, the Compliance Director's exercise of authority will be limited by the following:

a. The Compliance Director will have expenditure authority up to and including $250,000 for expenditures included in the Plan. This is not a cumulative limit. For individual expenditures greater than $250,000, the Compliance Director must comply with public expenditure rules and regulations, including Oakland Municipal Code article I, chapter 2.04. The City Administrator will seek authorization of these expenditures under expedited public procurement processes. The Compliance Director may seek an order

from this Court if he or she experiences unreasonable funding delays.

b. Members of OPD up to and including the rank of Captain will continue to be covered by the Meyers-Milias-Brown Act, the collective bargaining agreement, and OPOA members' rights to arbitrate and appeal disciplinary action. The Compliance Director will have no authority to abridge, modify, or rescind any portion of those rights for these members.

c. The Compliance Director will have no authority to rescind or otherwise modify working conditions referenced in the labor agreements between the City and the OPOA as those contracts relate to any member up to and including the rank of Captain. "Working conditions" include the rights identified in the above subparagraph, as well as salary, hours, fringe benefits, holidays, days off, etc.

d. Prior to removing the Chief of Police or disciplining or demoting the Chief of Police, an Assistant Chief, or a Deputy Chief, the Compliance Director will first provide written notice, including reasons for the intended action, to the parties and the affected individual and an opportunity for appeal to this Court. Where practicable, the Compliance Director will consult with the Mayor, the City Administrator, and the Chief of Police prior to providing such notice.[2] Within

[2] Prior consultation may not always be practicable. For example, the Compliance Director will not be expected to consult with the Chief of Police on a decision to discipline, demote, or remove the Chief of Police.

seven calendar days of the Compliance Director's written notice, the City, Plaintiffs, and the affected Chief, Assistant Chief, or Deputy Chief may oppose or support any such action, under applicable federal and state law, by filing a notice with the Court seeking an expedited briefing schedule and hearing. The affected Chief, Assistant Chief, or Deputy Chief will retain his or her employment and other rights pending the Court's decision.

e. In all disputes between the City and the Compliance Director relating to this order, except for the demotion, discipline, and removal decisions covered in the preceding subparagraph, the Compliance Director will consult with the Mayor, the City Administrator, the Chief of Police, and Plaintiffs in hopes of reaching consensus. If, after such consultation, the City and the Compliance Director remain in disagreement, the Compliance Director will provide written notice to the parties of the dispute and the Compliance Director's proposed direction. Within seven calendar days of the Compliance Director's written notice, the City may file a notice with the Court seeking an expedited hearing to determine whether the City should be excused from complying with the Compliance Director's direction. The City will comply with any direction that is not timely brought before the Court. The City's right to seek relief from the Court must not be abused and should generally be limited to matters related to employee discipline or expenditures in excess of $250,000. At any hearing on a disputed issue, the City will bear the burden of persuading the Court that the

City's failure to follow the Compliance Director's direction will not harm the City's compliance with the NSA or AMOU. Plaintiffs will be a party to any such hearing, and their counsel will be entitled to recover reasonable attorneys' fees and costs from Defendants, as set forth below in paragraph D.

D. Attorneys' Fees and Costs

The parties shall meet and confer regarding reasonable attorneys' fees and costs relating to Plaintiffs' motion to appoint a receiver, any motion that may be filed pursuant to paragraphs A.4, B.7.d, or B.7.e of this order, and any work performed after January 22, 2014. Any disputes over attorneys' fees and costs that the parties cannot resolve independently will be submitted to Magistrate Judge Cousins. Nothing in this order alters the right of Plaintiffs' counsel to receive previously agreed upon or previously earned fees and costs under the AMOU.

E. Role of the OPOA

Unless otherwise ordered, the OPOA will retain its limited status in intervention until this case is terminated. The Compliance Director will meet no less than once per quarter with the president of the OPOA to discuss the perspective of rank-and-file police officers on compliance efforts.

F. Further Proceedings

The parties shall appear for a status conference on **June 6, 2013, at 10:00 AM**, to discuss Defendants' progress toward compliance. The parties and Intervenor OPOA shall file a joint status conference statement on or before **May 24, 2013**.

The Court is hopeful that the appointment of an independent Compliance Director with significant control over the OPD will succeed – where City and OPD leaders have failed – in helping OPD finally achieve compliance with the NSA and, in the process, become more reflective of contemporary standards for professional policing. If the remedy set forth in this order proves unsuccessful, and Defendants fail to make acceptable progress even under the direction of the person appointed pursuant to this order, the Court will institute proceedings to consider appropriate further remedies. Such remedies may include, but are not limited to, contempt, monetary sanctions, expansion of the Compliance Director's powers, or a full receivership.

IT IS SO ORDERED.

Dated: 12/12/12 /s/ Thelton E. Henderson
THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO NEGRETE; et al., Plaintiffs-Appellants, v. CITY OF OAKLAND; POLICE COMMISSION OF THE CITY OF OAKLAND, Defendants-Appellees.	No. 20-16244 D.C. No. 3:19-cv-05742-WHO Northern District of California, San Francisco ORDER (Filed Sep. 27, 2022)

Before: WALLACE and COLLINS, Circuit Judges, and RAKOFF,* District Judge.

