

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RAYMING CHANG et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Civil Action No. 1:02cv2010 (EGS)
)	
UNITED STATES OF AMERICA)	
et al.,)	
)	
Defendants.)	
)	

**REPLY TO DISTRICT OF COLUMBIA OPPOSITION TO
CHANG PLAINTIFFS’ MOTION FOR SANCTIONS**

Faced with undeniable evidence of discovery abuse in the *Chang* Plaintiff’s Motion for Sanctions (Dkt. No. 418, hereinafter *Chang* Motion for Sanctions.), the District of Columbia (“District”), in its Opposition (Dkt. No. 426, hereinafter District Opp. or Opposition), attempts to divert the Court’s attention from its demonstrated misconduct to claim a type of victimless offense. The District does not deny or explain its “embarrassing” discovery abuses.¹ Instead, the District attempts to shift the liability for its failings by claiming that, because the missing

¹ In their Opposition, the District discusses and concedes its failures. District Opp. at 1 (“plaintiffs are entitled to sanctions”); at 33 (“sanctions are appropriate . . . [and] include both evidentiary and monetary sanctions”); at 38 (“District [] concurs that some monetary sanctions are appropriate”); at 35 (“District acknowledges its[s] noncompliance with its discovery obligations and recognizes the need for appropriate sanctions”); at 10 (“District’s production in this case has been flawed”); at 11 (“undersigned counsel recognized his failings with regard to non-production”); at 35 (“Despite all the faults in the District’s discovery efforts . . .”); at 36 (“District acknowledges that plaintiffs may have been prejudiced by the destruction or non-production of certain evidence”); at 40 (“The District concurs that plaintiffs should recover reasonable attorney fees for the additional work made reasonably necessary by the District’s discovery failings.”); at 41 (“[t]he District believes that this Court will order certain evidentiary sanctions to protect plaintiffs in the disposition of these cases from prejudice due to the District’s discovery abuses.”).

documents and material no longer exist, it is the *Chang* Plaintiffs who must prove prejudice beyond the obvious loss or long denial of evidence. The District urges the Court to reward this pattern of misconduct by making every possible assumption in the District's favor as to the possible content and importance of the materials the District failed to produce. Further, the District actually blames the Plaintiffs for its offenses. As a result, the District contends that no real sanctions are justified. To accept such a philosophy would create a perverse incentive for parties to adopt the same "delete, deny and blame" approach to legitimate discovery.

The District even proposes acceptance of a new rule that effectively would gut discovery obligations in future cases. The District argues that, despite the outrageousness of its conduct, it should be immune from monetary sanctions because it previously submitted Rule 68 offers to the *Chang* Plaintiffs. Under this strategy, a Rule 68 offer of judgment becomes self-proscribed immunity from monetary sanctions, regardless of the level of discovery abuse. The audacity of such a claim is stunning and chilling, particularly when it comes from a governmental body. If allowed, the District's argument would destroy any hope for orderly litigation under the Federal Rules of Civil Procedure by allowing premeditated violators of the Rules simply to make a Rule 68 Offer of Judgment to insure against being held accountable for discovery infractions.

Even now, despite the District's feigned remorse for past actions, it continues its pattern of obstruction and dilatory arguments. If possible, the District has become even less cooperative in discovery matters by failing to produce additional, relevant audio tapes, documents, and videotapes, even in connection with a Rule 30(b)(6) deposition relating to these topics.² The fact

² In fact, although the District did not produce the requested audio tapes and video tapes prior to the Rule 30(b)(6) deposition, it did produce two documents minutes before the 30(b)(6) deposition on March 3, 2009, more than five years after being requested. See email from Leah Taylor dated March 3, 2009, attached as Exhibit 1.

that the District clearly has not been deterred in its misconduct reflects its view that its behavior is immune from sanctions.

In sum, the disputed issues that remain before the Court are the scope and the timing of the appropriate sanctions.³ For all of its claimed willingness to admit mistakes and its acknowledgment that “sanctions are appropriate,” including both “evidentiary and monetary sanctions,” the District’s concessions ring hollow as it disputes each and every requested sanction in its Opposition and offers no meaningful substitutes of its own.⁴ The only evidentiary sanction that the District concedes might be warranted is to preclude the District from using, in trial, documents it produced on the last day of discovery and after the close of discovery (District Opp. at 37) – a particularly cynical response since the District admits it had no intention of using such documents anyway.⁵

In terms of monetary sanctions, the District argues that not only should requests of *Chang* Plaintiffs be narrowed considerably, and then extensively litigated, but also that they should be delayed until after trial. In sum, despite their recognition of “flawed,” “embarrassing,” “non-compliance” discovery violations, the District asks the Court order only that the District may not do the one thing it never intended to do in this case.

³ *Chang* Plaintiffs are simultaneously filing a separate Reply Memorandum that addresses the issue of application of the requested sanctions to the individual defendants.

⁴ The District argues that the *Chang* Plaintiffs have not supported their requested evidentiary sanctions with sufficient evidence. *See* District Opp. at 15. Although both the *Chang* and *Barham* Plaintiffs cited facts to support each of their requested sanctions in their Motions for Sanctions (*Chang* Motion for Sanctions, pp. 36-41 and specifically footnotes 28-32 (Dkt No. 418); and *Barham* Motion for Sanctions, generally (Dkt. No. 439)), the *Chang* Plaintiffs, to ease any burden on the Court, have attached as Exhibit 2, a complete list of the requested evidentiary sanctions and the facts that support them.

⁵ The District states it “had not contemplated seeking to admit these materials because they were not relevant and material to the events or claims in these cases.” District Opp. at 32.

The District has made three main arguments in support of its position that no meaningful sanctions should be imposed. It first argues that *Chang* Plaintiffs have not been severely prejudiced by the missing evidence and suggests that the requested sanctions would over-compensate for what has been destroyed or not produced. The District then claims that any prejudice *Chang* Plaintiffs suffered was of their own doing for failing to hector the District into complying with its discovery obligations. Lastly, the District argues that “any award of monetary sanctions” imposed by the Court “should be deferred until the ultimate disposition of this case.” District Opp. at 41. These arguments are illogical, in conflict with controlling case law, and misstate the facts of this case.

