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18 Proceedings recorded by mechanical stenography, transcript
19 produced by computer.
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1 P-R-O-C-E-E-D-I-N-G-S

2 (11:00 A.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Civil Action 02-2010, Rayming
4 Chang, et al versus United States of America, et al, and Civil
5 Action 02-2283, Jeffrey Barham, et al versus District of
6 Columbia, et al. Would counsel please identify yourselves for
7 the record.

8 MR. TURLEY: Good morning, Your Honor. Jonathan
9 Turley for the Chang Plaintiffs. With me today at counsel
10 table is Mr. Daniel Schwartz and Mr. P.J. Meitl.

11 THE COURT: All right. Good morning, Counsel.

12 MS. VERHEYDEN-HILLIARD: Good morning, Your Honor.
13 Mara Verheyden-Hilliard on behalf of the Barham Plaintiffs,
14 and with me at counsel table is Carl Messineo.

15 MR. MESSINEO: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. KOGER: Good morning, Your Honor. Thomas Koger
18 on behalf of the District of Columbia, Michael Fitzgerald,
19 Brian Jordan, Bryan DiGirolamo, Andre Harrison and Michael
20 Smith, and with me at counsel table are Ellen Efros and Chad
21 Copeland.

22 THE COURT: All right. Good morning, Counsel.

23 MR. HUDAK: Good morning, Your Honor. Brian Hudak
24 from the U.S. Attorney's Office for the federal defendants.
25 With me here today is Randy Myers from the Park Service.

1 THE COURT: All right. Mr. Hudak.

2 MR. FRANCUZENKO: Good morning, Your Honor. Alex
3 Francuzenko on behalf of the Fairfax County Sheriff's Office.

4 THE COURT: Good morning.

5 MR. BUCKLEY: Good morning, Your Honor, David
6 Buckley for Assistant Chief Newsham.

7 THE COURT: Good morning, Counsel.

8 MR. FAUST: Your Honor, John Faust, Vinson & Elkins,
9 for former Chief Ramsey in his individual capacity, and with
10 me from my firm is Robert Boxie.

11 THE COURT: All right. Good morning. Is that it?
12 Is that everyone?

13 Mr. Koger, what about these late disclosures? How
14 do you account for that? How does the City account for that?

15 MR. KOGER: The City's account --

16 THE COURT: It's very troubling. It's very
17 troubling.

18 MR. KOGER: It is, Your Honor, and I don't know that
19 I can account for it in the sense that I have a good reason.
20 I have --

21 THE COURT: So you have no reason?

22 MR. KOGER: I have no good reason, Your Honor.
23 Those documents -- the recent documents were turned over to
24 the Office of the Attorney General while the case was under my
25 management. Some -- probably in 2000 -- well, the arrest

1 records, going back to those, 2003, the documents which I have
2 recently turned over --

3 THE COURT: Some of the documents are indeed e-mails
4 from people in the Attorney General's office.

5 MR. KOGER: Those documents, Your Honor, I believe,
6 would have come to me in 2003 or at the latest 2004.

7 THE COURT: This case is taking on a new identity
8 and it sounds more and more like the civil counterpart of Ted
9 Stevens.

10 MR. KOGER: The civil counterpart of --

11 THE COURT: The civil counterpart of the Ted Stevens
12 case.

13 MR. KOGER: Your Honor --

14 THE COURT: It raises serious questions about when,
15 if ever, can anyone ever trust their government. These are
16 serious, serious problems, and I was very disturbed to see
17 these e-mails come across the computer screen.

18 MR. KOGER: Your Honor --

19 THE COURT: Serious revelations that go to heart of
20 some of Plaintiffs' theories.

21 MR. KOGER: Your Honor, first, let me assure you
22 that I am abashed and contrite in having failed the Court and
23 the parties in this matter.

24 THE COURT: I'm not so sure it's just you who has to
25 fall on the sword here. You know, you're doing a good job of

1 falling on the sword, but I think there is probably some other
2 forces that are at work. I'm not -- I haven't figured it all
3 out and it probably will take another month or two of briefs
4 to figure out just what the problem is, what the systemic
5 problem is, but there's a major problem here.

6 MR. KOGER: I -- to try to -- to try to inform your
7 investigation of this, I would offer that when I took on this
8 case in 2003, I obtained as many documents as I was able to
9 identify. I set up a war room, if you will. Some months
10 later that war room was converted to another function under a
11 collective bargaining agreement and it was the first of
12 several moves and documents, particularly the e-mails. I
13 misplaced and lost track of it. There's --

14 THE COURT: The videos have been lost also, haven't
15 they, the videos of the arrest?

16 MR. KOGER: No, Your Honor, the CD --

17 THE COURT: Was there a sizeable number of videos?

18 MR. KOGER: There was a CD that I produced. Those
19 videos had first been produced in March of 2004 in response to
20 the joint request for production by the Abatte Plaintiffs.

21 THE COURT: I think there's some surveillance tapes,
22 though, and the Plaintiffs can address it. I think there is
23 some surveillance tapes that have never been seen, I believe,
24 and all the copies. Yeah.

25 MR. KOGER: The CD that I turned over recently, I

1 just had made up so I could have all the videos in one unit
2 and everyone would have the same thing. The only --

3 THE COURT: I may be mistaken, but I'll let
4 Plaintiffs -- I have a recollection that there were some --
5 many videos as well as all the copies no longer exist, but
6 I'll let Plaintiffs address that.

7 MR. KOGER: Yes, Your Honor.

8 THE COURT: No, no, I haven't finished with you,
9 though. I want to find out what happened. What's going on
10 here? I mean, how can --

11 MR. KOGER: I'm sorry, Your Honor.

12 THE COURT: You know what, look, there are going to
13 be sanctions in this case and there's going to be an award of
14 attorney fees, and you know, those sanctions -- and there'll
15 be additional sanctions, and I'll tell you right now those
16 sanctions are going to be painful. They're going to hurt.

17 And I think that it's really unfortunate that the
18 citizens of the District of Columbia have to pay for these
19 types of shenanigans, and that's putting it mildly.

