

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAYMING CHANG, <i>et al.</i> ,)	
Plaintiffs,)	
v.)	Civ. Action No. 02-02010 (EGS)(AK)
UNITED STATES, <i>et al.</i> ,)	
Defendants.)	

**CHANG PLAINTIFFS' RESPONSE TO DECLARATIONS SUBMITTED BY
ATTORNEY GENERAL NICKLES AND OTHERS**

The District has failed to respond substantively and meaningfully to the Courts' Order of July 30, 2009, which demanded a full and complete explanation of the causes of the District's extensive discovery abuses in this case and the actions that the District has taken and plans to take in response.¹ In a series of declarations filed on August 12, 2009, by Attorney General Peter J. Nickles, Office of Attorney General ("OAG") lawyer Thomas L. Koger, Metropolitan Police Department ("MPD") General Counsel Terrence D. Ryan, MPD attorney Ronald B. Harris, and General Counsel to the Mayor Andrew T. Richardson III (the "Declarations") (Dkt. Nos. 490-2 through 490-6), the District does not explain the cause for the District's utter failure to comply with its most basic discovery obligations in the *Chang* and *Barham* cases, or why no

¹ The Court ordered Attorney General Peter J. Nickles to address "(1) the pattern of discovery abuses engaged in and repeatedly acknowledged by the District during the pendency of these cases; (2) the District's plan for both promptly concluding discovery in these cases and assuring the Court, the parties, and the public that all discoverable materials have been turned over to plaintiffs in these actions; and (3) whether any investigations have been conducted into the discovery violations and missing and/or destroyed evidence in these cases and if not, why not." (Dkt. No. 486 at 1-2.)

investigation had been conducted into the missing and apparently destroyed evidence, despite being informed by Plaintiffs years ago of these failures.

What is clear from the Declarations is that Nickles provided no explanation for the gross misconduct in this case. While the Court aptly described the instant actions as “the civil counterpart of the Ted Stevens case,” it may have been too kind in its analogy. (*See* Transcript of July 29, 2009 hearing at 6.) The misconduct of this case extends back almost seven years, involves a still growing library of withheld or missing evidence, and includes layers of questionable declarations that have been submitted to the Court. Indeed, no sooner had Nickles filed a declaration that was supposed to address false or misleading information in this case, than former D.C. City Councilmember Patterson felt compelled to file unilaterally a letter with the Court to inform it of factual inaccuracies contained in the Nickles declaration. This letter was followed by an unsolicited letter from the Chair of the D.C. City Council Committee on Public Safety and the Judiciary (“Judiciary Committee”), Phil Mendelson, which raised additional issues with the factual assertions made in the Nickles declaration. (*See* Mendelson Letter, attached as Ex. 1.)² Days later, Councilmember Mary Cheh, also challenged factual assertions contained in the Attorney General’s declaration. (*See* Jason Cherkis, *Pershing Park Case: Cheh Joins Others In Slamming Nickles’ Statement*, Wash. City Paper (Aug. 24, 2009), attached as Ex. 2.) Notably, these are just the challenges raised after the Court admonition and order. Despite the opportunity afforded by the Court, the District has demonstrated that it is unwilling or incapable of offering a full and credible account of its own actions.

² In response to the Court’s August 20, 2006 Order notifying the parties of its receipt of former Councilmember Patterson’s letter and providing the parties with an opportunity to comment on whether the letter should be posted publicly, the *Chang* Plaintiffs do not object to the posting of former Councilmember Patterson’s letter to the public docket. *Chang* Plaintiffs have not attached the letter as an exhibit here.

While not presenting a “plan” for completing discovery, the District does promise to produce what may be large numbers of even more recently discovered, responsive documents resulting from what appears to have been its first, real, systematic search for responsive documents, albeit almost seven years after the filing of the *Chang* Complaint. (*See* Dkt. No. 1)³ This remarkable admission of the District’s abject failure to preserve, maintain, evaluate, and produce responsive documents for these many years makes clear the necessity that Plaintiffs be permitted to resume discovery, including unfettered re-deposition of previously deposed witnesses, as outlined in Plaintiffs’ discovery proposal. (*See* Dkt. No. 491.) The District does not oppose Plaintiffs’ proposed Order for resumed discovery,⁴ but urges that, instead of granting that Order, the Court should refer the question of resumed discovery to Judge Kay for a Rule 16(a) conference. (*See* Dkt. 493.) This is nothing more than a transparent effort by the District to avoid having to continue to appear before this Court in relation to the discovery failures. Judge Kay would have to be educated on matters about which this Court is already fully informed. Moreover, this Court is scheduled to consider sanctions against the District in the next two months and the suggested resumed discovery is inextricably intertwined with the Court’s ruling on such matters.

As outlined in previous filings, this is not the first time the District has engaged in intolerable discovery abuses in defending civil rights litigation. It is apparent that stern

³ It should be noted that as of this filing, the District has not produced a single new document since the July 29, 2009 hearing, which occurred four weeks ago, even though District lawyers appear to have found responsive documents in the days immediately following the hearing.