1. The District’s Actions in Discovery Have Caused *Chang* Plaintiffs Significant Prejudice and the Requested Sanctions Are Measured Given the Enormity of District Abuse and Non-compliance.

As stated in the initial Motion for Sanctions, the *Chang* Plaintiffs have suffered severe prejudice due to the District’s failure to produce key discoverable evidence (*see Chang* Motion for Sanctions at 6-18), particularly as to three main categories of evidence: (1) the JOCC Running Resume; (2) Metropolitan Police Department (“MPD”) audio tapes containing radio runs of the events on September 27, 2002 (hereinafter “audio tapes” or “radio runs”); and (3) video tapes of the events on September 27, 2002.

a. JOCC Running Resume

The District’s Opposition flatly states that the *Chang* Plaintiffs “have not been prejudiced by the non-production of the September 27, 2002 JOCC Running Resume.” District Opp. at 15. The District argues that the Plaintiffs exaggerate what would have been included in the JOCC

Running Resume and, therefore, the requested evidentiary sanctions go too far.⁶ What is most striking is that the District does not even try to explain how, absent an intentional destruction, it was possible that multiple copies of the JOCC Running Resume (including one produced specifically for litigation purposes), and all underlying computer data, could have disappeared so mysteriously. Instead, the District proposes that it is the Plaintiffs who should suffer any inferences from its loss because, the District contends, the Plaintiffs cannot prove what was contained in the JOCC Running Resume. Indeed, while it does not deny that it could have contained the information sought by the Plaintiffs, it asks the Court simply to presume that it “would almost certainly *not* have” contained such information. District Opp. at 20.

The District is wrong on both the facts and the law. Contrary to the District’s representations to this Court, the deposition testimony of MPD witnesses about what would have been contained in the JOCC Running Resume is compelling and clear.⁷ This testimony offers a far more reliable basis for the Court to evaluate the prejudice caused by the loss of the Running Resume than the conclusory statements of the District. For example, Captain Jeffrey Herold of the MPD testified that,

⁶ Evidence of the importance of the JOCC Running Resume and the prejudice *Chang* Plaintiffs have faced by its non-productions were made clear once again in the most recent deposition. There, the District, testifying through a Rule 30(b)(6) witness, stated for the first time that the JOCC received footage from helicopters on September 27, 2002, and that the footage was down linked to the JOCC where it may have been included in the JOCC Running Resume, even if it was not recorded onto video tapes. *See* Crane Tr. from March 3, 2009, attached as Exhibit 3, at 12:17-14:10. Given the importance to this case of evidence of the timing and placement of police lines, the destruction of the JOCC Running Resume may have eliminated the one contemporaneous, reliable evidence on this point, the absence of which is highly prejudicial.

⁷ *Chang* Plaintiffs stated in their Motion for Sanctions that “[a]lthough it is impossible to know what was actually contained on the missing JOCC Running Resume” it probably contained a timeline of all major events, logs of decisions and communications, movements of senior officials, the issuance of major orders such as the decision to arrest, among other things. *See Chang* Motion at 24-25.

[e]ssentially [the JOCC Running Resume] is the - - is a compilation of everything that occurred during the day; movement of people, movement of officers, decisions made by commanders, things that were decided at certain times on how to handle certain situations. It is a log of the events of the day.

Herold Tr. at 176:01-06, attached as Exhibit 4. Herold later stated that “all significant information” would have been placed into the JOCC Running Resume. *Id.* at 177:04-09, attached as Exhibit 4. Chief Ramsey stated unequivocally that “arrest orders or mass arrest orders [would] be recorded in the [JOCC] Running Resume” and that although he was not sure what was in this specific JOCC Running Resume, “it’s possible” that it would have included a notation of the time he arrived at the Park. Ramsey Tr. at 465:17-20; 258:02-09, attached as Exhibit 5. Assistant Chief Broadbent stated that the JOCC Running Resume “would basically keep track of [] personnel” and “keep track of different activities” including the time that “prisoner processing buses” would have been called. Broadbent Tr. at 40:20-41:10; 192:13-21, attached as Exhibit 6.⁸ The Joint Operations Command Center Activation Procedures, which the District submitted as an exhibit, explicitly states that the JOCC is supposed to “document decisions . . . in [the] running resume.” *See* Exhibit H to District Opposition.

Instead of addressing this evidence, the District urges the Court to examine running resumes from two other cases, *Becker, et al. v. District of Columbia, et al.*, 01-877 (PLF)(JMF),

⁸ In its Opposition, the District attached a self-serving declaration of David Jackson, a lieutenant in the MPD Special Services Division. *See* Exhibit H to District Opposition. According to his own comments, Jackson did not review *Chang* Plaintiffs’ Motion for Sanctions (instead only reviewing the *Barham* Motion) and is thus unfamiliar with what *Chang* Plaintiffs suggest might be contained in the JOCC Running Resume. Jackson concedes, however, that “the level of detail in entries that were contained in a Running Resume varied from entry to entry and from Running Resume to Running Resume for a number of reasons.” *Id.* at ¶ 6. At most, Jackson states that some types of facts would “generally” not be reflected in the JOCC Running Resume: (1) the options a commander considers before issuing an order; (2) movements of personnel; and (3) arrival and movement of the Chief of Police (*but compare* Ramsey Transcript discussed above). Jackson could not state definitively whether any of those events was reflected in the JOCC Running Resume the District failed to produce in this case.

and *Bolger et al., v. District of Columbia, 03-0906 (JDB)*. The District argues that because certain information allegedly was not contained in the running resumes in those cases, such information would not have been contained in the JOCC Running Resume for September 27, 2002. The District has already established that the contents of Running Resumes may differ from incident to incident. Moreover, the District fails to discuss the January 2001 Running Resume, which contained significant detail on many subjects, including the herding or moving of protestors by police.⁹ Moreover, it is reasonable to believe the arrival of Chief Ramsey at Pershing Park and the orders to arrests were significant enough events on September 27, 2002, to be included in the Running Resume, since Assistant Chief Jordan documented Ramsey's arrival elsewhere in the City and the arrest orders. *See* After Action Report, IMF Detail September 26 through October 1, 2002, Area III, attached as Exhibit 7 (“0747 COP Ramsey on the scene” at Vermont & K, “0752 Arrest order given,” “0832 COP Ramsey on the scene” at the 900 block of 12th St. NW, “0837 About 70 arrests effected.”)