20 MR. KOGER: Yes, Your Honor.

21 THE COURT: And I don't take any comfort out of
22 telling the City's attorneys that the sanctions and attorney
23 fees I'm going to impose are going to be painful, but they
24 are. That's a promise. And I have no idea today just what
25 those sanctions will be, because everything is changed. The

1 landscape has changed since the previous round of sanctions
2 was filed, and I will, as appropriate, give Plaintiffs an
3 opportunity to ask for whatever additional sanctions are
4 appropriate, and I will strongly impress upon them that they
5 should be as innovative as they possibly can within the realm
6 of reason to suggest to the Court appropriate sanctions,
7 because this type of conduct by the City's attorney's office
8 is unacceptable, it will not be tolerated and that office is
9 going to pay the price.

10 But ultimately, the citizens of the District of
11 Columbia lose because it comes out of their pocket, and they
12 shouldn't have to pay for these types of shenanigans, and
13 again, that's putting it mildly.

14 MR. KOGER: Yes, Your Honor.

15 THE COURT: There are other words to describe it.
16 So, what's happening? How can this court, the lawyers, the
17 citizens of D.C., the parties, the Plaintiffs have any
18 confidence, how can they ever have any confidence that the
19 City has totally fulfilled its obligations to produce the
20 discovery that it has a responsibility to produce? How will
21 they ever have that comfort? How will they ever have that
22 confidence? This is shocking what's happening here.

23 MR. KOGER: Your Honor, I certainly don't disagree.

24 THE COURT: It's the civil counterpart of the Ted
25 Stevens case, and that's shocking. So, what do I have to do?

1 Appoint a special prosecutor in this case to find out what
2 happened? Do I have to bring in someone from the outside to
3 search the City's files to see whether or not all discoverable
4 material has been turned over to Plaintiffs? What do I have
5 to do?

6 That's a question I'm going to ask Plaintiffs as
7 well. I'm not going to tolerate this conduct, and the
8 citizens of D.C. should not have to tolerate it. What else is
9 there? How do we know that everything that's discoverable has
10 been discovered and produced? What can you tell me that will
11 suggest to me that I have confidence that all discoverable
12 material has been produced? What can you say?

13 MR. KOGER: Your Honor, but for -- but for an order
14 that would, in essence, put them in my shoes, I don't know --

15 THE COURT: Put who in your shoes?

16 MR. KOGER: Plaintiffs' counsel in my shoes. I
17 don't know how else --

18 THE COURT: That's a sad commentary, Counsel. What
19 you're saying is, the only way that anyone would ever have any
20 comfort is for this court to allow Plaintiffs' counsel to roam
21 through the files of the D.C. government, that's what you just
22 told me. That's a sad commentary.

23 So what about an attorney's word that we've done all
24 the searches, we've been diligent, we've searched everything,
25 and as an officer of the Court, I assure you, Judge, we've

1 turned over everything, we left no stone unturned. You can't
2 tell me that.

3 MR. KOGER: Your Honor, it is that effort that
4 results in this last minute production.

5 THE COURT: Last minute production on the eve of a
6 hearing to determine sanctions.

7 MR. KOGER: Yes, Your Honor, and --

8 THE COURT: And we're talking about startling
9 revelations that go to the heart of some of Plaintiffs'
10 theories.

11 MR. KOGER: Your Honor, I would not debate the
12 pertinence or relevance of this.

13 THE COURT: Did someone undertake a new search last
14 week or so? Tell me what happened.

15 MR. KOGER: No, it wasn't someone. It was me,
16 because we had produced the materials in response to your
17 order of May 27th, and in doing so, I was -- I was, for the
18 first time, in a period of time, not had the time to
19 exhaustively go through those files.

20 THE COURT: Counsel, you're telling me this is the
21 first time in years. These cases were filed in what, in
22 '02 -- these cases were filed in 2002.

23 MR. KOGER: No, Your Honor, that's not what I'm
24 telling you. I am lead counsel in these matters. You may
25 recall I was lead counsel in Abbate, and I was lead counsel in

1 Burgin. I was lead counsel in International Action Center
2 before Judge Kessler. I was lead counsel in Becker before
3 Judge Friedman. I am now lead counsel in Bolger before Judge
4 Bates, and I'm lead counsel in Frucht before Judge Leon, all
5 of which have overlapping issues of police responses to
6 protests.

7 All these documents, which have come in various
8 outreach efforts, are all, for better or worse, now under me,
9 and I've been compiling these documents since late, late 2003
10 when I returned to the Office of the Attorney General. I have
11 tried to maintain but have not succeeded in adequately
12 organizing these things, and through a series of moves of
13 these war rooms, these storage rooms and combination of cases
14 and as highlighted by my failure to produce the arrest
15 records, it was clear to me that I needed to go through these
16 documents and try and nail everything down, and I -- and it --
17 because of the --

18 THE COURT: Has everything been nailed down?

19 MR. KOGER: The best I can tell you is I think so.
20 But in my -- in my effort to do that --

21 THE COURT: But truthfully, you don't know that to
22 be a fact, do you?

23 MR. KOGER: Your Honor, I have to say I don't know
24 that to be a fact because what I've done is, I have tried to
25 focus my review of these materials.

1 THE COURT: But that's a sad commentary. Look, I
2 have a high regard for you, and you know that. You've been
3 practicing before this court for years, and I've said this
4 before, but it shouldn't be the responsibility of one person
5 in a case of this magnitude. And the case has been pending --
6 and two cases have been pending for seven years -- more than
7 seven years, almost ten years. Actually seven years, and
8 there's no one else who can assist you with this task?

9 MR. KOGER: Sincerely, Your Honor, I believe at this
10 context we have had a number of co-counsel with me over the
11 years who have come and gone. I can think of no one who has a
12 grasp of what should be there, has a history with the cases.
13 Certainly I cannot be extracted from the process, and it
14 seemed to me when this -- when I needed to --

15 THE COURT: So if you decided to go into private
16 practice tomorrow, the City would be in a sad state of
17 affairs, wouldn't it, without your leadership?

18 MR. KOGER: I don't think I'd want to say that,
19 but --

20 THE COURT: I can say it based upon what you just
21 told me.

22 MR. KOGER: But, I don't -- perhaps that I'm saying
23 it too much like blowing my own horn. What I mean to say is I
24 failed to properly familiarize my subordinates and arrange for
25 them to have time.

1 THE COURT: But you know what, my high regard for
2 you, Counsel, is not going to immunize the City from the
3 severe, harsh sanctions I'm going to impose, and again,
4 they'll be painful. They're going to be painful. Sanctions
5 and attorney's fees, and this outrageous conduct is not going
6 to be tolerated by the Court, and there will be significant
7 prices to pay.