⁴ *See* identical proposed Orders at Dkt. 491-2 in *Chang* and Dkt. No. 502-2 in *Barham*. The District’s response to the *Chang* request for proposed discovery reflects an apparent belief that the respective *Chang* and *Barham* proposed discovery differ. (*See* Dkt. No. 493.) That is incorrect. Both sets of Plaintiffs have proposed to the Court identical Orders and the *Chang* and *Barham* Plaintiffs have had no difficulty in the past coordinating their discovery activities while not joining their actions.

admonitions only beget empty promises, and more is required to force the District to change its ways. Thus, the District's flagrant violation of basic civil discovery rules makes clear that the only just way to proceed with this litigation is to impose upon the District both the total cost of the discovery to date – made incomplete and inadequate by the District's own outrageous conduct – as well as the cost of whatever future discovery is required to prepare these cases for trial.⁵ Only the imposition of the costs and fees of the prior discovery (as well as the new discovery) may be sufficient to convince the District that continued violation of federal rules relating to discovery is not an appropriate litigation strategy.

Instead of addressing these concerns head-on, the District once again singles one individual as a type of “designated defendant” or rogue operator. In this case, it is attorney Tom Koger who is given the total blame for the systemic failures of the District. While Koger shares in the responsibility for his actions in these cases, it is incredible that the District would suggest that Koger alone was the only person responsible for the District's, and particularly the MPD's, failure to preserve, maintain and produce responsive documents. It is, as noted, a variation of the District's overall strategy to blame one individual for wide systematic abuse in these arrests, while nimbly shifting responsibility away from others who share in the culpability.⁶ It cannot be, as Nickles claims, that the District's former lead attorney in these cases caused all the faults of the District's litigation procedures and document management procedures, particularly in light of

⁵ *Chang* Plaintiffs supplied an extensive appendix in the last filing that detailed the scope of new evidence and how it touches upon all facets of the case. (See Dkt. No. 491-3.)

⁶ As the Court will recall, the District early on identified Assistant Chief Peter Newsham as the sole wrongdoer in relation to the September 27, 2002 arrests. According to the District, he alone ordered the illegal arrests and his superiors, peers and subordinates simply relied on his decision and followed orders. Of course, as the *Chang* plaintiffs have alleged, as the City Council has found, and as it has become obvious after discovery in this case, many District officials and officers were at fault on September 27, 2002, including, among others, Chief Ramsey, Assistant Chief Fitzgerald, Assistant Chief Jordan, and various line officers.

Efros' involvement in the case and the Attorney General's claim that he has not yet conducted a thorough investigation.⁷ Moreover, in this litigation, Koger has routinely referenced his need to consult with superiors. (*See* Various communications, collectively attached as Ex. 3.) *Chang* Plaintiffs have asked Efros to explain her role in the litigation, but she has failed to respond. (*See* Letter to Efros dated August 18, 2009, attached as Ex. 4.)

1. The Declarations Fail to Address the Missing or Tampered Evidence.

Other than their repeated, but ultimately empty assurances that they take the Court's concerns seriously, the Declarations fail to address in a meaningful way the "a pattern of discovery abuses engaged in and repeatedly acknowledged by the District." Despite Nickles' claims that "immediately after the status hearing on July 29, 2009," he "directed that an investigation be done as to why documents were belatedly produced to plaintiffs . . . and [why] evidence was missing and/or destroyed" (Nickles Decl. ¶ 4), the District does not explain how the JOCC Running Resume (and the various paper and electronic copies of it) went missing. The credibility of the declarants is severely undermined by their failure even to address, much less explain how radio run audiotapes were altered – with critical portions apparently erased – or disappeared. Instead, the District suggests that these are simply issues it plans to look into at some unidentified future point in time.⁸ They also do not explain why these allegations are being

⁷ Nickles also blames the City Council for its alleged failure to appropriate funds to support the OAG's document management system. (*See* Nickles Decl. ¶¶ 16-17.) Councilmember Mendelson disputes that claim. (*See* Ex. 1.)

⁸ For example, in regards to the tampered and missing audio tapes, Nickles stated, "I have not yet taken an independent investigation of this issue, nor have I yet untangled the again conflicting reports as to whether and why gaps may exist in these recordings." (Nickles Decl ¶ 21.) Earlier, Nickles stated that the "nonexistence of [the JOCC Running resume and the 12 copies of it that were made] is not clear." (*Id.* ¶ 19.) He also stated that he has "not yet had the opportunity to corroborate what is stated in the [other] declarations" submitted by the District. (*Id.* ¶ 18.)

treated as new disclosures by Nickles and Efros despite their past involvement in the case on a supervisory level.

a. Audiotapes Containing Radio Runs

One of the most blatant acts of spoliation involves the District's production of what can only be altered copies of radio run audiotapes, containing missing portions corresponding to critical events on the day of arrests. (*See* Dkt. No. 418 at 14-19.) Yet, the District continues to fail to discuss how it came to submit to the Court the patently false declaration of Denise Alexander, why it continued to defend that declaration after it became clear that it contained falsehoods, and how it reached the conclusion never to withdraw Alexander's declaration from the record.⁹ Koger, who was lead attorney on the case at the time the affidavit was filed with the Court, sidesteps the issues related to the Alexander Declaration and instead stated: "I am advised that the conflicting reports of whether and why gaps may exist in these recordings will be a focus of Nickles' investigation." (Koger Decl ¶ 10.) In fact, the District fails even to acknowledge that gaps in the radio run audiotapes exist – information that could be confirmed with only a few hours of effort.¹⁰

Nickles also offers no timeline for submitting his conclusions on these issues to the parties or the Court.

