UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF THE CHANG PLAINTIFFS' MOTION FOR SANCTIONS AGAINST THE DISTRICT FOR DISCOVERY ABUSES

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January 16, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASE LAW

OTHER AUTHORITIES

RULES

INTRODUCTION

The District of Columbia, either directly or through its instrumentality, the Metropolitan Police Department ("MPD") (collectively, "the District"), consistently and flagrantly has abused the discovery process to the severe detriment of the *Chang* Plaintiffs, by destroying evidence; failing to preserve evidence; by failing to produce responsive evidence in a timely fashion; and by failing to amend discovery responses in a timely fashion, if at all, when additional responsive materials came to light.

These practices have continued not only throughout the discovery in this case, but also in the weeks after the close of discovery, despite repeated complaints from the *Chang* Plaintiffs about the District's shameless and outrageous destruction, withholding, or late production of significant, responsive information. Illustrative examples of the abuses abound, including: [1]

- The District lost or destroyed the Joint Operations Command Center ("JOCC") Running Resume and twelve copies of that document, even though that document would be the most complete contemporaneous record of the District's actions on September 27, 2002, and would contain countless pieces of information recorded, as they occurred, from top command officials and other additional sources.
- The District failed to produce the full set of audio tapes, which contain relevant Radio Runs, for September 27, 2002. The audio tapes that were produced contained significant gaps. When pressed for an explanation, the District submitted a signed declaration by one of its officers states that the audio tapes which had been produced were reviewed and contain no gaps or technical deficiencies. Weeks later, the District explicitly contradicted this declaration, when its 30(b)(6) witness admitted

[1] Evidence and citations regarding these examples are provided in more detail later in this memorandum.

that the produced audio tapes were deficient. Although requested to do so, the District has not withdrawn its previous productions or provided further audio tapes to augment earlier productions.

- The District produced over 3,000 pages of responsive documents on the last day of discovery, although many would have been relevant in the depositions of dozens of District witnesses that had been completed.
- Almost two months after discovery closed, the District produced two video tapes that depicted the events of September 27. These video tapes had been in the possession of the MPD General Counsel's office during the discovery period.
- Weeks after discovery was complete, and only under the threat of a Court Order, the District re-produced over seven hundred pages of materials that had previously been inappropriately over-redacted.
- The District continues improperly to withhold entire, or portions of, documents under an improper claim of the law enforcement privilege.

Standing alone, the District's outrageously late production of a significant amount of responsive materials is a clear discovery abuse for which sanctions would be warranted. Since the District was long aware of the existence of this material and *Chang* Plaintiffs' demands for its production, the District's intentional withholding of requested, responsive, significant discoverable material until the close of the discovery period constitutes knowing misconduct or reckless disregard by District officials. Of even greater significance is the District's refusal or failure to produce crucial and unique discoverable material – particularly the JOCC Running Resume – that can be explained only as spoliation of evidence, either through the District's purposeful failure to exercise due care in maintaining evidence, or the conscious destruction of material and responsive documents.

The *Chang* Plaintiffs' prosecution of its case has been irreparably injured by these actions. All outstanding issues rely on fact-intensive inquires. By withholding material – either entirely or until after a time in which it could be used effectively – the District guaranteed that its witnesses could not be questioned in depositions on the material or challenged over any contradictions. Not only did this dramatically undermine the value of discovery for the *Chang* Plaintiffs, but it deprived them of the ability to determine the meaning and value of particular information for trial in this case.

As a result, significant sanctions against the District are not only warranted but also are required to deter this repeated behavior by the District.[2] The District evidently believes it has no duty to comply with the Federal Rules of Civil Procedure ("FRCP"), this Court's Orders, or normal practices of litigation civility. Since the District cannot defend its flagrant trap and arrest practices, which it now admits occurred without probable cause, it chooses to protect itself from resulting findings of liability and the imposition of appropriate relief by withholding or destroying evidence. The District appears to believe that it will bear no consequences for failing to comply with the Federal Rules or this Court's orders as evidenced by its clear pattern of discovery abuse in similar civil rights cases. *See Bolger*, 248 F.R.D. 339, attached as Exhibit 1. This presumed license to ignore unilaterally the rules of discovery should be firmly admonished, corrected and sanctioned by the Court. Otherwise, the District – an all-too-common defendant in civil rights and related litigation – will continue to assume it not only can continue its illegal

[2] Apparently, the District employs discovery abuse as part of a conscious litigation strategy. This total failure to comply with basic rules of discovery is not unique to the instant case, as evidenced by this Court's recent ruling on discovery sanctions in *Bolger v. District of Columbia*, 248 F.R.D. 339 (D.D.C. 2008), attached as Exhibit 1. In that case, as in this one, the District repeatedly failed to comply with basic discovery obligations. As a result, this Court found that the District had engaged in a "clear case of sanctionable discovery misconduct" and ordered the District to pay monetary sanctions. The Court is still considering the imposition of adverse inferences. More discussion of this opinion can be found throughout this Memorandum.

trap-and-arrest practices but also that it can avoid resulting liability by abusing the discovery process to defeat civil rights actions.

These discovery violations have had an obvious and significant impact on *Chang* Plaintiffs' ability to prosecute this case, and *Chang* Plaintiffs request sanctions against the District both to remedy that harm and to deter such future abuse.

ARGUMENT

I. THE DISTRICT OWED A DUTY TO PRESERVE EVIDENCE, TO PRODUCE EVIDENCE IN A TIMELY FASHION, AND TO AMEND AND SUPPLEMENT THEIR PRIOR PRODUCTIONS.

A. The District Owed a Duty to Preserve Evidence.

The duty to preserve evidence is inherent in the Federal Rules of Civil Procedure, which require the preservation of certain key documents and information once there is a reasonable anticipation of litigation, particularly after service of a complaint, so that the opposing parties may review and examine such documents during the discovery process. *See, e.g.*, *Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 34 n.3 (D.D.C. 2004) (finding that "a litigant . . . is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.") The District is no different from any other civil litigant in this regard. It clearly had an obligation in this case to preserve documents related to the arrests at Pershing Park once it reasonably anticipated litigation arising from those arrests.

"[A] plaintiff has a legally protectable interest in the preservation of evidence required for securing recovery in a civil case." *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 848 (D.C. 1998). When a party either fails to preserve or destroys potential evidence in a foreseeable litigation, it can be deemed to have engaged in the "spoliation of evidence," and a trial court may

use its inherent power to impose an appropriate sanction. *See Jackson v. Fedders Corp.*, No. 94-0344, 1996 U.S. Dist. LEXIS 7306 (D.D.C. May 21, 1996).

The destruction of material documents or evidence is perhaps the most serious form of discovery abuse short of perjury. *See Roberts v. Canadian Pac. Ry., Ltd.*, 2007 U.S. Dist. LEXIS 2441 (D. Minn. Jan. 11, 2007) (stating "[a]ny possible destruction of evidence is a serious transgression of discovery procedures, going, as it does, to the core of the Court's truth-finding mission."). By destroying such evidence, the District seeks to deny the Court and the parties the benefit of the full facts of the case, which can undermine both the scope of a verdict and the scope of damages.

B. The District Owed a Duty to Respond to Discovery Requests in a Timely Manner and then to Supplement or Amend Prior Productions.

Rule 34 of the Federal Rules of Civil Procedure imposes a duty on the party responding to a discovery request to produce documents that are in the possession, custody or control of the party. Formal requests clearly implicate the duties of opposing parties to respond. *Sithon Maritime Co. v. Holiday Mansion*, No. 96-2262, 1998 U.S. Dist. LEXIS 5432 (D. Kan. Apr. 10, 1998). In addition, Fed. R. Civ. P. 26(e)(1) states that a party is under a duty to seasonably amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is, in some material respect, incomplete or incorrect. Moreover, any lead counsel has a duty pursuant to Fed. R. Civ. P. 26(e)(2) to continue to supplement all disclosures, responses, and documentary evidence in discovery. *Atkins v. Fischer*, 232 F.R.D. 116 (D.D.C. 2005). Neither the District nor its lead attorney complied with those duties in this case.

Supplementation to previous productions must occur in a reasonable amount of time. *See Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263 (8th Cir. 1975) (finding a defendant does not act seasonably in supplementing responses to interrogatories by filing an amendment five

weeks after the close of discovery and over three months after having received the material). The Advisory Committee Notes to the Federal Rules explain that although "supplementations need not be made as each new item of information is learned," they should "be made at appropriate intervals during the discovery period." Fed. R. Civ. P. 26(e) Advisory Committee's Notes, 1993 amendment.

Both the destruction and withholding of discoverable material constitute core violations of the Federal Rules. These violations undermine the entire judicial process, deprive the fact finder of relevant evidence, waste the time and resources of both the Court and the parties, tend to delay trial, and undercut efforts to reach a verdict openly and efficiently.

II. THE DISTRICT FAILED TO PRESERVE OR PRODUCE EVIDENCE ON A TIMELY BASIS, OR TO AMEND PRIOR RESPONSES.

The District's actions are textbook examples of discovery abuse. At the heart of this litigation are the actions the MPD, and other defendants, took in connection with the arrests of the Plaintiffs on September 27, 2002. Accordingly, Plaintiffs clearly are entitled to discover all evidence concerning the relevant actions taken and decisions made by the District and its employees on that date. Contemporaneous evidence of each actor's role in such events, and their motives and knowledge relating to those events, would be the most probative and reliable evidence, including at least, the JOCC Running Resume, audio recordings of police radio traffic and video recordings of the relevant events on September 27, 2002. To date, however, the JOCC Running Resume has not been produced, only some of the audio tapes containing police communications have been produced and those were incomplete, and video recordings of relevant events were withheld for years after being requested and were not produced until after discovery had closed. The District had a duty to preserve and produce this evidence; it failed to do so.