Putting aside the differences between the Running Resumes in different cases, Judge Bates, in *Bolger*, found that even in that case, “[t]here is no reasonable question that the [JOCC] running resume was likely to contain highly relevant evidence” and agreed that the missing evidence “would have additional detail about the timeline, which [was] critical to establishing the time of the arrest decision.” *Bolger*, 248 F.R.D. at 346. Notably, although the District claimed in the *Bolger* case (as they do here) that the Plaintiffs had suffered no prejudice, Judge

⁹ *See* 2001 Inauguration Running Resume, attached as Exhibit 8, at 000880 (“Approximately 500 demonstrators at 14th St and Penn Ave. . . [U.S. Park Police Horse Mounted Unit] to move them into Pershing Park. . .”); 000881 (at 2001 Inauguration, “Protestors moved and secured at Memorial Tree Park, NE bounded by First St & Penn St NW); 000901 (“approximately 120 demonstrators from 14th & U St. NW are marching peacefully south on 14th St. NW per CR 600. Chief Jordan, reported Commander Lojacon is walking a group of demonstrators to a permanent location.”).

Bates found that “[t]his argument is plainly without merit” and that the District’s failure to produce the JOCC Running Resume was a “clear case of sanctionable discovery misconduct.”

Id.

At the same time it argues the missing evidence is inconsequential, the District argues that Plaintiffs cannot be prejudiced if other evidence supports what *Chang* Plaintiffs contend may be in the JOCC Running Resume. The District ignores the quality of the evidence in the Running Resume: produced by the District in the normal course, containing contemporaneous, unbiased entries by persons unburdened by memory loss or litigation bias. Defendants will dispute all other evidence. For example, *Chang* Plaintiffs claim that the JOCC Running Resume would establish Chief Ramsey’s presence when individuals first were surrounded in Pershing Park by police lines, or about 9:15 a.m. based on deposition testimony by Lieutenant Herold and Captain Ralph McLean, among other things. The District argues that because the City Council Committee Report found that Ramsey arrived at the scene by that time, the *Chang* Plaintiffs therefore do not need the JOCC Running Resume to establish his presence. Thus, says the District, the Plaintiffs suffer no prejudice by the destruction of the JOCC Running Resume. But the time of Ramsey’s arrival is in dispute; Ramsey testified in deposition that he arrived well after 9:15 (“My recollection is it was closer to 10:00”; Ramsey Tr. at 256:05-18, attached as Exhibit 5). The JOCC Running Resume would have presented the most compelling account of these facts.¹⁰

¹⁰ The District makes similar arguments regarding various issues, including *Chang* Plaintiffs’ claims about the District’s ushering of individuals into Pershing Park. Because other testimonial evidence exists, the District claims that the destruction of the JOCC Running Resume is not prejudicial. Like the issue of Ramsey’s arrival, there is conflicting testimony. The JOCC Running Resume could have provided clear and convincing evidence regarding these claims.

More significantly, this Court has made clear that when one party destroys material evidence it should have produced in discovery, the presumption should be applied against the offending party, without requiring the opposing party to establish prejudice. *Jeanblanc v. Oliver Carr Co.*, No. 91-0128, 1992 U.S. Dist. LEXIS 10765, at **13 (D.D.C. July 24, 1992). This should be particularly true where, as here, not only all hard copies of the Running Resume but also the underlying computer database have mysteriously and unexplainably disappeared; one could speculate that the evidence it contained was very damaging to the District or to individuals employees of the District for that to occur. Where it is “impossible to know how much plaintiff’s case may have suffered because of defendant’s obstructive tactics,” prejudice can be presumed even without a showing of actual prejudice. *Monroe v. Ridley*, 135 F.R.D. 1, 6 (D.D.C. 1990).¹¹

b. Audio Tapes

Though belittling its impact, the District does not deny that the Plaintiffs have suffered prejudice from the audio tapes (and portions thereof) that it failed to produce. District Opp. at 27. The District has not even stated how many audio tapes exist that recorded law enforcement communications on September 27, 2002.¹² In fact, the District does not address how it permitted

¹¹ Other courts have imposed the same general rule. As the Eighth Circuit stated in a similar case,

[o]bviously the relevance of and resulting prejudice from destruction of documents cannot be clearly ascertained because the documents no longer exist. Under the circumstances, [the culpable party] can hardly assert any presumption of irrelevance as to the destroyed documents.

Alexander v. National Farmers Org., 687 F.2d 1173, 1205 (8th Cir. 1982); *see also National Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987) (inferring that destroyed documents were relevant).

¹² In an affidavit filed with the Court, the District indicates that there were at least eighteen audio tapes containing Radio Runs from September 27, 2002. (*See Exhibit 9.*) District 30(b)(6) witnesses testified that the District did not know how many audio tapes were created capturing

the filing of a patently false declaration by an MPD employee that the few audio tapes that had been produced contained no deficiencies. This sworn testimony was subsequently denounced as incorrect by the District, through a Rule 30(b)(6) witness. *See Chang* Motion for Sanctions at 16-17; Alexander Declaration, attached as Exhibit 9; Crane (30(b)(6)) Tr. at 101:05-103:14, attached as Exhibit 10. The District has failed to correct the production of tapes produced to the *Chang* Plaintiffs, although admitting they are “incomplete recordings” and “defective,” even though the District offered to provide supplementation as early as December 2007. (*See* District Opp. at 25; Crane Tr. at 95:15-22, attached as Exhibit 10.)