Judge Collins has voted to deny the petition for rehearing en banc, and Judge Wallace and Judge Rakoff so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DELPHINE ALLEN, et al., Plaintiffs, v. CITY OF OAKLAND, et al., Defendants.	Master Case No. C00-4599 TEH (JL) **SETTLEMENT AGREEMENT RE: PATTERN AND PRACTICE CLAIMS**

TABLE OF CONTENTS

[1] **I. PURPOSE**

The City of Oakland (hereinafter referred to as "the City") and the plaintiffs share a mutual interest in promoting effective and respectful policing. The parties join in entering into this Settlement Agreement (hereinafter "Agreement") to promote police integrity and prevent conduct that deprives persons of the rights, privileges and immunities secured or protected by the Constitution or laws of the United States. The overall objective of this document is to provide for the expeditious implementation, initially, with the oversight of an outside monitoring body (hereinafter "the Monitor"), of the best available practices and procedures for police management in the areas of supervision, training and accountability mechanisms, and to enhance the ability of the Oakland Police Department (hereinafter "the Department" or "OPD") to protect the lives, rights, dignity and property of the community it serves.

This document is intended as the basis for an agreement to be entered into between the City and Plaintiffs in the Delphine Allen, et al. v. City of Oakland, et al., consolidated case number C00-4599 TEH

(JL) otherwise known as the "Riders" cases. This document shall constitute the entire agreement of the parties. No prior or contemporaneous communications, oral or written, or prior drafts shall be relevant or admissible for purposes of determining the meaning of any provisions herein in any litigation or any other proceedings.

In the Riders cases, the plaintiffs have alleged that the Oakland Police Department was deliberately indifferent to, or otherwise ratified or encouraged, an ongoing practice of misconduct by the defendant officers to violate the plaintiffs' civil rights. Plaintiffs further alleged that the Oakland Police Department was deliberately indifferent to and or negligent in its hiring, training, supervision and discipline of its police officers, and that such indifference caused the alleged violations of the plaintiffs' constitutional rights. All such claims are hereinafter referred to as the "pattern and practice" claims. The City of Oakland defendants expressly deny such allegations asserted in the consolidated Riders complaints.

Nothing in this Agreement, the complaints filed in this action or the negotiation process [2] leading to the settlement of the pattern and practice claims shall be construed as an admission of liability or evidence of liability under any federal, state or local law, including 42 U.S.C. §§1983, 14141, 2000d and/or 3789d(c).

Subject to all plaintiffs settling their monetary damage claims, this Agreement resolves all pattern and practice claims in the Riders complaints. Upon

termination of this Agreement, as set forth in Section XV, paragraph B (3), plaintiffs agree to dismiss such claims with prejudice.

Nothing in this document is intended to alter the lawful authority of OPD personnel to use reasonable and necessary force, effect arrests and file charges, conduct searches or make seizures, or otherwise fulfill their law enforcement obligations to the people of the City of Oakland in a manner consistent with the requirements of the Constitution and laws of the United States and the State of California.

Nothing in this Agreement is intended to alter the existing collective bargaining agreement between the City and OPD member/employee bargaining units or to impair the collective bargaining rights of OPD member/employee bargaining units under state law or local law. The City recognizes that the implementation of certain provisions of this Agreement may require compliance with meet-and-confer processes. The City shall comply with any such legal requirements and shall do so with the goal of concluding such processes in a manner consistent with the purposes of this Agreement and to otherwise permit the City to timely implement this Agreement. The City shall give appropriate notice of this Agreement to the OPD member/employee bargaining units to allow such processes to begin, as to this Agreement, as filed with the Court.

This Agreement is binding upon the parties hereto, by and through their officials, agents, employees, successors and attorneys of record. This Agreement is

enforceable only by the parties, as described elsewhere in this document. No person or entity is intended to be a third-party beneficiary of the provisions of this Agreement for the purposes of any civil, criminal, or administrative action, and accordingly, no person or entity may assert any claim or right as a beneficiary or protected class under this Agreement. This Agreement is not intended to impair or [3] expand the right of any person or organization to seek relief against the City defendants for their conduct or the conduct of Oakland police officers; accordingly, it does not alter legal standards governing any such claims, including those under California Business and Provisions Code Section 17200, et seq. This Agreement does not authorize, nor shall it be construed to authorize, access to any City or Department documents, except as expressly provided by this Agreement, by persons or entities other than the City defendants and the Monitor.

This Agreement is entered into with the understanding that all OPD personnel shall strive to act in full compliance with its provisions. Acts of non-compliance with the provisions of this Agreement by OPD personnel shall result in corrective measures, up to and including termination.

II. DEFINITIONS

A. Bureau:

The first subordinate organizational unit within the Department.

B. Citizen:

Any individual person, regardless of citizenship status.

C. Command Officer/Commander:

Members of the Department holding the rank of Lieutenant or higher.

D. Command Staff

All members of the Department holding the rank of Lieutenant or higher.

E. Complaint

Any complaint regarding OPD services, policy or procedure, claims for damages (which allege member/employee misconduct); and any allegation of possible misconduct by an OPD member or employee. For purposes of this Agreement, the term "complaint" does not include any allegation of employment discrimination.