The materials the *Chang* Plaintiffs requested were no different than what is requested in any such civil liberties litigation. The District had a duty to, in a timely fashion, produce responsive discoverable evidence and to amend and supplement discovery productions; it failed to do so. It enjoys no special privilege or immunity for its actions in litigation; as with any other litigant, the case law of this Court recognizes that sanctions are appropriate against the District in such situations.

A. The District Failed to Preserve Evidence.

The District arrested the *Chang* Plaintiffs on September 27, 2002. As revealed by both news articles and internal actions within the District, it was well-understood within hours of the arrests and certainly by early October 2002 that litigation was likely to result and would include challenges both to the individual arrests and to the procedures employed during the arrests. Likely constitutional challenges to such trap-and-arrest practices were discussed in the media, both before and after they occurred. *See, e.g.*, Manny Fernandez & David A. Fahrenthold, *All Sides Brace for World Bank Protests; D.C. Police Warn Commuters to Avoid Driving Tomorrow*, WASH. POST, Sept. 26, 2002, at B1 (discussing complaints over "unconstitutional police practices" in handling large demonstrations); Jonathan Turley, *Un-American Arrest*, WASH. POST, Oct. 6, 2002, at B8 (discussing the trap-and-arrest tactic used by the District in the September 2002 protests). The *Chang* Plaintiffs filed their original complaint against the District Defendants and others on October 15, 2002, less than 30 days after the arrests occurred. (*See* Dkt. No. 1 in this case.) The MPD and the District were served with copies of the complaint on the same day. (*See* Certificate of Service, attached to Complaint.) Thus, even if the District's employees ignored the flood of public criticism as notice of the likely litigation, October 15, 2002, is the latest possible date on which the District had notice of litigation over the September 27, 2002, mass arrest.

There could be no clearer trigger to a party's responsibility to preserve documents than receiving service of a lawsuit, and the District should have taken document preservation measures immediately thereafter.

Nonetheless, despite the service of the *Chang* complaint on October 15, 2002, the District claimed[3] that it did not become aware that litigation was likely until October 24, 2002 – when D.C. City Councilmember Kathy Patterson held hearings regarding the law enforcement response to the September 27-29 protests. (Hunter (30(b)(6)) Tr. at 25:17-22, attached as Exhibit 2.)[4] The District testified that although it "is the policy of the Office of the Attorney General [then called the Corporation Counsel's Office] to make written notification to agencies regarding such matters", it did not know whether the practice was followed in this instance. (*Id*. at 33:4-6.) The District also testified that it is the policy of the Office of the Attorney General to issue a retention letter upon notice of anticipated litigation "as soon as possible." (*Id*. at 35:7-5-37:6.)

This policy was apparently not followed. The District testified that it could not locate any letter describing retention procedures or policies in this case, which was sent to MPD personnel.[5] Moreover, the District could not identify the individuals whom it believed may have

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[3] In order to ascertain the status of certain missing documents requested in discovery, the *Chang* Plaintiffs noticed a deposition of the District, through a 30(b)(6) designee, to explore the District's efforts in preserving and retaining documents. The District's 30(b)(6) designee, Deloris Hunter, stated that she was prepared to testify about "the date upon which the District of Columbia and the Office of the Attorney General reasonably anticipated litigation concerning the mass arrest at Pershing Park on September 27, 2002" – which she stated was October 24, 2002. (Hunter (30(b)(6)) Tr. at 25:7-16, attached as Exhibit 2.)

[4] When *Chang* counsel noted that the *Chang* Plaintiffs filed their complaint on October 15, 2002, Ms. Hunter agreed that the District likely would have been on notice on that earlier date. (Hunter (30(b)(6)) Tr. at 26:1-14, attached as Exhibit 2.) This testimony, and the failure of the witness to testify originally to that date despite having prepared herself to testify to the District's knowledge of the topic, fails to inspire confidence that the District took any measures on or about that crucial date.

[5] One might observe the heavy irony in such a claim: the District's retention procedures did not guarantee retention of its own document retention letter – if it ever existed.

received notification about the filing of the complaint. (Hunter (30(b)(6)) Tr. at 41:8-10, attached as Exhibit 2.) The District has no documentation or other evidence showing that Chief Ramsey, Assistant Chief Newsham, or Assistant Chief Jordan ever received any instructions regarding the need to preserve documents, despite their central roles in the events that led to the litigation. (*Id.* at 45:13-47:11.) Thus, despite a public scandal over the trap-and-arrest tactics and an active investigation by the City Council, and various pending lawsuits in federal court, there is no evidence that the District followed its own procedures by notifying its most involved employees to prevent the destruction of potential evidence.

Indeed, the District was unable to provide any evidence that it took any action to preserve evidence in the Fall of 2002. The District's 30(b)(6) designee's own notes contain no evidence that the District made any efforts to preserve documents in October 2002, and seem to provide no support for a belief that orders, instructions, or other actions were taken to prevent the destruction of key evidence in the months after the litigation was initiated. (*See id.* at 41:7-11) In fact, the District never imposed a "litigation hold on destruction" of recorded police channel communications that contained recordings of the events on September 27, 2002.[6] (*See* Crane (30(b)(6)) Tr. at 110:2-22, attached as Exhibit 4.)

The only clear evidence of an effort by the District to protect potential evidence is a July 28, 2003, memorandum –issued more than ten months after the arrests and more than nine months after the *Chang* Plaintiffs filed their complaint – which referenced the subpoena received from the city council, as opposed to the Plaintiffs, and did not explicitly direct District personnel to preserve documents. (*See* July 28, 2003 Memo, attached as Exhibit 3.)

[6] *See Disability Rights Council v. WMATA*, 242 F.R.D. 139, 146 (D.D.C. 2007) (finding that the failure to issue such a litigation hold "is indefensible").

The District's own testimony makes clear that it wholly failed to take even the most basic steps, required of those who anticipate or are in litigation, to preserve documents in a timely manner.[7]

B. The District Failed To Produce Key Discoverable Material.

What follows is a description of some of the most important properly discoverable material that the District never produced.

1. The District Failed to Produce the JOCC Running Resume.

The most complete evidence of the actions of the MPD and individual officers is the contemporaneous record kept by the MPD itself from the day in question. During a major public event in the District, the MPD creates a log of the day's events, personnel movement, and officer decisions in a document known as the JOCC Running Resume. This document is created by recording police communications and decisions that are reported to a typist in the JOCC, who has the responsibility for creating the Running Resume contemporaneously. As stated in the *Bolger* case, "[t]here is no reasonable question that the running resume was likely to contain highly relevant evidence . . . ." *Bolger*, 248 F.R.D. at 346, attached as Exhibit 1.[8]

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[7] In similar cases, such failure to preserve evidence or the destruction of evidence as part of "routine procedures" have not only been cited as a violation of Federal Rules but also may serve as the basis for criminal prosecution for obstruction of justice. For example, in the recent case of former Credit Suisse First Boston investment banker Frank Quattrone, the United States criminally charged the defendants for allowing an email to go out to staff encouraging them to follow the firm's "document retention policy," which required the destruction of any nonessential documents even though there was a "likelihood" of litigation. When this resulted in the destruction of evidence in a later securities case, the government charged the destruction as obstruction. *See generally United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006) (reversing conviction on basis of jury instruction error). Likewise, a lawyer who destroyed a laptop was charged with obstruction because he should have known that a possible case would result from the presence of pornography on the computer. *See* Matthew Malone, *Lawyer Accused of Destroying Evidence in Connecticut Pornography Case*, N.Y. TIMES, Feb. 17, 2007, at A1.

[8] "Essentially [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

The District has testified through various individuals that a JOCC Running Resume was created on September 27, 2002. Sergeant Douglas Jones stated that the District created up to twelve contemporaneous hard copies of the September 27, 2002, JOCC Running Resume, including one made specifically for litigation purposes.[9] (*See* Koger Declaration at 11, attached as Exhibit 6; Jones Tr. at 24:16-25:06; 47:22-48:14, attached as Exhibit 7.) None of these copies have been produced in the course of discovery.

Unquestionably, *Chang* Plaintiffs' discovery requests called for production of the JOCC Running Resume,[10] and there has been no suggestion by the District to the contrary.

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commanders, things that were decided at certain times on how to handle certain situations. It is a log of the events of the day." (*See* Herold Tr. at 176:01, attached as Exhibit 5.)

[9] According to Sergeant Jones, at the time of the command center activation "at least a dozen" hard copies of the September 27, 2002 Running Resume were distributed to command offices. The underlying computer file was stored redundantly, with an identical copy on each of two separate computer servers (*See* Jones Dep. at 21:21-24:7, attached as Exhibit 7.)

[10] *See* Plaintiffs' First Set of Joint Requests for Production of Documents From Defendant District of Columbia, served in January 2004, which included several requests that would include the JOCC Running Resume such as:

- Request 1: All documents that refer or relate to any of the Plaintiffs and that also refer or relate to the Mass Arrests, the Mass Detention, and/or the World Bank/IMF Demonstrations.
- Request 10: All documents created or received by the District Defendants on or before September 27, 2002, that refer or relate to any event expected to occur at Freedom Plaza or Pershing Park at any time between September 26, 2003 and September 29, 2002.
- Request 11: All documents created or received by the District Defendants on or before September 27, 2002, that refer or relate to a demonstration activity involving bicycles expected to occur anytime between September 26, 2002 and September 29, 2002.
- Request 12: All documents that record or otherwise refer or relate to radio or telephone communication within the MPD and/or between the MPD and any other District, federal, state or local law enforcement agencies or personnel, on September 27, 2002, relating or referring to the World Bank/IMF Demonstrations, the Mass Arrests, or the Mass Detention.
- Request 13: All documents constituting diaries or logs or summaries of the events of September 27-29, 2002, relating to the World Bank/IMF Demonstrations and the Mass Arrests.
- Request 16: Documents sufficient to identify the law enforcement officers who participated in any way in the Mass Arrests and/or the Mass Detention.
- Request 29: All documents that refer or relate to the movements of officers located in or around Pershing Park on September 27, 2002.

