UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAYMING CHANG, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-2010 (EGS\JMF)
	)	(Submitted to Special Master)
UNITED STATES OF AMERICA, et al.	)	
Defendants.	)	

CHANG PLAINTIFFS' SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING EVIDENCE FOR SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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INTRODUCTION

On May 5, 2010, when U.S. District Judge Emmet G. Sullivan appointed U.S. Magistrate Judge John M. Facciola to serve as Special Master in *Chang v. United States* (Dkt. No. 645), Judge Sullivan already had condemned the massive discovery abuses committed by the District of Columbia (the "District"), which resulted even then in delaying the litigation and extending discovery. Faced with unequivocal discovery violations – many of which the District, through its then Attorney General, admitted to – Judge Sullivan described this case as "the civil counterpart of Ted Stevens." (Tr. of July 29, 2009 Hearing at 6.)

It was that record – established over three years ago – that led to the Special Master investigation. Yet, over the course of the period of the Special Master's investigation, new discovery violations and false statements to the Court have been revealed. This includes the discovery of serious violations disclosed in the most recent series of hearings concerning the document Officer John Strader discovered, the discovery of an attempt to delete computer evidence, and the recent disclosure that, despite repeated misrepresentations to the Court, the FBI never investigated the attempt to delete computer evidence. These most recent discovery and ethical violations reveal that little has changed in how the District handles evidence in this case and the District's disregard of the rules governing discovery and candor to the Court. Indeed, after three years of the Special Master's investigation, Attorney General Irvin Nathan testified that the delay in this case is solely the fault of the Plaintiffs – and not the fault of the District, the Office of the Attorney General ("OAG"), or the Metropolitan Police Department ("MPD").

From the failure to preserve evidence to the failure to produce evidence in a timely fashion to the outright destruction of evidence, the proof of violations originally before Judge

Sullivan was overwhelming. Illustrative examples of those violations include, but unfortunately are not limited to:[1]

- The District's loss (or destruction) of the Joint Operations Command Center ("JOCC") Running Resume, twelve hard copies of that document, and any email and other electronic record of its existence. (2011 PFOF § IV.H.)
- The District's failure to produce the full set of audio tapes, which contain relevant Radio Runs for September 27, 2002, and instead producing tapes that contained significant gaps. Despite the obvious editing of such tapes, the District then submitted an admittedly false declaration that was later found to have been written by MPD Deputy General Counsel Ronald Harris, not the declarant, Ms. Alexander. (*Id.* § V.G.)
- The District's failure to search sufficiently for relevant video footage, and then only producing two video compilations that contain unexplained gaps, time-jumps, and other anomalies. The evidence was again accompanied by false representations made by District witnesses. (*Id.* § VI.J-K.)

The troubling nature of these violations was further highlighted in the Report on Certain Discovery Issues Emanating From Litigation Arising Out of the Pershing Park Incident of September 27, 2002, submitted by former U.S. District Judge Stanley Sporkin in December 2009:

> We find quite troubling some of the contradictory evidence that surfaced during the inquiry. We are particularly disturbed by the

[1] Plaintiffs' Proposed Findings of Fact for Report and Recommendation of Special Master, filed with the Court on April 18, 2011 ("2011 Proposed Findings") contain detailed examples of the District's violations. (*See* Dkt. No. 777). All citations to Plaintiffs' 2011 Proposed Findings will be "2011 PFOF ¶ __."

> fact that not only have we been unable to retrieve a hard copy of the Running Resume but also that the electronic copy was purged from the system. *We have no way of knowing whether this was an act of intentional mischief or reflects a benign action. We do not believe it was the later.*
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> ***
>
> Because the contradictory statements in the record are incapable of being reconciled, *we cannot rule out the possibility of untruthfulness or something worse.*

(Chang SM (2010) Ex. 1, at 15-16 (emphasis added).)[2]

Judge Sporkin rightly suspected "intentional mischief," "untruthfulness," or "something worse" to describe the District's discovery conduct in this case. The District has engaged in extensive efforts to obstruct – through misrepresentations to the Plaintiffs, the City Council, Judge Sullivan, Judge Sporkin, and the Special Master – any investigation into its wrongdoing. Specifically, the District's misrepresentations include the following:

JOCC Running Resume:

- In a letter dated November 21, 2003, MPD Office of General Counsel ("OGC"), through Mr. Harris, responded to the City Council subpoena that MPD was producing a number of documents including "the SOCC/JOCC running resumes for" the April 2000 and September 2002 IMF Events. (Chang SM (2010) Ex. 76, at 5.) Mr. Harris admitted during testimony before the Special Master that the letter to the City Council "was not accurate." (Harris SM (2010), Oct. 15, at 22:5-15.)

[2] Importantly, Judge Sporkin's investigation was necessarily incomplete. He was "unable to reach Ms. Alexander during the course" of his investigation because Judge Sporkin was "told she [was] on personal leave." (Chang SM (2010) Ex. 1, at 15.) Judge Sporkin was also not informed of Officer Strader's discovery of a book he suspected was the JOCC Running Resume, which occurred around the same time as Judge Sporkin's investigation.

- On August 12, 2009, former Attorney General Peter Nickles submitted a declaration to the Court swearing that the OAG "attempted to obtain the missing JOCC [R]unning [R]esume" from the City Council, but "OAG was denied access" to such materials. (Chang SM (2010) Ex. 65, at 10 ¶ 20.) But the City Council never received the JOCC Running Resume and could not have provided a copy back to the OAG – as Mr. Harris only much later admitted. The District, however, never corrected Mr. Nickles's 2009 misrepresentation to the Court. (*See* 2011 PFOF ¶ 182.)

- OAG attorneys Thomas Koger and Ellen Efros reviewed Mr. Nickles's 2009 declaration before it was filed, but neither corrected the misrepresentation – despite Mr. Koger's awareness that MPD did not provide the City Council with a copy of the JOCC Running Resume. (*See id.* at ¶ 183.) In any event, the declaration misrepresented the OAG's alleged inability to have access to the City Council's materials because all files were made public with the exception of two depositions by undercover officers and a portion of Assistant Chief Peter Newsham's deposition. (*See id.* at ¶ 184.)

- The District did not inform Judge Sporkin of Marc Bynum's determination in 2008 that he was virtually certain the E Team data could be recovered. (Chang SM (2010) Ex. 1, at 16 n.4 (describing the likelihood of recovering data from the two systems in use as "a long shot.").)

Audio Recordings:

- In response to Judge Sullivan's order compelling the District "to supplement their production of recorded police channel communications to account for any technical deficiencies," Mr. Harris obtained copies of audio recordings and directed Denise Alexander, an employee within the Office of Unified Communications, to oversee a review of the tapes. (*See* 2011 PFOF ¶ 292.) In an email, Ms. Alexander noted significant gaps in the recordings. (*See id.*

at ¶ 298.) Yet, Mr. Harris drafted a declaration for Ms. Alexander to sign, which the District submitted to the Court, stating that she "did not detect anything technically deficient with the recordings" and that there "is nothing unusual or deficient about this transmission or recording." (*See id.* at ¶ 304; Chang SM (2010) Ex. 20.) This declaration was false.

- On January 8, 2010, the District submitted the declaration of Commander James Crane to the Court – even though the declaration had been signed on March 5, 2009. (Chang SM (2010) Ex. 16; *see* 2011 PFOF ¶ 318.) The declaration stated that "[w]hile gaps in recordings appear on certain duplicate tapes, the complete recordings appear on other tapes." (Chang SM (2010) Ex. 16, ¶ 3.) During the 2010 Special Master proceedings, however, Commander Crane admitted he could not compare the "other tapes" to the original recordings – making it impossible for him to know whether the complete recordings appear on other tapes. (*See* 2011 PFOF ¶ 319.) Thus, the March 5, 2009 declaration was false.

Video Recordings:

- The District continually changed its position regarding the existence and nature of video recordings for the September 2002 IMF Event. For example, throughout the course of the litigation, the District misrepresented: the number of members of the Electronic Surveillance Unit ("ESU") who recorded video of the September 2002 IMF Event; the existence of original video recordings; and the existence of JOCC video recordings. (*See id.* § VI.)

- The District has only produced two videos allegedly recorded by members of the ESU.

- On January 21, 2010, the District testified through a Rule 30(b)(6) witness that one of the two videos produced was recorded entirely by one individual and was not edited in any way.

(*See id.* ¶ 476.) The District then represented that it had the "original" videotape for inspection. (*Id.*)

- On February 23, 2010, District Counsel George Valentine represented to Judge Sullivan that the District could answer a number of questions "by just producing th[e] originals, and again, that's assuming we never produced them in the first place." (Tr. of Feb. 23, 2010 Hearing at 41:17-42:06.) In the same hearing, District Counsel Monique Pressley represented that "[w]here videotapes are concerned, we have always stated that originals have been preserved." (*Id.* at 58:24-25.)

- On March 2, 2010, in a hearing before Judge Sullivan, Ms. Pressley indicated, again, that the District was in possession of the original video footage, stating: "The District does not object to obtaining a neutral uninvolved expert to take the two original tapes, make a copy of them safely, [and] give a set to Plaintiffs…." (Tr. of Mar. 2, 2010 Hearing at 48:23-25.)

- On November 17, 2010, after the District admitted it could not locate the original videotapes, Judge Facciola directed Ms. Pressley and Mr. Valentine to submit declarations to the Court addressing previous representations that they made to Judge Sullivan claiming that the original video footage was preserved. (*See* Minute Order dated November 17, 2010.)

- As demonstrated by photographs taken by NC4 employee Eric Kant during the September 2002 IMF Event, the JOCC recorded video during the September 2002 IMF Event – contradicting everything the District has said to date. The District has never produced video footage recorded in the JOCC, from either the CCTV cameras, the helicopter video feed, or the manned observation posts even though it is clear the District recorded video that weekend. (*See* Chang SM (2012) Ex. 13, at DC 2011-005407 & -005408.)

Other Discovery Failures by the District:

- Judge Sullivan declined to refer to the Special Master other equally egregious discovery failures by the District in this case, which were already well established, including: 1) failure to preserve evidence; 2) loss and destruction of relevant evidence other than the areas of inquiry for the Special Master; 3) tampering with evidence other than the areas of inquiry for the Special Master; 4) solicitation, preparation, and submission of false or misleading testimony/affidavits; 5) withholding and late production of evidence; and 6) misleading statements by District Counsel. (Order Appointing Special Master, Dkt. No. 645 at 3 n.2.)

As this recitation clearly establishes, the District's misconduct in this case has covered virtually every area of discovery and has been going on since the beginning of this case over ten years ago. It is not simply limited to the E Team data or the document Officer Strader discovered, which were the focus of the resumed Special Master hearings, and are the main focus of the proposed findings below. Coupled with the massive destruction of evidence, the tainting of audio and video tape evidence, and the routine failure to produce requested discovery in a timely and complete fashion, the District's misrepresentations to the Court (as well as the Plaintiffs) cannot be innocent mistakes. Instead, they suggest an intentional effort to cover-up evidence and obstruct the progress of this case. These past incidents, more fully detailed in Plaintiffs' 2011 Proposed Findings (*see* Dkt. No. 777) and Response to the District's Supplemental Findings (*see* Dkt. No. 948), provide context for the District's continued evidence spoliation as described herein.

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After initially considering whether to refer to the United States Attorney General the District's failure to produce discovery, Judge Sullivan obtained agreement from the Plaintiffs

and the District to refer some of what he considered to be the three most significant issues – the failure to produce the JOCC Running Resume, and the defects with the audio and video tapes – to a Special Master for further investigation. Judge Sullivan directed the Special Master to "prepare and file a Report and Recommendation containing findings of fact and conclusions of law regarding the alleged destruction of certain evidence." (Dkt. No. 645 at 2.) "Specifically, the Special Master shall investigate, examine, and report on the potential destruction of evidence regarding: A. the International Monetary Fund ("IMF") September 27, 2002 JOCC Running Resume; B. the IMF September 27, 2002 Recordings of Radio Runs; and C. the IMF September 27, 2002 Video Recordings." (*Id.* at 2-3.)[3] Thus, there appears to have been no doubt in Judge Sullivan's mind when he appointed the Special Master that the District had failed to produce the JOCC Running Resume, and that there had been serious spoliation of audio and video evidence.