F. Effective Date

The date this Agreement was entered by the Court.

* * *

[48] **TASK 48 (Section XII)**

XII. DEPARTMENTAL MANAGEMENT AND ANNUAL MANAGEMENT REPORT

On or before September 5, 2003,, OPD shall develop and implement a policy requiring each functional unit of OPD to prepare a management report every 12 months. The division commanders individually shall meet with the Chief of Police and their respective Deputy Chief to thoroughly review the management report of that division. These management reports shall include relevant operating data and also highlight ongoing or extraordinary problems and noteworthy accomplishments.

TASK 49 (Section XIII)

XIII. INDEPENDENT MONITORING

A. Monitor Selection and Compensation

1. Within 60 days after entry of this Agreement, the City and plaintiffs' counsel shall mutually select a Monitor, subject to the approval of the Court, who shall review and report on OPD's implementation of, and assist with OPD's compliance with this Agreement. The selection of the Monitor shall be pursuant to a method jointly established by the plaintiffs' counsel and the City. In selecting the Monitor, plaintiffs' counsel and the City recognize the importance of ensuring that the fees and costs borne by the City are reasonable, and, accordingly, fees and costs shall be one factor considered in selecting the Monitor.

2. The maximum sum to be paid the Monitor, including any additional persons he or she may associate pursuant to Section XIII, paragraph C (1)(2) (excluding reasonable costs or fees associated with non-compliance or breach of the Agreement by the City or the Department), shall be set forth in a contract between the City and the Monitor and approved by the City Council. The contract amount shall be calculated to fairly and reasonably compensate the Monitor for accomplishing the tasks and responsibilities set forth in this Agreement. The maximum amount specified in the contract will not exceed four million dollars ($4,000,000.00) for the entire five years of the implementation of the Settlement Agreement. Should the monitoring be extended for [49] an additional period of time, the compensation will be renegotiated subject to the approval of the City Council.

3. If the plaintiffs' counsel and City are unable to agree on a Monitor, or on an alternative method of selection, the plaintiffs' counsel and the City each shall submit to the Court no more than two (2) names of persons who shall have the following attributes:

a. A reputation for integrity, even-handedness and independence;

b. Experience as a law enforcement officer, expertise in law enforcement practices, or experience as a law enforcement practices monitor;

c. An absence of bias, including any appearance of bias, for or against the plaintiffs,

the City, the Department, or their officers or employees; and

d. No personal involvement, in the last five (5) years, whether paid or unpaid, with a claim or lawsuit against the City or the Department, or any of their officers, agents or employees, unless waived by the parties, which waiver shall not be unreasonably withheld.

To assist the Court in selecting the Monitor when there is a disputed selection as above, the City and the plaintiffs' counsel shall submit to the Court the resumes, cost proposals, and other relevant information for such persons demonstrating the above qualifications, and the Court shall appoint the Monitor from among the names of qualified persons so submitted.

B. Period and Appointment

The Monitor shall be appointed for a period of five (5) years, but in no circumstances to exceed seven (7) years past the date on which this Agreement was entered by the Court by the agents of the plaintiffs and the agents of the City. The extension of the Monitor beyond five years shall be allowed only if the Court determines that it is reasonably necessary in order for the Monitor to fulfill his/her duties pursuant to this Agreement.

C. Staffing

1. The Monitor may associate such additional persons or entities as are reasonably [50] necessary to perform the monitoring tasks specified in this Agreement. Any additional persons or entities associated by the Monitor shall possess the following attributes: a reputation for integrity, even-handedness and independence; an absence of bias, including any appearance of bias, for or against the plaintiffs, the City, the Department, or their members or employees; and no personal involvement in the last five (5) years, whether paid or unpaid, with a claim or lawsuit against the City or the Department or any of their officers, agents or employees unless waived by the parties, which waiver shall not be unreasonably withheld.

2. The Monitor shall notify the City and the Court if and when such additional persons or entities are selected for association by the Monitor. The notice shall identify the person or entity to be associated and the monitoring task to be performed, and, if a waiver is being requested, the notice shall indicate if the person had any such involvement in the last five (5) years, whether paid or unpaid, with a claim or lawsuit against the City or the Department, or any of their members, agents, or employees. Either the plaintiffs' counsel or the City may notify the Monitor, in writing, within 10 days (excluding weekends, and federal or state holidays) of any objection either may have to the selection. If the parties and the Monitor are unable to resolve any such objection, and the Monitor believes that the specific person or entity in question is needed

to assist the Monitor, and such person or entity satisfies the qualifications and requirements in this paragraph, the Monitor may seek Court authorization to hire such person. For purposes of all paragraphs of this Agreement, other than the preceding paragraph, the term Monitor shall include any and all persons or entities that the Monitor associates to perform monitoring tasks, and such persons shall be subject to the same provisions applicable to the Monitor under this Agreement.

D. Replacement of Monitor

Should any of the parties to this Agreement determine that the Monitor, and/or his/her agents, employees, independent contractors, has exceeded his/her authority or failed to satisfactorily perform or fulfill his/her duties under this Agreement, the party may petition the Court for such relief as the Court deems appropriate, including replacement of the Monitor and/or [51] his/her agents, employees and/or independent contractors.