Nonetheless, the JOCC Running Resume has not been produced to the Plaintiffs in this or related litigation, nor does the JOCC Running Resume appear on any privilege log provided by the District.

By Order dated June 27, 2007, the Court lifted the stay on discovery for most matters in the *Chang* and *Barham* cases and ordered that discovery conclude by November 16, 2007. (Dkt. No. 303.) Aware of this impending court-ordered deadline and in an effort to address the District's deficient document productions, *Barham* Plaintiffs filed a Motion to Compel the Production of Running Resumes and Recorded Police Channel Communications by the District of Columbia on October 1, 2007. (Dkt. No. 338.) On October 30, 2007, after full briefing on the Motion, the Court granted *Barham* Plaintiffs' Motion and ordered

> that if the District of Columbia is unable to produce the J.O.C.C. running resume by the close of discovery on November 16, 2007, defendants shall submit a sworn declaration by counsel of record describing in detail the efforts undertaken to locate the document. Defendants' declaration shall describe the entirety of the search, including the places searched, the dates the search took place, and the persons involved in conducting search. Defendants shall specifically account for any copies of the J.O.C.C. running resume for September 27, 2002 that may have been provided to the Metropolitan Police Department Office of General Counsel and to the Offices of MPD Command Staff.

(Dkt. No. 351.)

The District complied with the Court's Order on November 16, 2007, by filing the Declaration of Thomas L. Koger Pursuant to Order Dated October 30, 2007, along with numerous attachments (hereinafter "Koger Declaration"). The Koger Declaration does not claim

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- Request 30: All documents that refer or relate to any information provided to Chief Ramsey, Mayor Williams, Assistant Chief Newsham, and/or Major Rick Murphy of the U.S. Park Police throughout September 27, 2002 in whatever form.

These requests are also attached as Exhibit 16.

that the JOCC Running Resume for September 27, 2002, never existed.[11] Rather, Mr. Koger recounts the unsuccessful efforts taken to locate a copy of the JOCC Running Resume by various MPD and District personnel. Not only have all copies of the JOCC Running Resume been lost or destroyed but also, incredibly, the District also suggests that the underlying data used to create the JOCC Running Resume has been lost. (*See* Koger Declaration ¶¶ 55, 56, 63, attached as Exhibit 6.) Mr. Koger indicates in his declaration that the original JOCC Running Resume and copies of the JOCC Running Resume were destroyed or lost sometime between September 27, 2002, and February 2004, when document preservation efforts should have been in full effect. (*See* Koger Declaration at 1-4, attached as Exhibit 6.) The Koger Declaration does not address or attempt to explain whether the document preservation procedures in place by the District were simply inadequate or whether the destruction or loss of the JOCC Running Resume and the twelve hard copies of the JOCC Running Resume, including one made specifically for litigation purposes, was intentional.

Regardless, the District has engaged in discovery abuse, if not intentional spoliation. The similarities to the *Bolger* case previously referenced are clear with one significant difference. Unlike the instant case, after repeated requests by *Bolger* Plaintiffs' counsel and after multiple court orders over almost four years of litigation, the District finally produced a copy of the JOCC Running Resume. This Court found such conduct by the District to be sanctionable, (*see generally Bolger*, 248 F.R.D. 339, attached as Exhibit 1), even though the JOCC Running Resume in *Bolger* was eventually produced, allowing the Court and parties to use its contents to help decide the merits of the case. In the instant case, Mr. Koger and various 30(b)(6) witnesses have confirmed that the JOCC Running Resume was lost or destroyed.

[11] Mr. Koger does indicate that early in the litigation he was under the impression that the JOCC Running Resume did not exist, but was later informed that, in fact, it had been created. (Koger Declaration ¶¶ 6-7, attached as Exhibit 6.)

2. The District Failed to Produce the Full Set of Audio Tapes Containing Radio Runs.

Another obvious and important source of contemporary evidence is any audio tape that captures the statements and orders of law enforcement officers from the day in question. Early in this litigation, the *Chang* and *Barham* Plaintiffs sought to discover recordings of radio communications between various MPD personnel and officials on September 27, 2002 – commonly referred to as "Radio Runs." (Hunter (30(b)(6)) Tr. at 140:8-18, attached as Exhibit 2.) Such evidence normally would have been relayed to the JOCC, and some would have appeared as well in the JOCC Running Resume. (*Id*.)[12] Thus, in addition to the requests for the Running Resume, the *Chang* Plaintiffs also requested copies of any such audio tapes containing Radio Runs through their general discovery requests and through repeated specific requests.[13]

a. The District Failed to Produce All of the Audio Tapes that Contain Radio Runs and Corresponding Documents That Relate to September 27, 2002.

The District testified that, sometime in July 2003, the Office of the General Counsel made efforts to collect audio tapes containing the radio communications transmitted on September 27, 2002, in response to a subpoena from the City Council. (*Id*. at 88:4-13.) Those audio tapes were turned over to the District's counsel at approximately the same time. (*Id.* at 89:7-89:20.)

In an affidavit filed with the Court, the District states that there were at least eighteen audio tapes containing Radio Runs from September 27, 2002. (*See* Exhibit 8.) District 30(b)(6) witnesses testified that the District did not know how many audio tapes were created capturing

[12] Thus, not only is the JOCC Running Resume missing, but so is the evidence that formed one of the bases of that document.

[13] *See* note 10, *infra*. The definition of "document" or "documents" in Plaintiff's requests included "tape recordings," "records of personal conversations", and "all other recorded or sound reproductions, however produced or reproduced."

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 4.)

To date, the District has produced to the *Chang* Plaintiffs only four of those eighteen or more audio tapes. This production clearly represents a fraction of the total number of audio tapes containing Radio Runs relating to the events of September 27, 2002.[14]

b. Those Audio Tapes Containing Radio Runs Which Were Produced Appear to be Incomplete, Damaged or Partially Destroyed.

Although *Chang* Plaintiffs received only four audio tapes containing recordings of Radio Runs, there are, at a minimum, several additional audio tapes containing Radio Runs in the District's possession, as the District has produced a total of eight audio tapes with Radio Runs to the *Barham* Plaintiffs. After reviewing the eight tapes that were made available to the *Barham* Plaintiffs, *Barham* counsel notified the District of significant problems associated with the production. (*See* Email, Exhibit 10.) For example, even though the tapes are labeled as having a two-hour time frame of recorded information on a particular channel, no tape contains more than one hour of recorded information. The tapes have the capacity to record 120 minutes – 60 minutes on side A and 60 minutes on side B – of audio communications on each cassette. None of the cassettes contained any recordings on side B of the tapes.

[14] Surprisingly, the District did produce some audio tapes containing Radio Runs to the *Barham* Plaintiffs that it did not produce to the *Chang* Plaintiffs. On Monday October 1, 2007, counsel for the District notified counsel for the *Barham* class that eight audio tapes were available for pickup. (*See* Exhibit 9.) He 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. To date, the District has failed to produce to the *Chang* Plaintiffs the eight audio tapes that *Barham* counsel received. It is unclear whether these eight tapes included the four previously produced to the *Chang* Plaintiffs. The District has not accounted for or explained why some audio tapes were produced to the *Barham* Plaintiffs and not to the *Chang* Plaintiffs, despite having received a joint request for the production of documents that encompassed these tapes.

In addition, recorded time periods appear to be unaccounted for in those tapes that were provided. *Barham* counsel inquired to the District as to whether there was a technical reason for two hours of recordings being recorded on one hour of tape. (*See* Exhibit 10.) District Counsel replied that he would request supplementation. (*See* Email dated October 17, 2007, attached as Exhibit 11.) In response to Plaintiff counsels' questions and attendant motion, the Court ordered District counsel to supplement their production of recorded police channel communications to account for any technical deficiencies, questions regarding authenticity, or unaccounted for periods of time in the produced audio tapes. (*See Barham* Dkt. No. 351.) In response to the Court order, the District filed the declaration of Denise Alexander, a Training Instructor for the District of Columbia Office of Unified Communication. (*See* Exhibit 8.) Ms. Alexander stated that she and two other employees were tasked with reviewing the audio tapes provided to them by MPD Office of the General Counsel attorney Ronald Harris to determine whether there was anything out of the ordinary concerning the recordings, including gaps in transmissions, equipment, and unaccounted for periods of time. Ms. Alexander declared, under oath, that "there is nothing unusual or deficient" about the transmissions or recordings, despite the apparent compression of two hours of events into one hour of recordings. (Alexander Declaration ¶ 5, attached as Exhibit 8.)

Ms. Alexander's Declaration included an email memorandum identifying the tapes she and her team reviewed and the time periods that were to appear on each tape. (*See id*. at 3-5.) Ms. Alexander's own notes show significant gaps on the tapes during crucial time periods at Pershing Park, such as:

- On the 2-d Channel, there is a 2 hour and 48 minute gap from 7:17 a.m. to 10:05 a.m.
- On the 1-d Channel, there is a 24 minute gap between 9:35 a.m. and 9:59 a.m.
- On the Tact 1 Channel, there is 23 minute gap between 9:41 a.m. to 10:04 a.m.