⁹ Instead, the District simply states that it "takes very seriously plaintiffs' assertions that this office has attempted to persuade this Court with a perjured declaration from an MPD employee." (Nickles Decl ¶ 21.) *Chang* Plaintiffs have also requested the District explain what disciplinary action that District has taken against Alexander. (*See* August 18, 2009 Letter, attached as Ex. 4.) The District has not responded to this request.

¹⁰ This avoidance of dealing with the Alexander declaration appears to be endemic to the District's approach to the litigation. In response to the *Chang* Plaintiffs' Motion for Sanctions, in which *Chang* Plaintiffs spent three pages discussing the gaps on the tapes and the problems with the Alexander Declaration (Dkt. No. 418 at 15-18), the District failed even to address the issue or discuss the declaration. (*See* Dkt. No. 426.)

Given the District's recalcitrance in admitting even the existence of apparent alteration of the audiotapes and the complete absence in the Declarations of any discussion of how the gaps were created or tapes were not produced, it is clear that only an independent inquiry – not aimed just at glossing over the OAG's shortcomings or pinning all blame for others' failings on Koger – will be able to resolve this issue.

b. JOCC Running Resume

Chang Plaintiffs agree with Nickles that the “nonexistence” of the JOCC Running Resume “appears to be inexcusable.” (Nickles Decl. ¶ 19.) Nonetheless, he then goes on to make numerous excuses. First, he suggests that “the current OAG protocol for issuance of litigation ‘hold letters’ is much more stringent than it was through late 2003, when the Running resume could not be located for production to the D.C. Council or to the Civil Litigation Division.” (*Id.*)

Second, Nickles appears to excuse the Office of the General Council's inability to produce a copy of the JOCC Running Resume by blaming failed litigation taken against Mary Cheh, then-special counsel to the Judiciary Committee of the City Council. Nickles suggests that because the Committee's Report on Investigation of Metropolitan Police Department's Policy and Practice in Handling Demonstrations in the District of Columbia stated that it relied upon “the Department's running resume,” the City Council must have somehow obtained the JOCC Running Resume and relied upon that specific document. (*See* Nickles Decl. ¶ 20.)¹¹ This ignores the fact that this reference may refer to other “running resumes” produced by the MPD or the Judiciary Committee may have been misled as to what was provided to it. Councilmember

¹¹ In her letter, Councilmember Patterson stated that, in response to its subpoena, the Judiciary Committee received “what was described as the SOCC/JOCC running resume.” Former Councilmember Patterson did not appear to examine whether the document was actually the JOCC Running Resume for September 27, 2002.

Cheh, in a press interview, “took issue with Nickles’ claims that the council had received the running resume—a major piece of evidence in the case that has gone missing.” According to the article, Cheh suggested that “[t]he council did not get a copy of the running resume despite requesting one from the D.C. Police Department.” (See Cherkis, Pershing Park Case: Cheh Joins Others In Slamming Nickles’ Statement, attached as Ex. 2.)

In an effort to close all remaining holes, *Chang* counsel reviewed all publicly available files held by the Office of the Secretary to the Council and the Committee on Public Safety and the Judiciary¹² and confirmed that the JOCC Running Resume from September 27, 2002 was not among those documents. (See Meitl Declaration ¶¶ 8, 12, attached as Ex. 5.) The publicly available set of documents did contain a number of running resumes from April 2000. (See *id.* ¶ 14.) Moreover, the Committee on Public Safety and the Judiciary staff told *Chang* counsel that several individuals, over the past couple of years, had examined the same set of documents in a search for the JOCC Running Resume and had been unsuccessful – suggesting that the OAG’s office was likely fully aware that the City Council did not have a copy of the document. (See *id.* ¶ 9.)¹³ The direct contradiction of the latest series of declarations from the District should only serve to strengthen the conclusion that the Attorney General’s Office cannot be relied upon to get to the bottom of this issue.

Beyond the excuses provided by Nickles, and instead of explaining the disappearance of twelve printed copies and two electronic copies of the JOCC Running Resume, Nickles and

¹² In her letter, former Councilmember Patterson stated that “by the conclusion of the Committee’s investigation – and the publication of the Committee report on March 24, 2004 – the thousands of pages of documents gathered by the investigation were made public [with limited exceptions]. . . . To the best of my knowledge, all of the Committee’s investigation files remain available today for public review”

¹³ Councilmember Mendelson, in his letter, stated that Koger had “an intern or paralegal from OAG come to review the [publicly available boxes] in the Council Secretary’s office.” (See Ex. 1.)