At that time, the District essentially admitted such spoliation and defended its actions only by claiming that sanctions should not be imposed until trial and not be too severe. Indeed, in 2009, the District recognized that its discovery abuses in this case were "inexcusable and should not have occurred" – conceding that sanctions are appropriate. (*See* District's Opposition to Renewed Motion for Sanctions, Dkt. No. 519 at 1-2 ("The District does not dispute that sanctions are appropriate in this instance….").) These admissions were further confirmed during

[3] The Special Master's investigation was subsequently expanded to include: "(1) any effort to delete data from the E-Teams server; (2) any knowledge by agents, representatives, and employees of the District of that effort; (3) any knowledge by counsel for the District of that effort and all the circumstances that pertain or relate to counsel's advising fellow defendants, plaintiffs' counsel, and this Court of what [counsel] had learned about the effort to delete data" because these issues were related to the Special Master's initial duties. (*See* Minute Order dated Sept. 27, 2011 (stating that items 1 and 2 "fall squarely within the Special Master's authority"); *see also* Minute Order dated Oct. 3, 2011 (reconsidering the prior minute order by adding that the Special Master shall investigate item 3 "insofar as it implicates the destruction of evidence regarding the Running Resume and/or counsel's involvement in any false or misleading testimony, affidavits, or statements to the Court regarding destruction of that evidence").)

the first round of Special Master hearings in which the Court learned of the wholesale destruction of key evidence, including nearly all audio communications (other than mostly irrelevant snippets) and video recordings of the September 2002 IMF Event. These admissions were also confirmed by the District's actions following its discovery that someone had attempted to delete the E Team data related to the September 2002 IMF Event.

Now, with a new Attorney General and a new lead counsel, the District has taken a perverse turn backwards. While the law in this jurisdiction is clear that a spoliator cannot take advantage of the absence of evidence caused by his spoliation, *Ashford v. E. Coast Express Eviction*, No. 06-cv-1561 RJL/JMF, 2008 WL 4517177 (D.D.C. Oct. 8, 2008), the District's new legal team attempts to do just that. Despite overwhelming evidence developed over 19 days of hearings spanning a three year period, the District now claims that the very absence of the Group Systems Running Resume proves either it never existed or was not the JOCC Running Resume (and therefore the evidence that it contained either had not been spoliated or was insignificant). Instead, the District's most recent theory is that the newly discovered E Team data is the *real* "running resume," that the District's failure to preserve the Group Systems Running Resume did not deprive the parties of significant evidence, and that, therefore, there is no prejudicial harm to the Plaintiffs that would justify sanctions.

To the contrary, as described in the 2011 Proposed Findings, the Group Systems Running Resume (a) existed, (b) contained substantial detail (unlike the E Team data), (c) could have had a significant influence on the evidence of this case and the loss of which is seriously prejudicial to Plaintiffs, (d) was not preserved or produced by the District, and (e) may have been intentionally destroyed. Additionally, the 2010 Special Master Hearings created a clear and complete record with respect to the nature and extent of the District's actual destruction of radio

runs and video recordings. (See 2011 PFOF, Dkt. Nos. 777, 777-1 & Response to District's Supp. Findings, Dkt. No. 948.)

In the course of the 2009 hearings before Judge Sullivan, then Attorney General Nickles vowed to "tak[e] all necessary actions to assure the Court and the public that the problems at issue here will not reoccur" and that "the failure in discovery and the problems with preservation of evidence recited by this Court and plaintiffs will be thoroughly investigated." (Declaration of Peter J. Nickles ("Nickles Decl."), Dkt. No. 490-1 at ¶ 3.) In addition, MPD General Counsel Terrence Ryan provided a declaration to the Court in which he promised that various document management protocols would be implemented within MPD to ensure similar discovery abuses would not occur in the future. (*See* Declaration of Terrence D. Ryan ("Ryan Decl."), Dkt. No. 490-4.) Those promises by Mr. Ryan later served as a baseline for the District entering into a Consent Order to settle the *Barham* litigation. That Order provided, in part, that the District would:

- "develop, maintain and/or implement a document management protocol or system to ensure the preservation of records and documents arising from mass demonstrations and protests;"
- "maintain an index and log of any documents, items, things, recorded or electronic/computer/digitized material … that are directly related to a complaint or litigation hold letter for matters arising from mass demonstrations and protests;"
- issue policy statements related to litigation hold procedures and practices;
- issue policy statements or general orders related to the preservation and indexing of Command Center and Communications Systems Records and Data for no less than three years; and

- index and maintain documentation and media related to photographic or video or other recorded evidence.

(*Barham* Dkt. No. 640.)

In fact, however, these representations of reform to the Court, like so many others, have proven to be false. As the evidence developed during the Special Master's 2012-2013 proceedings clearly established, the District continued to mislead the Court and the parties as to the handling of the newly discovered E Team data, despite the significance the District now attaches to this evidence. Furthermore, when afforded an opportunity to produce to the Court and the parties the long missing Running Resume, which Officer Strader believes he located, the attorneys representing the District failed in all respects: (i) they did not utilize the procedures the District had promised to follow in Mr. Ryan's declaration, including logging in and preserving the document; (ii) having misplaced or destroyed the document turned over by Officer Strader through Captain Herold, they sought to substitute another document and to convince both police officers that the substitute document was the document that they had provided to the MPD OGC; (iii) the District witnesses to these events were allowed to prepare their testimony together in a way that made their coordinated testimony before the Special Master completely unreliable; (iv) despite that effort at joint preparation, a number of the District witnesses presented clearly fabricated or false testimony; and (v) the District responded by attacking the integrity and well meaning efforts of two very experienced and well considered career police officers. This final step was the most venial of all, as these officers are supposedly clients of the OAG and MPD OGC.

Despite Mr. Ryan's professional conduct being called into question – creating a clear conflict of interest between his interests and those of his supposed clients – he continued to make

key decisions related to the investigation of Officer Strader's discovery and the E Team data. In fact, Mr. Ryan withheld key information (the existence and nature of attempted deletions) from his client, Chief of Police Cathy Lanier, in an attempt to maintain control over the investigation into the E Team data. When Chief Lanier ordered that MPD would not investigate the attempted deletion of the E Team data, Mr. Ryan ignored that order, later – to Chief Lanier's clear incredulity – proclaiming a lack of memory to be the cause for his insubordination.

A. The District's Discovery Failures With Respect to the E Team Data.

Despite the importance the District now places on the E Team data, the District would have the Court ignore the fact that it previously failed twice to preserve and produce that evidence of the September 2002 IMF Event. First, the District had a duty to preserve evidence, at the very latest, by October 15, 2002, when Plaintiffs filed their Complaint in this action. At that time, the E Team data was still an active event on the E Team server. But, as recent evidence now shows, on February 12, 2003, an MPD employee or contractor attempted to delete the September 2002 E Team data – in clear violation of the District's duty to preserve and produce relevant evidence. Second, in 2008, the District learned that an NC4 contractor was 95% certain that the September 2002 E Team data could be recovered. But rather than bringing this information to the Court's and Plaintiffs' attention, the District remained silent and only now claims that the amount the contractor requested – $5,200 – to recover this evidence was $200 more than the $5,000 the District was then willing to pay and, therefore, nothing was done to recover this data. The District's very claim that retrieving the E Team data was not worth the extra $200 clearly demonstrates the District's belief that the E Team data was trivial or irrelevant. Regardless of the District's view of the E Team data at the time, moreover, not only was that data clearly called for by the discovery demands, but also there was a pending Court

order compelling the production of the running resume.[4] If the E Team data is the JOCC Running Resume, as the District now claims, the District consciously and flagrantly violated that Court Order.

Finally, in May 2011, the District agreed to hire NC4 (formerly E Team) to confirm that the data related to the September 2002 IMF Event existed on the E Team servers, and to recover it.[5] After NC4 contractor Marc Bynum indicated that an individual had "deleted" the data related to the September 2002 IMF Event, the District withheld this revelation from the Court and the Plaintiffs for 70 days. District counsel made clear in testimony that, even then, they had not intended to inform the Court or the Plaintiffs that someone had attempted to delete the E Team data, despite having already informed the other Defendants' counsel months earlier. District counsel ultimately informed Plaintiffs' counsel of this fact only because the Court was on the verge of establishing a final briefing schedule. And even then, District counsel so advised the Court only after Plaintiffs' counsel informed the Court that District counsel had been withholding critical information. Indeed, Ms. Pressley, lead counsel for the District, testified that she never intended to reveal the discovery in that hearing and only did so after Plaintiffs' counsel, Jonathan Turley, insisted on raising it with the Court. Thus, while almost immediately informing the Defendants (despite not knowing who was responsible for the attempted deletion), had there been no compulsion to disclose the fact at the July 12, 2011 status conference, the disclosure to the Court and the Plaintiffs would have gone well beyond the 70-day delay.

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[4] On October 30, 2007, Judge Sullivan issued an order in the *Barham* case compelling production of the Running Resume. (Chang SM (2012) Ex. 73.)

[5] As was made clear in both the 2010 and 2012-2013 Special Master proceedings, the E Team system was the secondary system for creating and maintaining the JOCC Running Resume. The information on the other system, known as Group Systems (or sometimes Groupwise), has never been recovered. (*See* 2011 PFOF § IV.F; PFOF ¶¶ 36-50.)

Instead of notifying the Special Master, who is specifically charged with investigating "the potential destruction of evidence regarding [ ] the I[MF] September 27, 2002 JOCC Running Resume," the District's counsel represented to the Court that the MPD Internal Affairs Division ("IAD") was investigating the matter. Contrary to this representation, no such investigation ever occurred. In fact, Chief Lanier and Assistant Chief Michael Anzallo had directed that MPD should *not* be involved in such an investigation – specifically because of the Special Master's ongoing investigation. Furthermore, Chief Lanier and Asst. Chief Anzallo expressly informed Attorney General Nathan and Mr. Ryan of that decision. At the same time, however, District trial counsel (who claimed to have had no knowledge of Chief Lanier's decision despite Mr. Ryan and Attorney General Nathan's knowledge) continued to represent to the Court the existence of the IAD investigation, making no reasonable effort, as required by Federal Rules of Civil Procedure 11 and 26, to investigate its status. This was a gross violation of the duty of candor and reasonable inquiry owed to the Court by not just individual counsel representing the District before the Special Master, but also her supervisors – up to and including the Attorney General, who possessed important information but failed to communicate that information to the line attorneys, and the MPD General Counsel, who interfaced with District trial counsel about this case on a regular basis.

Not only has the District not changed its behavior that led to the discovery failures in this case, it has doubled-down on its discovery abuses in disregarding its obligations to the Court. Instead of continuing to admit its wrongdoing and abuse of the judicial system, as previous District counsel and even former Attorney General Nickles did, the District now claims it did nothing wrong and that no sanctions of any kind are appropriate in this case. (*See, e.g.,* District Supp. Proposed Findings, Dkt. No. 944 at ¶ 204.) The District would have the Special Master

ignore Judge Sullivan's recognition of the discovery abuses by the District known in 2009 when he ordered former Attorney General Nickles to file a declaration that, among other things, "shall address [ ] the pattern of discovery abuses engaged in and repeatedly acknowledged by the District during the pendency of these cases." (July 30, 2009 Order, Dkt. No. 486 at 1-2.) The District would also have the Special Master ignore the fact that the former Attorney General and District counsel have admitted these failures and vowed to correct them. (*See* Nickles Decl., Dkt. No. 490-1 at ¶ 14 (stating "unequivocally that significant, remedial actions will be taken to address these issues and to prevent their reoccurrence, including proper disciplinary action."); Chang SM (2012) Ex. 107, at 32:25-33:1 (Nickles stating, "I have reconstituted the trial team, and I am heading the trial team.); *see also* Declaration of Thomas L. Koger, Dkt. No. 490-2; Declaration of Ronald B. Harris, Dkt. No. 490-3; and Ryan Decl., Dkt. No. 490-4.)

To the contrary, the District's institutional memory has been reset with a new Attorney General and new lead counsel. Indeed, in contrast to former Attorney General Nickles, current Attorney General Nathan testified before the Special Master that: "I certainly did not head this trial team, I do not head this trial team." (Nathan SM, May 8, at 49:2-3.) Thus, he disclaims any responsibility to pass on to his subordinates significant information, such as Chief Lanier's decision not to conduct an IAD investigation, or to keep the Court accurately and currently informed. Astonishingly, Attorney General Nathan also testified that, even in the light of all of this evidence of professional malfeasance, an investigation of his staff was not warranted because he believed they had acted in conformity with the standards of his office. It is clear that both the Attorney General and the District are unrepentant and the past three years of Special Master proceedings have failed to convey the gravity of the District's discovery abuses in this case. Only the most severe sanctions will be necessary before the OAG takes seriously its

professional responsibilities to the Court, to opposing parties, and to the people of the District of Columbia.