- On the Tact 2 Channel, there is a 53 minute gap between 9:19 a.m. and 10:12 a.m.

Remarkably, these gaps coincide with the time periods of greatest interest in establishing the intent and knowledge of the Defendants leading up to the mass arrest. Ms. Alexander's Declaration does not address or explain these gaps. The District later testified that it was likely that radio communications occurred during this time period but could not explain why the gaps existed on the tapes. (*See* Crane (30(b)(6)) Tr. at 101:05-103:14 attached as Exhibit 4.)[15]

Some of the crucial decisions of the day, including the decision to arrest the individuals at Pershing Park, apparently took place between 9:30 a.m. and 10:00 a.m. As such, the information that seems to be missing from the radio transmission recordings is crucial.

As a result of the District's failure to produce all of the audio tapes that relate to the September 27, 2002, arrests, it is apparent that entire tapes or portions of tapes have either not been preserved despite clear notice of this litigation and clear requests for production, or the District has willfully chosen not to produce the tapes to the *Chang* Plaintiffs or the District has destroyed them, all despite the fact that they were requested almost four years ago. Similar to the *Bolger* case, "a consistent pattern [has been] established, whereby plaintiffs [must] fight to obtain almost every relevant [piece of evidence]. The protracted discovery period, the excessive amount of time plaintiffs had to devote to discovery disputes, the difficulty of deposing

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[15] The District did "recognize there's an issue with the lack of recordings" and offered to review the tapes again to determine whether there is some technical deficiency or some other reason to explain the gaps, something Ms. Alexander had presumably already done. (Crane (30(b)(6)) Tr. at 102:06-107:02, attached as Exhibit 4.) To date, Plaintiffs have received no such further explanation. In addition, District counsel, when notified of the inconsistencies of Ms. Alexander's Declaration, did not concede that a problem existed, but instead stated only: "Note for the record that Ms. Alexander made the declaration under the penalty of perjury, and she's indicated that the foregoing is true and correct." (*Id*. at 105:12-16.)

Given these deficiencies, *Barham* counsel requested a complete production of the tapes. Counsel for the District stated that he requested such supplementation. *Chang* Plaintiffs have received no explanation from Counsel for the District. No further audio tape productions have been received by the *Chang* Plaintiffs.

witnesses without all relevant information, and the District's failure to be forthright all clearly operated to the prejudice of the plaintiffs." (*See Bolger*, 248 F.R.D. at 346, attached as Exhibit 1.)

3. The District Failed to Produce All Video Tapes.

Similar to the audio tapes that contain Radio Runs, the District has failed to produce all of the video recordings of activities on September 27, 2002. Although some video tapes have trickled in – but only after the close of discovery – it appears that the District has failed to properly search for, locate, and produce all video evidence of the police response to the activities on the day in question.

Chang Plaintiffs requested copies of such recordings through their general discovery requests and through repeated specific requests.[16] The District has recognized that video tapes that document the events are required to be produced, but has failed to do so. (*See* Letter dated October 31, 2007, attached as Exhibit 12.)

The District testified 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 4.) These four tapes have been produced to the *Chang* Plaintiffs. The District could not affirmatively state that these four tapes, however, were the only four video tapes in the District's possession with recorded evidence from September 27, 2002. (*Id*. (30(b)(6)) at 78:6-80:04.)

Other evidence, however, suggests that there were significantly more video recordings taken on September 27, 2002. For example, a letter, dated March 9, 2004, from the District to

[16] *See* note 10, *infra*. *Chang* Plaintiffs' interrogatories and document requests defined "document" or "documents" explicitly included "tape recordings," "records of personal conversations" and "all other recorded or sound reproductions, however produced or reproduced."

the law firm of Covington & Burling LLP, which represented the *Abbate* Plaintiffs in a related action, stated that they were producing nine video tapes in response to the Plaintiffs' First Joint Request for Production of Documents. (*See* Letter from Tom Koger, attached as Exhibit 13.) The *Chang* Plaintiffs were also a party to the joint requests that resulted in the production of those tapes to Covington & Burling, but have never received the nine video tapes, or seen copies of them. The *Abbate* Plaintiffs settled their case with the District and the discovery they received has never been made available to the *Chang* Plaintiffs. In addition, a document produced by the District to the *Chang* Plaintiffs, indicated that at least three people besides Mr. Yates were assigned by the District to videotape the September 27, 2002, protests. (*See* DC03663, attached as Exhibit 14.) The District, however, could not testify in a 30(b)(6) deposition whether these individuals actually did videotape relevant events. (Crane (30)(b)(6) Tr. at 81:06-82:03, attached as Exhibit 4.) The District also testified that the District and federal law enforcement agencies used helicopters on September 27, 2002, that had the ability to "downlink" video footage to the JOCC, where such footage was generally recorded. (Rae Howell Tr. at 24:11-28:21, attached as Exhibit 14.).[17]

C. The District Failed to Timely Amend Previous Productions and Instead Waited to Produce Thousands of Documents Until the Last Day of Discovery and After the Close of Discovery

The District produced over 3,000 pages of documents on the last day of discovery and has continued to produce key evidence after the close of discovery.[18] These run-out-the-clock

[17] The Plaintiffs' concern regarding absence of video tapes are further justified by the *Bolger* case. As this Court stated in that litigation, if plaintiffs "had not persisted in their repeated efforts to obtain [relevant evidence], the District may have never disclosed" crucial evidence. *Bolger*, 248 F.R.D. at 342, attached as Exhibit 1.

[18] This Motion does not even address evidence that was produced prior to the last day of discovery, making it so late as to render the evidence nearly useless to Plaintiffs. It should be noted, however, that again the District's actions have a pattern. In the *Bolger* case, the District produced a copy of the running resume right before a deposition of Sergeant Douglas Jones, who

productions were in response to requests that were made as early as January 2004, and included unredacted or less redacted versions of documents previously produced in redacted format on an improper claim of privilege.[19] Over 3 ½ years passed from the time documents were requested and the time the responsive documents were produced.[20] Such extremely late production, of course, made it impossible to use the documents in the numerous depositions of District officials that preceded the production. No reasons were given by the District for these delays.

In the thousands of pages that were produced by the District on the last day of discovery, and after discovery closed, there are numerous examples of clearly material evidence that would have had a significant impact upon past discovery requests and depositions. While the failure to disclose thousands of documents until the last day of discovery is a *per se* violation of the rules, following are some examples of the types of documents that the District withheld until the end that would have been relevant to over fifty depositions already had been taken.

1. Field Arrest Reports

Chang and *Barham* Plaintiffs submitted document requests for field arrest forms, but the District's counsel consistently informed the *Chang* Plaintiffs that such forms either did not exist or could not be found. The District made these claims even though MPD Officer John Hansohn

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was to testify on the topic. This production occurred after almost four years of requests for the document. (*See Bolger*, 248 F.R.D. at 342, attached as Exhibit 1.)

[19] On January 13, 2004, the *Chang* Plaintiffs served their First Set of Joint Requests for the Production of Documents from Defendant District of Columbia. (Exhibit 16.)

[20] The District started responding to these requests in Spring and Summer of 2004. Dozens of depositions took place prior to these productions and even more took place in 2005. On March 1, 2006, discovery was stayed pending the disposition of disqualification motions. (*See* Dkt. No. 254.) By Order dated June 27, 2007, the Court lifted the stay on discovery for most matters in the *Chang* and *Barham* cases and ordered that discovery conclude by no later than November 16, 2007. (*See* Dkt. No. 303.) The District was under a duty to respond to the Plaintiffs' document requests and to seasonably amend prior productions at all times between January 13, 2004 and March 1, 2006, and then between June 27, 2007, and November 16, 2007. This totals 1,279 days – or a little over 3 ½ years.

testified that he was shown the "missing" Pershing Park field arrest forms by the very same District counsel, in preparation for his deposition, approximately two years after the mass arrest. (Hansohn Tr. at 43:05-45:08, attached as Exhibit 17.) Thus, it was clear that the documents were not missing but had simply been withheld by the District.

As if by magic, two days after the Hansohn deposition, on October 3, 2007, District counsel informed *Barham* counsel that field arrest forms were available for pickup from the OAG. (Exhibit 18.) This production constituted thousands of pages. The documents were not bates stamped or otherwise organized. The District did not provide *Chang* counsel with a copy of the documents. *Chang* counsel and *Barham* counsel had to work in concert to reproduce this production so that both sets of Plaintiffs could have full sets.

On October 19, 2007, *Barham* counsel asked District counsel whether the District would consent to a motion to compel the production of all outstanding field arrest forms not yet provided. District counsel responded by stating that he believed "that the District has provided all field arrest forms in its possession, recognizing that a significant number are unaccounted for." On November 8, 2007, the District consented to the *Barham* Plaintiffs' proposed order. Then, under a court order, but not until the last day of discovery, the District produced approximately 1,200 additional pages of field arrest forms. Obviously, these arrest forms could not be used in depositions of line officers that had already taken place.