Koger resort to shooting the messenger. For the first time, they question the veracity of the testimony of one the MPD's own officers – Sergeant Douglas Jones.¹⁴ In Plaintiffs' deposition of Sergeant Jones, he testified that "at least a dozen" hard copies of the September 27, 2002 Running Resume were distributed to MPD command staff¹⁵ and "likely" also to the MPD's Office of General Counsel. (*See* Jones Dep. Tr. at 21:21-25:6; 44:14 – 46:10; attached as Ex. 6.) The underlying computer file was stored redundantly, with an identical copy on each of two separate computer servers. (*See id.* at 41:15-42:01) Jones testified that the running resume computer data file was, at that time, not only still in existence but was "very easy" for him to retrieve, which he did. (*Id.* at 30:6-31:6.) Jones testified, that at some later date, Synchronized (formally, "Joint") Operations Command Center Director Neil Trugman approached Jones with an "official," litigation-related request from the MPD Office of General Counsel for the running resume. (*Id.* at 28:22-30:2.) Jones recalled that Trugman conveyed that the MPD-GC request was made in connection with litigation, specifically about the Pershing Park mass arrest. (*Id.* at 29:13-22.).

Jones testified that he satisfied that request by generating a hard copy of the running resume from the electronic file. (*Id.* at 28:17-30:13.) Additionally, he wrote on a piece of paper the precise location (or "path") on the MPD computer server for the running resume data file. Jones testified he handed the hard copy of the running resume and the file path location to Trugman the next morning. (*See id.* at 25:17-26:02.)

¹⁴ In the District's Opposition to the Motion for Sanctions (Dkt. No. 426), the District did not address Sergeant Jones' testimony even once, even though Plaintiffs had spent considerable time in their motions detailing Jones' testimony.

¹⁵ Sergeant Jones stated that the term "command staff . . . probably" encompassed Assistant Chiefs of Police, the Chief of Police, inspectors, and the MPD general counsel. (Jones Dep. Tr. at 45:15-19, attached as Ex. 6.)

Jones' credibility in this area has been established elsewhere. He testified in the *Bolger* case that he had sent the running resume involving the events covered in that case not once, but twice, to the OAG's office. *Bolger v. District of Columbia*, 248 F.R.D. 339, 345 (D.D.C. 2008) Nonetheless, in *Bolger*, the District refused and failed to produce the running resume to plaintiffs, who also had been subject to a mass false arrest. *See generally id.* District counsel (some of the same attorneys who have represented the District in *Chang* and *Barham*), claimed there that the running resume never existed. *Id.* at 341. When deposed, however, Jones testified he had located the email he had sent to the OAG's office and the running resume in *Bolger* was magically found.¹⁶ *Id.* at 342.

Instead of accepting Jones' detailed testimony as true or conducting an independent law enforcement investigation of possible obstruction of justice, the District obtained the declarations of three MPD officers or employees – Trugman, Gaffigan, and Tilghman – to refute Jones' sworn testimony. In essence, the District is now claiming that Jones' testimony is itself false. Yet, these three individuals do not state categorically that the JOCC Running Resume did not exist or that copies were not distributed. Instead, they simply deny recollection of having requested or seen copies of the JOCC Running Resume. (*See* Trugman Decl ¶ 4-5; Gaffigan Decl ¶ 3-4; Tilghman Decl ¶ 3-4, Dkt. Nos. 373-2 in *Barham*.) Moreover, Jones testified that the three individuals who submitted declarations were three of the MPD officers or employees who received a copy or were in control of copies of the JOCC Running Resume – which has now disappeared. (Jones Dep. Tr. at 25:07-26:17; 44:08-45:10; 63:02-09, attached as Ex. 6.)

¹⁶ *Chang* Plaintiffs have also requested the District explain, by August 21, 2009, what disciplinary action that District has taken against Sergeant Jones, given their apparent belief that he testified falsely. (*See* August 18, 2009 Letter, attached as Ex. 4.) The District has not responded to this request.

Whatever the cause, all twelve paper copies and two electronic copies of the JOCC Running Resume apparently are gone. Only an independent investigation will determine whether that occurred through negligence or advertence. For the purposes of the *Chang* case, however, only factual findings – assuming the missing JOCC Running Resume would have established the worst case against the District and individual Defendants – would be the appropriate and just sanction against the District.

c. Videotapes

The Declarations continue the District's practice of evasion when it comes to identifying the relevant videotapes and which were created, who created them, and when they were produced by the District. *Chang* Plaintiffs have routinely asked the District to provide a list of all videotapes, or other video recordings, that are, or have been, in its possession, that recorded the events of September 27, 2002. (*See, e.g.*, Email from P.J. Meitl to Chad Copeland, dated July 31, 2009, attached as Ex. 7.) The District has failed to respond to these requests.¹⁷

If the District really was interested in resolving this issue, it would take the simple steps of identifying, in an unambiguous manner, the tapes it produced in discovery, which it has refused to do, even as recently as its July 22, 2009, production. *Chang* Plaintiffs have requested clarification on such issues but once again, the District has failed to respond, despite Koger's claim that the footage most recently produced is duplicative of footage that had been previously produced. (Koger Decl. ¶ 12.)

¹⁷ Koger asserts that copies of the videotapes were delivered at some time in the past to *Abbate* plaintiffs' counsel at Covington & Burling. *See inter alia* Dkt. No. 493. That may or may not be correct; *Chang* Plaintiffs do not know. Regardless, it is no excuse for the refusal of the District to provide a current, complete list of all videotapes relevant to the September 27, 2002 arrests so *Chang* Plaintiffs can determine what they have and do not have from the District.