8 It's admirable that you're falling on the sword, but
9 that's not going to immunize the City, and again, that's a sad
10 commentary for the citizens who live here. They're entitled
11 to better representation.

12 So what -- what's the next step? I mean, within a
13 week there have been two significant startling revelations of
14 discoverable material. What's the next step? Am I to expect
15 another e-mail at 7:30 tonight?

16 MR. KOGER: Well, I started communicating to other
17 parties in this matter shortly after your order compelling the
18 production as to where we should go from here.

19 THE COURT: You know what, this case should be
20 settled. That's what should happen. This case should be
21 settled as soon as it possibly can to spare the citizens of
22 the District of Columbia additional expenses, additional
23 embarrassment and bring some finality to this case. That's
24 what should happen.

25 MR. KOGER: I wish I could have accomplished that

1 earlier.

2 THE COURT: I understand that. It didn't happen
3 earlier, but now there have been some other startling
4 revelations. There's more discovery out there. I don't know
5 what else is out there. At some point the attorneys sit down
6 and say, "Enough of this, we need to settle this case," you
7 know.

8 The mayor needs to get involved and tell his city
9 government to settle this case. That's what should happen.
10 That's what should happen. It starts at the top, because this
11 is about the city government and about its abysmal involvement
12 in this case. And that's a very appropriate word, abysmal.
13 This is outrageous.

14 It's seven years after this case was commenced, and
15 notwithstanding numerous court orders, the Government is still
16 locating discoverable information that has been there for
17 seven years in the Government's files. I don't know what else
18 I can do other than to impose the significant sanctions and
19 awards of counsel fees that I will do.

20 I'm going to give the Plaintiff discovery -- the
21 additional discovery they want and the City is going to pay
22 every penny of what their cost will be for the additional
23 discovery. I can tell you that's one sanction I'm going to
24 impose today. Whatever the reasonable expenses are for the
25 additional discovery that Plaintiffs want, the City is going

1 the pay for it, every penny. So what does that mean? That
2 means six more months of delay? Plaintiffs have been delayed
3 for seven years now, notwithstanding a -- notwithstanding
4 numerous resolutions of significant issues in this court, all
5 of which have been affirmed by the Court of Appeals. This
6 case has been crying out for settlement for a long time.

7 Maybe we're at the posture now where the City
8 government will seriously consider settlement of all these
9 cases, of all these claims on terms that are reasonable;
10 otherwise, this litigation is going to go on and I have every
11 reason to believe there'll be additional sanctions imposed and
12 additional awards of attorney's fees because I don't have any
13 comfort whatsoever that all discoverable material has been
14 produced.

15 And I'm not so sure I'll ever get to that point in
16 this case, just as I never had any comfort whatsoever that all
17 discoverable material was produced in the Stevens case, I
18 never did, and look what happened there.

19 Anything else? You've done a great job of falling
20 on the sword, but you know what, it's not your responsibility.
21 I fault the city government for not giving you the resources
22 that you need to do your job. That's a sad commentary. It's
23 admirable that you stand before the Court and take full
24 responsibility, but it's not your fault, Counsel, and you
25 should not have to stand there and fall on the sword. The

1 city government doesn't give you the resources that you need
2 to do your job, then the citizens need to know that and the
3 mayor needs to give you whatever resources you need to do your
4 job and to proudly represent the citizens of the District of
5 Columbia, or the mayor needs to settle this lawsuit tomorrow.

6 I appreciate your willingness to accept
7 responsibility, but it's not your fault. You shouldn't have
8 to be a one-man show for the D.C. Government. They're
9 fortunate to have you there, and if you left tomorrow, I
10 wouldn't blame you, because who can work without the resources
11 they need to properly do their job.

12 All right, Counsel. Thank you.

13 MR. KOGER: Thank you, Your Honor.

14 THE COURT: Let me hear from Plaintiffs' counsel.
15 You haven't had time to go over the documents. You received
16 what, over a thousand pages or so of document and films. You
17 haven't had time to go over the documents. I know that. And
18 one of the things would be, unfortunately, is going to result
19 in additional delay to the Plaintiffs, more delay, is going to
20 result in the imposition of sanctions that will be painful,
21 and there will be awards of attorney's fees and you will get
22 compensated for every penny of any future discovery that's
23 reasonably needed to be conducted in this case.

24 How would you like to proceed?

25 MR. TURLEY: Well, first of all, Your Honor, on

1 behalf of my colleagues, I want to thank the Court for what it
2 has said. This has been a very difficult period. Even after
3 a long period of difficulty, this, as you noted, has changed
4 the landscape in an even worse position.

5 THE COURT: It's difficult for a judge, too. Look,
6 I mean, my job here is to preside over this case in a fair
7 manner and no one ever has enough time to do his or her job.
8 We all recognize that. And this -- I'm sure I'm not the only
9 judge in this court who routinely extends the time for
10 everyone to complete discovery, you know, even when the time
11 limits have been stretched because no one ever has enough time
12 to properly do his or her job, but this is bordering on the
13 absurd here where, you know, within a week of a hearing to
14 determine sanctions, the Government locates information that's
15 always been there.

16 It's one thing to say someone delivered a box of
17 material to the Office of Attorney General and we never had
18 this before, just came out of nowhere, but these -- this
19 information comes from the D.C. government's files, and that's
20 extremely troubling to the Court, very troubling.

21 MR. TURLEY: Yes, Your Honor, we are --

22 THE COURT: And I don't know. I don't know if
23 you've had enough time to think about how you want to proceed.
24 I know you haven't had time to go over everything you
25 received. I know that. I recognize that. And thank you for

1 the e-mails.

2 And that's another thing. It's one thing for the
3 Government to, at the eleventh hour, turn over information to
4 the Plaintiffs, and I didn't expect to receive a copy of any
5 information that the Government turned over to Plaintiffs, but
6 it's quite another thing for the Court to not even be informed
7 by notice that additional discoverable material, whatever it
8 was, had been located and turned over. I wouldn't have known
9 about this at all until this morning, unless the Plaintiffs
10 had filed a notice to the Court indicating that -- that
11 discoverable material had been turned over to them.

12 MR. TURLEY: Yes, Your Honor. The thing that is
13 most troubling for Plaintiffs' counsel, and we have had
14 meetings, because this is unprecedented for any of us. Even
15 counsel who was involved in Bolger, this is something that in
16 all of our years of practice we've never seen.