2. Redacted Materials

The Court has before it the *Chang* Plaintiffs' Motion to Compel the Production of Materials Withheld By the District of Columbia on the Basis of the Law Enforcement and/or Deliberative Process Privileges. (Dkt. No. 342.) Apart from the specific issues raised in that motion, the District routinely abused the discovery process by unjustifiably claiming privilege for relevant documents. The District then abandoned its privilege claims and produced entire or

less fully redacted versions of the same documents long after those documents could no longer be used in depositions. The District had a continuing obligation to produce all materials responsive to *Chang* Plaintiffs' requests for production, and to assert claimed privileges only in accord with the law of this Circuit. Rather than comply with this obligation, the District has engaged in a series of obstructive tactics with excessive claims of privilege, followed by last minute withdrawals of previous claims, so that responsive materials that should have been produced, cannot be meaningfully used in discovery. This pattern of discovery abuse constitutes an independent basis for applying sanctions against the District.

Between early 2004 and December 7, 2007, the District withheld or produced in redacted form thousands of documents on the purported basis of the so-called law enforcement or deliberative process privileges. On the same grounds, the District has objected to questions posed by Plaintiffs counsel in a number of depositions throughout discovery. *Chang* Plaintiffs repeatedly have demanded that the District comply with the law of this Circuit and its incontrovertible discovery obligations, resulting eventually in their Motion to Compel. (*See* Dkt. No. 342.)

It is apparent that many of the District's claims were nothing more than a subterfuge to avoid production of relevant documents during the regular discovery period. Thus, after discovery was complete, the District provided hundreds of pages of documents of previously withheld or redacted documents either in unredacted form or with reduced redactions.

- On November 30, 2007, two weeks after discovery had closed, the District admitted that 150 pages of material should be reproduced to the *Chang* Plaintiffs without any redactions and that many additional pages of documents should be reproduced with reduced levels of redaction. (*See* District's opposition to *Chang* Plaintiffs' Motion to Compel at 3-4; Anzallo Decl. ¶¶ 8-10, 14, 16.)

- On December 7, 2007, three weeks after discovery had closed, the District filed a new set of declarations, including over 500 pages of material without redactions or with lesser redacted material. (*See* Dkt. No. 357.)
- On December 21, 2007, five weeks after discovery had closed, the District produced an additional 72 pages of documents. The District also stated that some documents are still under review regarding the applicability of the privileges and promised additional declarations supporting its privilege determinations. To date, *Chang* Plaintiffs have not received these declarations.
- On January 4, 2008, seven weeks after discovery closed, the District filed with the Court a Supplemental Declaration of Michael Anzallo (Dkt. No. 368) and dozens of pages of additional documents.

Even now, the District has failed to provide privilege logs describing the basis for claimed privileges, nor has it provided the meaningful supporting declarations.

The District's practice of making fallacious privilege claims and then producing unredacted or lesser redacted versions of relevant documents after the close of discovery ensured Plaintiffs could not question District officials about that material. Not only did this dramatically undermine the value of discovery for the *Chang* Plaintiffs, but it deprived them of the ability to determine the meaning and value of particular information for trial in this case. It is a clear discovery abuse for which sanctions can be imposed appropriately.

3. Audio Tapes Containing Radio Runs and Video Tapes

As previously discussed in regards to the missing evidence, four audio tapes containing Radio Runs were produced to the *Chang* plaintiffs on November 16, 2007 – the last day of discovery, despite their having been requested as early as January 13, 2004 – almost four years

earlier. No documentation was received with this production or reason given for its late production.

On December 12, 2007, forty-seven months after being originally requested, the District arrived at a 30(b)(6) deposition concerning the audio tapes that contained Radio Runs and the video tapes, also discussed above, with two additional video tapes purporting to show the events of September 27, 2002. These had not been produced previously. Discovery had closed in the case on November 16, 2007, almost a month before this production. The tapes were clearly marked "IMF/WTO Arrests 2002." When questioned about the cause for the lateness of the production, the District stated, "[t]hat hasn't been determined yet," but that the tapes had been in the possession of the MPD General Counsel's office for the previous 3 ½ years. (Crane (30(b)(6)) Tr. at 77:8-12, attached as Exhibit 4.)[21]

III. *CHANG* PLAINTIFFS HAVE SUFFERED HARM AS A RESULT OF THE DISTRICT'S FAILURES.

A. *Chang* Plaintiffs Have Been Irreparably Injured by the District Defendants' Failure to Preserve Documents, Failure to Produce Documents, and the Destruction of Documents.

The District's failure to properly preserve and produce the evidence described above considerably damages *Chang* Plaintiffs' ability to efficiently litigate and pursue their claims. Although it is impossible to know what was actually contained on the missing JOCC Running Resume, the numerous missing audio tapes, the missing video tapes, and any other evidence that

[21] It is worth noting that in this case, as well as the *Bolger* case, discovery abuses appear to involve the MPD General Counsel's office. In *Bolger*, the Court found that the MPD General Counsel's office and, in particular, attorney Ronald Harris, who has been active in the instant litigation, failed to exercise good faith and reasonable diligence in locating and producing documents. (*See Bolger*, 248 F.R.D. at 345, attached as Exhibit 1.) In *Bolger*, the Court found that Harris failed to recognize that he had possession of a key document even though it was emailed to him on more than one occasion and was repeatedly requested by the Plaintiffs. (*Id*.)

the District has failed to produce, it likely goes to the very heart of this litigation. The JOCC Running Resume is essentially a timeline of all major events on September 27, 2002, which logs decisions and communications, records actions in real time, and documents communications between various agencies. The movements of individual defendants, including Assistant Chief Newsham and former Chief Ramsey, would likely be contained within the JOCC Running Resume as well as information regarding timing of the orders to arrest, who issued such orders, and who knew of and/or approved of such orders. The individual District Defendants have disputed clear evidence of their culpability for the challenged arrests by relying on their testimony and that of others regarding the sequence of events and conversations which allegedly took place. The JOCC Running Resume would have assisted the Court and a jury in determining the minute-by-minute sequence of events pertaining to the arrests. "There is no reasonable question that the running resume was likely to contain highly relevant evidence as to the [days'] events." (*Bolger*, 248 F.R.D at 346, attached as Exhibit 1.)

Similarly, the audio tapes containing Radio Runs on September 27, 2002, would have helped to resolve factual disputes in this case, separate and apart from facts contained on the video tapes that were included in the JOCC Running Resume. Even in the small slice of recordings that were produced by the District, there is significant evidence. These audio tapes make clear that the decision to effectuate arrests was made long before any persons were in the vicinity of Pershing Park and not on the basis of any individual conduct in or before the individuals entered Pershing Park. In a recording made at 8:15 a.m., an unidentified officer stated "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. So just head north on 12th for now." (*See* Tape marked 9/27/02 IMF Citywide 05:59:30 & 7:59:18). The importance of the audio recordings is also evidenced by the MPD's own policies, which require maintaining the

recordings for all major events. The fact that the policy was not followed in this case demonstrates even more clearly that the nature of the District's discovery abuse.

The video tapes contain actual footage of the events taken on the day in question. Their evidentiary value is clear, as the tapes provide an additional record of the MPD's actions before and during the arrests.

Although the exact evidence contained in the JOCC Running Resume, the audio tapes containing Radio Runs, and the video tapes may never be known, it is clear that the District's destruction or loss of this evidence has forever foreclosed *Chang* Plaintiffs from pursuing all relevant discovery and from effectively examining District officials and officers. *See Jeanblanc v. Oliver Carr Co.*, No. 91-0128, 1992 U.S. Dist. LEXIS 10765, at **2-3 (D.D.C. July 24, 1992).

The District's actions clearly injured the *Chang* Plaintiffs' ability to conduct quick and efficient discovery, forcing what should have been months of discovery into a litigation death march lasting over six years. The costs incurred by the Plaintiffs is injury enough to justify sanctions.

Nonetheless, when there is clear discovery abuse, such as that perpetrated by the District in this case, it is not necessary for the *Chang* Plaintiffs to show prejudice to justify severe sanctions. In *Jeanblanc*, the plaintiff purposefully destroyed all documents relating to the subject matter of the case after the case had been filed but before any discovery requests had been served. *Id.* at *8. The Court stated that the plaintiff's destruction of evidence prejudiced the defendants' case because the defendant was unable to effectively cross-examine the plaintiff regarding the documents. In the end, the Court dismissed the section of the plaintiff's compliant that dealt with the destroyed evidence, finding that where the spoliating party's destruction of evidence makes it difficult or impossible to show precisely the nature of the prejudice suffered, it may not even be necessary for the Court to find prejudice to the litigant. *Id.* at *13. Similarly,

in *Monroe v. Ridley*, 135 F.R.D. 1, 6 (D.D.C. 1990), this Court found that it was "impossible to know how much plaintiff's case may have suffered because of defendant's obstructive tactics" and for that reason prejudice could be presumed even without a showing of actual prejudice.

As the Eighth Circuit succinctly 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).

B. *Chang* Plaintiffs Have Been Irreparably Injured by the District Defendants' Failure to Amend and/or Supplement Prior Productions on a Timely Basis.

Regarding the evidence that was produced at the end of discovery or after the close of discovery, the harm is equally clear. It is likely that *Chang* Plaintiffs would have pursued different lines of questioning, sought to question different witnesses, and proposed different interrogatories/document requests if all evidence had been produced on a timely basis. For example, *Chang* Plaintiffs would have sought to question District personnel on the identity of individuals in the video tapes that were produced weeks after the close of discovery. These late productions wasted both time and money for the *Chang* Plaintiffs, who would have been able to limit the number of depositions, limit the amount of time required to prepare for depositions, and save a considerable amount of resources if they were not forced to constantly push the District to live up to its most basic discovery obligations.

IV. SANCTIONS SHOULD BE AWARDED AGAINST THE DISTRICT AS A RESULT OF ITS DISCOVERY ABUSES.

As discussed in detail in Sections I and II of this Memorandum, the District had an obligation to preserve potentially responsive materials and to produce all documents responsive

to the discovery requests in this case in a timely fashion and then to timely amend its responses as other evidence was located. The District failed to meet its obligations. As a result, the Court should impose sanctions.