B. The District's Discovery Failures With Respect To A Purported Copy of the Running Resume Provided To The MPD Office of General Counsel By Two Sworn MPD Police Officers.

Beyond the District's failures concerning the E Team data, the District has violated its own procedures and, subsequently, the terms of the *Barham* Settlement Agreement. Such procedures had been designed to prevent reoccurrence of the many discovery failures and lapses of the kind that occurred in the *Chang* and *Barham* cases over the last ten years by mandating the indexing, logging, and implementation of a document management system for all documents submitted to the OAG and the MPD OGC related to mass demonstration cases. If anything, the account of the lackadaisical treatment of important documents by the District has revealed the District's failure to implement basic document controls consistent with even the most *minimal* professional standards. It took years before Mr. Ryan apparently logged a document that he claimed Officer Strader had discovered (and only after it sat initially on his desk and then in storage for a long period of time), only to produce a document which both police officers who had handled the original document stated was a different document.

In the Fall of 2009, the District became aware of and, through the MPD OGC, took possession of a document from Officer Strader (via Captain Jeffrey Herold). Officer Strader believed this document was the long-missing JOCC Running Resume for the September 2002 IMF Event, for which there was an Order compelling production. (*See* Chang SM (2012) Ex. 73.) Just months before Officer Strader made his discovery, Mr. Ryan filed a declaration with this Court attesting that he had directed the immediate cataloging of all documents related to mass protest cases, including the *Chang* and *Barham* cases. (*See* Ryan Decl., Dkt. No. 490-4.) Yet, when two respected, career officers provided a document that may have been a key piece of

evidence – and specifically identified it as such – Mr. Ryan and his deputies did not follow Mr. Ryan's own procedures in handling the document. Instead, they treated it as nothing more than a joke to be played on their colleagues. In addition to failing to catalog the document when it was delivered, the MPD General Counsel and his colleagues relied on the superficial review of the document by the former OAG lead counsel in this case, Tom Koger, to conclude that the book was not relevant to the *Chang* litigation. This is the same former lead counsel who had earlier been removed from the case and disciplined for his discovery failures in the *Chang* litigation. Even worse, Mr. Ryan and Teresa Quon both admitted that they knew Mr. Koger had been removed and disciplined for egregious discovery violations in this case. But they both insisted they had no reason not to trust his opinion despite the fact that he had an obvious conflict of interest since such discovery would implicate, again, his own mishandling of the *Chang* case.[6]

These events occurred while Judge Sullivan was holding status conferences regarding the District's failure to discover and produce the JOCC Running Resume, among other relevant discovery, and the Special Master began hearings related to the potential destruction of the JOCC Running Resume. Furthermore, by the time Captain Herold produced Officer Strader's discovery of what he thought was the JOCC Running Resume to the MPD OGC, Judge Sporkin

[6] Mr. Ryan, Ms. Quon, Shana Frost, and others repeatedly testified that they had no reason to doubt the account of the other District attorneys in this case because of their personal working relationship with each other – a dubious standard to follow in complying with professional standards, due diligence and candor to the Court. Indeed, Ms. Frost insisted that she simply believed Mr. Ryan's and Ms. Quon's account as true in working to try to convince Officer Strader and Captain Herold to change their account. Ms. Quon claimed she relied on her personal relationship with Mr. Koger to evaluate his statements regarding the document Officer Strader discovered, despite the fact Mr. Koger had been removed from the case because of discovery failures. Each of these attorneys had an obvious conflict of interest between their personal interests and their clients' interests, including potential allegations against each of them for failure to comply with an Order to Compel and destruction of evidence and obstruction in the loss or substitution of the Strader document. Yet, each lawyer accepted the other District lawyers' accounts as true – without question – in dealing with these controversies, while meeting together to try to coordinate their sworn testimony.

– at the request of Attorney General Nickles – was investigating the disappearance of that very JOCC Running Resume. Nonetheless, not a single attorney in the MPD OGC felt it was necessary to disclose Officer Strader's discovery to Judge Sullivan or to Judge Sporkin, or to provide either of them with the book to review.

C. The District Made Misrepresentations To This Court In An Attempt To Prevent The Special Master From Investigating The District's Failures With Respect To The E Team Data And Officer Strader's Discovery.

The District's efforts to thwart the Special Master investigation did not end with the District's concealment of Officer Strader's discovery or the concealment of Mr. Bynum's discovery of attempted deletions on the E Team system. In addition, the District made affirmative misrepresentations to this Court regarding the existence and scope of the FBI's investigation into the E Team and Group Systems servers. After finally being forced to reveal that someone had attempted to delete the E Team data, the District filed pleadings with this Court proclaiming that the MPD IAD had initiated an investigation, and that the matter was then referred to the FBI to conduct a criminal investigation as to whether someone had attempted to delete the E Team data. In so doing, the District claimed that the criminal nature of this investigation made it inappropriate for the Special Master also to investigate the same issue in a civil proceeding, forcing witnesses potentially to testify against themselves. The Special Master twice rejected these arguments, pointing out that the District's Fifth Amendment objections were "at best, unclear" and certainly did not justify delaying the Special Master's investigation into (1) any effort to delete E Team data; (2) any knowledge by MPD employees, representatives, or agents of that effort; and (3) any knowledge by counsel for the District of that effort. (*See* Mem. Order Denying Motion to Stay, Dkt. No. 839 at 6-9 (stating that "it makes much more sense in a case about to enter its second decade to soldier on"); *see also* Mem. Opinion Granting Motion to

Compel 30(b)(6) Deposition, Dkt. No. 873 at 8 (recognizing that "the potential complications that arise from [a parallel criminal investigation] are at this point theoretical").)

In 2011, the Special Master recognized that "[t]here is no indication that any [FBI] investigation has begun." (*See* Dkt. No. 839 at 5.) He then explained that the suggestion the "FBI or the United States Attorney will make 'findings and recommendations' at the conclusion of its investigation is fanciful." (*Id.* at 6.) At the same time, the Special Master cautioned that there were even more complex issues regarding whether the Fifth Amendment privilege would even exist for potential witnesses. (*Id.* at 7 (explaining that the applicable statute of limitations related to the initial deletion in 2003 would need to be considered).) While the statute of limitations would possibly bar a prosecution for the initial deletions – and negate the need or ability of a witness to invoke the Fifth Amendment privilege – the statute of limitations "would not bar a prosecution based on . . . a conspiracy to cover up the deletion that was hatched in 2010 when it became clear that a Special Master would be taking testimony under oath about the loss of the running resume." (*Id.* at 7-8.) The District, like an ostrich, has simply ignored the possibility of the latter crime occurring and instead focuses on the former, time-barred crime as evidence of "no harm, no foul." (Nathan SM, May 8, at 18:1-10.).

What the District failed, at the time, to inform the Special Master or Judge Sullivan was that its arguments were baseless. There was no IAD investigation, as both the Attorney General and the MPD General Counsel well knew. Furthermore, once someone at the MPD informed the FBI that all the E Team data had been recovered and no investigation was necessary – the FBI closed its investigation into the attempted deletion of the E Team data. Not only was this instruction from someone at the MPD to the FBI contrary to Chief Lanier's orders, it also was contrary to the District's numerous representations to this Court. But rather than correcting those

misrepresentations, the District continued to make misrepresentations to the Court. In doing so, the District severely hindered any potential investigation into any "conspiracy to cover up the deletion that was hatched in 2010."

D. After The District Failed in Their Efforts To Close The Special Master's Investigation, The District Engaged In Improper And Unethical Litigation Tactics.

Finally, the District's litigation practices during the Special Master proceedings not only make the testimony of District witnesses highly suspect, they also raise serious ethical issues that indicate the District has failed to learn from these experiences or reform its litigation conduct. The District's actions in this case simply do not meet minimum professional standards of the District of Columbia Bar, much less the Court's Rules and expectations.

First, it apparently is standard practice within the OAG to conduct joint witness preparation sessions, even when a witness's credibility is in question. This practice cannot be excused as a means for the District simply to save time. What clearly happened here was much worse: in the face of direct challenges to witnesses' credibility, the OAG huddled its witnesses together to coordinate their testimony. It did so with Ms. Quon and Mr. Ryan, and it attempted to do so with Captain Herold and Officer Strader. Officer Strader was so concerned by this conduct that he insisted on having a Union representative accompany him to a meeting at the MPD General Counsel's Office – which was terminated when Officer Strader refused to proceed without his Union representative. It is only the integrity of these police officers that thwarted the District's attempt to have those officers alter their testimony to conform to the tainted testimony of Ms. Quon and Mr. Ryan.

But the witness coordination did not end there. Even though Mr. Ryan was a witness on many of the same subjects, the District continued to have Mr. Ryan participate in the witness preparation session of Asst. Chief Anzallo, dealing with the critical issue of whether there should

be an IAD investigation of the attempted deletion of E Team data. Mr. Ryan's role in preparing witnesses to testify about the same subjects to which Ryan had testified cannot be excused on the basis of his position as the MPD General Counsel. This is particularly true when Asst. Chief Anzallo's (as well as Chief Lanier's) prospective testimony relates to the handling of what the District claimed was a separate criminal investigation.

Second, it is clear from the Special Master's proceedings that the District has learned nothing from its experience in this and other cases in which its professional conduct has been questioned. It is clear the District will not alter its litigation abuses absent the most painful, far-reaching, public sanctions available. Sadly, the District must be forced (or shamed) to comply with its professional responsibilities. Unfortunately, there is no other way. Even after being told by Judge Sullivan that this case is "the civil counterpart of Ted Stevens" (Tr. of July 29, 2009 Hearing at 6), the District continued its practice of discovery abuses and lack of candor with the Court. The District's obstruction in this case was clearly based on its assumption that it could wait out not only the Plaintiffs, but also Judge Sullivan and the Special Master, and ultimately would not have to pay the costs of delay and litigation, much less the damages owed to the Plaintiffs. This pattern of litigation strategy by the District has been criticized in other cases, but the level of dilatory and obstructionist efforts in this case is simply unprecedented. The District will not seriously consider altering its conduct (as shown by Attorney General Nathan's testimony) or seriously consider resolution of the case until it is ordered to pay the full costs of discovery as an immediate sanction in this case, and subjected to other, equally serious evidentiary sanctions.

Even though the District's discovery abuses have been well-documented and conceded by his predecessor, Attorney General Nathan accepts no responsibility for the delays and

discovery abuses in this case. Instead, he casts blame for the delays in this case on the Plaintiffs. It is true that had Plaintiffs not brought the District's discovery abuses to the Court's attention, this case would long ago have gone to trial. It is also true that had Plaintiffs not opposed every unsuccessful effort by the District to limit the Special Master's examination of the issues before him, and even to cease the Special Master proceedings altogether, this case would long ago have been resolved without any knowledge of the sheer magnitude of the District's discovery abuses. Attorney General Nathan is correct: if the Plaintiffs had not raised these questions and the Court and the Special Master had not ordered these disclosures, the case could have proceeded without delay, but it also would have proceeded without the evidence withheld, destroyed or altered by the District. Trying to force Plaintiffs to conduct a trial on the merits without access to the key evidence and contemporary records of the events, which the District failed to preserve, tainted, or destroyed, is clearly contrary not only to the law of this Circuit but also to basic concepts of due process.

What may be most disturbing is that nearly every attorney witness for the District – except, surprisingly, Mr. Koger – claims that they made no mistakes in this process. According to Attorney General Nathan and Mr. Ryan, this is precisely how the OAG should function. Respectfully, the *Chang* Plaintiffs request that the Special Master look at these actions in light of the entire context of this case. While individual events and facts discussed below perhaps may have been excused if they were isolated, inadvertent, and innocent, the cumulative effect of the evidence and the District's behavior in spite of that evidence requires an exacting remedy and consequence – lest the District simply continue with business as usual.