17 THE COURT: Well, unfortunately, I just saw it in
18 another case. I saw this type of shenanigans by a government,
19 you know, and it is a sad commentary, and I hope we haven't
20 gotten to the point where, you know, we just can't trust what
21 our governments are doing these days. It's a sad commentary.

22 MR. TURLEY: Well, what particularly disturbs us is
23 that the conduct leading up to this -- first of all, the
24 District hasn't even fulfilled its obligations under past
25 orders to compel. There's still material out there that have

1 not been produced.

2 THE COURT: And there's going to be sanctions, and
3 as I indicated, the sanctions are going to hurt. They're
4 going to be extremely painful.

5 MR. TURLEY: And the thing that we've struggled
6 with, Your Honor, on the Plaintiffs' side is that when you
7 look at the mosaic of misconduct in this case, you're really
8 struck by a series of things that it's hard to say are
9 coincidences. I mean, the Running Resume is a good example of
10 that. We know now that 12 Running Resumes were produced. We
11 know that from the District's own witnesses, from 30(b)(6)
12 witnesses, from other witnesses in terms of those that
13 existed. That -- those Running Resumes are enormously
14 important in a case of this kind as they were in Bolger, and
15 the same defendant, as was in Bolger, also stood to --
16 withheld that document but eventually produced it.

17 In this case, 12 copies of the Running Resume, which
18 is the contemporaneous -- the reproduction of the
19 contemporaneous statements and radio calls that went out, just
20 disappeared, and the District has no explanation where they
21 went.

22 THE COURT: That's the information I was trying to
23 recall. The radio runs.

24 MR. TURLEY: Right. And then you have the --

25 THE COURT: You have the --

1 MR. TURLEY: No. You've got the Running Resume over
2 here -- and by the way, the City counsel asked for the Running
3 Resume, and what they were given was something that was not
4 the Running Resume of the JOCC. It was actually the Running
5 Resume of the special services, and the District never told
6 them that this -- there was another Running Resume that was in
7 fact relevant, and instead we got the same one. And we
8 finally pressed them, counsel in both cases, and found out
9 that there were 12 copies of the real Running Resume that were
10 destroyed. And when we asked for the radio runs --

11 THE COURT: You say destroyed.

12 MR. TURLEY: Well, that are missing, we assume are
13 destroyed because the District has just said that they have
14 disappeared.

15 And then when we finally get the radio runs, when
16 they are reproduced, we get a series of tapes that say that
17 there are two hours of time on tapes that only one hour is
18 present on, and when we look at those tapes, the same period,
19 the critical period of the arrests are missing.

20 I mean, not since Rose Mary Wood has there been a
21 more convenient gap in these tapes. If you look at each of
22 these tapes, the very same period is missing. And then you
23 had all the videos, thousands of pages that were --

24 THE COURT: That's startling. That's shocking.

25 MR. TURLEY: And thousands of pages were produced

1 after discovery had run. Your Honor, you practiced. You
2 could imagine, as you've seen in our late notices, what a
3 lawyer would have done in deposition with these things. So
4 what we're left with is basically depositions that, it turns
5 out, that there was a great deal of information for a host, if
6 not all of these witnesses, that we weren't able to ask about.
7 And Your Honor --

8 THE COURT: You're going have your opportunity. If
9 you want to redo that, you know, you're going to have it and
10 they're going to pay for every penny of that. I'm not so sure
11 that's the most productive way, but I'm telling you right now,
12 you're going have to give some thought -- and I recognize
13 you're not in a position now to tell me what type of
14 additional discovery, but the City is going to pay for every
15 penny of reasonable expenses for additional discovery.

16 MR. TURLEY: Well, I appreciate that, Your Honor.

17 THE COURT: That's going to be more delay.

18 MR. TURLEY: Yeah, we've been working on that, Your
19 Honor. We actually think one of the most obvious -- Oh, yes,
20 I'm going to turn over to my co-counsel, but one of the more
21 obvious things that we are likely to suggest is that while we
22 stated that the Court should award discovery costs from 2007,
23 we believe the Court should consider forcing the payment of
24 all discovery because they have made all prior discovery,
25 which they drew out, to be virtually meaningless for us, and

1 we believe that a sanction --

2 THE COURT: That may not be an unreasonable sanction
3 at all.

4 MR. TURLEY: And perhaps that will return a level of
5 integrity to the system and may get the attention of people
6 above Mr. Koger to finance this case for the next round in a
7 proper fashion. My co-counsel has asked to speak, so I'm not
8 going to delay any further.

9 But thank you, Your Honor. We will be filing, as
10 you've noted --

11 THE COURT: How much time do you need to sort
12 through what you received? I'm not ruling out the possibility
13 or probability you may get some more information from them in
14 another day or two or so, you know, who knows.

15 Mr. Koger, your search is continuing, right?

16 MR. KOGER: Yes, Your Honor.

17 MR. TURLEY: We can probably file something with the
18 Court within two weeks, but I have to speak with my
19 co-counsel.

20 THE COURT: That's about the time frame that I was
21 thinking. So it would be your request for any additional
22 discovery, and I'm going to get to other issues and sanctions
23 and attorney's fees and everything else, but at the bare
24 minimum, you're asking for at least two additional weeks.

25 MR. TURLEY: I believe so, but I haven't spoken with

1 our co-counsel, who may have scheduling issues. But from our
2 standpoint in Chang, we can do that in two weeks, Your Honor.

3 THE COURT: All right.

4 MR. TURLEY: Thank you, sir.

5 THE COURT: Counsel.

6 MS. VERHEYDEN-HILLIARD: Thank you, Your Honor. I
7 wanted to make a couple of additional points. We represent
8 the class in this matter. We also represent virtually every
9 single Plaintiff in the cases that Mr. Koger referenced, the
10 Bolger case, the IAC case, the Becker case, the Frucht case,
11 all of those cases.

12 THE COURT: Right.

13 MS. VERHEYDEN-HILLIARD: And in the Bolger case, as
14 Mr. Turley referenced, we have had issues in terms of
15 discovery sanctions and withholding and dilatory conduct and
16 misrepresentations to the Court from the OAG. But the problem
17 that we have here, we believe, is not an issue of resources.
18 To be honest, Your Honor, we believe the issue is more
19 significant than that.