A. The District Is Subject to Sanctions.

1. Courts Have Inherent Authority to Sanction for Discovery Abuses.

It is well-established in the District of Columbia Circuit that when "rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process," courts have an inherent power to impose sanctions for abusive litigation practices. *Shepherd v. American Broad. Cos.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995); *see also Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) ("A federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence."). The court's inherent authority is most commonly invoked when there is no court order in place regarding the conduct at issue. *See, e.g. Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2nd Cir. 2002) ("[e]ven in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs") (emphasis added). The Supreme Court has explained that a court's inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citation omitted).

2. The District Is Subject to Sanctions under FRCP 37(c)(1) for Its Failure to Produce Relevant Evidence and Its Failure to Amend Prior Responses on a Timely Basis.

It is not necessary, however, to rely on the Court's inherent authority to impose sanctions in this case since the Federal Rules provide a mechanism to sanction parties for violations of the

discovery rules. As noted in Section I.B of this Memorandum, under FRCP 26(e)(2), a party is "under a duty to seasonably amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect . . . ." In addition to prohibiting the use of evidence not timely produced, Rule 37(c)(1) empowers the court to impose "other appropriate sanctions" including "requiring payment of reasonable expenses, including attorney's fees, caused by the failure." "Rule 37(c)(1) is a self-executing sanction, and the motive or reason for the failure is irrelevant. It therefore is unnecessary to decide whether the defendant acted in bad faith . . . ." *Elion v. Jackson*, No. 05-0992, 2006 U.S. Dist. LEXIS 63854, at *2 (D.D.C. Sept. 8, 2006). The court is free to fashion an appropriate sanction to assure that a party is not prejudiced by the opposing party's failure to meet its discovery obligations.

To avoid the mandatory preclusion of evidence, "the burden is on the party facing sanctions to prove that its violation was either substantially justified or harmless." *Id.* at *3. A party meets the "substantially justified" standard if the issue is one that "could engender a responsible difference of opinion among conscientious, diligent[,] but reasonable advocates . . . ." *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 200, 205 (D.D.C. 1998). In light of the facts laid out above, the Court should issue sanctions under Rule 37, because the District's failure to timely produce the requested documents is neither substantially justified nor harmless. There is no dispute that the JOCC Running Resume, audio tapes containing Radio Runs, and video tapes should have been preserved and produced. The District has produced selected audio tapes and video tapes already, and has never disputed that the JOCC Running Resume was responsive to the *Chang* Plaintiffs' discovery requests. In the absence of such a dispute, there can be no "substantial justification" for the District's failure.

It is equally clear that *Chang* Plaintiffs have been harmed by the failure of the District to timely produce the evidence at issue in this motion, as detailed in Section III of this Memorandum. Defendants' failure to produce has limited *Chang* Plaintiffs' ability to explore fully evidence highly relevant to the case and to test witnesses on the evidence – precisely the type of prejudice that Rule 37 is designed to remedy. *See Thomas v. Paulson*, 507 F. Supp. 2d 59 (D.D.C. 2007) (declining to consider affidavit in connection with motion for summary judgment under Rule 37(c)(1) because attorney's failure to identify witness denied defendant the opportunity to depose the witness and "thereby test the statements made in the affidavit"). Consequently, the harm created by the District's failure must be remedied by granting the requested sanctions.

3. The District Is Subject To Sanctions under Rule 37(b) for Its Failure to Comply with the Court's June 27, 2007 Order.

Federal Rule of Civil Procedure 37(b)(2) authorizes the imposition of sanctions for failure to comply with discovery orders.[22] *Ilan-Gat Engineers, Ltd., A.G./S.A. v. Antigua Int'l Bank*, 659 F.2d 234, 239 (D.C. Cir. 1981). Courts are afforded broad discretion in determining appropriate sanctions under Rule 37, and a Court's decision to award sanctions pursuant to Rule 37 is reviewed only for abuse of discretion. *National Hockey League v. Metropolitan Hockey Club, Inc*., 427 U.S. 639, 642 (1976) ("The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.")

[22] Rule 37 is "intended to encourage and enforce strict adherence to the 'responsibilities counsel owe to the Court and to their opponents.'" *Metropolitan Opera Ass'n v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 212 F.R.D. 178, 219 (S.D.N.Y. 2003) (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976)). Rule 37 "authorizes imposition of sanctions for negligence or tactical intransigence as well as willful or intentional wrongs." *Metropolitan Opera Ass'n*, 212 F.R.D. at 219.

In order to sanction a party pursuant to Rule 37(b)(2), the court must identify a specific discovery order that was actually violated. *McDowell v. District of Columbia*, No. 02-1119, 2006 U.S. Dist. LEXIS 89138 (D.D.C. Nov 30, 2006). However, an order requiring discovery to be completed by a certain date is sufficient to invoke the provisions for sanctions. *Smith v. Fairfax Vill. Condominium VIII Board of Directors*, 775 A.2d 1085, 1090 (D.C. 2001).[23] The District's failure to timely produce documents violated the Court's June 27, 2007, Order that discovery was to close on November 16, 2007. The District should be sanctioned under Rule 37(b)(2).[24]

B. Sanctions Are Warranted.

Because the Court has the power to issue sanctions against the District for its failures in preserving and timely producing evidence, the Court can then turn to deciding whether sanctions are warranted in this case.

Courts are encouraged to consider many factors in determining and fashioning sanctions and the "'choice of sanctions should be guided by the "concept of proportionality"; between

[23] Several federal courts have found that a party who disobeys a discovery scheduling order is properly subject to Rule 37 sanctions. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (docket control order which required discovery to be completed by a certain date and warned that Rule 37 sanctions could be imposed was sufficient order to invoke Rule 37 sanctions); *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co.*, 857 F.2d 600, 602 (9th Cir. 1988) (recognizing that Rule 37(b)(2) sanctions apply to discovery schedule orders*); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc.*, 116 F.R.D. 363, 365 (M.D.N.C. 1987) (recognizing that violation of scheduling orders may lead to dismissal of claims).

[24] Even without a specific preservation order, a party has a duty to preserve potentially relevant evidence; once a party is on notice that litigation has been filed, courts uniformly impose such an obligation. *See, e.g., Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 34 n.3 (D.D.C. 2004) (finding that "a litigant . . . is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request"); *Howell v. Maytag*, 168 F.R.D. 502, 505 (M.D. Pa. 1996) ("A party which reasonably anticipates litigation has an affirmative duty to preserve relevant evidence.").

offense and sanction.'" *United States v. Philip Morris U.S.A., Inc*., 327 F. Supp. 2d 21, 25 (D.D.C. 2004) (citation omitted). Typically, courts enumerate and attempt to balance a number of factors to ascertain an appropriate sanction for spoliation that occurs during pending litigation. *See, e.g., Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (applying five factor test); *Veloso v. Western Bedding Supply Co.*, 281 F. Supp. 2d 743 (D.N.J. 2003) (applying four-factor test for application of spoliation inference); *Jackson*, No. 94-0344, 1996 U.S. Dist. LEXIS 7306, at **29-30 (multi-factor test). The D.C. Court of Appeals considers: (1) the degree of negligence or bad faith involved, (2) the importance of the evidence lost to the issues at hand, and (3) the availability of other proof enabling the party deprived of the evidence to make the same point. *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759, 767 (D.C. 1990).

These factors have each been previously addressed in this memorandum in Section II and III but other facts further emphasize the need for significant sanctions.

1. The District's Actions Constitute Bad Faith and Gross Negligence.

The overwhelming amount of discovery abuses in this case is evidence in and of itself of bad faith and negligence by the District. Moreover, this is not the District's first foray into mass arrest litigation, as is evident by the facts described in the *Bolger* case. (*See generally* Bolger, 248 F.R.D. 339, attached as Exhibit 1.) The District is an experienced and continual party to litigation, particularly litigation involving unlawful arrests, increasing its culpability in this instance. Other courts have found that such experience is a factor that a Court might consider in determining the culpability of a party in relation to discovery abuses:

> The failure of Defendant Orangetown to safeguard this evidence is even more egregious because the Orangetown Police Department is, or should be, in the business of insuring that evidence is handled properly. This is not a situation where an organization unaccustomed to the requirements of maintaining chain of custody and retaining important evidence has failed to preserve and protect items relevant to litigation. Rather, the town of Orangetown, through its Police Department, is experienced, and has procedures in place, with regard to retaining and safeguarding evidence. There is no excuse for their failure in this instance.

Donato v. Fitzgibbons, 172 F.R.D. 75, 80 (S.D.N.Y. 1997) (finding gross negligence on part of defendant Orangetown in failure to preserve evidence); *see also Jeanblanc*, 1992 U.S. Dist. LEXIS 10765, at *3 (emphasizing that the spoliating party was an attorney who had worked as a professor of law for 20 years and had practiced law for another 20 years). Similarly, the MPD is no stranger to litigation, chain of custody requirements, or the necessity of maintaining proper records and there is no excuse for their failure in this instance.