FINDINGS OF FACTS

The *Chang* Plaintiffs respectfully submit their third set[7] of proposed findings of fact and conclusions of law regarding the matters currently assigned to Special Master Facciola for investigation.[8]

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[7] In April 2011, the *Chang* Plaintiffs submitted the 2011 Proposed Findings, which stemmed from evidence relating to the JOCC Running Resume, the video tapes, and the audio tapes, and which was developed during the eight days of Special Master hearings held between October 2010 and December 2010. (*See* 2011 PFOF, Dkt. No. 777.) Due to the subsequent disclosure regarding the discovery of the long-missing E Team data, the Defendants filed, with the *Chang* Plaintiffs' consent, a motion to enlarge their time to file objections and counter submissions. (Dkt. No. 783 at 1.) During a hearing on July 12, 2011, following the production of the E Team data, Special Master Facciola gave the Defendants 30 days to file "their proposed findings of fact and conclusions of law as to the audio recordings and video footage…." (Minute Order dated July 12, 2011.) The District, along with Defendants Newsham and former Chief of Police Charles Ramsey, filed Objections and Responses on August 11, 2011. (*See* Dkt. Nos. 811 and 812 (Newsham), 810 (Ramsey), and 813 (District).) As of August 11, 2011, Plaintiffs reasonably concluded that the issue of spoliation and destruction of the audio and video recordings was firmly in the Special Master's hands. Then, on August 23, 2012 – more than one year later – the District sought leave to file Supplemental Proposed Findings of Fact and Conclusions of Law concerning the audio and video recordings (Dkt. No. 905), which the Court granted (Dkt. No. 943). Thereafter, the District filed its Supplemental Proposed Findings of Fact on March 8, 2013 (Dkt. No. 944), and the Plaintiffs filed their Response to these Supplemental Proposed Findings on April 5, 2013. (Dkt. No. 948.) The District has never responded to Plaintiffs' 2011 Proposed Findings of Fact and Conclusions of Law concerning the JOCC Running Resume.

This latest filing references, but does not repeat, the content of the *Chang* Plaintiffs' 2011 Proposed Findings. Instead, this filing focuses on the new evidence developed during the Special Master hearings held between November 8, 2012 and May 8, 2013, and which was not discussed in Plaintiffs' previous submissions.

[8] This filing utilizes the following citation format:

> Testimony from the Special Master's evidentiary hearings held on November 8-9, 28-29, and December 18, 2012; January 3-4, 9, 11, March 18, and May 8, 2013, is cited as "([Witnesses Last Name] SM, [Date] at [page number and line cite].)." For example, a citation to Officer Strader's testimony from November 8, 2012, is cited as "(Strader SM, Nov. 8, at 42:21-25.)."
>
> Exhibits offered by the *Chang* Plaintiffs and admitted into the Special Master's record during the 2012-2013 hearings are cited as "(Chang SM (2012) Ex. [no.].)." Exhibits offered by the District and admitted into the Special Master's record are cited as

I. BASIC FACTS

1. Following the eight days of hearings between October and December 2010 (the "2010 Special Master Hearings"), the Special Master held 11 days of resumed hearings in November and December of 2012, and January, March, and May of 2013 (the "2012-2013 Special Master Hearings"), receiving testimony from 12 witnesses (totaling approximately 1,850 transcript pages) and receiving approximately 70 exhibits into evidence. (*See* Minute Orders dated November 8, 2012, November 9, 2012, November 28, 2012, November 29, 2012, December 18, 2012, January 3, 2013, January 4, 2013, January 9, 2013, January 11, 2013, March 19, 2013, and May 8, 2013; *see also* Minute Orders dated October 12, 2010, October 13, 2010, October 14, 2010, October 15, 2010, October 18, 2010, November 9, 2010, November 10, 2010, and December 14, 2010.)

II. BACKGROUND OF WITNESSES

2. The witnesses who testified during the 2010 Special Master Hearings are described in the 2011 Proposed Findings . (*See* 2011 PFOF ¶¶ 10-30.) The witnesses described below are in the same order as they initially appeared in the 2012-2013 Special Master Hearings.

3. Officer John Strader is an Officer with the MPD and is currently assigned to the Command Information Center ("CIC"), where he has worked since November 2002. (Strader SM, Nov. 8, at 5:13-15; 6:24-25; 9:12-17; 10:16-18.) Officer Strader has been with the MPD for 18½ years. (*Id*. at 7:6-7.) Prior to joining the MPD, Officer Strader was in the United States Army. (*Id*. at 7:10-11.) Officer Strader's responsibilities include monitoring radio calls and information provided to the CIC and then generating reports based on that information for the MPD's use. (*Id*. at 5:22-6:9.) There has never been a question about Officer Strader's ability to collect information and report it accurately. (*Id*. at 7:1-5.) Officer Strader is "a very honest, straightforward person." (Burton SM, Nov. 29, at 37:17-21.)

4. Terrence Ryan is the General Counsel for the MPD.[9] (Ryan SM, Nov. 8, at 124:15-18.) Mr. Ryan is a member of the D.C. Bar. (Ryan SM, Nov. 9, at 76:17-18.)

"(District SM (2012) Ex. [no.].)." The parties restarted exhibit numbers for those materials used during the 2012-2013 hearings.

Transcripts of Hearings held before Judge Sullivan in this matter, which are not otherwise designated as an Exhibit, are cited as "(Tr. of [date] Hearing at [page number].)."

Pleadings and Orders entered on the Court's docket in this case, which are not otherwise marked as an Exhibit, are cited as "(Dkt. No. [ ].)." Pleadings and Orders entered on the Court's docket in *Barham v. Ramsey*, 1:02-cv-02283 (EGS/JMF), which are not otherwise marked as an Exhibit, are cited as "(*Barham* Dkt. No. [ ].").

[9] As General Counsel for the MPD, Mr. Ryan falls under the rubric of the OAG. Mr. Ryan, as well as his entire office, ultimately reports to the D.C. Attorney General as part of the Public Safety Division of the OAG. (*See* Chang SM (2012) Ex. 104; *see also* Anzallo SM, Jan. 3, at 233:20-234:2.)

5. Marc Bynum is a systems administrator at NC4, which markets and services the E Team software.[10] (Bynum SM, Nov. 28, at 8:19-9:1, 9:6-8.) Mr. Bynum has worked at NC4 since 2005, and is based in Calhoun, Georgia. (*Id.* at 9:2-5.) Mr. Bynum has been working with E Team software since December 2004, is trained in the technical aspects of it, and has a "strong understanding of how the E Team system works." (*Id.* at 9:22-10:5.)

6. Eric Kant is an interoperability architect at NC4. (Kant SM, Nov. 28, at 118:21-2s, 119:6-7.) As an interoperability architect, his responsibilities include handling projects that relate to the interoperability of systems, strategic guidance, and special projects for NC4. (*Id.* at 119:8-11.) Prior to working for NC4, Mr. Kant worked for E Team Inc.; he was reemployed by NC4 when that company acquired the assets of E Team Inc. (*Id.* at 119:18-24.) Mr. Kant was employed by E Team in September 2002 and, as a subject matter expert, he assisted customers to implement the E Team solution for their given operation. (*Id*. at 119:25-120:1, 120:17-22.)

7. Teresa Quon is an attorney in the OGC for the MPD. (Quon SM, Nov. 28, at 241:1-3.) She is a member of the D.C. Bar. (*Id.* at 241:24-25.) She has worked in her present job since January 2, 2007 (*id.* at 241:4-6), and since that time has "assisted with, at times gathering the documents, trying to index them, trying to assist where [she] could, make tapes, et cetera" relating to the *Chang* litigation and other "IMF cases and mass demonstration cases." (*Id.* at 242:22-243:12.)

8. Sergeant Delroy Burton has been an MPD police officer for 18 years. (Burton SM, Nov. 29, at 9:13-23.) He holds an elected position as Executive Steward for the Fraternal Order of Police ("FOP"), MPD Labor Committee. (*Id.* at 9:24-10:12.) FOP Chairman Kristopher Baumann contacted Sergeant Burton in 2011 to act as Officer Strader's union representative during a scheduled meeting with the MPD OGC. (*Id.* at 11:16-12:1.)

9. Monique Pressley is a former assistant attorney general with the OAG for the District. (Pressley SM, Dec. 18, at 9:18-22.) Ms. Pressley worked for the OAG from 2000 or 2001 until May 2005 as a trial attorney, an Assistant Corporation Counsel, and then an Assistant Attorney General. (*Id.* at 9:23-10:3.) She returned to the OAG in 2009 as a Senior Assistant Attorney General. (*Id.* at 10:3-4.) When she returned to the OAG in 2009, she was assigned as lead counsel to the *Chang* and *Barham* litigations, and was responsible for defending the District and certain individual named District defendants. (*Id.* at 12:2-10,12:22-13:1.) Ms. Pressley is a member of the D.C. Bar. (Pressley SM, Dec. 18, at 6:3-5.)

10. Captain Jeffrey Herold is a Captain with the MPD. (Herold SM, Jan. 3, at 180:8-9.) Since April 2010, Captain Herold has been the executive officer for the Second District. (*Id.* at 180:10-15.) He has been a police officer with the MPD for almost 24 years, and will retire in May 2014. (*Id.* at 180:24-181:5.)

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[10] NC4 is a private company that deals with situational awareness, as well as other products, in the public safety market. (Kant SM, Nov. 28, at 118:23-119:1.) NC4 purchased the assets of a company called E Team in August 2005, which included the E Team software. (Bynum SM, Nov. 28, at 9:13-16; Kant SM, Nov. 28, at 119:12-20.)

11. Assistant Chief Michael Anzallo is the Assistant Chief of Police for the MPD. (Anzallo SM, Jan. 3, at 216:19-20.) He is currently in charge of the Internal Affairs Bureau, and has had this position for approximately four years. (*Id.* at 216:21-217:1.) Before he joined the Internal Affairs Bureau, he was the commander of the criminal investigations division, a position he held for five years. (*Id.* at 217:13-19.)

12. Shana Frost is a trial attorney in the OAG. (Frost SM, Jan. 9 p.m., at 32:20-23.) She is assigned to General Litigation Section II, but also is assigned to cases within the Equity Section (the *Chang* litigation is assigned to the Equity Section) of the OAG. (*Id.* at 35:10-36:4.) She was assigned to the *Chang* litigation "a couple of months" after Mr. Koger withdrew his appearance. (*Id.* at 36:16-25.)

13. Chief of Police Cathy Lanier is the Chief of Police for the MPD of Washington, D.C. (Lanier SM, Mar. 19, at 4:5-8.) She has been the Chief of Police since 2007. (*Id.* at 5:10-11.)

14. Attorney General Irvin Nathan is the Attorney General of the District of Columbia. (Nathan SM, May 8, at 5:7-10.) Mr. Nathan has been the Attorney General since January 2011. (*Id.* at 5:11-13.)

III. JOINT OPERATIONS COMMAND CENTER[11]

15. The Synchronized Operations Command Center ("SOCC") encompasses the CIC, the JOCC, and the Intelligence Operations Center ("IOC"). The JOCC is a sub-unit of the SOCC. (*See* 2011 PFOF ¶ 76.)

16. The IOC is a component of the SOCC, but was physically located away from the CIC and JOCC. The IOC was designed to coordinate intelligence personnel, including undercover personnel in the field, monitor intelligence personnel operations, and maintain its own running resume, known as the Intelligence Running Resume. (*See Id.* ¶ 82.)

17. The Intelligence Running Resume for September 27, 2002 contains references to Chief Ramsey's location at certain sites on September 27, 2002, as well as the effectuation of arrests. (*See Id.* ¶ 83; *see also* Chang SM (2010) Ex. 81, at 3, 5, and 6.)

18. The CIC is a room on the fifth floor of MPD headquarters. It contains twenty-two computers, serves as a 24/7 watch and warning center for the MPD, and is activated daily without reference to demonstrations or anything else. The terms SOCC and CIC have often been used interchangeably by members of the MPD. (*See* 2011 PFOF ¶ 80.)

19. The SOCC issued daily reports of activity. (*See Id.* ¶ 77.) The SOCC Daily Report for September 27, 2002 contains a reference to "Demonstrations" and instructs readers to

[11] Plaintiffs' 2011 Proposed Findings contain detailed findings related to the structure and operation of the JOCC. (*See* 2011 PFOF ¶¶ 76-127.) Plaintiffs summarize those findings for the Court's convenience in considering the unique issues raised in the 2012-2013 Special Master Hearings.

"See JOCC data" for more information. (*See Id.* ¶ 78; *see also* Chang SM (2010) Ex. 80, at DC 2010 Supp 000467.)

20. The JOCC is located across the hall from the CIC. (*See* 2011 PFOF ¶ 81.) The JOCC is activated when there is either an emergency situation or a planned event in the District requiring the coordination between local and federal agencies. (*See Id.* ¶ 79.) For a specific event, numerous agencies may be working in the JOCC, such as the U.S. Capitol Police, the U.S. Park Police, the Washington Metropolitan Transit Authority Police, FEMA, FBI, the Secret Service, and ATF. (*See Id.* ¶ 81.) The JOCC video screens can display fixed camera feeds, news feeds, and information being displayed on some of the workstation computers, including the JOCC Running Resume.