20 When it comes to the question that Your Honor asked,
21 which is, you know, how can we ever be sure that we ever have
22 everything, well, we know in fact that we can never have
23 everything because the District has acknowledged it has lost
24 and destroyed the critical operational material that was
25 created in realtime on the day of the events in question.

1 With reference to the Running Resume, not only were there --

2 THE COURT: There's no way to replicate that with
3 all the technological experts.

4 MS. VERHEYDEN-HILLIARD: Well, that's what I wanted
5 to --

6 THE COURT: Because, you know, if there's a way,
7 then you should hire those experts and I'll pay for that, too.
8 No, the City will pay for that as well if there's a way to
9 legitimately go through the technology that the City employed
10 that day and recreate it, because what the experts tell me is
11 everything is there.

12 MS. VERHEYDEN-HILLIARD: That would be exactly the
13 point I wanted to make in reference to what Mr. Turley was
14 saying. He referenced the fact that there were 12 hard copies
15 of the Running Resume, the Running Resume being the backbone
16 document, the realtime entry of all the information from all
17 the different police agencies, all the sources, all at the
18 same time. This is very detailed in the Barham motion for
19 sanctions.

20 But there were also two electronic automatic
21 redundant backups. Those were both destroyed. Those were
22 both destroyed as well as all the hard copies.

23 THE COURT: When you say destroyed, what's the basis
24 for --

25 MS. VERHEYDEN-HILLIARD: The District of Columbia

1 has represented that those electronic records no longer exist,
2 that they have searched, that they know the exact path where
3 those were located. We deposed the operations informational
4 officer who is the one who told us that not only have there
5 been 12 copies, which were handed all the way up through
6 command staff, but that specifically the documents, the --

7 THE COURT: When you say all the way up, does that
8 mean to the chief?

9 MS. VERHEYDEN-HILLIARD: The chief of police has not
10 acknowledged receiving it, but in deposition after deposition
11 after deposition they stated that the chief of police would
12 routinely have received it, and the chief of police said he
13 may well have received it.

14 But here's the really important factor. They
15 admitted in testimony, in deposition testimony that this
16 material is destroyed after a request had been made to deliver
17 the Running Resume to the general counsel for the MPD for the
18 purposes of this litigation. There has been no investigation.
19 There has been no explanation.

20 When it comes to the radio runs, we have listened to
21 the radio runs. We were delivered tapes. We were told those
22 tapes were full. We came back and we realized, after
23 listening to them, that they were missing time. This court
24 entered an order in October of 2007, a court order telling the
25 District that they were obliged to explain the discrepancy and

1 the missing data on the tapes. In response, the Office of
2 Attorney General filed a false affidavit with this court, a
3 materially false affidavit to explain away the Court's
4 questions.

5 We did subsequent depositions, and in our
6 depositions, the District of Columbia was forced to admit that
7 the tapes were not proper, that they were not complete. The
8 District says that they have destroyed --

9 THE COURT: The tapes were not --

10 MS. VERHEYDEN-HILLIARD: Complete. That the radio
11 runs that we have are in fact missing critical time. The
12 first set they gave us was missing huge swaths of time at the
13 moment of the arrest, and I want to note not just one tape,
14 Your Honor, multiple tapes.

15 How do multiple different tapes, recording different
16 police channels, all lose data of time at the period of time
17 that the arrests are being made and the orders are being given
18 across multiple channels? When we raised this issue, when
19 they were forced to file their false affidavit with the Court,
20 when we went back to them, they told us that they had
21 destroyed the master tapes and they could only operate from
22 the copies, so there was nothing more they could do. Then
23 suddenly --

24 THE COURT: And this was what, two or three years
25 after the event?

1 MS. VERHEYDEN-HILLIARD: Right. That's right. Then
2 suddenly they deliver to our office new tapes that had more
3 time on them with more explanation as to where more time can
4 come from since they said they only had one set of copies and
5 destroyed the masters. But the tapes that had more time
6 across multiple channels, once again, are still missing
7 seconds and minutes at the time of the arrests.

8 I mean, it is as if, as Mr. Turley said, you know,
9 Rose Mary Wood was leaning backwards and deleting one tape
10 with eight arms. I mean, this is multiple, multiple tapes.
11 You cannot inadvertently lose this.

12 In this manner, again, and we believe this is very
13 critical, the District of Columbia's deponent admitted that
14 they delivered the tapes to the MPD general counsel's office
15 within one week of the arrests. Now, when we filed our motion
16 for sanctions and we've raised these issues with the District
17 and we put it before the Court, they did not come back and
18 say, "We're outraged, we're shocked, we can't believe this
19 happened, we've engaged an internal investigation."

20 The Attorney General of the District of Columbia,
21 Peter Nickles, has not engaged in an internal investigation as
22 to what happened. With all due respect to Mr. Koger, I don't
23 believe this is an issue of District resources.

24 THE COURT: I want this -- I will say this now. I
25 want Mr. Nickles to file a declaration in this case addressing

1 all of these issues that you've raised and addressing the
2 issue that Mr. Koger highlighted about the fact that he has to
3 personally go through all these files, no additional help. I
4 need a declaration from the man at the top, Mr. Nickles.

5 MS. VERHEYDEN-HILLIARD: We would appreciate
6 explanation, Your Honor. We don't believe -- the questions
7 that Your Honor raises are absolutely valid questions. One,
8 how can we ever know that we've received everything, and
9 indeed we know that --

10 THE COURT: I don't think we will ever know. I
11 don't have any confidence right now that we'll ever know that
12 all discoverable material has been produced.

13 MS. VERHEYDEN-HILLIARD: Well, we know in fact that
14 it hasn't because on those pages that we just got last night,
15 they reference red line versions of memos that went back and
16 forth. The e-mails themselves show attachments, but we
17 weren't given the attachments, so right there, with these
18 materials last night, we know there's even more.

19 With each new set of materials they've given us in
20 the last seven days, all of those materials have indicated and
21 referenced further material and further discovery, so we can
22 engage in six more months of discovery and at the end of that
23 time, where will we be? I mean, our clients are so --

24 THE COURT: This is not going to cost you any money
25 because the City is going to pay for it. I mean, that's not

1 much comfort, but some comfort.

2 MS. VERHEYDEN-HILLIARD: Well, we appreciate that
3 because we believe that the City has engaged in a practice of
4 really a war of attrition and scorched earth litigation in
5 this case. They have drawn it out and drawn it out and at the
6 same time destroyed and lost the critical fundamental evidence
7 to what went on.