All of the relevant videotapes must be produced by the District before the recommencement of discovery with clear and concise evidence of what has or has not been produced, and when. *Chang* Plaintiffs should be permitted to perform additional discovery (including recalling previous witnesses) to permit exploration with them of the tapes, among other things.

d. Continued Late Discovery Production

Since the July 29, 2009 hearing, the District – apparently for the first time – has undertaken what the District claims is a systematic search of OAG and MPD files, and has discovered what appears to be a considerable cache of yet-unproduced documents. Apparently, these documents are being prepared for production to the Plaintiffs. (*See* Dkt. No. 493.)¹⁸ Yet, some four weeks after the July 29, 2009 hearing, not a single additional document has yet been produced to the Plaintiffs.

Additionally, the District's productions in the past have raised numerous questions about missing pages and bates stamp numbers, authorship of handwriting, references to other, unproduced documents and other issues. Plaintiffs have requested information regarding such productions. (*See, e.g.*, Letter dated June 19, 2009; Letter dated August 14, 2009, collectively attached as Ex. 8.) To date, the District has failed to respond to these requests.

Once all of the remaining documents are produced, and additional information provided, there can be no question that discovery will have to be resumed and largely redone as previously proposed in response to the Court's request. (Dkt. No. 491.) The cost of such discovery, and the cost of the discovery to date – much of which has to be redone because of the District's failure to

¹⁸ In their August 18, 2009 letter, *Chang* Plaintiffs requested that Efros more fully explain the District efforts, as referenced in the Declarations, to ensure that District agencies had performed adequate searches for documents. (*See* Ex. 4.) *Chang* Plaintiffs requested a response by August 21, 2009. (*See id.*) *Chang* Plaintiffs have not received a response from Efros.

produce all relevant materials at the time many of the witnesses were deposed originally – must be borne by the District.

2. The District Has Not Investigated Its Discovery Violations and Does Not Explain Why Not.

Despite the Court’s express Order, the District does not state whether it has conducted an investigation of its “discovery violations and missing and/or destroyed evidence” but it is clear it has not, despite being aware of the discovery failures identified by plaintiffs for over a year. The District has no good explanation as to why not, as asked by the Court. Instead, Nickles appears to claim he has known of this issue only since the Court’s Order four weeks ago and suggests that he will conduct such an investigation, or perhaps it will be conducted by others possibly associated with Nickles, at some indeterminate time in the future.

That is insufficient.

Many of the specific concerns of the *Chang* Plaintiffs can and should be resolved by resuming discovery, requiring the District to pay all past and future discovery costs, and imposing other forms of sanctions. In this regard, it would be valuable to learn what really happened to the JOCC Running Resume and the audiotapes, in part because that knowledge would instruct the severity of sanctions to be ordered against the District. If the Court grants Plaintiffs’ proposed discovery order, at some point in the relatively near future, *Chang* Plaintiffs hope to complete discovery and to address the substance of their complaint, unless there is a meaningful settlement.

The greater issue raised by the Court involves the District’s systematic disregard for its civil litigation responsibilities in this case and, apparently, in many others. In the greater interest of justice, that issue must and should be addressed. It will require a truly independent

investigator – probably with subpoena powers – to determine the causes of these concerns and how best to remedy them. The Attorney General has demonstrated he cannot meaningfully investigate himself, nor can the Court rely on someone, no matter how prominent, who has otherwise existing ties to the OAG or the Attorney General. Such an investigation must be truly independent.

a. The District Has Known of these Discovery Failures for Several Years and Has Failed to Investigate or Correct the Problem.

The Court ordered Nickles to address “whether any investigations have been conducted into the discovery violations and missing and/or destroyed evidence in these cases and if not, why not.” (Dkt. No. 486.) The Declarations make clear that it was only after the July 29, 2009 Court hearing that Nickles began an investigation “both as to why documents belatedly were produced to plaintiffs in these actions as well as with respect to plaintiffs’ allegations that evidence was missing and/or destroyed.” (Nickles Decl. ¶ 4.) Furthermore, Nickles states that the actions taken as a response to the discovery failures of his office are “preliminary” “[b]ecause I have had only two weeks since the status conference to undertake the investigation . . .” (*Id.* ¶ 5)

This is not a new problem; the District has known about it for years. In October 2007, the *Barham* Plaintiffs filed a motion to compel the District to produce running resumes and recorded police channel communications. (*See* Dkt. No. 338 in *Barham*.) Apparently, Efros had already assumed her supervisory position over this case by this date. The Court granted the *Barham* motion on October 30, 2007. (*See* Dkt. No. 351 in *Barham*.) On November 16, 2007, the District filed the declarations of Koger and others, which concluded that the JOCC Running

Resumes had disappeared. (See Dkt. No. 373 in *Barham*.)¹⁹ From that point forward, at least, the District was on firm notice that its document retrieval, management and production processes had failed, either through negligence or intentional acts, and some steps should be taken – at least in the *Chang* and *Barham* cases – to ensure proper management of litigation documents. Nonetheless, as recently as the day before the July 29, 2009 hearing, the District was producing documents responsive to the Plaintiffs’ requests and the Declarations here indicate more documents will be produced. No investigation was commenced by the District as to the document management practices in these cases or any other cases where similar problems were likely to occur.²⁰ During this time period, Efros apparently supervised these two cases for the OAG.²¹

At a January 9, 2008 status conference (more than eighteen months before the July 29, 2009 hearing), *Chang* Plaintiffs notified the Court and the District of its intent to file a “fairly robust motion for sanctions” that was “based upon . . . an astonishing array of evidence that was produced by the District literally at the end of discovery.” (Transcript of January 9, 2008 hearing

¹⁹ In addition, on November 9, 2007, the *Barham* Plaintiffs filed a consent motion to compel, from the District, the missing field arrest forms, which the Court granted days later. (See Dkt. No. 363 in *Barham*; November 13, 2007 Minute Order.)