21. In September 2002, as information was relayed to the JOCC from the field, pieces of information were entered and saved into either (or both) the Group Systems or E Team software throughout the day. At the end of the day or event, a report is run that compiles all of the different entries into chronological times, which is then saved as a Microsoft Word document known as the JOCC Running Resume. (*See id.* ¶ 84.)

22. A JOCC Running Resume is created every time the JOCC is activated for a mass demonstration event. (*See id.* ¶ 85.)

23. Information could not be entered into the Group Systems or E Team software from the field. Instead, information from the field is relayed to analysts, who are police officers, who then input information into the systems. The JOCC Running Resume is constantly being modified throughout the day. (*See id.* ¶ 87.)

24. Members of the MPD had primary responsibility for inputting information into Group Systems or E Team, although personnel from other law enforcement agencies who were present in the JOCC could also input information into the systems. (*See id.* ¶ 88.)

25. Sergeant Douglas Jones oversaw the input of information into the Group Systems or E Team systems. (*See id.* ¶ 89.)

26. The JOCC Running Resume recorded all the transactions that took place during the operation of an event. (*See id.* ¶ 95.) It was typical for JOCC Running Resumes to contain a synopsis of whatever information was collected throughout the day of a mass demonstration, including the movement of protestors, the movement of Civil Disturbance Unit ("CDU") platoons, the presence of command officials at different sites, the presence of the Chief of Police at different sites, and any decision to arrest a large number of people. (*See id.* ¶ 96.)

27. The purpose of the JOCC Running Resume was to record all significant information related to manpower, reports from CDU, reports from platoon leaders, and commands from high-ranking officers. (*See id.* ¶ 97.) This includes orders given over cell phones. (*See id.* ¶ 102.) In other words, the purpose of the system was to capture all information pertaining to the demonstration. (*See id.* ¶ 98.)

28. According to Stephen Gaffigan, the Senior Executive Director of the Office of Quality Assurance, an order to arrest a large number of people during a demonstration would be

recorded in the JOCC Running Resume because the purpose of the JOCC Running Resume was to record such decisions. (*See id.* ¶ 99.)

29. The fact that arrests were made at a location would be reflected in the JOCC Running Resume. The ranking official that gave the order would see to it that the information was communicated to the JOCC. (*See id.* ¶ 100.)

30. One of the last entries on a JOCC Running Resume was to note that the electronic version of the JOCC Running Resume would remain available to authorized personnel. (*See id.* ¶ 91.)

31. At the conclusion of an event, Sergeant Jones would specifically save an electronic copy of the JOCC Running Resume to an electronic file on the CIC network, which was maintained separate from the server on which the Running Resume software ran. (*See id.* ¶ 90.)

32. Following an event, Sergeant Jones would print out twelve copies of the Running Resume and provide them to Mr. Gaffigan. Mr. Gaffigan would then distribute the Running Resumes to the command staff, which included the Executive Assistant Chief of Police and the Office of the Chief of Police. (*See id.* ¶¶ 108-12.)

33. Even at a later time, between 2004 to 2006, the MPD continued to print hard copies of the JOCC Running Resume and provide them to senior officials within the MPD. (*See id.* ¶ 113.)[12]

34. The MPD had a policy of maintaining a hard copy of the JOCC Running Resume for any event in which the JOCC was activated. (*See* 2011 PFOF ¶ 115.)

35. For the September 2002 IMF Event, the JOCC Running Resume would have been quite extensive – between 80 to 200 pages and approximately a quarter inch thick. (*See id.* ¶ 117.)

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[12] The District claims that with the introduction of E Team, the JOCC Running Resume was no longer printed in hard copy. (*See* District's Notice Regarding E Team, Dkt. No. 927 at 9.) This is clearly incorrect. Marian Rai Howell, who oversaw the operation of the JOCC between March 2004 and May 2005, testified that it was the policy of the MPD during this time to print out hard copies of the JOCC Running Resume (which, during this time period, would have been E Team) to "facilitate the review by the command officials at the after-action meetings." (Chang SM (2010) Ex. 35, at 91:2-92:22.) She also testified that she personally saw hard copies of the JOCC Running Resume while she was acting director between 2004 and 2005. (*Id*. at 20:17-21:9, 92:15-18.)

IV. USE OF GROUP SYSTEMS AND E TEAM SYSTEM[13]

36. George Crawford, a computer specialist for the District's Office of the Chief Technology Officer, believes that Group Systems and E Team were both being utilized by the JOCC on September 27, 2002. (Crawford SM (2010), Oct. 12 p.m., at 16:6-17:1.) Crawford believes Group Systems was the primary system and E Team served in a backup or secondary capacity. (*Id.* at 17:6-19.) Giuseppi Crissafulli, who worked as a contractor/computer programmer for the MPD between February 2001 and March 2005, recalls that both systems were being used by the MPD in 2002. (Crisafulli SM (2010), Oct. 13 a.m., at 63:7-13; 73:20-23.)

37. E Team would not have been "operational" in September 2002 because "[i]t was not designed as a law enforcement-type system. It was an emergency management system" that "had to be customized for use by MPD." (Jones SM (2010), Oct 12 a.m., at 84:25-85:5.)

38. Neil Trugman, an MPD law enforcement coordinator between 2000 and 2004, testified that September 2002 "may have been the first time [MPD] us[ed E Team]." (Trugman SM (2010), Oct. 12 a.m., at 106:10-23.)

39. Sergeant Jones testified that, following the September 2002 IMF Event, he "went ahead and exported the [running resume] information like I normally did – that's my job to export it from Group Systems into a Word document – a cumulative Word document – and I did print out – I recall printing out approximately 12 copies and taking them to Mr. Gaffigan's office." (Jones SM (2010), Oct. 12 a.m., at 26:23-27:9.) He later added, "I was there. It was my responsibility to generate that. I exported it. I created the electronic file. I made copies." (*Id.* at 78:1-4.)

40. Sergeant Jones noted that the MPD did not start using the E Team system on an official basis until December 2003. (Chang SM (2012) Ex. 28.)

41. In March 2012, Mr. Gaffigan testified as a Rule 30(b)(6) witness on behalf of the District regarding the use of the E Team system. (*See* Exhibit 2 to Plaintiffs' Response to District's Supplemental Findings of Fact, Dkt. No. 948-2.) Mr. Gaffigan testified that, in preparation for his testimony, he interviewed eleven individuals "who were associated with the IMF/World Bank demonstrations in 2002 … and asked them a series of questions related to that

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[13] Since it was not until the third hearing in the 2012-2013 Special Master Hearings that the District began to contest whether Group Systems was operational in the JOCC on September 27, 2002, there was little testimony during the 2012-2013 Special Master Hearings on this point. (*See* Statements of William Causey, Nov. 28, at 199:18-200:23.) The 2010 Special Master Hearings, however, included significant testimony regarding the use of Group Systems during the September 2002 IMF Event. As a result, the citations in this section will include the applicable year of the testimony before the Special Master to distinguish between testimony in 2010 and testimony in 2012-2013. For example, testimony from George Crawford will be referred to as Crawford SM (2010), Oct. 12 p.m., at [ ] while testimony from Marc Bynum will be Bynum SM (2012), Nov. 28, at [ ].

event." (*Id.* at 15:20-16:3.) Mr. Gaffigan testified that he and District Counsel Causey had selected the eleven individuals because they were "officers who were actually assigned to the JOCC itself." (*Id.* at 35:10-36:10.) Mr. Gaffigan asked each of the eleven individuals the following question: "[D]o you recall for the September 2002 IMF demonstration the JOCC was using two computer systems, the older group systems and the newer E-Team?" (*Id.* at 17:8-11 (question 3).) The eleven people that Mr. Gaffigan asked included: Chief Ramsey, Asst. Chief Newsham, Ron Harris (MPD Attorney), Mr. Ryan (MPD attorney), Officer Damien Johnson, Officer Ronald Young, Sergeant Grisel Reid, Officer Stephen Bias, Officer Anna Moss-Davis, Captain Lamont Coleman, and Officer Todd Mattingly. (*Id.* at 16:8-15.)

42. Of those individuals, only Chief Ramsey (*id.* at 19:1-22), Asst. Chief Newsham (*id.* at 20:7-21:3), Mr. Harris (*id.* at 30:1-16), and Mr. Ryan (*id.* at 32:18-33:13) – each one either a named defendant in this litigation or a primary official of and witness for the District – responded "no" to Mr. Gaffigan's question about both Group Systems and E Team operating in the JOCC during the September 2002 IMF Event. Officer Damien Johnson said he did not remember. (*Id.* at 28:20-29:19.)

43. The remaining six officers all responded that both E Team and Group Systems were in use during the September 2002 IMF event. (*See id.* at 21:6-22:11 (Officer Young); *id.* at 22:18-23:21 (Sergeant Reid); *id.* at 24:2-25:7 (Officer Bias); *id.* at 30:20-31:14 (Officer Moss-Davis); *id.* at 31:22-32:15 (Captain Coleman); and *id.* at 33:18-34:12 (Officer Mattingly).)

44. The responses provided by these six officers – all disinterested officers not directly involved in the litigation – are further bolstered by the evidence that only three of these officers appear on the E Team profile summary for the entire weekend during the September 2002 IMF event – Officer Young (DCMPDUser045), Sergeant Reid (DCMPDUser082), and Officer Mattingly (DCMPDUser123). (*See* Chang SM (2012) Ex. 5.) Officer Bias, Officer Moss-Davis, and Captain Coleman are not identified on the E Team profile summary for the September 2002 IMF Event. (*Id.*) Officer Johnson, who did not recall whether there were two systems in use, is also not listed on the E Team profile summary. (*Id.*) It should be emphasized that each of them was specifically chosen by District Counsel Causey to receive Mr. Gaffigan's survey because they had been present in the JOCC and knew its operations. (Dkt. No. 948-2 at 35:10-36:10.)

45. In fact, the Group Systems software continued to be used in the JOCC after the September 2002 IMF Event. When Sergeant Jones looked on the server in "the area on there where it would have the old [Group Systems JOCC] activation resumes," he found a JOCC Running Resume for a "D.C. sniper incident where the JOCC was activated." (Jones SM (2010), Oct. 12 a.m., at 30:20-31:11.) Events related to the D.C. sniper did not occur until after the September 2002 IMF Event.

46. Sergeant Jones, in addition to his testimony regarding the existence of a Group Systems JOCC Running Resume for September 2002, also stated in an affidavit that "sometime in 2003" he "provided Mr. Trugman a copy of the running resume along with the location of the associated electronic files." (Chang SM (2010) Ex. 2, ¶ 4 at 2.) When Sergeant Jones later conducted a digital search for the Group Systems JOCC Running Resume he could not locate the file. (*Id.* at 2-3.)

47. On February 12, 2003 at 8:07 a.m., an individual who self-inputted his or her name as Charlie O'Connell, selected the "delete" function for the E Team September 2002 IMF Event. (Chang SM (2012) Ex. 5.) Charlie O'Connell was an NC4 employee at the time. (Bynum SM (2012), Nov. 28, at 24:16-17.)

48. As mentioned below, there is no way to validate whether the user was actually Charlie O'Connell or someone else using that user id and password – not uncommon since MPD personnel and contractors shared user ids and passwords at that time. (Bynum SM (2012), Nov. 28, at 49:5-51:3.) But it is clear that an NC4 employee would not have selected the "delete" function for an event without explicit instruction from an MPD official. (*Id.* at 61:24-62:4.)

49. On February 12, 2003 at 8:04 a.m., a user of the id "DCMPDSysAdm01" signed into E Team and self-reported his name as Neil Trugman – the same individual who had asked Sergeant Jones for the electronic file location of the Group Systems JOCC Running Resume. (Chang SM (2012) Ex. 6, at 1; Chang SM (2010) Ex. 2, at 2.)

50. The September 2002 E Team data was not recovered until the summer of 2011 – over 8 years after someone selected the "delete" function for that same data. (Chang SM (2012) Ex. 2, at 1.)

V. OPERATION OF E-TEAM SYSTEM

A. General Design

51. E Team is a web-based system that tracks and manages incidents, events, and resource requests. (Bynum SM, Nov. 28, at 10:6-10, 10:23-24.) In order to gain access to the E Team software, a user needs a login and password. (*Id.* at 10:25-11:3.) Depending on how much control the E Team client wants over the process, either E Team can manage the distribution of logins and passwords, or the client can manage the process itself. (*Id.* at 11:8-14.) Clients often had users share logins and passwords and, according to Mr. Kant, the software was built to allow such sharing to occur. (Kant SM, Nov. 28, at 175:13-15, 176:14-17.)