8 I mean, to lose the realtime documents, and then in
9 their responses they say, "Well, you should just rely on
10 Defense witnesses' statements." We should not have to rely on
11 self-serving Defendant statements. What we should have had is
12 the records of what was being said and what was being done at
13 the moments in time on that day.

14 I wanted simply to be able to raise those issues
15 with Your Honor. We are evaluating the issue of sanction as
16 well and what in fact would resolve things. There is the
17 issue of additional discovery because there's a host of issues
18 raised, including intelligence gathering on the protesters in
19 material that was just released last week as well as material
20 that was specifically requested by name in February 2004 and
21 that the District never produced to us until the night before
22 deposition, the last day of discovery, which never allowed us
23 then to discover that material, and again, goes back to the
24 fact we do not believe it's an issue of resources.

25 In February 2004, the Barham plaintiffs specifically

1 requested what's known as the Broadbent files, which we knew
2 were intelligence files. They said they didn't have them,
3 they didn't have them, they didn't have them. I mean, it's a
4 specific request. It wasn't a general request. And then at
5 the last day of discovery and then the week afterwards, they
6 began trickling out papers to us, and we could do nothing more
7 with those documents.

8 With regard to the field arrest forms. They
9 arrested 400 class members in this case, and we did not have
10 field arrest forms, and we kept asking for field arrest forms.
11 The District said they didn't have them.

12 THE COURT: All this discovery shortcomings have
13 been appropriately documented in previously filed motions by
14 Plaintiffs, so it comes as no surprise. None of this is any
15 surprise to the City.

16 MS. VERHEYDEN-HILLIARD: That's right.

17 THE COURT: I want Mr. Nickles himself, under
18 penalty of perjury, to address all of those shortcomings, the
19 reasons for those shortcomings and his plan that he's going to
20 personally put in place for completion of all discovery in
21 this case and for whatever his proposal is that will give not
22 only this court but the parties and the citizens of the
23 District of Columbia the confidence that they need to have
24 that all discoverable material has been produced to
25 Plaintiffs. That's the burden on Mr. Nickles himself to do

1 that, and I want that done no later than two weeks from today.

2 I'm not going to extend the time for that.

3 Now, the question I have of Plaintiffs' counsel is
4 do you want to wait and get that information before you tell
5 me how you wish to proceed? I'm not trying to build in
6 further delay, but I'm going to be as innovative as I possibly
7 can also in structuring sanctions, attorney's fees and an
8 appropriate plan to at least complete discovery in this case.

9 MS. VERHEYDEN-HILLIARD: Thank you, Your Honor. And
10 I would need to consult with Chang counsel as well as my
11 co-counsel.

12 THE COURT: Right. The other question I want to
13 raise now is why there haven't been any investigations by the
14 city government into any of this. Why hasn't the City council
15 looked into any of these very serious problems that have been
16 raised, appropriately so, time and time and time again by the
17 Plaintiffs? There has been no oversight by anyone.

18 The Attorney General's office is in charge of this.
19 No one has sought to intervene, to investigate, to ask
20 questions why these discovery problems have existed for so
21 long. I submit the city council has an obligation, the
22 mayor's office has an obligation to the citizens of the
23 District of Columbia, if no one else, to ensure that its
24 Office of Attorney General is functioning at the level of
25 professionalism that the citizens of D.C. are entitled to.

1 And it's shocking that no one has attempted to
2 exercise any oversight responsibility into the many serious
3 shortcomings of the Office of the Attorney General of the
4 District of Columbia. And quite frankly, I'm not going to
5 tolerate it.

6 Now, if I have to get involved and appoint someone
7 to start investigating, I'll do it. I would prefer not to. I
8 will leave it up to the City to exercise appropriate oversight
9 responsibility, but this nonsense is going to stop and it's
10 going to stop soon.

11 Now, my question to you, and maybe I need to take a
12 short recess to let you huddle with your colleagues, as to
13 whether or not you want that declaration from Mr. Nickles
14 first before you tell me how you want to proceed or whether
15 you want to submit your declaration -- your proposal in two
16 weeks. You may want to think about that and talk about it
17 with your colleagues for a few minutes, but you know, this is
18 going to come to an end.

19 Either this case is going to be settled soon on
20 terms that are fair to everyone, or discovery is going to be
21 settled but moved to the next wrung, but I am determined that
22 I'm going to bring about finality in this case, if the case is
23 not settled, just as soon as I possibly can.

24 And again to Plaintiffs, whenever you file your
25 declaration -- I'm going to address the other pending issues

1 when I come back. Whenever you address the issue of sanctions
2 and attorney's fees, I strongly suggest to you that you be as
3 innovative in your request for appropriate sanctions,
4 financial and otherwise, because it's appropriate that the
5 Court impose significant sanctions to deter this type of
6 outrageous conduct by the City's attorney's office in the
7 future.

8 Let me take a short recess, and I want your best
9 thoughts about how you would like to proceed and then I'll
10 deal with these other issues that are pending before the Court
11 at this point.

12 MS. VERHEYDEN-HILLIARD: I believe we'll only need a
13 couple of minutes.

14 THE COURT: I'll take a recess until noon. That
15 clock is showing ten minutes till noon. I'll take a recess
16 until noon, and I'll address the other matters that are
17 pending as well.

18 THE DEPUTY CLERK: This honorable court now stands
19 in short recess.

20 (A BRIEF RECESS WAS TAKEN.)

21 THE DEPUTY CLERK: This honorable court is again in
22 session. Please remain seated.

23 THE COURT: All right. Counsel.

24 MS. VERHEYDEN-HILLIARD: Thank you, Your Honor. I
25 consulted with my co-counsel in Barham as well as with Chang

1 counsel. We would like to file, in two weeks, our request to
2 the Court regarding the discovery issues, and we also would
3 like to see in two weeks, as Your Honor had recommended, the
4 response from the Attorney General. We don't need to see it
5 first. We think they should just both be filed.

6 THE COURT: You want a chance to respond to his?

7 MS. VERHEYDEN-HILLIARD: We would like to respond to
8 his.

9 THE COURT: All right. So then the declaration by
10 Mr. Nickles is due two weeks from today, and Plaintiffs'
11 request for additional discovery, two weeks from today. Let's
12 see, that's -- today is what, the 29th? It's the 12th and
13 you would like a couple of weeks after that to respond to
14 whatever Mr. Nickles says?