This refusal to engage in meaningful and transparent discovery production, as required by the Federal Rules of Civil Procedure and the Court’s Orders, continues even in the face of this Motion for Sanctions. Upon reinstatement of discovery in this case, the *Chang* Plaintiffs noticed the continuation of the District’s 30(b)(6) deposition regarding the audio tapes for March 3, 2009, made necessary by the District’s witness’s inability to answer basic questions about the tapes. Instead of welcoming the opportunity to produce, once and for all, all of the audio tapes in complete and unencumbered condition, the District’s counsel demanded details as to which tapes were “problematic.” *See* Email dated February 19, 2009, attached as Exhibit 11.¹³ *Chang* Counsel responded that they still required “exact copies of all audio and video tapes recording the events of September 27 in the District’s possession.” (Email dated February 24, 2009,

MPD activity on September 27, 2002, but that there would have been more than eighteen tapes. (Crane (30(b)(6)) Tr. at 71:01-72:21, attached as Exhibit 10.) To date, the District has produced to the *Chang* Plaintiffs only four of those audio tapes and the District does not explain why it has failed to produce the others to *Chang* Plaintiffs.

¹³ It is only logical to conclude that the unexplained gaps that exist on the tapes that were produced -- for example, a 24 minute gap between 9:35 and 9:59 A.M. on Channel 1-d; a 23-minute gap between 9:41 and 10:04 AM on Channel Tact 1 -- which happen to coincide with the times of most critical police activity, resulted from something other than pure chance. It can reasonably be concluded that the missing evidence is particularly prejudicial to the interests of the District and its employees. The District makes no effort to explain these gaps.

attached as Exhibit 12) but the District produced no new tapes, making meaningless the further questioning of the 30(b)(6) witness on the substance of the audio tapes.

Then, at 5 p.m. on Thursday, March 5, 2009, the day before this Reply was due to be filed, the District filed a declaration of Commander James Crane – the same individual who served as the District’s 30(b)(6) witness – in a vain effort to rehabilitate or retract not only his prior testimony but also the materially false declaration of Denise Alexander. (*See* Dkt. No. 429.)¹⁴ In this last minute declaration, Crane states that he is submitting the declaration “to make clear that . . . there are no audio cassette tapes that have been edited, deleted, lost or destroyed.” (Crane Decl. at 2, Dkt. No. 429-2.). In doing so, Crane makes references to ten other audio tapes, none of which have been produced to the *Chang* Plaintiffs.

Crane also states that the claim in Alexander’s declaration that the tapes were not “unusual or deficient,” “was correct” because there were not “technical deficiencies” even though Crane, in his previous deposition, had contradicted this assertion. In his declaration, Crane admits that the gaps on certain tapes are “unusual” but claims they resulted from “human and/or mechanical error.” *Id.* at 3.

Instead of discussing these fundamental issues, the District contests Plaintiffs’ claim, in their Motion for Sanctions, that the audio tapes would contain critical evidence. In its Motion, *Chang* Plaintiffs cited a portion of one audio tape that it does have in which an officer is heard saying at 8:15 a.m. “just head North on 12th Street now. We’re at 12th and F, uh, you know, the sooner we stop these people, I guess they’re gonna lock them up.” *See* Tape marked 9/27/02 IMF

¹⁴ The District’s strategy is transparent. Although the District possessed the information contained in the Crane declaration at the time of the filing of their Opposition, they waited until the day before the Reply filing to turn the information over to the Plaintiffs. As a result of this purposeful timing, which effectively precluded the *Chang* Plaintiffs from a thorough response in this Reply, the District’s filing is entirely improper and will be addressed in a subsequent Motion to Strike.

Citywide 05:59:30 & 7:59:18.¹⁵ Instead of either producing all of the missing, complete audio tapes or explaining why it cannot do so, the District urges that this particular nugget of information is not material because the communication in fact referred to some other group of individuals, not involved with the Pershing Park arrest.¹⁶ Of course, this misses the point. The portion of audio tape is cited merely as an example of the type of evidence the District has withheld from discovery by refusing to produce complete versions of all of the audio tapes. That evidence clearly would be material and its unavailability is clearly prejudicial to Plaintiffs. The audio tapes provide contemporaneous evidence, from the perspective of law enforcement, of events, communications between law enforcement officers, and orders that were being given.

¹⁵ Of course, without all the audio tapes, and all portions of those tapes in its possession, the *Chang* Plaintiffs, and the Court, have very little context in which to analyze the tape.

¹⁶ The District cites an after action report prepared by one of the Defendants (Brian Jordan) which states that at 8:15 (the exact same time as the audio recording), that a:

Group marching at 13th and H observed throwing cones and newspaper boxes into the street to stop vehicle traffic. Heading North on 12th Street. Group branched off in different directions.

District Opposition at 26. The District suggests that the group described in this report must be the same as the one described in the audio tape cited by Plaintiffs. The District claims that this group was then arrested several blocks north of the reported location, which suggests that the officer's comments on the audio tape, cited by the *Chang* Plaintiffs, must have been referring to that arrest, as opposed to what took place in Pershing Park.

This is pure speculation (which, oddly enough, might be clarified if the District had produced all of the audio tapes in unaltered fashion). It simply is unclear what group of protestors the officer is referring to or to where the other law enforcement officers (that he is speaking to) are in relation to the officer speaking on the radio. The other officers may as well be south of 12th and F. Since the event to which the District refers and the events described in the audio tape occurred at exactly the same time but three full city blocks apart, it seems unlikely that they involved the same group of protestors. Moreover, Jordan's after action report suggests that the "group branched off in different directions," meaning certain protestors may have headed south and ended up in Pershing Park. Lastly, the reported criminal behavior reported in Jordan's after-action memo was reported AFTER the officer made his comments about locking "em up," which suggests his comments had nothing to do with the alleged wrongdoing by the protestors. See After-Action report, attached as Exhibit 7. In any case, the exact circumstances of the audio communication are not relevant here (though they may be for trial).

Furthermore, it refutes the District's claim that the missing evidence would not have contained discussion or statements about arrest orders. Given the obvious importance of this segment, the Court can reasonably conclude that other communications the District has failed to produce would likely contain similar content and prevented the Plaintiffs from using the information to expand or refine their discovery.¹⁷ The District's failure to produce the evidence is severely prejudicial to Plaintiffs.