E. City-Provided Office Space, Services and Equipment

The City shall provide the Monitor and any staff of the Monitor with office space, which may be in the Police Department or within other City offices, and with reasonable office support such as telephones, access to fax and photocopying, etc. The City and OPD shall bear all reasonable fees and costs for the Monitor.

The Court retains the authority to resolve any dispute that may arise regarding the reasonableness of fees and costs charged by the Monitor.

F. Resolving Monitor Fee Disputes

In the event that any dispute arises regarding the payment of the Monitor's fees and costs, the City, plaintiffs' counsel and the Monitor shall attempt to resolve such dispute cooperatively, prior to seeking the Court's assistance.

G. Responsibilities and Authority

The Monitor shall be the agent of the Court and shall be subject to the supervision and orders of the Court, consistent with this Agreement. The Monitor shall have only the duties, responsibilities and authority conferred by this Agreement. The role of the Monitor shall be to assess and evaluate compliance with the provisions of the Agreement. The Monitor shall not, and is not intended to, replace or take over the role or duties of the Chief of Police or other police or City officials. The Monitor shall offer the City and OPD technical assistance regarding compliance with and implementing the Agreement.

H. Required Audits, Reviews and Evaluations

In order to report on OPD's implementation and compliance with the provisions of this Agreement, the

Monitor shall conduct audits, reviews and evaluations, in addition to any others deemed relevant by the Monitor, of the following:

1. OPD policies and procedures established to implement the Agreement, to ensure that these policies and procedures are consistent with both the purposes of this Agreement and, as reasonably practicable, the best practices in law enforcement.

[52] 2. All completed and pending internal affairs proceedings and files except investigator[s] notes while the investigation is open.

3. Policy and procedures used by OPD for Internal Affairs misconduct investigations, including a review of an appropriate sample of closed IA cases; assess and evaluate the quality and timeliness of the investigations; recommend reopening of investigations that the Monitor determines to be incomplete; recommend additional measures that should be taken with respect to future investigations in order to satisfy this Agreement; and review and evaluate disciplinary actions or other interventions taken as a result of misconduct investigations.

4. Quality and timeliness, from appropriate samples, of OPD use of force incident reports and use of force (K-4) investigations; review and evaluation of actions of OPD's Use of Force (K-4) Board and Firearms-Discharge Board of Review (K-3); and review and evaluation of disciplinary actions or other interventions

taken as a result of use of force investigations or K-3 and K-4 Board reviews.

5. If the Monitor determines that any use of force investigation or internal (IAD or Division-level) investigation/report which has been adjudicated or otherwise disposed or completed, is inadequate under this Agreement, the Monitor shall confer with the Chief of Police, IAD Commander and the Inspector General, and provide a confidential written evaluation to the Department and the Court. Such evaluation shall be for the purpose of assisting the Chief of Police in conducting future investigations, and shall not obligate the Department to reopen or re-adjudicate any investigation.

6. Implementation of provisions of this Agreement related to OPD training, including changes to the FTO program.

7. OPD's development and implementation of PIMS as required by this Agreement, including any supervisory action taken in response to analyses from such a system.

[53] 8. City/OPD's Performance Appraisal System.

9. Compliance with provisions in this Agreement relating to command, management and supervisory duties.

10. The Monitor may request information about "court related" problem officers from OPD's MLL, the Office of the District Attorney (DA), or the Office of the Public Defender (PD). All information provided to the Monitor by the

DA and/or PD shall be confidential and serve as a "check and balance" of the PIMS.

11. Other reviews as deemed relevant, such as sampling cases developed from the directives targeting specific geographic areas, to ensure that OPD enforcement activities fully comply with all applicable Department procedures and federal and state law.

    When appropriate, the reviews and evaluations shall include, at a minimum, annual audits of stratified random samples.

I. Reports

During the first two (2) years of this Agreement, the Monitor shall issue quarterly reports to the parties and to the Court. Thereafter, the Monitor shall issue semi-annual reports to the parties and the Court. At any time during the pendency of this Agreement, however, the Monitor may issue reports more frequently if the Monitor determines it appropriate to do so. These reports shall not include information specifically identifying any individual member/employee. Before issuing a report, the Monitor shall provide to the parties a draft for review to determine if any factual errors have been made, and shall consider the parties' responses; the Monitor shall then promptly issue the report. All efforts to make these reports available to the general public shall be made, including posting on the Department's web site, unless the Court orders that the reports or any portions of the reports should remain confidential. In addition, public disclosure of the

reports and any information contained therein shall comply with the Public Safety Officers' Procedural Bill of Rights.

[54] **J. Meetings**

1. During the first year of this Agreement, the Monitor shall conduct monthly meetings that shall include representatives of OPD, the City Attorney's Office, the City Manager's Office, the Oakland Police Officers' Association, and plaintiffs' counsel. These meetings may be continued beyond the first year at the request of the parties to this Agreement. The purpose of these meetings is to ensure effective and timely communication between the Monitor, OPD, the City Attorney's Office, the City Manager's Office, the Oakland Police Officers' Association and plaintiffs' counsel regarding the development of procedures and policies under the Agreement, implementation, compliance and information-access issues. Throughout the duration of this Agreement, directives, policies and procedures developed by OPD pursuant to this Agreement shall be provided to plaintiffs' counsel for review and comment as a part of the Department's existing staffing process. Written comments may be returned to the Department by the specified deadline, or verbal comments may be given at the monthly meetings.