²⁰ Although the Court did not ask the District, in its Declarations, to comment on whether investigations had been initiated in other civil rights cases involving the same District attorneys, such a discussion is clearly applicable to the pending issues. As Koger explained to the Court, he is lead counsel on a number of protest related matters. Moreover, Judge Bates, in the *Bolger v. District of Columbia* litigation, has already found that the District engaged in a “clear case of sanctionable discovery misconduct” and ordered the District to pay significant monetary sanctions regarding factual circumstances very similar to the instant case. 248 F.R.D. 339, 345 (D.D.C. 2008). The District has not initiated any investigation in regards to that or other cases, and certainly failed to explain, in its Declarations, why such an investigation had not been commenced.

²¹ In its August 18, 2009 letter, *Chang* Plaintiffs requested information as to Efros’ assumption of supervisory responsibilities in the *Chang* and *Barham* cases. The letter requested a response by last August 21, 2009, in order to allow the parties to better inform the Court of relevant facts. Efros has not responded to that letter. (See Ex. 4.)

at 9.)²² The Court then set a briefing schedule for such a motion, requiring Plaintiffs to file their pleading by January 31, 2009. Although the case was stayed prior to the filing of the motions, the District was clearly on notice regarding Plaintiffs' claims regarding the discovery abuses. Apparently, Efros was already serving as Koger's supervisor at the time and Nickles had already assumed the role of interim Attorney General. Yet, no investigation ensued.

On January 16, 2009 (more than six months before the July 29, 2009 hearing), the Plaintiffs filed their separate Motions for Sanctions against the District, which specifically and thoroughly described the myriad of discovery abuses perpetrated by the District. (Dkt. No. 418 in *Chang*; 439 in *Barham*.) The District responded on February 13, 2009, admitting there had been errors in discovery and admitting that sanctions would be appropriate. (Dkt. No. 424 in *Chang*; 450 in *Barham*.) (By this point, Nickles had been nominated and confirmed as the Attorney General for the District.) Nowhere in its response does the District describe any effort by the OAG to investigate its discovery abuses or determine how and why evidence went missing, despite the District's bold admission to the Court of its errors. (*See* Dkt. No. 424 in *Chang*.)

²² Co-lead Counsel for the *Chang* Plaintiffs, Professor Jonathan Turley, also stated that

this is evidence that we've requested repeatedly. There still is evidence that we believe still exists that has not been turned over, but what has been turned over was enormously important and was withheld to the final day. . . . In my career I have never had this amount of discovery that was withheld until the very last day, including un redacted copies of material that we have been fighting over for literally months that were produced in un redacted form just shortly before the end of discovery, after all the depositions had been completed. So we will be filing that motion, and in that motion we will be suggesting not only that this conduct is sanctionable, and I truly -- I don't file sanction motions nor do my colleagues unless we believe that this is way over the line So in our view we still haven't gotten, A, some discovery we've identified to the District that we believe is being withheld, including identified things like videotapes that were previously identified and not turned over to us . . .

Transcript of January 9, 2008 hearing at 10-12.

In the seven months between the filing of the Motion for Sanctions and the July 29, 2009 hearing, the District took no steps to assure the Plaintiffs or the Court that all relevant materials had been produced or to determine why evidence was missing. Only in the days immediately before the July 29, 2009 hearing did counsel for the District look for other responsive documents. (*See* Dkt. Nos. 483, 485.)

Nickles makes bold statements that the OAG and he personally take the Court's concerns "very seriously" and that "full discovery" is "an essential part of our system of civil justice and anything less compromises that system." (Nickles Decl. ¶ 3.) But it is clear the OAG knew of these issues, admitted them in Court months ago, and still took no actions. It is only the Court's Orders that drove them to commit to take actions to address the inadequate process of handling civil litigation discovery.²³

In fact, the District's failure to correct or remedy persistent discovery abuse extends beyond this case. In prior years, the District has been sanctioned and criticized by courts – only to claim a lack of resources or aberrant conduct. Indeed, the excuses made by counsel in this case appear a virtual mantra for the OAG (and its former incarnation as the Office of Corporation Counsel). For example in *Webb v. D.C.*, 189 F.R.D. 180 (D.D.C. 1999), Judge Lamberth faced virtually the identical "excuses that the [Corporation Counsel's] office is understaffed and without sufficient resources to meet court-imposed deadlines have continued unabated. . ." *Id.* at 192. The Court declared:

Given the long history of this problem, the Court can no longer view the Corporation Counsel's lack of resources as merely an unfortunate circumstance, but rather as the consequence of a knowing and willful decision by the District of Columbia not to provide its legal counsel with adequate resources. At some point,

²³ Nickles also claims the failure to have a proper document management system was caused by the City Council's rejection of a budget request for such a system. (Nickles Decl. ¶ 16.) Council Member Mendelson disputes such assertions. (*See* Ex. 1.)

this ongoing refusal to fund its own legal defense ceases to weigh in favor of leniency and begins to weigh heavily in support of severe and serious sanctions against the District.”