2. Other Proof Cannot Replace the Missing Evidence.

The missing JOCC Running Resume, audio tapes, and video tapes are, in combination, the only contemporaneous evidence of what took place on September 27, 2002. The District can produce or provide no other evidence that would provide the *Chang* Plaintiffs with the same understanding of what actually took place. With depositions of officers and officials taking place nearly five years after the events in question, memories have waned and recollections have faded. In many depositions, witnesses stated that they could not recall or did not remember more times than they substantively answered questions. For example, Chief Broadbent, who was in charge of the JOCC, uttered some form of the phrases "I don't know" or "I don't recall" over eighty times in his 2007 deposition. (*See* Broadbent Tr. generally.)[25]

The District might claim that it produced other evidence, such as the Special Services Running Resume, some audio tapes, and some video tapes. This evidence, however, is insufficient and not a replacement for the missing evidence. The Special Services Running Resume and the JOCC Running Resume differ in purpose, specificity, and form.[26] For example,

[25] This transcript was not attached due to its size but the *Chang* Plaintiffs will produce a copy to the Court if requested or if the District disputes this characterization.

[26] The Special Services Running Resume was produced in response to a subpoena from the City Council, which asked for all of the running resumes. The District did not explain that the JOCC Running Resume had been destroyed or lost. It should also be noted that an unredacted version

the Special Services Running resume is far less detailed than the JOCC Running Resume. Moreover, the *Chang* Plaintiffs have requested all of the evidence, not those particular pieces the District is willing to share. The audio tapes that contain Radio Runs that were produced are filled with technical errors and contain significant gaps (*e.g.*, side B was missing on the tapes produced). The video tapes also suffer from technical concerns and fail to account fully for the relevant time period.

3. Maintaining the Integrity of Judicial Proceedings Requires Severe Evidentiary and Monetary Sanctions.

Courts have routinely stressed the importance of meaningful sanctions to protect the integrity of judicial proceedings. As the Supreme Court noted with regard to the ultimate sanction of dismissal/default:

> the most severe in the spectrum of sanctions provided . . . must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent . . . it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

National Hockey League, 427 U.S. at 643. Sanctions such as preclusion of evidence and dismissal of the action are "necessary to achieve the purpose of Rule 37 as a credible deterrent 'rather than a "paper tiger."'" *Update Art, Inc. v. Moddin Pub. Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988) (quoting *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1064 (2d Cir. 1979)). This Court has not hesitated to enter even the ultimate sanction – default judgment – for a party's failure to comply with discovery orders. *See, e.g., Monroe*, 135

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of the Special Services Running Resume was not produced until the last day of discovery, and only after the Court granted *Barham* Plaintiffs' motion to compel its production.

F.R.D. at 5 (entering default judgment and attorney's fees award against defendant for failure to comply with discovery orders).

Here, Plaintiffs requested that the District produce evidence which the District either allowed to be destroyed or withheld for years until the very end of discovery. The District must believe that it will not be held accountable for such flagrant misconduct.

C. *Chang* Plaintiffs Request that the Court Impose a Broad Range of Sanctions Against the District.

A court's options of sanctions for discovery abuse and spoliation range across a wide spectrum, from the most extreme – dismissing the defendant's answer and entering a default judgment – to the weakest – instructing a defendant never to repeat such a practice. *Donato*, 172 F.R.D. at 81; *see also Monroe*, 135 F.R.D. at 5. A Court's inherent authority enables it to enter a wide variety of sanctions against the disobedient party, ranging from fines, fees, and costs, to "drawing adverse evidentiary inferences or precluding the admission of evidence," or even entering default judgment. *Shepherd*, 62 F.3d at 1474-75; *see also Young v. Office of the United States Sergeant at Arms*, 217 F.R.D. 61, 70 (D.D.C. 2003) (noting that the Court has inherent authority to use preclusion as a sanction"). Rule 37(b)(2) also authorizes a broad range of sanctions, from an order to pay reasonable attorney's fees to default judgment and dismissal. The "determination of an appropriate discovery sanction is left to the discretion of the trial court", and a Court's decision can only be reversed if its actions were "clearly unreasonable, arbitrary or fanciful." *Hull v. Eaton Corp.*, 825 F.2d 448, 452 (D.C. Cir. 1987) (quoting *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984)); *National Hockey League*, 427 U.S. at 642. As the *Bolger* opinion expressed, "the Court may impose any combination of sanctions." (*Bolger*, 248 F.R.D at 343, attached as Exhibit 1.)

1. Default Judgment

Although a default judgment is the harshest sanction that may be imposed in this case, its entry is warranted here because no other remedy will suffice. In *Computer Associates International v. American Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990), a copyright holder sought a default judgment against a computer software developer that had destroyed portions of the developer's source code during the pendency of the lawsuit. The holder claimed that a comparison of the source codes would show that the developer had violated a copyright in the structure, sequence, organization, and other features of its programs. *Id*. Granting the motion for a default judgment, the court stated as follows:

> Destruction of evidence cannot be countenanced in a justice system whose goal is to find the truth through honest and orderly production of evidence under established discovery rules. . . . [N]othing less than default judgment on the issue of liability will suffice to both punish this defendant and deter others similarly tempted.

Id.

In determining whether a default judgment should be entered, this Court must consider "the effect of a [party's] dilatory or contumacious conduct on the court's docket, whether the [party's] behavior has prejudiced the [other party], and whether deterrence is necessary to protect the integrity of the judicial system." *Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990) (citing *Shea v. Donohoe Constr. Co.*, 795 F.2d 1071 (1986)).

The first of these factors, the effect of the District's disobedience upon the judicial system, argues strongly in favor of entering a default judgment. While the FRCP were designed to permit discovery to proceed without direct supervision by the Court, the District Defendant's misconduct has occupied the Court's attention with hearings and motions and has delayed the progress of this case by several months, if not years. Other litigants with meritorious cases have

thus been denied the opportunity to obtain swift justice. Such prejudice to the judicial system justifies the entry of default judgment against the District. *See Shea*, 795 F.2d at 1075-76.

Furthermore, as this Court found in *Monroe*, permitting a defendant to abuse the discovery process and to obtain advantages through delay would discourage other litigants who contemplate bringing actions against the District and its officials. 135 F.R.D. at 6. The District's abuses have substantially increased the amount of time *Chang* Plaintiffs' counsel has had to spend on this case.[27] If the District is permitted to profit from this abuse of the discovery process, private attorneys will be discouraged from accepting *pro bono* or contingent-fee public interest cases in which the District or its officers are involved, anticipating not only extended discovery battles, but a continued practice of spoliation and obstruction. The District has consistently worked to prolong the litigation and drive up costs for the *Chang* Plaintiffs.

This "Stalingrad" approach to litigation is well known to public interest attorneys who have sued the District. It forces attorneys to fight for every right and privilege under the rules in the hope that counsel will simply abandon the litigation as too great a drain on their time and resources. The District's misconduct could make it more difficult for others to obtain the justice they deserve, and an entry of default judgment is therefore necessary to "'provide meaningful access for other prospective litigants to overcrowded courts.'" *Shea*, 795 F.2d. at 1076 (quoting *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 42 (2d Cir. 1982)).

2. Adverse Inferences

A court may also consider adverse inferences to be drawn against a party as a means to "level[] the evidentiary playing field and for the purpose of sanctioning improper conduct." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). In fact, an adverse

[27] In the event that *Chang* Plaintiffs prevail at trial, this burden will shift to the taxpayers of the District.

inference instruction is mandatory where the destruction is made or allowed with gross indifference to or reckless disregard for the relevance of the evidence to plaintiffs' claims. *See Rice v. United States*, 917 F. Supp 17, 20 (D.D.C. 1996) (citing *Battochi v. Washington Hosp. Ctr.*, 581 A.2d 759, 766-67 (D.C. Oct. 16, 1990) An adverse inference is appropriate where there has been destruction of evidence and "'the party having control over the evidence . . . had an obligation to preserve it at the time it was destroyed.'" *Mazloum v. D.C. Metro. Police Dep't*, 530 F. Supp. 2d 282, 290 (D.D.C. 2008) (quoting *Kraus v. GMC*, No. 2107c515(DNF), 2007 U.S. Dist. LEXIS 79651 (M.D. Fla. Oct. 25, 2007)).

Under such an inference, the jury is instructed that it may assume that the lost evidence, if available, would have been unfavorable to the spoliator. *See Baliotis v. McNeil*, 870 F. Supp. 1285, 1292 (M. D. Pa. 1994). This Court has stated that three elements are required to establish an adverse inference: (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind"; and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defense of the party that sought it. *Mazloum*, 530 F. Supp. 2d at 291.

The first and third elements, the District's duty to preserve evidence and whether the missing evidence would be relevant to the claims brought by the *Chang* Plaintiffs has been well documented in this brief. The second element, the culpable state of mind, also previously discussed, is evidenced by the repeated and systematic failures and half-attempts by the District. The District failed to place a litigation hold on documents relating to *Chang* Plaintiffs' claims; it failed to produce key evidence in a timely manner; and its officers submitted patently false statements to the Court pertaining to missing evidence. The loss of evidence in this case,

particularly when one considers how often the District is a party to mass arrest and civil rights cases, is astounding, and can only be attributed to deliberate actions or inaction by the District.

In this instance, the Court should also tie evidentiary inferences to those individuals within the MPD whose actions would have most likely been recorded or documented by the missing evidence. In particular, this includes Chief Ramsey, Assistant Chief Newsham, Assistant Chief Fitzgerald, Assistant Chief Jordan, and the individual officers named in the *Chang* Plaintiffs' Complaint. These officials had the most influence within the police department regarding the steps to be taken after the events of September 27, 2002. Chief Ramsey, on his own, could have ensured that all evidence relating to September 27, 2002 would be safeguarded.