Lastly, the District tells the Court that "Plaintiffs have been provided significantly improved audio tapes by Commander Crane." District Opp. at 38. This statement, simply is false. The *Chang* Plaintiffs have never received audio tapes from Commander Crane nor have they been informed by Commander Crane or by other District officials that audio tapes were being provided by Commander Crane to the *Chang* Plaintiffs. In fact, *Chang* Plaintiffs have not received additional audio tapes from the District for several years.

¹⁷ The District also attempts to extrapolate their objections to the claimed audio tape prejudice to two other adverse inferences:

- That the MPD trapped and arrested all individuals, including the *Chang* Plaintiffs, in Pershing Park on the morning of September 27, 2002.
- That Assistant Chief Newsham ordered the park to be closed prior to arriving at Pershing Park.

In requesting these inferences, *Chang* Plaintiffs pointed to evidence, including Commander Joseph Griffith's testimony, that supported such claims. Griffith testified that as demonstrators moved towards the center of the City, Newsham ordered his subordinates to encircle individuals and to "contain them there, I'm on my way." See Griffith Tr. 61:17-62:22, attached as Exhibit 13. The District has argued that because Newsham made this order via cell phone, rather than radio, *Chang* Plaintiffs' claims about prejudice due to the missing audio tapes is overstated. The District ignores the fact that Newsham's orders may have been relayed by officers over recorded communications channels, or might have still been contained in the running resumes. This is highly likely since Griffith testified that he was communicating with the JOCC at about the same time he received the order from Newsham. See *id.* at 22:08-14. Again, the District's efforts to confuse the issues and divert the Court's attention away from the actual prejudice suffered by the Plaintiffs should be rejected by the Court.

c. Video Tapes

The District claims that, despite its failure to produce video tapes in a timely fashion, *Chang* Plaintiffs have not been prejudiced, since they assert “no sanction of any type is necessary or appropriate with regard to video tapes.” *Id.* at 38. To the contrary, *Chang* Plaintiffs discussed at length the prejudice they have suffered as a result of the missing video tapes in their Motion for Sanctions. *See Chang* Motion for Sanctions at 24-27.

Oddly, the District seems to defend its failure to produce video tapes on the ground that “the District had no obligation to conduct the videotaping that was done that day.” It doesn’t deny, apparently, that video taping occurred or even that the District has or had such video tapes in its possession and its failure to produce a comprehensive set of the video tapes should be a basis for sanctions. Whether the District was “required” to make such tapes is not relevant; what is relevant is that they did create them and they, like the audio tapes and the JOCC Running Resume, were a contemporaneous record of events unaffected by diminishment or inaccuracy due to time, memory and litigation bias. Since they existed, Plaintiffs had a right to request them in discovery and the District had an obligation to produce them in whatever form they existed. Instead of producing unedited, original versions of the tapes, however, the District produced a few video tapes that appeared to contain significant gaps and/or technical deficiencies.

The District’s Opposition does raise new inconsistencies about what video tapes exist. The District testified through a Rule 30(b)(6) witness that the only video recordings made by the District on September 27, 2002, were four tapes recorded by John Yates of the MPD Electronic Surveillance Unit. Crane (30(b)(6)) Tr. at 14:19-15:11, attached as Exhibit 10. The District did produce to *Chang* Plaintiffs four video tapes. In its defense of its failure to produce the additional video tapes (despite its Rule 30(b)(6) witness testimony to the contrary that no such

tapes were made), the District claims that it created as many as nine such tapes and produced them to another plaintiff (no longer involved in this litigation). *See* March 9, 2004 Letter, attached as Exhibit 14.

This “blame-the-victim” argument suggests that the *Chang* Plaintiffs should have undertaken, some years ago, to obtain from another plaintiff, no longer in the case, video tapes produced by the District to that plaintiff but not to *Chang* Plaintiffs. More importantly, the District presented Rule 30(b)(6) testimony that only four video tapes existed. *Chang* Plaintiffs should have been able to rely on that testimony without having to seek out additional tapes, particularly from a plaintiff no longer in the case. Nonetheless, the District has now admitted that it had in its possession at least nine such tapes,¹⁸ that its Rule 30(b)(6) testimony was false, and that it either cannot or will not explain the inconsistency. Even at the stage of sanctions, the District has refused, even now, to produce all of the video tapes it admits exist. Again, the *Chang* Plaintiffs have been severely prejudiced.

2. The District Cannot Shift Blame for its Discovery Failures Onto the Party Denied the Evidence.

The District failed to meet a major portion of its discovery obligations, flagrantly violated the Court’s Orders and the Rules of Civil Procedure, and greatly prejudiced Plaintiffs’ rights. The District does not even try to defend the majority of their abuses or explain prior false testimony given under oath. Instead, the District argues that the sanctions sought by the *Chang* Plaintiffs are unwarranted because the *Chang* Plaintiffs could have avoided or mitigated prejudice. In essence, the District argues that it was *Chang* Plaintiffs’ obligation to spend the money and time necessary to try to coax the District to satisfy its obligations under the federal

¹⁸ Furthermore, a document produced by the District indicated that at least three people in addition to Mr. Yates were assigned by the District to videotape the September 27, 2002, protests. *See* DC03663, attached as Exhibit 15.

rules. There is no legal basis for such “blame-the-victim” defense and such a meritless argument has no place in federal court. The District states that the *Chang* Plaintiffs: (1) failed to ask the District the “correct” questions about the existence and location of certain documents;¹⁹ (2) failed to notify the District at an earlier stage about problems with documents and material produced;²⁰ (3) knew that the District had produced documents to other sets of Plaintiffs and then failed to arrange, on their own, to obtain duplicated of those materials;²¹ and (4) failed to file Motions to Compel at an earlier stage in the litigation.²² To the contrary, *Chang* Plaintiffs have acted reasonably throughout the litigation, consistently requesting supplementation or explanation of missing or deficient materials.

a. The *Chang* Plaintiffs Made Consistent and Repeated Requests for Evidence.