Id. at 192-93. In disregard of such past admonitions, the District appears entirely undeterred and has even filed additional contested factual assertions. Indeed, the OAG’s defense of its own conduct mirrors its implausible defense in this case. Despite that fact that the District previously engaged in the same “trap and arrest” techniques, it has maintained the arrest of hundreds of innocent people without probable cause was the work of such rogue officers as Commander Newsham. Here, it is arguing that, despite years of objections from the Plaintiffs and countless communications over the withholding of documents (and dilatory practice), people like Nickles were unaware of the violations and suggests that any misconduct was the result of a rogue lawyer.

b. The Proposed Investigation by the Attorney General of the Attorney General Lacks Independence and is Insufficient.

The District clearly has neither the incentive nor the interest to conduct such an investigation on its own, and it has not done so to date. Instead, Attorney General Nickles has insisted, like Captain Renault in the film *Casablanca*, that he is “shocked, shocked” that there are violations occurring in this case.²⁴ Nickles provides no specifics on how the matter will be investigated or why the OAG should control an investigation – or select the reviewer – of its own alleged misconduct. The District fails even to identify which individuals will be responsible for performing an investigation of the discovery abuses in this case. While Nickles declares he “directed that an investigation be done . . .” (*id.* ¶ 4), he does not state who will be performing

²⁴ CASABLANCA (Warner Bros. 1942)

the investigation. It clearly cannot be Efros, Kaplan, or Koger.²⁵ Nickles has been responsible for this litigation – with his name appearing on all of the filings – since he became the Attorney General in January 2008. A significant number of the discovery abuses occurred while he was serving as Attorney General, and he has been personally active in these cases – stating that “the District filed a proposed judgment against itself on [the common law false arrest] claims in January 2008, with my authorization.” (Nickles Decl. ¶ 26.) He would hardly be considered an impartial or independent investigator of his own office’s actions.

Similarly, it does not appear to be former Judge Sporkin, whom Nickles states has the role only “to assist in improving the management of discovery in our massive class action cases.” (Nickles Decl ¶ 8.) Although the Declarations are unclear on this point, Sporkin indicated in the press that he has been brought on to assist Attorney General Nickles in planning for future discovery responses, as opposed to an investigation of past abuses. The Washington City Paper reported that “Sporkin suggests that his role may not be directly dealing with the Pershing Park case—but figuring out how to fix the OAG. Sporkin says his job would figure out: ‘How to make the city responsive and a great place, and how to make the law department an outstanding law department.’” (Jason Cherkis, The Pershing Park Case: Judge Sporkin Starting To Get Involved, Praises AG Nickles, Wash. City Paper (Aug. 11, 2009), attached as Ex. 9.) It is not even clear whether Judge Sporkin will be given access to confidential files and mediation records, or whether he is or has been a consultant to the office in regards to other matters.

²⁵ The Declarations do not suggest that any of these individuals would be responsible for the investigation. Efros is now lead counsel on the cases and was the supervising attorney during the vast majority of discovery abuses. Kaplan has been tasked with advising Nickles on ways to make sure “that the problems that have arisen in this case do not recur.” (Nickles Decl. ¶ 7.) Koger has been lead counsel for the past several years and is at the center of the discovery abuses.

Nickles did not consult with the Plaintiffs or the Court on who would perform a review of the OAG's actions – instead unilaterally appointing “an advisor” in an ill-defined role of review.

Obviously, a truly independent investigator to resolve these issues must be subject to normal vetting to ensure the person's true independence. *Chang* Plaintiffs sought information from the District as to Sporkin's previous relationships with the District government and with Nickles – as would be fully appropriate if he were to be the one selected to conduct such an inquiry – in its August 18, 2009 letter to Efros, and requested a response by August 21, 2009, in order to allow the parties to better inform the Court of relevant facts. By the time of this filing, Efros has not responded to that letter. (*See* Ex. 4.)

The only way to have a reliable and independent investigation of the District's gross discovery failures is for the court to appoint an independent investigator, preferably with subpoena powers, to determine why critical evidence from the District has gone missing or appears to have been tampered with.

3. The District Has Made No Sincere Effort to Settle This Case.

At the July 29, 2009 hearing, the Court urged the District to try to settle these cases. *Chang* Plaintiffs have made clear since filing this complaint seven years ago of their willingness to resolve this matter on appropriate, reasonable grounds. In the four weeks since the hearing, however, Plaintiffs have not received a phone call, an email or a letter indicating a desire by the District to settle the *Chang* case or even to talk or to meet to discuss the possibility of settlement. Thus, the District's efforts to convince the Court that it recognizes “the importance of settling these cases” and “has expended significant resources to try and settle these cases on a reasonable

basis” (Nickles Decl. ¶¶ 26-28; Koger Decl. ¶ 22-27) are empty rhetoric.²⁶ Therefore, Nickles’ public statement that “he has tried to reach a settlement with the protesters,” is an exaggeration. (See Del Quentin Wilber, U.S. Judge Blasts D.C.'s Handling of Protest Cases, Wash. Post, July 30, 2009, at B1, attached as Ex. 10.)