52. After logging in to the E Team system, users are prompted to enter their "profile" information, which includes their name, organization or agency, phone number, and position they are filling. (Bynum SM, Nov. 28, at 11:15-20; Kant SM, Nov. 28, at 153:11-19.) The entering of this profile information is not a verified process; a user can put in any information he or she wants. (Bynum SM, Nov. 28, at 12:5-8, 13:16-20; Kant SM, Nov. 28, at 177:22-25.) For example, the Chief of Police could access the system with a login and password provided to her, but enter someone else's name and other identifying information in the profile section. (Bynum SM, Nov. 28, at 12:9-12.) Each time a person logs in to the E Team system, he can enter different profile information. (*Id.* at 13:10-15.)

53. Once a user has logged in to the system and completed the profile section, he can then input information and data related to an event or incident that is occurring. (*Id.* at 12:13-17.) The E Team system maintains the information entered in chronological order and maintains what is called a running history file. (*Id.* at 13:21-14:3.) This running history file logs any time an entry is made on the system or a change is made to a preexisting entry. (*Id.* at 14:1-9.)

54. The E Team system automatically populates information regarding who entered or edited data based on the name a user enters in the profile screen. (*Id.* at 48:9-19.) If a user logs in with his own user name and password, but enters someone else's name in the profile, the history file report will show that the document was added by, edited by, or deleted by the name entered in the profile. (*Id.* at 49:11-50:7.)

B. Specific Characteristics of MPD's System

55. In order to gain access to the E Team system, an MPD user needed a user name and password. (*Id.* at 10:25-11:3.) E Team did not manage the distribution of user names and passwords for the MPD. (*Id.* at 11:4-7.)

56. As discussed above, clients often allowed employees to share user names and passwords, and Mr. Kant testified that he had no reason to believe that MPD employees were not sharing user names and passwords. (Kant SM, Nov. 28, at 175:13-18.) One of the purposes of the profile was to differentiate between, and have contact information for, the various users who were entering in information. (*Id.* at 176:18-177:5.) However, there was no way to verify that a person entered the correct profile information for that particular user. (*Id.* at 177:22-25; Bynum SM, Nov. 28, at 12:5-8, 13:16-20.)

57. Within the E Team system utilized by the MPD, there were events, incidents, and situations. (Bynum SM, Nov. 28, at 28:22-25.) An event is the all-encompassing categorization within E Team; it is "an overall umbrella for many incidents or other actions that could be taken during an event, like resource requests, agency situation summaries, jurisdictional situation summaries, incidents." (*Id.* at 27:17-28:1.) Next in the hierarchy were incidents, which were "any situational information that need[ed] to be observed or need[ed] to be brought to the attention of the managers." (*Id.* at 28:2-12.) Then there were situations, which were all the occurrences that happened within an incident. (*Id.* at 28:15-21.)

58. During the September 2002 IMF Event, MPD employees were receiving "just in time training," meaning that as an operator showed up to fill his position, he would "get his user name and password, sit down and it was on-the-job training as most of these events are." (Kant SM, Nov. 28, at 125:6-18.) The training involved how to find the application on the computer, how to log in, how to fill out the profile section, and how to enter and retrieve information. (*Id.* at 127:2-10.) Users were not trained on what the delete function of the system was and how it worked. (*Id.* at 128:2-5.)

59. The MPD's E Team data related to the September 2002 IMF Event was stored on the Lotus Domino server in an archived sub-directory. (Bynum SM, Nov. 28, at 44:2-21.)

60. In order to access the MPD data on the E Team server, an administrator password needed to be entered into the physical server and then another administrator password needed to be entered to get into Lotus Domino. (*Id.* at 86:9-15.) On May 3, 2011, Mr. Crawford had the administrator password for the physical server, and Mr. Bynum had the administrator password for Lotus Domino. (*Id.* at 86:16-23.) Mr. Bynum testified that he believed Mr. Bias also had the administrator password for Lotus Domino in May 2011. (*Id.* at 86:24-87:5.) Mr. Bynum also testified that, in 2002, someone else at NC4 would have had the Lotus Domino password, and if

someone from MPD requested that password, NC4 would have provided it to them. (*Id.* at 113:2-7.)

61. The fact that the District did not renew its contract with NC4 did not have an impact on the District's ability to access the data stored on the servers located at the MPD. The District owned the data and had their own passwords, thus they could have accessed the data at any time. (*Id.* at 115:23-116:7.)

C. Operation of "Delete" Function

62. Some users have what are called "delete rights." (*Id.* at 14:16-18.) Having delete rights means that the user "can remove an incident from … the active view of E Team." (*Id.* at 14:25-15:2.) Typically, it is the client who decides who is given delete rights. (*Id.* at 14:19-24; Kant SM, Nov. 28, at 183:2-4.)

63. According to Mr. Kant, only administrators and above (i.e., those who were administering the quality of data inside the application), had delete rights. (Kant SM, Nov. 28, at 128:7-21.) Mr. Kant testified that besides himself, Mr. O'Connell, and John Hughes (another NC4 employee), that Mr. Bias and Mr. Trugman were also administrators with delete rights. (*Id.* at 129:2-10.) Mr. Kant believed that Mr. Bias had delete rights because he was helping to deploy the system at the time and was "sort of the first user on the system or being what we term maybe a super user." (*Id.* at 129:15-19.) Mr. Kant believed that Mr. Trugman had delete rights because "he was running the operation and had access to the Sys. Admin. Accounts." (*Id.* at 184:1-4.)

64. When a user with delete rights is viewing an event or incident in E Team, there is a button at the top that says "delete." (Bynum SM, Nov. 28, at 15:3-24, 16:4-10.) The delete button relates to the data or record the user is currently working on. (*Id.* at 16:20-23.) According to Mr. Bynum, there is also a "cancel" button and a "submit" button at the top of the screen. (*Id.* at 16:11-13.) Instead of selecting the delete button, a user could choose to close out the event or incident. (Kant SM, Nov. 28, at 178:24-179:1.) Closing out an event requires the same number of steps as choosing the delete button. (*Id.* at 188:23-189:3.) Mr. Kant testified that to close a record, a user would have to use two clicks of the mouse to "select close and submit it." (*Id.* at 180:7-8). To delete a record, a user would have to select delete and then click that they are sure – also two clicks of the mouse. (*Id.* at 188:19-25.)

65. Once someone selects the delete button, a screen pops up telling them that the document will be deleted. (Bynum SM, Nov. 28, at 17:2-8.) According to Mr. Kant:

> A little pop-up box comes up on the middle of the screen and says, are you sure you want to delete and click okay or cancel, I believe are the two buttons. And if you say okay, then the record is marked as deleted and drops off of your primary screens.

(Kant SM, Nov. 28, at 138:11-15.)

66. No alert is sent when a user selects the delete button – not to E Team, not to someone in management at the MPD, and not to MPD general counsel. (Bynum SM, Nov. 28, at 17:14-18:1; Kant SM, Nov. 28, at 189:4-15.)

67. When a user selects the delete button, the data is not permanently destroyed, but it is deleted in terms of the way the E Team system works. (Bynum SM, Nov. 28, 25:11-15.) If a user pushes the delete button, the data is removed from the user's primary screen and moved to another part of the server's memory. (Kant SM, Nov. 28, at 137:4-5; Bynum SM, Nov. 28, at 25:22-26:10.)

68. While selecting the delete button does not permanently destroy the data, after a user pushes the delete button, the data would appear deleted to a casual (i.e., not technologically savvy) user. (Bynum SM, Nov. 28, at 27:14-16.)

69. According to Mr. Bynum, any casual user with a basic operational understanding of E Team could have deleted the data by simply selecting the delete button. (*Id.* at 32:13-21.) Deleting the entire event would take "just a few minutes." (*Id.* at 32:22-25.)

70. Mr. Bynum testified that users do not typically delete whole events unintentionally, and that they do not typically use the delete button to make room for new active events. (*Id.* at 33:21-23, 80:17-21.)

71. While NC4 employees can delete data from the E Team system, they do not delete data, incidents, or events without being specifically instructed to do so by the client. (*Id.* at 61:24-62:4.) Mr. Kant's testimony mirrored Mr. Bynum's on this issue:

> Q (by Mr. Meitl): So, would E Team in 2002, 2003 delete an event or an incident without the instructions of the client?
>
> A: No.
>
> *********
>
> Q: So, it was a significant enough event though that you needed specific instruction from the client to perform that action?
>
> A: We wouldn't perform any action on the system without instruction from the client. It's their operation. It's their system. We're there in a support capacity to help them out, but we would never take action on our own.

(Kant SM, Nov. 28, at 185:24-186:1, 186:9-15.)

D. Back-End Operation

72. The E Team data was stored on a Lotus Domino server on a windows machine located at MPD. (Kant SM, Nov. 28, at 203:24-204:10.) As explained by Mr. Kant, "[a] web application has a server that's serving up information, and you're using a browser locally to access that information." (*Id.* at 204:14-16.) The server is generally referred to as the "back end." (*Id.* at 204:11-13.)

73. If a user had the technological know-how, the E Team data could be accessed through the Lotus Domino server without having to open the E Team software. (Bynum SM, Nov. 28, at 44:22-45:2; Kant SM, Nov. 28, at 206:17-24.) Accessing the E Team data in this way would not be recorded in the E Team system. (Kant SM, Nov. 28, at 206:25-207:2.)

74. If a user accessed the data through this kind of "back-end," he could delete the data. (Bynum SM, Nov. 28, at 45:3-6; Kant SM, Nov. 28, at 207:3-8.) If this happened, NC4 would not be able to tell that a deletion had actually occurred. (Bynum SM, Nov. 28, at 45:7-11; Kant SM, Nov. 28, at 209:11-13.) NC4 would also be unable to restore any data deleted through the back-end. (Bynum SM, Nov. 28, at 45:12-14; Kant SM, Nov. 28, at 209:14-16.)

75. An MPD user could have accessed the data through the Lotus Domino server and deleted it. (Bynum SM, Nov. 28, at 45:15-17 (stating that it's a fair statement to say that "we don't know, sitting here today, if any information was deleted in that fashion."); Kant SM, Nov. 28, at 209:17-19 (stating that its possible that E Team data was deleted through the back end.).)

VI. THE DISTRICT'S MISREPRESENTATIONS REGARDING THE EXISTENCE AND NATURE OF E TEAM DATA.

A. The District Was Aware In May 2008 That E Team Data Related to the September 2002 IMF Event Existed, and Could Be Recovered.

1. The discovery in May 2008 of E Team data related to the September 2002 IMF Event.

Summary: In May 2008, an NC4 contractor visited the District to determine whether E Team data related to the September 2002 IMF Event was recoverable from the MPD servers. After accessing one of the E Team servers, the NC4 contractor was 95% certain that the data could be recovered. The fact that the data was recoverable was not disclosed to the Plaintiffs or the Court until November 2010. The fact that the District knew this in 2008 was not disclosed to the Plaintiffs or the Court until August 2011.

76. At MPD's request, and working under a procurement contract, NC4 contractor Marc Bynum visited the District in 2008 to determine if E Team data related to the September 2002 IMF Event was located on MPD servers. (Bynum SM, Nov. 28, at 64:11-21, 68:9-69:2.)

77. Mr. Bynum arrived at MPD Headquarters on May 6, 2008. (*Id.* at 68:20-23; Chang SM (2012) Ex. 9.) He was met by Carlos Chicon, an MPD employee, and provided access to the E Team servers. (*Id.* at 67:21-68:3; Chang SM (2012) Ex. 9.)

78. After accessing one of the E Team servers, and locating data from the Fall 2002 time period, Mr. Bynum concluded that NC4 could extract data from September 2002 from the E Team servers. (*Id.* at 69:7-11; 70:4-9.)

79. Mr. Bynum was "extremely confident" that NC4 could recover the data. (*Id.* at 70:11-13.) In fact, Mr. Bynum testified that he was 95% certain he would be able to recover the data. (*Id.* at 70:14-21.)

80. Mr. Bynum communicated his findings to Norbert Butler, an NC4 employee who was responsible for the MPD's account. (*Id.* at 110:19-22.) Mr. Bynum assumes that his findings were conveyed to the District. (*Id.* at 70:22-71:4.)

81. Despite the fact that the MPD knew in 2008 that Mr. Bynum was 95% certain that he could recover the data (Ryan SM, Jan. 3, at 46:9-12), the District did not disclose the findings of Mr. Bynum's visit until November 1, 2010. (Chang SM (2012) Ex. 11; *see* PFOF ¶¶ 97-103.) And even then, the District did not disclose that the "survey" had been conducted in May 2008. (Chang SM (2012) Ex. 11; Pressley SM, Jan. 9 p.m., at 16:8-15.) Ms. Pressley testified that she did not think that it was relevant to the Court to know when the survey had been conducted. (Pressley SM, Jan. 9 p.m., at 16:8-15, 21:18-20.)