2. The Monitor shall also convene meetings with representatives of OPD, City Attorney's Office, City Manager's Office, the Oakland Police Officers' Association and plaintiffs' counsel to provide a forum for the

discussion and comment of the Monitor's reports before the reports are issued to the Court. The plaintiffs' counsel and their retained experts and/or consultants shall be compensated by the City up to but not to exceed Fifty Thousand Dollars ($50,000); this amount includes all fees and costs over the duration of this Agreement for their participation in the review of policies called for in this Agreement. The plaintiffs' counsel shall submit to the City, on an annual basis during the duration of the Agreement, a statement of such fees and costs.

K. Access and Limitations to OPD Documentation and Staff

1. By policy, OPD personnel shall be required to cooperate fully with the Monitor and to provide access to information and personnel in a timely fashion. The Monitor shall have the right to interview any member/employee of OPD pursuant to the provisions of this Agreement.

2. Except as restricted below, the City and OPD shall provide the Monitor with full and [55] unrestricted access to all OPD staff, facilities and non-privileged documents (including databases) necessary to carry out the duties assigned to the Monitor in a timely fashion. The Monitor shall have the right to interview any member/employee of OPD pursuant to the provisions of this Agreement. The Monitor shall cooperate with the City and the Department to access personnel and facilities in a reasonable manner that, consistent

with the Monitor's responsibilities, minimizes interference with daily operations. This right of access shall include all documents regarding use of force data, policies and analyses. The Monitor shall provide the City or Department with reasonable notice of a request for copies of documents. Upon such request, the City and the Department shall provide the Monitor with copies (electronic, where readily available, or hardcopy) of any documents to which the Monitor is entitled access under this Agreement. The Monitor shall maintain all documents obtained from the City, OPD or the plaintiffs' counsel in a confidential manner and shall not disclose non-public information to any person or entity other than the Court or the parties, absent written notice to the City and either consent by the City or a Court order authorizing disclosure.

3. The Monitor shall have access to OPD personnel medical records, generally, if permission for such access is granted by the applicable member/employee, or the information from such records is otherwise contained in investigative files.

4. For any other OPD personnel medical records reasonably necessary to carry out the duties assigned to the Monitor by this Agreement, the Monitor shall notify the Court and the City in writing of the need for such documents, and the City shall so notify the affected member/employee. The Court, the City, or the affected member/employee may, and the City if requested by the affected member/employee shall, notify the Monitor in writing within 10 days (excluding weekends, and federal or state holidays) of any objection

they may have to such access. If the parties, the Monitor and, where applicable, the affected member/employee are unable to resolve any such objection, and the Monitor continues to believe that the documents in question are reasonably necessary to assist the Monitor, the Monitor may seek Court authorization for access to [56] such documents, subject to any appropriate protective orders. The City shall assert applicable defenses and privileges from disclosure and protections of such records for the City and the affected member/employee. Any documents obtained by this procedure shall be treated as confidential.

L. Limitations to Personal and Confidential Information

Nothing in this Agreement shall be construed to require disclosure of strictly personal information not material to implementation of this Agreement. Personal information includes, but is not limited to, background investigations, personal financial information other than compensation paid by the City, personal medical (including psychological) information, and residential or marital information. The Monitor shall not access attorney-client privileged information or work-product information. If the City or OPD objects to the access to any material, the City shall state why the material is not relevant, or that the information is privileged or otherwise confidential, and shall provide a privilege log. The City and OPD acknowledge that in order to evaluate the performance appraisal system, the disciplinary system for staff, the PIMS system, IAD

investigations and other aspects of OPD, the Monitor will need substantial access to information about individual members, information about situations which may be currently in litigation or which may be the subject of future litigation, and information related to ongoing criminal investigations and prosecutions to the extent that disclosures of such information to the Monitor may not compromise or may not reasonably tend to compromise the integrity of the pending criminal investigation. If, after efforts among the parties to resolve the disagreement, the objection remains, the Court shall make the final determination.

M. Access to Criminal Investigation Files

1. The Monitor shall have direct access to all documents in criminal investigation files that have been closed by OPD. The Monitor shall also have direct access to all arrest reports, warrants and warrant applications, whether or not contained in open criminal investigation files; where practicable, arrest reports, warrants and warrant applications shall be obtained from sources [57] other than open criminal investigation files.

2. The Monitor shall have access to documents containing confidential information prepared for and contained solely in open criminal investigations of OPD personnel reasonably necessary to monitor compliance with this Agreement (other than arrest reports, warrants and warrant applications which shall be subject to the general access provisions).