Among others, the following adverse inferences are tied directly to the evidence improperly withheld:

a. That the lost evidence (including the JOCC Running Resume, the audio tapes containing Radio Runs, and the video tapes) if available, would have been unfavorable to the District's position in this case.

b. That Chief Ramsey was present at Pershing Park before and during the time when the individuals within Pershing Park were surrounded, via police lines, by law enforcement officials.[28]

c. That Assistant Chief Newsham discussed with Chief Ramsey that he intended to order the arrests of individuals within Pershing Park, and that Chief Ramsey did not object to this suggestion, tacitly approved of the arrests, and failed to prevent the arrests from being made.[29]

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[28] The Judiciary Committee of the City Council found that Chief Ramsey was at the scene at approximately 9:15 a.m., a full half hour before the decision to make a mass arrest was made. March 24, 2004 Report on Investigation of the Metropolitan Police Department's Police and Practice in Handling Demonstrations in the District of Columbia Judiciary Committee at 52-53, attached as Exhibit 19.

[29] The Judiciary Committee of the City Council found similarly: "Chief Ramsey is responsible for the arrests at Pershing Park." *See id*. at 59.

d. That the MPD trapped and arrested all individuals, including the *Chang* Plaintiffs, in Pershing Park on the morning of September 27, 2002. [30]

e. That the MPD ushered individuals, including the *Chang* Plaintiffs, into Pershing Park on September 27, 2002.[31]

f. That Assistant Chief Fitzgerald failed to object or prevent the use of police lines at Pershing Park on September 27, 2002, and failed to object or prevent the arrests of individuals at Pershing Park, despite knowing that no probable cause existed.

g. That Assistant Chief Jordan failed to object or prevent the use of police lines at Pershing Park on September 27, 2002, and failed to object or prevent the arrests of individuals at Pershing Park, despite knowing that no probable cause existed.

h. That Assistant Chief Newsham ordered the park to be closed prior to arriving at Pershing Park.[32]

3. Preclusion

Courts routinely issue orders precluding the entry of certain evidence as a sanction for discovery abuses. *See, e.g., Donato*, 172 F.R.D. at 84 (precluding defendant town from introducing any expert testimony about state of headlights on police cruiser involved in automobile collision and submitting adverse inference instruction to jury due to defendant's gross negligence in failing to preserve headlights in violation of court preservation order); *Ohio v. Arthur Anderson & Co.*, 570 F.2d 1370 (10th Cir. 1978) (affirming trial court's order forbidding defendant from opposing two of State of Ohio's claims and awarding State $60,000 in fees and expenses for defendant's dilatory compliance with the court's document production orders); *Adolph Coors Co. v. American Ins. Co.*, 164 F.R.D. 507 (D. Colo. 1993) (prohibiting defendant insurance company from denying existence of duty to defend plaintiff in underlying

[30] As demonstrators moved towards the center of the City and prior to his arrival, Newsham ordered his subordinates to encircle and hold individuals within in Pershing Park and to "contain them there, I'm on my way." *See* Griffith Tr. 61:17-62:22, attached as Exhibit 20.

[31] In a recording made at 8:15 a.m., an unidentified MPD officer stated "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. So just head north on 12th for now."

[32] *See* note 30.

environmental litigation as sanction for failing to comply with court's document production orders); *Hammond v. Coastal Rental & Equip. Co.*, 95 F.R.D. 74 (S.D. Tex. 1982) (ordering that audit prepared by plaintiffs be taken as true and prohibiting defendants from contesting sums claimed in audit after payroll records improperly withheld from production by defendant were destroyed in fire).

While additional preclusions could be sought for evidence still withheld, the following preclusions are tied directly to the evidence improperly withheld. That the District be precluded:

a. From presenting any evidence regarding the whereabouts or movements of District personnel on September 27, 2002;

b. From presenting any evidence regarding conversations that took place between senior MPD officers at Pershing Park on September 27, 2002;

c. From presenting any evidence regarding the procedures, strategies, or plans utilized by the District at Pershing Park on September 2002; and

d. From utilizing any evidence that was produced at the close of discovery, after the close of discovery, or which has not yet been produced.

The District's failure to preserve evidence and produce such evidence serves only their interest and has severely injured the *Chang* Plaintiffs' prosecution of this case. It would be fundamentally unfair and prejudicial to the *Chang* Plaintiffs if the District were permitted to argue or set forth facts regarding the whereabouts of MPD officers and officials, conversations between MPD officials, or the strategies, procedures and tactics employed on September 27, 2002, while the *Chang* Plaintiffs are unable to utilize evidence from the JOCC Running Resume, audio tapes, and video tapes not produced by the District, that could undermine or contradict such testimony. Entry of an order precluding any assertion by the District regarding the whereabouts of officers will address some, but not all, of the prejudice suffered by the *Chang* Plaintiffs. It also will work, in conjunction with the other sanctions requested in this motion, to

"achieve the purpose of Rule 37 as a credible deterrent 'rather than a "paper tiger."'" *Update Art, Inc.* 843 F.2d at 70 (quoting *Cine Forty-Second Street Theatre Corp.*, 602 F.2d at 1064).

4. Monetary Sanctions

In any case, the Court should also impose monetary sanctions to compensate the *Chang* Plaintiffs for the discovery abuses perpetrated by the District and to serve as a deterrent for future misconduct by parties like the District. This Court's opinion in the *Bolger* case serves as clear precedent for this sanction.[33]

a. Reimbursement of Fees and Costs

At a minimum, the District should be required to compensate the *Chang* Plaintiffs for their costs and fees associated with the preparation, taking of, and review of all depositions and the documents related to those depositions relating to:

- Discovery of relevant information regarding the whereabouts and movements of MPD officials on September 27, 2002.
- The questioning of District personnel regarding the document preservation procedures.
- The District's 30(b)(6) witnesses that were responsible for discussing the District's information systems, audio recordings, video recordings, and CJIS systems.

In *Bolger*, this Court noted that "considerable burdens and costs were incurred by plaintiffs in their persistent, but reasonable, discovery efforts to obtain the running resume, and that those efforts were necessitated by the discovery violations of the District and its attorneys." (*Bolger*, 248 F.R.D. at 346, attached as Exhibit 1.) As a result, the Court found that the "imposition of monetary sanctions on the District is just and proportionate to the discovery offenses that have occurred . . . ." (*Id.* at 26.) In this case, *Chang* Plaintiffs have been forced to expend numerous

[33] The imposition of monetary sanctions in *Bolger* does not indicate that the ruling was limited to monetary sanctions. At the time of the sanctions filing, the *Barham* Plaintiffs were still completing discovery to determine the scope of the abuse. After the sanctions opinion in *Bolger* was issued and discovery was completed, the Court requested supplemental filings related evidentiary sanctions. The Court is still considering motions on that topic.

hours and costs as a result of the District's failures which cover a much wider spectrum of discovery abuses.

Moreover, because all of the depositions that have been taken since the reopening of discovery would have been altered had the missing evidence been produced at an appropriate time, *Chang* Plaintiffs request that the Court order the District to pay the *Chang* Plaintiffs' attorneys' fees and costs for the preparation, taking of, and review of all depositions since June 27, 2007.

The *Chang* Plaintiffs fully expect that, upon filing of this Motion, the District will "magically" find at least some of the missing evidence – similar to the *Bolger* case. The Court should disallow the introduction by the District of any evidence produced after the filing of this Motion to avoid further prejudice to the Plaintiffs. Regardless, *Chang* Plaintiffs ask that the Court order the District to pay for an independent third-party contractor to transcribe all audio tapes containing Radio Runs within three weeks of receipt and to order the District to provide all video tapes in DVD format. The *Chang* Plaintiffs then ask that the Court order that discovery be reopened as to that limited information and that the Court order the District to pay for all fees and costs associated with that new stage of discovery, including the costs and attorneys' fees associated with reviewing the newly produced evidence; preparing for, taking, and reviewing newly scheduled depositions; and the filing of any motions as a result of that evidence.

Finally, *Chang* Plaintiffs request payment of all attorneys' fees and costs associated with this Motion for Sanctions.

b. Deterrent Monetary Sanctions

In *In re Prudential Insurance Co.*, the court ordered a $1,000,000 monetary sanction as a result of Prudential's destruction of documents. 169 F.R.D. 598, 617 (D.N.J. 1997). The court explained that the "sanction recognizes the unnecessary consumption of the Court's time and

resources in regard to the issue of document destruction." *Id*. Moreover, the imposition of this sanction "inform[ed] Prudential and the public of the gravity of repeated incidents of document destruction and the need of the Court to preserve and protect its jurisdiction and the integrity of the proceedings before it." *Id*. The court further indicated that it had "considered the financial worth of Prudential and the minimal financial impact this sanction will have on Prudential's financial stability." *Id*. In *United States v. Philip Morris*, 327 F. Supp. at 26, this Court ordered a monetary sanction of $2,995,000.00 as a sanction for the destruction of documents with many similar facts to this case.

As in the *Prudential* and *Philip Morris* cases, this Court should impose a monetary sanction against the District. The *Chang* Plaintiffs propose an amount of $500,000.00. This amount would deter future discovery abuses by the District.

CONCLUSION

For the foregoing reasons, *Chang* Plaintiffs respectfully request that the Court enter either a default judgment, or the requested adverse inferences and preclusion of certain evidence. As well, the *Chang* Plaintiffs request that the Court impose monetary sanctions ordering the District to compensate the *Chang* Plaintiffs' for attorneys' fees and costs since the reopening of discovery. *Chang* Plaintiffs further request that Court order the District to pay a punitive monetary sanction of $500,000.00.

Respectfully submitted,

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Dated: January 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2009, I caused a true and correct copy of the foregoing *Chang* Plaintiffs' Motion for Sanctions, supporting Memorandum of Points and Authorities, and proposed Order to be served electronically upon the following:

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