What is most curious about this line of argument is that the District seems unable to decide if the Plaintiffs are overly aggressive or too passive in pursuit of discovery. In this instance, the District falsely portrays the Plaintiffs as so passive in seeking discovery as to forfeit the right to discovery it requested from the District. Yet, a review of the correspondence regarding discovery makes clear the *Chang* Plaintiffs have been professional, thorough and timely in requesting discovery and seeking supplementation.

¹⁹ See District Opp. at 11. The District claims that had the “plaintiffs asked questions reflecting the existence and location of the [field arrest] forms,” the failure by the District to produce the forms would have been avoided. *Id.*

²⁰ See District Opp. at 28. The District claims that the Plaintiffs should have asserted the deficiency in the audio tapes at an earlier point in the litigation.

²¹ See March 9, 2004, Letter, attached as Exhibit 14, which fails to list *Chang* Plaintiffs as either a recipient or as a CC recipient.

²² See District Opp. at 30. The District states that the Plaintiffs “did not timely move to compel the production of additional tapes.” *Id.* See also *id.* at 32 (the District claims the Plaintiffs waited too long to file their Motion to Compel redacted materials). This argument is particularly troubling because it suggests that the District views a Motion to Compel as necessary before the District will begin to respond responsibly to discovery demands. *Chang* Plaintiffs, in accordance with the Federal Rules, have attempted to avoid the filing of Motions to Compel.

The District had notice of anticipated litigation by at least October 15, 2002, the day the *Chang* Plaintiffs filed their Complaint in this matter. *See* District Opp. at 2.²³ The District was required to implement document preservation efforts by this date, at the latest.

The *Chang* Plaintiffs served their First Set of Joint Requests for Production of Documents From the District in January 2004. *See* Joint Requests, attached as Exhibit 16. These requests, as discussed in the Motion for Sanctions, included requests that would have encompassed the JOCC Running Resume, audio tapes that recorded law enforcement radio runs, video tapes that recorded relevant events, field arrest reports, and other documentary evidence related to the planning and execution of the law enforcement response to the September IMF protests. *See id.* The *Chang* Plaintiffs followed this initial and comprehensive request with several other supplemental requests that sought clarification and additional documents. Thus, for example, on March 11 2005, the *Chang* Plaintiffs requested supplementation to the District's production based on testimony elicited in a number of depositions. *See* Letter dated March 11, 2005, attached as Exhibit 17. This letter specifically requested arrest forms. *See id.*²⁴

In August 2005, several depositions occurred, including Chief Charles Ramsey's deposition. On November 16, 2005, *Chang* counsel sent a letter to the District discussing the

²³ Indeed, well before this complaint, the media referenced likely litigation – starting almost immediately after the mass arrest.

²⁴ Other examples include:

- On July 8, 2004, the *Chang* Plaintiffs submitted a letter to the District that discussed, in detail, the various problems with the District's productions up to that point. The *Chang* Plaintiffs specifically requested supplementation and privilege logs for any withheld documents.
- On July 16, 2004, the *Chang* Plaintiffs submitted a letter to the District that again asked for additional documents.
- On July 20, 2004, the *Chang* Plaintiffs submitted an additional letter requesting further supplementation from the District.
- On July 21, 2004, the District requested an extension in responding to the various discovery requests until August 2004, which the *Chang* Plaintiffs consented.

problems that the parties encountered in scheduling a District 30(b)(6) witness to testify regarding various issues, including the “location, movements, and action” of Ramsey, Newsham, Jordan, Fitzgerald, other commanding officers, and the individual arresting officers. *See* Letter dated November 16, 2005, attached as Exhibit 18. On December 20, 2005, Plaintiffs submitted a second set of discovery requests to the District. *See* Request for Documents, attached as Exhibit 19. Specifically, the *Barham* Plaintiffs requested that the District provide “circumstances of the loss or destruction of audio recordings reflecting statements provided during the MPD and FIT investigations related to the September 27, 2002 arrests.” *Id.* The requests also asked the District to “provide all documents or logs reflecting or recording the existence, maintenance or destruction of audio recordings or tapes made in connection with the MPD and FIT investigations related to the September 27, 2002 arrests.” *Id.*

Between October 2006 and June 2007, all discovery in the case was stayed. *See* Dkt. Nos. 292 & 303. Upon the lifting of the stay, *Chang* counsel immediately resumed active discovery, submitting numerous requests for admissions and scheduling several depositions. On September 20, 2007, *Chang* Plaintiffs submitted a request for supplementation of previous productions, specifically requesting “that the District produce, or make available for review and copying, any and all documents in the possession of the office of the MPD General Counsel, which are responsive to *Chang* plaintiff’s previous document requests.” *See* Letter dated September 20, 2007, attached as Exhibit 20.

On September 20, 2007, *Chang* Plaintiffs requested copies of the running resume and audio tapes from the City Council that were used during its investigation. *See* Letter dated September 20, 2007, attached as Exhibit 21. The City Council chose not to respond directly to *Chang* Plaintiffs but instead communicated through Mr. Koger. Mr. Koger, relayed to *Chang*

Plaintiffs that the City Council “is not in possession of the running resume from September 27, 2002 that the court ordered the District to produce.” *See* Koger Declaration at 17, attached as Exhibit 22.²⁵

On October 1, 2007, *Barham* Plaintiffs moved to compel production of the running resume and audio tapes. *See* Barham Dkt. No 338. On October 30, 2007, this Court granted the Motion to Compel the production of the “Running Resumes and Recorded Police Channel Communications.” *See* Barham Dkt. No. 351.

On October 31, 2007, the District produced two videotapes to the *Chang* Plaintiffs and stated that these tapes “were provided in supplementation of earlier productions in this matter.” *See* Letter dated October 31, 2007, attached as Exhibit 23.²⁶ Immediately thereafter, the *Chang* Plaintiffs sent a letter to District Counsel requesting an explanation and clarification regarding the videotapes. *See* Letter dated November 2, 2007, attached as Exhibit 24.