15 MS. VERHEYDEN-HILLIARD: Yes.

16 THE COURT: All right. The 26th for Plaintiffs'
17 reply.

18 MS. VERHEYDEN-HILLIARD: Thank you, Your Honor.

19 THE COURT: All right. And again, the declaration
20 for Mr. Nickles has to address the pattern of shortcomings,
21 the pattern of discovery abuses in this case and his plan for
22 concluding discovery and to also give this court and the
23 parties and the citizens the comfort that they need to know
24 that all discoverable material has been turned over. Simple
25 as that.

1 Yes, Counsel.

2 MR. TURLEY: I just wanted to note that we're
3 prepared also in two weeks to be -- have our motion cover
4 sanctions as well as --

5 THE COURT: I'm going to address that in just a few
6 minutes, all right. I'm going to address everything else
7 that's pending right now.

8 MR. TURLEY: Thank you, Your Honor.

9 THE COURT: There may be a need to talk again. I
10 want to deal with the other miscellaneous outstanding matters.

11 Earlier this year, the Court, March 30th, to be
12 exact, the Court granted the Rule 68 Plaintiffs' motion for
13 attorney's fees with a reasonable amount to be determined by a
14 supplemental order of the Court. I'm going to refer that. I
15 have enough on my plate right now. I'm going to refer that to
16 Judge Kay for a report and recommendation on the reasonable
17 amount of attorney's fees.

18 MS. VERHEYDEN-HILLIARD: May I make one request with
19 regard to that?

20 THE COURT: Yes.

21 MS. VERHEYDEN-HILLIARD: The District, in its
22 opposition, said that they believe the Plaintiffs were
23 entitled to, I believe, \$97,000 in attorney's fees, so that's
24 not in dispute. So, we would request that they pay that
25 amount while the Court refers the additional amount which is,

1 I think, at approximately another 130,000.

2 THE COURT: All right. Any problems with that, Mr.
3 Koger?

4 MS. EFROS: May I, Your Honor? We would appreciate
5 the referral to Judge Kay.

6 THE COURT: What about the amount of 97,000?

7 MS. EFROS: We would prefer not to do an interim
8 award at this point. We would rather have the issue resolved
9 in totality.

10 THE COURT: All right. I'm going to direct the City
11 to issue a check within 10 days from today's date. If it's
12 not issued, there'll be other sanctions. For any amount in
13 excess of \$97,000, that's referred to Judge Kay for report and
14 recommendation.

15 The Court also, in early March -- strike that --
16 May, granted in part and denied in part Plaintiffs' motion to
17 compel against the District and the FBI respectively.
18 Documents have been produced for *in camera* review and that
19 issue will also be referred to Judge Kay for determination of
20 what if any of those documents should be produced.

21 There are two motions for leave to file surreplies,
22 one by the Chang plaintiffs in relation to the OAG officers'
23 motions for judgment on the pleadings and one by the FBI in
24 relation to Barham plaintiffs' motion to compel.

25 (PHONE RINGING.)

1 THE COURT: That's the daily telephone call.

2 The Court will grant both of those motions, and the
3 surreplies are deemed filed. Let me just say one thing,
4 though, loud and clear about surreplies. I'm not going to
5 tolerate them anymore. There will be no further surreplies
6 filed in these cases. I can't think of one motion by anyone
7 that's been filed that has not been accompanied at some point
8 by someone filing a motion to file a surreply. That's not
9 going to happen. That's it. No more.

10 The parties are admonished that future requests to
11 file surreplies will be viewed with extreme disfavor, and if I
12 have to impose sanctions, I don't care who it's on, Plaintiffs
13 or Defendants, I'll do it. I'll only grant future requests
14 for leave in exceedingly narrow circumstances such as a change
15 in the law or newly discovered information. Any new arguments
16 made in replies and/or proposed surreplies that could have
17 been made in the original motion or response will result in
18 the striking of pleadings and other appropriate remedies,
19 which could include, again, sanctions, so a hint to the wise
20 should be sufficient.

21 The Barham Plaintiffs' motion to compel the FBI
22 search -- the FBI to search its record for references to the
23 named Plaintiffs, that -- I'm going to grant that motion.
24 It's troubling that in one case someone was attempting to
25 cross a border and my recollection is his name showed up in a

1 database somewhere. It's no hardship at all for the FBI to
2 have a technician push buttons for databases to determine
3 whether any of these databases have identifiable records for
4 these Plaintiffs, so substantially for the reasons advanced by
5 the Plaintiffs, the motion is granted.

6 The FBI is directed to run the names of the named
7 Plaintiffs through the data sources identified by Plaintiffs
8 and to disclose any positive results from the search regarding
9 the, quote, maintenance and use and dissemination, including
10 intelligence-related use and dissemination of information and
11 data related to the persons arrested on September 27, 2002 in
12 connection with the Pershing Park mass arrest, and this is
13 through the context of Rule 30(b)(6) depositions or in
14 communications between counsel.

15 These searches must be conducted and the results
16 disclosed to Plaintiffs by no later than September 30th,
17 2009.

18 Now, I want to be fair about that, though. In the
19 event there's a search and the search reveals that -- reveals
20 privileged information that should not be disclosed to
21 Plaintiffs, then I direct the FBI to bring that information to
22 the Court's attention for appropriate consideration by the
23 Court. So I'm not -- I'm mindful that people could be the
24 subject of other appropriate investigations, and I'm not
25 trying to interfere with that. I'm not suggesting that that's

1 the case, but I'm also mindful that since we're dealing with
2 the FBI, it's extremely possible.

3 The motions for judgment on the pleadings, we're not
4 there yet. They've been fully briefed, they're ripe and at
5 some point, if the case doesn't settle, the Court will have to
6 address and resolve that motion, those motions and potentially
7 other motions filed by Plaintiffs, although my preference
8 would be to go to trial. You know, if it's appropriate to
9 carve out some time for Plaintiffs to file appropriate
10 potentially dispositive motions, then the Court will do so, so
11 I'll keep those motions under advisement.

12 Now, motion for sanctions. To the Plaintiffs, don't
13 get surprised at what I'm about to say, but I'm not
14 back-peddling from anything I said earlier. But in light of
15 the notices filed by Plaintiffs on the afternoon of
16 July 27th and the evening of July 28th, it's patently
17 obvious to the Court that the District's discovery violations
18 are still a very unfortunate live issue, and as a result, the
19 issue of the appropriate sanctions is not yet in a posture for
20 resolution.