3. If the Monitor reasonably deems that access to documents contained solely in either:

a. Open criminal investigation files, which investigations have been open for more than ten months; or

b. Open criminal investigation files of OPD personnel, which investigations have been open for less than ten months, is necessary to carry out the duties assigned to the Monitor by this Agreement, the Monitor shall notify the Court and the City, in writing, of the need for such documents. After notification by the Monitor, either the Court or the City may respond in writing to the Monitor within ten days (excluding weekends, and federal or state holidays), should either have any objection to such access. If the parties and the Monitor are unable to resolve any such objection, and the Monitor continues to believe that the documents in question are reasonably necessary to assist the Monitor, the Monitor may seek Court authorization for access to such documents, subject to any appropriate protective orders. Any documents obtained by this procedure shall be treated as confidential.

N. Access to Intelligence Files

The access provisions of the previous paragraphs do not apply to documents contained solely in Anti-Terrorist files, or solely in Intelligence files, or

Investigative Notes files or similar files in joint task forces with other law enforcement agencies.

O. Access to "Whistle Blowers"

The Monitor shall have full access to any "whistle blower" who wishes to communicate [58] with the Monitor. The Monitor shall be informed of any and all "whistle blower" reports made by such OPD personnel. The Monitor shall not be given the name of any OPD member/employee who uses the confidential reporting process described above and who indicates that he or she does not want their names given to the Monitor.

P. Testimony

The Monitor shall be an agent of the Court and may testify in this case regarding any matter relating to the implementation, enforcement or dissolution of the Agreement. The Monitor shall not testify and/or respond to subpoenas or documents in other matters relating to the City and OPD, except as required or authorized by the Court. The Monitor shall not be retained by any current or future litigant or claimant in a claim or suit against the City and its employees.

Q. Confidential Records Maintenance

The records maintained by the Monitor shall not be deemed public records. All documents, records, computerized data, and copies of any reports or other information provided to the monitor, as well as any

reports, memoranda or other information produced by the monitor, shall be maintained for a period of 12 years following the entry of this Agreement.

R. Court Resolution of Disputes

In the event the Monitor reports that the duties and the responsibilities of the Monitor, as specified in this Agreement, cannot be carried out because of lack of cooperation, failure to provide appropriate data and documents otherwise called for in this Agreement, lack of timely response or other forms of unwarranted delays from OPD or the City, the Court may impose such remedies as it deems just and necessary. Plaintiffs' counsel may bring motions based on their belief that the City or OPD is failing to comply with the provisions of this Agreement. The City may also bring motions to amend the Agreement, should it determine such changes are necessary to achieve the overall purposes of the Agreement. Before any such motions are brought, the parties shall meet and confer following the exchange of a letter brief. Should it be necessary to continue the meet and confer process, the parties may request mediation before Magistrate Judge Larson, another [59] Magistrate Judge mutually requested, or another Magistrate Judge as designated by the Court. The Court shall hold hearings on such matters and, if plaintiffs prevail, plaintiffs' counsel shall be entitled to their costs and legal fees. Should the plaintiffs not prevail, the standards set forth in FRCP Rule 11 and 42 USC Section 1988 shall apply so as to determine if the City shall be entitled to an award of fees and costs.

Additionally, in the event of substantial and/or chronic noncompliance with provisions of this Agreement, the Court may impose such sanctions and/or remedies as it deems just and necessary, including, but not limited to, attorneys' fees.

S. Petitions for Relief

At any time during the pendency of this Agreement, the City may petition the Court for relief from any provisions of this Agreement. However, such relief shall not be granted unless the City demonstrates that all good faith efforts have been undertaken to comply with the subject provision, that the provision is inconsistent with the overall purposes of the Agreement, and that implementation of the provision is operationally and/or fiscally onerous or impracticable.

TASK 50 (Section XIV)

XIV. COMPLIANCE UNIT

A. Compliance Unit Liaison Policy

Within 30 days from the effective date of this Agreement, OPD shall hire and retain, or reassign current OPD members/employees, to serve as an OPD Compliance Unit for the duration of this Agreement. The Compliance Unit shall serve as the liaison between OPD, the Monitor and the plaintiffs' counsel, and shall assist with OPD's compliance with the Agreement. Among other things, the Compliance Unit shall:

1. Facilitate the provision of data and documents;

2. Provide to the Monitor access to OPD personnel, as needed;

3. Ensure that documents and records are maintained as required by the Agreement;

4. Prepare a semi-annual report describing the steps taken, during that reporting period, to comply with the provisions of the Agreement.

* * *

[61] annual compliance reports.

TASK 52 (Section XV)

XV. HOUSEKEEPING PROVISIONS

A. <u>Reports and Records to be Maintained by the OPD</u>

1. The City and OPD shall file regular status reports with the Court delineating the steps taken by OPD to comply with the provisions of this Agreement. Commencing within 120 days from the effective date of this Agreement, these reports shall be filed twice annually, at six (6) month intervals, until this Agreement is terminated.

2. During the term of this Agreement, the City and OPD shall maintain all records necessary to document compliance with the Agreement.

B. Implementation and Jurisdiction

1. This Agreement shall become effective on the date of entry by the Court. The implementation of the provisions of this Agreement is as specified in each provision.