On November 16, 2007, the District submitted the Alexander Declaration. *See* Declaration, attached as Exhibit 9. The Koger Declaration, which discussed the missing JOCC

²⁵ As a result, the District’s argument that *Chang* plaintiffs could have obtained the requested materials from the City Council is false. *See* District Opp. at 29 n.9. (“Accordingly, to the extent that plaintiffs lack audio tapes of radio runs . . . it is due, in part, to a combination of their failure to seasonably raise their objections to the District’s production and to their failure to *timely* avail themselves of documents in the public domain readily accessible to them though the [City Council].”) Not only did the *Chang* Plaintiffs specifically request such materials from the City Council who replied that they no longer had these documents, but the City Council used Mr. Koger as their agent or filter for passing on this news to the *Chang* Plaintiffs.

²⁶ The District, in responding to the *Chang* Plaintiffs’ argument that the District failed to supplement its productions on a timely basis, suggest that deposition testimony that discussed missing or deficient documents, as opposed to formal productions or actual transfer of documents to the Plaintiffs, was a sufficient response by the District to meet its obligation to supplement prior productions. *See* District Opp. at 31. This ignores the facts that, when the District did supplement finally its production, it did so in tardy fashion that made it impossible for Plaintiffs to make full use of the produced materials. For example, the District did not produce two videotapes of the relevant events until October 31, 2007, more than four years after being requested, and produced to Plaintiffs thousands of pages of responsive documents on the last day of the previous discovery cut-off.

Running Resume, was submitted on the same day. On December 12, 2007, the Plaintiffs questioned the District through its Rule 30(b)(6) witness, Commander Crane, regarding the deficiencies in the audio tapes. Commander Crane suggested that the District would provide new tapes to the Plaintiffs. In late January 2008, the Court stayed the litigation and all discovery. *See* Minute Order, signed January 30, 2008. That 30(b)(6) testimony resumed on March 3, 2009; no additional audio tapes or corrected audio tapes have been produced.

As this record demonstrates, the Plaintiffs consistently pursued the District, demanding that it comply with its discovery obligations. The JOCC Running Resume and the audio tapes were the subject of Motions to Compel and resulting Court Orders, all to no avail. Other than seek a Court order compelling discovery from District as to each instance in which the District failed to meet its discovery obligations – causing an enormous cost to the Court and the parties – it is hard to conceive what more studious and aggressive actions could have been taken by Plaintiffs to convince the District to live up to its responsibilities.

b. The District's Claims Regarding "Avoidability of Prejudice" Have No Bearing on the JOCC Running Resume.

As discussed above, the District was on notice to preserve documents at the latest in October 2002. *Chang* Plaintiffs' First Requests for the Production of Documents was submitted in January 2004, filed jointly with other groups of Plaintiffs no longer in this litigation. These requests encompassed the request for production of the JOCC Running Resume. *See* Motion for Sanctions at 11-12. In his declaration regarding the destroyed JOCC Running Resume and its attendant copies, Mr. Koger indicates that the original JOCC Running Resume and copies of that document were destroyed or lost sometime between September 27, 2002, and February 2004. *See* Koger Declaration at 1-4, attached as Exhibit 22. Thus, at best, only one month had passed between the time Plaintiffs requested the JOCC Running Resume and when it was destroyed.

The JOCC Running Resume may have been destroyed prior to the requests for documents. In either case, the evidence was clearly destroyed long after the District was aware of the litigation and the requirement to preserve relevant documents to avoid spoliation. Nothing *Chang* Plaintiffs could reasonably have done would have prevented the District's failure to comply with its normal discovery obligations in the light of the destruction of this evidence by the District.

c. The Duty to Provide Discovery Responses to Plaintiffs Rests With the District, Not With the Plaintiffs.

As noted above, the District repeatedly argues that *Chang* Plaintiffs simply should have sought copies of documents they never received from other sets of plaintiffs. *See e.g.*, District Opp. at 29-30. The District argues that *Chang* Plaintiffs' failed to "mitigate the prejudice" that they suffered from the District's non-compliance with its discovery obligations. As best as the Plaintiffs can make out, the District argues that it is really the Plaintiffs who are at fault when they allowed themselves to be harmed by the District's denial of evidence through spoliation and false testimony. Again, the District confuses the facts and misstates the law.

As an initial matter, the District has an obligation to each party in this case and must comply with its discovery obligations to each party. In compliance with the Court's Orders, the Plaintiffs spent considerable time to coordinate discovery to avoid possible duplicative depositions and similar items as much as possible. Yet, this did not absolve the District's obligation to produce discovery to each set of plaintiffs nor did it shift the burden of production, copying and delivery of materials produced by the District onto the individual Plaintiffs. At a minimum, it required the District to notify all parties when discovery productions were made to any parties. This, the District failed to do. For example, on March 9, 2004, the District produced a handful of documents and nine videotapes to the law firm of Covington & Burling, which represented a separate class of Plaintiffs. *See* March 9, 2004, Letter attached as Exhibit 14. The

District's letter, sent by Mr. Koger, did not copy other Plaintiffs counsel on the case or instruct attorneys at Covington to forward the documentation onto other counsel. The District then proceeded to negotiate a settlement with the Covington lawyers that led to the departure of counsel and their clients from the litigation.²⁷

The District assumes that it may conduct a type of shell game discovery, hiding the produced materials from one plaintiff while disclosing it to another. Thus, on Monday, October 1, 2007, counsel for the District notified counsel for the *Barham* class that eight audio tapes were available for pickup. *See* Email dated October 1, 2007, attached as Exhibit 25. Mr. Koger did not include *Chang* counsel on this notification. Only through subsequent communication between *Barham* and *Chang* counsel were the *Chang* Plaintiffs alerted to the existence and production of the eight audio tapes. *Chang* plaintiffs have still never received copies from the District.

Lastly, the District spends a considerable part of its brief on its faulty production of Field Arrest Forms, which it concedes was defective. *See* District Opposition at 10-11.²⁸ The District concedes it engaged in discovery abuse related to these forms. Nonetheless, the District argues that, because the *Chang* Plaintiffs allegedly received copies of their own field arrest forms pertaining to their clients only at the time of their arrests, they could not be prejudiced by the

²⁷ Notably, the District simply states that “[u]pon information and belief, Covington & Burling made both the audio and video tapes and the CD-Rom available for duplication by all other plaintiffs.” It also notes that Mr. Koger conferred with counsel representing the *Burgin* plaintiffs. District Opp. at 4, 28. The District does not explain how this was communicated to other Plaintiffs or submit any declarations or affidavits from Covington & Burling attorneys.