The District has relied primarily on coercive and inflexible Rule 68 offers as a means of imposing a resolution of this case. Over the repeated objections from the *Chang* Plaintiffs, the District has continued to threaten these current and former students with crippling financial penalties – even if they prevail. *Chang* Plaintiffs have sought to deter future misconduct and to establish that the District committed knowing violations of constitutional rights of hundreds of innocent citizens in its use of “trap and arrest” tactics. The District’s Rule 68 offerings suggest that, even if the Plaintiffs prevailed in showing these abuses, the *Chang* Plaintiffs, nevertheless could be forced to pay the District tens or hundreds of thousands of dollars. As made clear to the District, such offers cut off any discussion and provide no room for negotiation between the parties and are an attempt to bully Plaintiffs into premature settlements by threatening the possibility of punitive damages at the end of litigation. The District, however, continues to make these threats.

The record in this case – and conduct of the District in negotiations – make clear that, contrary to their bold statements in the Declarations, the District is not really interested in trying to reach a reasonable and fair settlement. The last settlement offer from the District came on September 18, 2008. Despite Plaintiffs’ offers from the beginning of this litigation to try to resolve this controversy through settlement, the District has never offered to sit down with *Chang* Plaintiffs counsel and attempt to negotiate a reasonable settlement. Efforts at mediation

²⁶ The District was not asked by the Court to discuss settlement negotiations in its declarations but did so nonetheless. As a result, *Chang* Plaintiffs are compelled to respond.

have been fruitless and have served as nothing more than an opportunity to buy delay.²⁷ For this reason, *Chang* Plaintiffs would oppose any future efforts at mediation that delayed in any way commencement and completion of resumed discovery in this case.

Furthermore, any efforts by *Chang* Plaintiffs to settle this case have been stymied by the District's insistence that the District's settlement with the *Abbate* Plaintiffs is the proper settlement offer that the District should make in relation to the September 27, 2002 arrests. (Nickles Decl. ¶§ 27-28; Koger Decl ¶¶ 22-23, 27.) These settlement terms – negotiated by Nickles' former firm (but while Nickles was a partner), Covington & Burling – were rejected by the remaining *Chang* Plaintiffs because they were deemed to be inadequate in deterring future misconduct.²⁸

The District appears to be particularly concerned about having to pay *Chang* Plaintiffs' attorneys fees, which have mounted almost exclusively because of the District's litigation tactics, failure to produce evidence, and loss of critical documents. In any case, the District will be required to pay reasonable attorneys' fees, regardless of the cause, either in sanctions, as a result of a finding of liability under Section 1983 (for which liability the District has declined to admit responsibility, although admitting to liability under common law false arrest principles), or in settlement. This issue is simply made harder, more burdensome and ultimately more costly to the taxpayers of the District of Columbia by the OAG's practice of insisting upon drawn out separate litigation over Plaintiffs attorney's fees.²⁹

²⁷ Pursuant to the mediation rules, *Chang* Plaintiffs will not comment on negotiations and offers made in the context of mediation.

²⁸ In their August 18, 2009 letter *Chang* Plaintiffs sought, from Efos, information as to Nickles' involvement in the *Abbate* case when he was a partner at Covington & Burling. *Chang* Plaintiffs requested a response by August 21, 2009. Efos has not responded to that letter. (See Ex. 4.)

²⁹ It should be noted that counsel for the *Chang* Plaintiffs is the only private law firm or entity in this litigation who has not yet had attorney's fees paid or reimbursed by the District. This is in

4. Severe Sanctions Are Needed.

Once the Declarations are viewed in context and with an eye to detail, it is apparent that the District has no qualms about defying the Court's Orders and violating normal civil discovery requirement, evidenced by the fact that:

- the Declarations do not directly respond to the Court's questions;
- the District clearly never considered initiating an investigation of the discovery abuses until spurred to do so by the Court;
- there is still no independent investigation of the District's alleged misconduct; and
- the District has not altered its settlement approach largely since 2005, despite the fact that Plaintiffs have uncovered shocking and considerable loss of central evidence.

Without appropriate and tough sanctions, the District will have no impetus to change its behavior going forward. The Court has largely already determined that the District shall be responsible for all discovery costs after July 29, 2009. (*See* Tr. of July 29, 2009 hearing at 43.) Given the District's failure to ever previously investigate the discovery abuses and its failure to respond meaningfully in the submission of their Declarations, *Chang* Plaintiffs believe that significantly more severe sanctions will be necessary, including forcing the District to bear the full cost of discovery in this case. The details regarding the *Chang* Plaintiffs proposed sanctions will be laid out with greater specificity in their renewed motion for sanctions, to be filed on September 15, 2009.

contrast to the more than \$1.2 million that has been paid out to the attorneys for Chief Ramsey and Assistant Chief Newsham.

Respectfully submitted,

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Dated: August 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2009, I caused copies of the foregoing *Chang* Plaintiffs' Response to Declarations Submitted by Attorney General Nickles and Others to be served electronically upon the following:

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