21 There's no alternative at this point. I mean, I
22 recognize arguments made by Plaintiff for sanctions up to this
23 point, but there's no alternative but to deny, without
24 prejudice, that request because I want to give Plaintiffs the
25 best opportunity to roll all their arguments into one pleading

1 for appropriate sanctions and subject to renewal after the
2 Plaintiffs have had an opportunity to review any newly
3 produced evidence and determine whether additional discovery
4 is needed.

5 Now, the Plaintiffs asked for two weeks a few
6 minutes ago, and that's fine, if that's all you want. My --
7 I'm not so sure two weeks is appropriate, because I want your
8 best arguments for not only the sanctions that you requested
9 up to the point of your filing of motions, but sanctions for
10 any conduct that you believe is sanctionable since the filing
11 of those motions. So the question to you is, how much time do
12 you really need?

13 MS. VERHEYDEN-HILLIARD: Court's indulgence.

14 (PAUSE.)

15 MS. VERHEYDEN-HILLIARD: Thank you, Your Honor. We
16 would like to file our filing in two weeks with regard to the
17 discovery issues and 45 days with regard to the sanctions.

18 THE COURT: All right. Now, you're going to have to
19 file a new pleading. I mean, basically it may be, you know,
20 paste from the other pleading and incorporate all your new
21 arguments, but I want one pleading that has your legitimate
22 requests for sanctions for all the conduct that you believe is
23 sanctionable.

24 MS. VERHEYDEN-HILLIARD: Yes, Your Honor.

25 THE COURT: And I haven't determined whether I'll

1 enlist the aid of one of my magistrate judges to assist me
2 with that, but I want your best thoughts and I want your --
3 for all the sanctions that you want, which could be financial
4 and otherwise.

5 So, you want 45 days from today's date to file your
6 renewed motion for sanctions then, correct; is that right?

7 MS. VERHEYDEN-HILLIARD: Yes, Your Honor.

8 MR. TURLEY: Yes, Your Honor.

9 THE COURT: That takes us to -- let me ask you about
10 this, Leah.

11 (PAUSE.)

12 THE COURT: All right. I haven't done the math.
13 What's 45 days, Counsel? Today is what? What is today, the
14 29th? I mean, 30 days -- Let's do it the easier way. 30
15 days would be August the 29th. What's today, the 30th?
16 Today is the 29th. 30 days would be -- August the 29th, so
17 we're looking at what, September the 15th or so? I mean,
18 it's roughly 45 days; is that right?

19 MS. VERHEYDEN-HILLIARD: Yes, Your Honor.

20 MR. TURLEY: Yes, Your Honor.

21 THE COURT: All right. September 15th. How much
22 time for the City to respond? I'm not going to extend time.
23 I'm just not going to do it. There's going to be a new
24 attitude by the Court with respect to requests to extend time.
25 I mean, we're inundated with requests to extend time and also

1 for these motions to file surreplies. That's all history. So
2 how much time do you need? 30 days?

3 MR. KOGER: We would ask 30 days, Your Honor.

4 THE COURT: All right. October the -- October the
5 15th. And then I'll give you two weeks for reply.

6 MR. TURLEY: Thank you, Your Honor.

7 THE COURT: All right. And your discovery request,
8 though, you still want two weeks from today. That's all.

9 MR. TURLEY: Yes, Your Honor.

10 THE COURT: All right. And I gave you a date
11 certain with respect to that.

12 And if someone didn't hear it earlier, the City's
13 going to be responsible for all costs associated with future
14 discovery, future discovery that's required as a result of the
15 discovery problems that have surfaced over the past week, all
16 right. And it may well be they're entitled to pay for any
17 additional discovery, I don't know. I don't know. If there's
18 some link between additional discovery and shortcomings in the
19 past, then they're going to pay the freight on that.

20 MS. VERHEYDEN-HILLIARD: And we just wanted to
21 clarify, Your Honor, that any future discovery is discovery
22 that the Plaintiffs are taking, not that the Defendants --

23 THE COURT: Oh, Defendants don't get anymore
24 discovery, no. The City gets absolutely no discovery.

25 MS. VERHEYDEN-HILLIARD: Thank you, Your Honor.

1 MR. TURLEY: Thank you, Your Honor.

2 THE COURT: All right. Anything further?

3 MS. VERHEYDEN-HILLIARD: Not from Plaintiffs.

4 THE COURT: Mr. Koger, in fairness, any additional
5 requests?

6 MR. KOGER: No, Your Honor.

7 THE COURT: All right. Do I need to set another
8 status hearing date? I probably should. What makes sense
9 here? What's your best thoughts about when the status hearing
10 should be? You have a lot of work to do, discovery requests.
11 Actually, I don't know, what makes sense here? September?

12 MR. TURLEY: Your Honor, it may --

13 MS. VERHEYDEN-HILLIARD: One moment.

14 MR. TURLEY: I'm sorry, we're just having to confer,
15 Your Honor.

16 THE COURT: Sure, sure.

17 (PAUSE.)

18 THE COURT: I need to focus on discovery, so that's
19 the date I'm looking at. I need some time in September to
20 look at that myself, so maybe the latter part of September.

21 MR. TURLEY: Your Honor, we think that perhaps a
22 September status hearing date would be appropriate in this
23 case.

24 THE COURT: I think so. I'm looking at September
25 the 29th. That will give -- you're filing yours in two

1 weeks, the City's going to respond to that. I need some time
2 to think about it.

3 MR. TURLEY: That's fine with Plaintiffs, Your
4 Honor.

5 THE COURT: September the 29th at 11:00 o'clock.
6 Is that a good date for the City?

7 MR. KOGER: Yes, Your Honor.

8 THE COURT: All right. All right. Anything
9 further?

10 MR. KOGER: Thank you, Your Honor.

11 THE COURT: All right. Parties are excused. Thank
12 you. No need to stand. Thank you.

13 (PROCEEDINGS END AT 12:07 P.M.)

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CERTIFICATE OF REPORTER

18 I, Catalina Kerr, certify that the foregoing is a
19 correct transcript from the record of proceedings in the
20 above-entitled matter.

21

22

23

Catalina Kerr

Date

24

25