82. It was not until August 23, 2011, three years after Mr. Bynum's initial discovery, that the District disclosed that the survey of the E Team server took place in May 2008. (Chang SM (2012) Ex. 12, at 81:4-82:3.)

83. Mr. Ryan testified that he does not recall receiving a report of Mr. Bynum's May 2008 findings and that he only learned sometime in 2012 that Mr. Bynum had conducted a search and was 95% certain that he could acquire the information. (Ryan SM, Jan. 3, at 18:20-19:3, 20:24-21:2, 25:5-7.) Despite saying that he was surprised when he found out, and that he knew that two federal judges had issued various orders relating to the production of the E Team data and that it "[p]otentially [ ] could be a problem" or a violation of those court orders that the District knew that the E Team data could be recovered but did not immediately inform the Court or produce the data, Mr. Ryan did not seek to discipline or punish the person who did not reveal the information to him. (*Id.* at 21:12-19, 25:8-20, 25:25-26:4.) Mr. Ryan did not even call Mr. Harris to ask if he knew that the data had been found. (*Id.* at 22:2-4.)

84. Ms. Pressley testified that she "fully recognize[s] that many things could have been done differently had that information come to light sooner" and that she's "certainly one of the people who was not pleased" when she learned when the survey had been done. (Pressley SM, Jan. 9 p.m., at 21:25-22:3.) Ms. Frost testified that she was surprised when she learned about Mr. Bynum's 2008 determination, and that she considered it to be a significant fact. (Frost SM, Jan. 11, at 43:21-23, 44:3-7.)

85. In May 2008, Mr. Bynum was only instructed to determine whether the data could be recovered or extracted. He was not instructed to actually recover or extract the data. (Bynum SM, Nov. 28, at 71:5-13.)

86. Mr. Bynum did not return to the District prior to May 2011 to recover the data, and is not aware of any other NC4 employee traveling to the District between May 2008 and May 2011 to recover the data. (*Id.* at 71:17-22.)[14] Mr. Bynum assumes that NC4 was not asked

[14] Based on his experience, Mr. Bynum believes that if someone else from NC4 had traveled to the District to recover the data, he would have known. (Bynum SM, Nov. 28, at 71:23-72:2.)

to recover the data before May 2011 because the District did not want to pay for it. (*Id.* at 74:1-7.)

2. In 2009, MPD contacted NC4 to determine if the September 2002 IMF Event data could be recovered from MPD servers. No additional survey, similar to the one conducted in May 2008, was conducted.

Summary: In 2009, the District refused to contract with NC4 to obtain the E Team data because NC4 wanted two hundred dollars more than what the District was willing to pay. The potential availability of the E Team data was not disclosed to the Court, or the Plaintiffs, until November 2010.

87. On August 5, 2009, Travis Hudnall, MPD's Chief Technology Officer, contacted NC4 inquiring as to the availability of E Team data related to the September 2002 IMF Event. (Chang SM (2012) Ex. 10.)

88. On August 12, 2009, Mr. Ryan filed a declaration in this case stating:

> On … August 4, 2009, I personally met with Travis Hudnall, MPD's current Chief Technology Officer. I directed him to revisit earlier efforts to obtain information from the vendor who provided the computer program known as 'E-Team' utilized by MPD to create the Joint Operations Command Center (JOCC) running resume on September 27, 2002. Mr. Hudnall was instructed to determine whether the vendor still has custody and control over the E-Team servers, specifically those that were, at the time of the events giving rise to these civil actions, housed in Philadelphia, as well as any backups thereto. The purpose of this inquiry is to determine whether those servers and their backups still exist, and if so, what actions would be necessary to retrieve data from them.

(Chang SM (2012) Ex. 88, ¶ 8.)

89. At the time of Mr. Ryan's declaration, the MPD knew that the E-Team data could be retrieved. (Ryan SM, Jan. 3, at 47:19-21.) Mr. Ryan agreed that if he personally had known that Mr. Bynum had concluded with 95% certainty that the material could be recovered in 2008, that information should have been disclosed to the Court in his declaration. (*Id.* at 34:18-25.)[15]

[15] Mr. Ryan claims that he did not know that the E-Team data could be retrieved in 2008 or 2009, and that he did not learn that information until 2012. (Ryan SM, Jan. 3, at 47:14-18.) The emails he received in 2009, however, were clear that NC4 would need to visit MPD headquarters, as they did in 2008, to determine whether the information existed on MPD's servers. (*See* Chang SM (2012) Exs. 89 & 90 (identifying NC4's need to visit MPD to review MPD's servers for relevant data).) The District did not contract to have NC4 visit MPD headquarters until 2011, and did not inform or seek guidance from the Court in 2008 or 2009 – as it could have pursuant to Federal Rule of Civil Procedure 26(b)(2)(C).

90. On September 25, 2009, Mr. Ryan received an email and a proposed contract, under which NC4 would have visited the District to search the E Team servers located at MPD headquarters. (Chang SM (2012) Exs. 90 & 92.) NC4's proposal estimated the cost to the District to be $5,200. (Chang SM (2012) Ex. 92, at 6.)

91. The District refused to enter into the contract with NC4 because NC4 wanted two hundred dollars over what the District was willing to pay. (Chang SM (2012) Ex. 90, at 2 (stating that MPD cannot execute the contract for more than $5,000); (Pressley SM, Jan. 9 p.m., at 24:10-16, 25:21-23 (indicating that budgetary issues were the reason it was decided not to retrieve the data in 2009.).)

92. According to Mr. Butler, Mr. Hudnall explained that the District did not wish to enter the contract for two reasons: 1) "[t]he dollar amount was just a little over some level"; and 2) "it would require others to review/approve it and he [Travis Hudnall] did not want to spend the effort." (Chang SM (2012) Ex. 91.)

93. Mr. Ryan "remember[s] some activity" about not entering the contract with NC4 because it was over $5,000, and recalls that Mr. Hudnall was trying to negotiate it down to $5,000. (Ryan SM, Jan. 3, at 60:16-23, 60:24-61:3.) According to Mr. Ryan, Mr. Hudnall was trying to use a purchase card, which has a $5,000 limit. In order to have a contract more the $5,000, they would have had to go through the office of contracts and procurement. (*Id.* at 57:4-23.)

94. In Mr. Ryan's own words, the work not being done over $200 was "penny wise and pound foolish." (*Id.* at 70:13-16.)

95. Despite the August 2009 communication from the MPD to NC4 indicating that they wanted someone to assist in getting the E-Teams servers operational again, Mr. Bynum did not visit the District in 2009, and is unaware of anyone else from NC4 visiting the District for this purpose prior to May 2011. (Bynum SM, Nov. 28, at 76:2-77:2.)

96. Despite his August 12, 2009 declaration to the Court, Mr. Ryan never confirmed that a contract had been issued and that the work had started. (Ryan SM, Jan. 3, at 61:4-7.) According to Mr. Ryan, he never followed up because his "attention was drawn to other matters" and this issue "was not on [his] radar screen any longer." (*Id.* at 70:22-71:2.) When Mr. Ryan found out that a contract had not been issued in 2009, he did not update his declaration to the Court. (*Id.* 74:22-24, 79:21-25.)

B. Recovery of September 2002 E Team Data and Discovery That an Individual Had Attempted to Delete Data Related to the September 2002 IMF Event.

1. The District's November 1, 2010 Filing Stating the E Team Data May Be Accessible

Summary: On November 1, 2010, the District filed its Report Regarding Electronic Data Retrieval Efforts, in which it revealed that NC4 was "cautiously optimistic, based on a survey of one of the servers" that data related to the September 2002 IMF

Event could be extracted from the E Team server. The District failed to reveal that the survey had been conducted in May 2008.

97. On October 25, 2010, Judge Sullivan "ORDERED that the District, at its own expense, shall cause Groupware to access the data in its server and cause the creation of a running resume for September 26, 27, and 28, 2002." (*See* Minute Order dated Oct. 25, 2010, Chang SM (2012) Ex. 41.) The Court further ordered "that the District file a written report by no later than November 1, 2010 regarding the success or failure of this effort." (*Id.*)

98. On November 1, 2010, the District filed its "Report Regarding Electronic Data Retrieval Efforts." (Chang SM (2012) Ex. 11.)

99. In that Report, the District stated that "[b]y way of *clarification*, the District suggested that the servers in possession of the Metropolitan Police Department may still be accessed for the purpose of searching for *backup copies* of the September 26-28, 2002 JOCC Running Resume." (Chang SM (2012) Ex. 11, at 1 (emphasis added).) The District went on to state that to "the District's knowledge, there are currently three servers which may be storing such information – one Groupsystems server, one E-Teams server, and one backup E-Teams server." (*Id.*)

100. The District stated that its potential ability to access "backup copies" was limited to the E Team system. As stated by the District, "Mr. Butler [an NC4 employee] and his team are cautiously optimistic, based on a survey of one of the servers, that information on the server from the relevant time period is still capable of being extracted." (*Id.* at 2.)

101. The District, however, failed to include in its "clarification" Report that the "survey of one of the servers" was conducted approximately two-and-a-half years earlier – in May 2008. (Pressley SM, Jan. 9 p.m., at 20:21-22:3.)

102. It was not until Mr. Bynum's deposition, in August 2011, that Plaintiffs learned that the survey referred to in the November 1, 2010 Report occurred in May 2008.

103. Between May 2008 and May 2011, there were two rounds of sanctions briefing regarding the District's spoliation of evidence, numerous hearings before Judge Sullivan regarding the destruction of evidence, over 20 depositions, and eight days of witness testimony before the Special Master – as well as Judge Sporkin's investigation into the loss and destruction of evidence. (*See* Chang SM (2012) Ex. 85.)

2. May 3, 2011

Summary: On May 3, 2011, NC4 contractor Marc Bynum visits the District in order to attempt to extract data related to the September 2002 IMF Event from the E Team server. Upon recovering the data, Mr. Bynum discovers that someone attempted to delete the data. Chief Lanier, in consultation with Mr. Nathan, Assistant Chief Anzallo, and Mr. Ryan, decides that MPD should not conduct the investigation and that the matter should be referred to the Court.

104. On May 3, 2011, Mr. Bynum visited the MPD to attempt to extract data related to the September 2002 IMF Event from the E Team server. (Bynum SM, Nov. 28, at 18:17-19:4; Ryan SM, Nov. 9, at 17:2-12; Pressley SM, Dec. 18, at 17:22-24.)

105. Mr. Bynum arrived at the MPD at 9:30 a.m. and met Mr. Crawford, who took him to a room in the basement that housed the E Team server. (Bynum SM, Nov. 28, at 19:5-17.)

106. In order to access the physical E Team server, Mr. Bynum needed an administrator password, which the MPD provided him. (*Id.* at 19:21-20:6.) To access the data on the server, Mr. Bynum regenerated the certificate for the notes ID, which took him approximately 15 minutes. (*Id.* at 20:12-18.) He then started Lotus Domino, got the administrator client ID up and running, and searched for the data in the file structure. Once that data was available, he was able to look for the September 2002 data. (*Id.* at 20:25-21:8.)

107. Mr. Bynum located the September 2002 data on the server and proceeded to review it to ensure that it was "viable," and that there wasn't anything major missing. (*Id.* at 20:25-21:17.)

108. During the process of accessing and recovering the E Team data, Mr. Bynum discovered that someone had attempted to delete the September 2002 IMF Event data. (*Id.* at 22:1-14, 19-20; Ryan SM, Nov. 9, at 18:4-15; Pressley SM, Dec. 18, at 28:12-21, 30:03-14; Frost SM, Jan. 11, 46:8-14.)

109. Once Mr. Bynum had the administrator password, it took him "45 minutes to an hour" to recover the data and discover that there was an attempted deletion. (Bynum SM, Nov. 28, at 23:12-16.) Mr. Ryan recalls that it took Mr. Bynum 30 minutes from the time the server was attached to a monitor to the time he announced that there had been an attempted deletion. (Ryan SM, Nov. 9, at 21:24-22:6.)

110. By use of the term "deletion," Mr. Bynum meant the physical act of an individual selecting certain data (i.e., a situation, incident, or event) and then selecting the delete button within the E Team system. (Bynum SM, Nov. 28, at 24:18-24.) As discussed above, while selecting the delete button does not permanently destroy the data, after a user pushes the delete button, the data would appear deleted to a casual (i.e., not technologically savvy) user. (*See supra* at PFOF ¶¶ 68-69; Bynum SM, Nov. 28, at 27:14-16.)