2. All deadlines stated in this document are to be calculated as business days, not calendar days, unless otherwise specified. The deadlines, specified in Section XV, paragraph C (Meet and Confer), are to be calculated as calendar days. The calculation of days in the Settlement Agreement will be based on the Federal Court calendar referencing holidays. The deadlines provided for implementation specified in the Settlement Agreement are mandatory deadlines and failure to meet these deadlines will result in the City being deemed out of compliance unless the Monitor and or the Court deems otherwise. Appended to this Agreement is the Department's Business Implementation Plan. The interim dates specified in this Plan are recommended dates to assist the Department's critical path planning of the overall implementation of the reforms. These interim dates may be adjusted based on operational efficiencies and budgetary restraints.

3. The Court shall retain jurisdiction over this action, for all purposes, during the term of this Agreement. This Agreement shall remain in effect for five (5) years following the entry by [62] the Court, but shall, under no circumstances, exceed seven (7) years. Without further action, the Agreement shall terminate five (5) years from the effective date, unless the Monitor

reports to the Court that an extension of time, not to exceed two (2) years, is reasonably necessary to serve the purposes of the Agreement. The City may contest the extension, by motion to be heard by the Court, no later than 60 days prior to the expiration of the Agreement. The City may present evidence to the Court in support of the motion. At such hearing, the City has the burden to establish substantial compliance with the Agreement during the five-year period. "Substantial compliance" is defined, for the purposes of this Agreement, as meaning that OPD has complied with the material provisions of the Agreement. Materiality is determined by reference to the overall objectives of the Agreement. Non-compliance with technicalities or, otherwise, minor failures to comply while generally complying with the Agreement, shall not be deemed failure to substantially comply with the Agreement.

4. The City and the plaintiffs may jointly stipulate, by and through their counsel of record, to make changes, modifications and amendments to this Agreement. Such stipulations shall be reported to the Monitor and are subject to the approval of the Court.

5. If any term or provision of this Settlement Agreement shall be found to be void, invalid, illegal or unenforceable by the Court, notwithstanding such determination, such term or provision shall remain in force and effect to the extent allowed by such ruling. In addition, notwithstanding such determination, all other terms and provisions of this Settlement Agreement shall remain in full force and effect.

6. The City shall not be deemed to be in violation of any provision of this Agreement by reason of the failure to perform any of its obligations hereunder to the extent that such failure is due to unforeseen circumstances. "Unforeseen circumstances" include conditions not reasonably foreseeable by the City at the time the Agreement was executed: acts of God, catastrophic weather conditions, riots, insurrection, war, acts of a court of competent jurisdiction or any similar circumstance for which the City is not responsible and which is not within the City's control. [63] Delays caused by unforeseen circumstances shall reasonably extend the time of compliance. The City may seek from the Court a reasonable extension of time to comply with the provision of the Agreement, or other relief, as soon as practicable, but no later than 45 days of the time the City becomes aware of the unforeseen circumstances. The City shall issue a notice to the Court, Monitor and plaintiffs' counsel. The notice shall include a description of the unforeseen circumstances and the steps taken to minimize the risk of non-compliance.

7. If any unforeseen circumstance occurs which causes a failure to timely carry out any requirements of this Agreement, the City shall notify the Court and plaintiffs' counsel in writing within 20 calendar days of the time that the City becomes aware of the unforeseen circumstance and its impact on the City's ability to perform under the Agreement. The notice shall describe the cause of the failure to perform and the measures taken to prevent or minimize the failure. The

City shall implement all reasonable measures to avoid or minimize any such failure.

8. If plaintiffs' counsel and the City agree or the Court determines that delay in meeting any schedule or obligation in this Agreement has been caused by unforeseen circumstances then, subject to the provisions of Section XV, paragraph B (4), the time for performance shall be extended for a period up to that equal to such delay.

C. Meet-and-Confer Process

1. As part of any meet-and-confer or consulting process demanded by OPD member/employee bargaining units, as described on page 2, lines 12-20, the City shall discuss and seek to resolve with those OPD member/employee bargaining units any disputes or uncertainties regarding which provisions are subject to such process. The City shall identify and provide to the OPD member/employee bargaining units the provisions of this Agreement such as it believes are subject to the process being demanded. Within 30 days of the date of the completion of the meetand-confer process, the City shall report to the Court the results of any such discussion on this question. In the event that the City and the OPD member/employee bargaining units are unable to resolve the list of the provisions of the Agreement which are subject to the meet-and-confer [64] process, the City shall seek declaratory relief from this Court to resolve such issue, provided that the OPD member/employee bargaining units shall receive

notice and an opportunity to be heard by the Court on this issue.

2. Following the resolution of any dispute or uncertainty regarding the issues subject to a demanded process, the City shall continue with that process. The City shall report to the Court on the progress of such process. The reports shall include:

a. Proposed agreements with the OPD member/employee bargaining units relating to provisions of this Agreement as they are resolved by the City arising from the meet-and-confer process as they are determined, and

b. A list of provisions identified, pursuant to paragraph (1) of this Section, such as are scheduled for implementation within 45 days.