²⁸ The District also argues that the failure to produce the field arrest forms and the JOCC Running Resume should not have necessitated the Plaintiffs deposing several other arresting officers. District Opp. at 12-13. *Chang* Plaintiffs sought the depositions of these officers precisely because the District failed to produce significant evidence, which included the JOCC Running Resume and the field arrest forms, which would have greatly assisted the Plaintiffs in determining the actions of arresting officers and officials on September 27, 2002. Had this, and other, evidence been produced on a timely basis, many of these depositions may have been avoided.

non-production of these documents by the District. This argument ignores, among other things, that it was important for the *Chang* Plaintiffs to obtain the documents from the District for purposes of establishing authenticity, and that a reliable production of all arrest forms would have demonstrated the District's pattern and practice during those arrests. The forms were also important to show, as this Court has noted, that these forms contain presumably false representations by officers who attested to witnessing crimes that (1) they did not witness and (2) in fact never occurred.

3. Monetary Sanctions Should Be Imposed and Should Not Be Deferred.

a. Reimbursement of Fees and Costs Should Not be Deferred.

The District argues that the Court defer imposing an order for the District to reimburse Plaintiffs for attorneys fees and costs incurred as a result of their discovery abuses until after a judgment has been entered. The District seems to base its position on the assumption that attorneys fees and costs recoverable under 42 U.S.C. § 1983, would include those associated with the District's discovery abuses. Remarkably, the District further argues that any award of fees also should be deferred because Plaintiffs did not accept Rule 68 Offers of Judgment, and that if the final judgment is not better than the District's January 24, 2007, Offer of Judgment, the District should not have to pay for any of Plaintiffs' attorneys fees and costs after that date, including those related to its discovery abuses.

Plaintiffs seek attorneys' fees for costs resulting from the District's abuse of the discovery system, its failure to comply with its discovery obligations and the extraordinary costs that resulted from the District's actions. While reasonable attorneys fees also are recoverable under §1983, the purpose of monetary sanctions here is to ensure that, no matter what the ultimate result of litigation, the District must pay for the costs it forces the Plaintiffs to incur as a

result of the District's discovery abuse. Rule 37(d)(3) requires the imposition of reasonable expenses, including attorney's fees, against the party which failed to produce discovery, absent substantial justification or a finding that such an award would be "unjust."

Moreover, the District argues that the Court should now act in anticipation that the unaccepted Rule 68 Offers of Judgment would off-set any monetary costs the Plaintiffs suffered as a result of the District's discovery abuses. The District's concept is both impossible and stunningly bold. The Court cannot now predict how these cases will result ultimately or what remedies will be applied.²⁹ More significantly, the Court must reject the District's apparent strategy that would permit it, upon making a Rule 68 Offer of Judgment, to engage in gross discovery abuse with no monetary sanctions at least until the final resolution of the case. Accepting such an argument would eviscerate the Federal Rules of Civil Procedure and give free reign to litigants like the District which choose to ignore their discovery obligations.

The Court should not create such perverse incentives for litigants. The possibility of sanctions is intended to force parties to comply with the rules of discovery and unless sanctions are imposed for wrongdoing, parties have no incentive to do so.

b. The Deterrence of Monetary Sanctions

As a deterrent against similar defaulting on its discovery obligations in the future, *Chang* Plaintiffs seek to have the Court order the District to pay a monetary sanction of \$500,000.00, or whatever amount the Court deems appropriate. Citing no authority, the District argues that these sanctions should not be imposed because doing so would be the equivalent of imposing punitive damages upon a municipality, which are generally unavailable.

²⁹ Final resolution of these cases may have to await resolution of long-promised Motions to Dismiss by individual District Defendants on the grounds of claimed qualified immunity as well as an answer, some day, from the federal Defendants.

Of course, punitive sanctions are not the same as punitive damages. Sanctions are, indeed, aimed at punishing a litigant for wrongdoing; without sanctions, irresponsible litigants will have no incentive to comply with the rules. The District is simply incorrect that a Court cannot penalize a municipality for discovery abuses. In *Salazar v. District of Columbia*, 570 F. Supp. 2d 105 (D.D.C. 2008), this court ordered the District to pay \$931,050 “in penalties for failure to comply with prior Court Orders and applicable Federal Rules of Civil Procedure.” In that case, after the District’s “persistent and longstanding failure to comply with Court deadlines,” the Court entered an Order setting new deadlines and providing sanctions for failure to comply with those new deadlines. *Id.* at 108. The sanctions were monetary penalties – ranging from \$100 per day to \$5,000 per day – for each day the District missed a deadline. *Id.*

The District, or any other municipality, should not be allowed to fail so egregiously to comply with the law governing litigation and then not be forced to suffer consequences serious enough to deter future misconduct. The District’s conduct in this litigation is not an isolated incident (*see Chang* Plaintiffs’ Motion to Compel at 3 n.2) and the District must be discouraged from continuing to neglect its discovery obligations, which harms litigants, wastes judicial resources and thwarts justice. The perversity of the District’s position is even more clear when one considers that if a private litigant had engaged in similar conduct, he would likely be forced to pay a hefty sum to deter such behavior in the future. *See In re Prudential Ins. Co.*, 169 F.R.D. 598, 617 (D.N.J. 1997) (ordering Prudential to pay \$1,000,000 as a sanction for destroying documents); *United States v. Phillip Morris*, 327 F. Supp. 21, 26 (D.D.C. 2004) (ordering Phillip Morris to pay \$2,995,000 as a sanction for destroying documents).

CONCLUSION

For the foregoing reasons, the *Chang* Plaintiff’s Motion for Sanctions should be granted.

Respectfully submitted,

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Dated: March 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2009, I caused a true and correct copy of the foregoing *Chang* Plaintiffs' Reply to the District's Opposition to the Plaintiff's Motion for Sanctions to be served electronically upon the following:

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