3. With regard to a matter that is not a mandatory subject of collective bargaining, the City shall not propose or enter into any such agreement with OPD member/employee bargaining units that will adversely affect the City's timely implementation of this Agreement. With regard to all such agreements with the OPD member/employee bargaining units, the City shall not make them effective before the expiration of 45 days after such proposed agreement is reported to the Court. The time for implementation of any provisions of this Agreement affected by such agreement with the OPD member/employee bargaining units, concerning a mandatory subject of bargaining, shall be extended for such 45-day period. If the Court determines that

implementation of such proposed agreement would not significantly impact the City's ability to implement the affected provision(s) of this Agreement, the Court shall waive some or all of such 45-day period, and the City shall initiate such implementation. If such determination is not made, the parties shall discuss appropriate clarifications or modifications to this Agreement. Where the parties believe that a modification of this Agreement is appropriate, they shall present such modification to the Court for its consideration. The implementation date for the affected provision(s) of this Agreement shall be extended while the matter is before the Court, unless the Court orders earlier implementation. [65] Any motion concerning a proposed bargaining agreement with the OPD member/employee bargaining units, pertaining to the provisions of this Agreement, shall be brought during the 45-day period.

4. In the event that the City believes the meet-and-confer process, consultation, or any such proposed agreement or resolution of a dispute with OPD member/employee bargaining units resulting from the meet-and-confer process, will impair the City's ability to timely implement one or more provisions of this Agreement, and the OPD member/employee bargaining units and the City are unable to agree upon or reach an appropriate resolution, then the City shall so report to the Court and shall seek appropriate declaratory or injunctive relief (including specific performance) on such provision(s). The plaintiffs' counsel also may seek relief from the Court in the event that the plaintiffs' counsel believe the meet-and-confer

process, consultation, or any such proposed agreements or resolution of disputes with OPD member/employee bargaining units will impair the City's ability timely to implement one or more provisions of this Agreement, and the plaintiffs' counsel and the City are unable to agree on an appropriate resolution. Any such motion shall demonstrate the ways in which the City would be so impaired.

5. In ruling on a motion under page 2, lines 12-20, or in regard to any meet and confer issue identified pursuant to Section XV, paragraphs C (1), (2) and (3), the Court shall consider, *inter alia*, whether the City's proposed agreements, or the resolution of disputes with OPD member/employee bargaining units which address provision(s) of this Agreement, are consistent with the objectives underlying such provision(s), and whether the City has satisfied its labor relations obligations under state and local law. On any such motion, if the City has engaged in good faith efforts (including consideration of the manner in which the City carried out any applicable meet-and-confer or consulting obligations) to be able to implement this Agreement in a timely manner, the City:

a. Shall not be in contempt or liable for any other penalties, and

b. May be potentially held in breach for such provision(s) only for the limited [66] purpose of the issuance of declaratory or injunctive remedies (including specific performance), but may not be regarded as in breach for any other purpose.

6. If there is a significant change in a state law that impairs or impedes the City's ability to implement this Agreement, then each of the parties reserves the right to seek declaratory relief or other relief from the Court regarding implementation of the affected provisions of this Agreement in light of the change in state law.

7. The parties agree to defend this Agreement. The parties shall notify each other of any Court or administrative challenge to this Agreement. In the event any provision of this Agreement is challenged in any local or state court, the parties may seek removal of the action to a federal court.

8. In order to meet this provision of the Settlement Agreement, and facilitate the orderly dissemination of new or revised directives, policies and procedures, the following procedures are recommended:

a. Upon final draft approval by the Chief of Police, the unsigned draft shall be forwarded by hand delivery, facsimile, or United States mail to the Independent Monitor, plaintiff's counsel, and the OPOA.

b. If the new or revised directive, policy or procedure does not require the Chief of Police's signature, the Office of Inspector General will forward by either hand delivery, facsimile or United States mail to the Independent Monitor, plaintiff's counsel and the OPOA.

c. The plaintiff's counsel and the OPOA shall have fifteen (15) calendar days from the date of receipt of any draft directive, policy or procedure to make written comments. All written or verbal comments or recommendations should be directed to the Office of Inspector General.

d. Any party may request that a discussion over any draft directive, policy or [67] procedure be placed on the agenda for discussion at the next monthly meeting required by-this-Settlement Agreement. Placing of the item on this agenda shall automatically extend any deadlines associated with the directive, policy or procedure until either 15 calendar days (or the next regular work day if the 15th day falls on a Saturday, Sunday, or holiday) after the next monthly meeting where the item is discussed or, if the item is not resolved at the next monthly meeting, until 15 calendar days (or the next regular work day if the 15th day falls on a Saturday, Sunday, or holiday) after the monthly meeting at which the item is resolved and agreed to by the parties as reflected in the minutes of the monthly meeting in the event of an extension as contemplated by this paragraph, or in the case of any other directive, policy or procedure where the parties desire to extend the deadline, the parties can stipulate to a different deadline date other than as set forth above without Court approval, with said stipulation to be reflected in a letter agreement

and in the minutes of the monthly meeting.

e. In the event the plaintiffs counsel or the OPOA fails to respond to any draft directive, policy or procedure within fifteen (15) calendar days, (or the next regular work day if the 15th day falls on a Saturday, Sunday, or holiday) the parties shall have deemed to have no comments or recommendations.

f. Once the draft is returned to the Department, drafts requiring the Chiefs signature shall be reviewed by the Chief of Police for final approval. The Office of Inspector General and the appropriate Task Manager will review drafts not requiring the Chiefs signature.

END OF DOCUMENT