111. Mr. Bynum knew there had been attempted deletions because there was a label next to the history file that said the record had been deleted. (Bynum SM, Nov. 28, at 22:21-25, 23:22-24.) The deletions related to the September 2002 file. (*Id.* at 22:19-20.) More precisely, Mr. Bynum believes that the deleted data was related to September 27-29, 2002. (*Id.* at 23:17-21.)

112. A report created by NC4 at a later date, titled "E Team Summary Report Deleted Events Records," indicates that an event titled "IMF/WB Conference" was created on September 26, 2002 and was selected for deletion by a person using the user name Charlie O'Connell, the name of an NC4 employee, on February 12, 2003. (Chang SM (2012) Ex. 2; Bynum SM, Nov. 28, at 48:24-49:4.)

113. Another report created by NC4 indicates that an event named "IMF/WB Conference," and for which the MPD was "expecting very large amount of protestors and demonstrators in various sites throughout the city," was created on September 26, 2002, had a planned completion date of September 30, 2002, was last updated on September 28, 2002, and was deleted on February 12, 2003 by someone utilizing the user name "Charlie O'Connell." (Chang SM (2012) Ex. 4; Bynum SM, Nov. 28, at 59:8-17.) To the extent any information from September 27, 2002 had been entered into this event, it was subject to the February 12, 2003 deletion. (Bynum SM, Nov. 28, at 59:18-23.)

114. While Mr. Bynum had no doubts that someone had used the delete button in relation to data for the September 2002 IMF Event (*id.* at 33:17-20), it is not certain that Mr. O'Connell is the person who actually selected the delete button. (*Id.* at 49:5-8.) Even if Mr. O'Connell was the person who deleted the data, he would not have done so unless so instructed by someone at the MPD. (*See supra* at PFOF ¶ 71; Bynum SM, Nov. 28, at 53:6-9.)

115. Mr. Bynum testified that, based on the information in the NC4 reports, it appears that the user name that deleted the information was that of a System Administrator. (Bynum SM, Nov. 28, at 53:16-54:2.) A System Administrator has the rights to do everything in the E Team system, including the right to delete events. (*Id.* at 54:03-11.)

116. When Mr. Bynum found the attempted deletions, he was sitting in the basement of the MPD in front of the server. (*Id.* at 36:8-14.) Mr. Bynum informed Mr. Ryan, Ms. Pressley, Ms. Frost, and Mr. Crawford about the attempted deletions. (*Id.* at 33:12-16, 36:15-24, 37:14-19, 77:18-78:6, 95:19-96:1; Ryan SM, Nov. 9, at 18:4-15, 21:6-11.)[16] Mr. Bynum may have also told Stephen Bias. (Ryan SM, Nov. 9, at 21:11.)

117. When Mr. Bynum told people in the room that there had been attempted deletions, it caused alarm and people became concerned. (Bynum SM, Nov. 28, at 113:15-17, 114:2-5; Ryan SM, Nov. 9, at 22:7-10.) In his Rule 30(b)(6) deposition on behalf of the District, Mr. Valentine testified that "I think everyone was kind of floored at what they learned and were concerned." (Chang SM (2012) Ex. 42, at 67:5-6.)

118. In fact, several officials in the District believed that the attempted deletions may have constituted a crime. (Ryan SM, Nov. 9, at 37:21-24, 38:04-11, 45:16-18; 61:7-8; Anzallo SM, Jan. 3, 223:4-7.) Ms. Pressley testified that: "the fact that Mr. Ryan had immediately called IAD upon being given the information by Mr. Bynum was certainly my clue that the general counsel's office viewed it as a potential crime that merited further and immediate investigation."

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[16] While Mr. Bynum and Mr. Ryan both testified that Ms. Pressley was present when Mr. Bynum discovered the deletions (*see* Bynum SM, Nov. 28, at 36:15-24, 37:14-16, 95:19-96:1; Ryan SM, Nov. 9, at 21:6-10), Ms. Pressley has a different recollection. Ms. Pressley testified that she was not in the room while Mr. Bynum attempted to recover the data. (Pressley SM, Dec. 18, at 17:25-18:2.) According to Ms. Pressley, she was in her office when Ms. Frost called her and told her to come over to MPD. (*Id.* at 23:15-24:9.) Contradicting this account, Ms. Frost testified that Ms. Pressley was already in the "server room" when she arrived. (Frost SM, Jan. 11, at 44:22-23, 45:7-9.) Ms. Frost further testified that when she arrived, Mr. Bynum had already accessed the data and discovered the attempted deletions. (*Id.* at 46:4-19.)

(Pressley SM, Dec. 18, at 37:3-6.) Ms. Frost testified that she understood that "someone hit[ting] a button believing that it could be – could delete evidence with the intent to delete evidence" could be potentially criminal conduct. (Frost SM, Jan. 11, at 50:12-15.) Mr. Nathan told the Court that "[i]f someone intended to delete it, that would be a potential crime and would be very serious, and I would be concerned about it, and I was concerned about it." (Nathan SM, May 8, at 34:10-16.)

119. According to Mr. Bynum, after telling Mr. Ryan, Ms. Pressley, Ms. Frost, and Mr. Crawford about the attempted deletions, he continued to work with the data on the server, checking to make sure the rest of the information was viable. (Bynum SM, Nov. 28, at 38:24-39:3, 39:6-16). While Mr. Ryan and Ms. Pressley testified that Mr. Bynum was instructed, by Mr. Ryan, to hold tight and wait until they heard from the Court (Ryan SM, Nov. 9, at 22:11-15, 35:7-11; Pressley SM, Dec. 18, at 31:22-32:12), Mr. Bynum testified that he does not remember Mr. Ryan specifically telling him to stop working (Bynum SM, Nov. 28, at 78:14-19), and that no one told him to stop working at this time because there had been an attempted deletion and the Court needed to be contacted. (*Id.* at 39:17-20, 40:2-4.) According to Mr. Bynum, he was not told that he needed to stop working until after the lunch break, at which time he was told that he had to wait while the system was being backed up. (*Id.* at 40:5-8.) Mr. Bynum believes that it was Mr. Crawford's boss who told him to stop working when he returned from lunch. (*Id.* at 95:12-18, 97:13-18.)

120. While Mr. Ryan does not recall whether anyone touched the server after the attempted deletion was discovered, or whether Mr. Bynum did any additional work that day (Ryan SM, Nov. 9, at 33:8-34:17; 51:1-17), Ms. Frost testified that, after IAD arrived, Mr. Bynum continued to work on extracting the data. (Frost SM, Jan. 11, at 54:01-05, 55:01-04.)

121. After being told about the deletion, Mr. Ryan left the room and called Asst. Chief Anzallo, the assistant chief in charge of the Internal Affairs Bureau, and asked him to send an IAD agent to his location in the building. (Ryan SM, Nov. 9, at 22:11-15, 23:2-9, 23:14-21, 35:7-11; Anzallo SM, Jan. 3, at 218:22-219:2.) Mr. Ryan testified that "I wanted to alert [Anzallo] to what I perceived to be a potentially big problem. If in fact, somebody had attempted to delete the information on that server, that could be a huge problem." (Ryan SM, Nov. 9, at 25:6-13.)

122. Mr. Ryan testified that he informed Asst. Chief Anzallo that they had "discovered a potential problem with the data in the server and that it appears that someone may have attempted to delete it." (*Id.* at 24:2-6; *see also* Anzallo SM, Jan. 3, at 219:10-17 (stating that Mr. Ryan explained generally that he was with the servers and that there may have been possible tampering with the servers.).)

123. After talking with Mr. Ryan, Asst. Chief Anzallo called Commander Christopher LoJacono. (Anzallo SM, Jan. 3, at 220:17-18; Ryan SM, Nov. 9, at 25:3-5, 18-22) Asst. Chief Anzallo explained to Cmdr. LoJacono what he heard from Mr. Ryan and asked that he send an agent down to Mr. Ryan's location. (Anzallo SM, Jan. 3, at 220:19-23.) Cmdr. LoJacono got in touch with Agent Sylvan Altieri and sent him to Mr. Ryan's location. (*Id.* at 220:24-25; Ryan SM, Nov. 9, at 26:20-27:1.)

124. Asst. Chief Anzallo and Cmdr. LoJacono discussed the fact that Mr. Ryan's request involved a case that was currently under investigation by Judge Facciola. (Anzallo SM, Jan. 3, at 221:6-15.) They decided the better course of action was to have Agent Altieri simply observe what was going on, and not open a case or doing anything further. (*Id.* at 221:15-19.) They made this decision because they didn't want to interfere with the Court's investigation. (*Id.* at 221:24-222:9.)

125. IAD took no other steps beyond observing; Agent Altieri did not secure the servers or take any other investigative steps. (Anzallo SM, Jan. 4, at 9:11-15.) Asst. Chief Anzallo is not aware of Agent Altieri taking possession of any evidence. (*Id.* at 9:22-25.)

126. Mr. Ryan testified that later in the day, on May 3, 2011, he, along with Ms. Pressley and Ms. Frost, met with Chief Lanier to explain Mr. Bynum's discovery and the attempted deletions. (Ryan SM, Nov. 9, at 40:15-24, 52:7-53:04.) Ms. Pressley testified that she did not meet with Chief Lanier on May 3, 2011, and that Mr. Ryan's testimony that she was present at a meeting is incorrect. (Pressley SM, Dec. 18, at 52:11-17, 53:17-54:1.) Ms. Frost also testified that she did not meet with Chief Lanier that day. (Frost SM, Jan. 11, at 56:20-57:1.) Chief Lanier testified that she does not recall if Ms. Pressley and Ms. Frost accompanied Mr. Ryan. (Lanier SM, Mar. 19, at 7:17-8:3.)

127. Mr. Ryan testified that he informed the chief "[t]hat there was a potential problem with someone attempting to delete information from the computer." (Ryan SM, Nov. 9, at 53:1-4.) While Chief Lanier recalls being told in May 2011 that "there were some servers that were recovered that may have any information that was on the long running resumes" (Lanier SM, Mar. 19, at 4:13-22), she testified that Mr. Ryan did not discuss with her that there had been an attempted deletion. (*Id.* at 23:25-24:7.) In fact, Chief Lanier testified she had never been told, before her own testimony before the Special Master, that the attempted deletion occurred by someone hitting the delete button. (*Id.* at 42:20-43:2.)

128. Chief Lanier stated that an attempted deletion is something she would have expected Mr. Ryan to inform her about, and that she would have understood that such an attempted deletion was potentially criminal. (*Id.* at 24:8-15.)

> Q: (by Mr. Turley): Had you been made aware that a piece of evidence that had been sought by Judge Facciola for many years showed evidence of someone hitting the delete button, would you have taken steps to make sure that this was treated as a potentially criminal matter?
>
> A: I have answered that question. Yes.

(*Id.* at 36:5-10.)

129. Later on the afternoon of May 3, 2011, Asst. Chief Anzallo met with Chief Lanier[17] and informed her of his decision that IAD would not investigate the attempted deletions.

[17] One of Asst. Chief Anzallo's duties is to brief Chief Lanier on the day's events. (Anzallo SM, Jan. 3, at 226:12-19.)

(Anzallo SM, Jan. 3, at 223:23-224:01; Lanier SM, Mar. 19, at 8:13-19; Ryan SM, Nov. 9, at 41:11-18.) Chief Lanier agreed with this decision. (Lanier SM, Mar. 19, at 8:13-22; Anzallo SM, Jan. 3, at 228:6-7.)

130. Chief Lanier testified that she reached the conclusion that the investigation should not be done by the MPD for two reasons: 1) because the MPD did not have a computer forensics unit and did not have the expertise to do an analysis of the server; and 2) because of what she knew from following the case, it would be safer to have the analysis done by a neutral third party (i.e., she "didn't want MPD being involved"). (Lanier SM, Mar. 19, at 8:23-9:9.)

131. Chief Lanier testified that she told Asst. Chief Anzallo to guard the door in the locked room where the servers were and recommended that the FBI come and take the servers because she knew they had a good computer forensics unit. (*Id.* at 10:8-19.) Chief Lanier "did not contemplate any involvement by the Metropolitan Police Department in whatever way." (*Id.* at 13:19-14:10, 16:9-12.)

132. Mr. Nathan recalled receiving a call from Mr. Valentine, who told him that a computerized version of the document had been found.[18] (Nathan SM, May 8, at 7:2-8.) Mr. Valentine informed Mr. Nathan that "there may have been attempted deletions from the hard drive and that that was going to be investigated." (*Id.* at 7:9-13.)

133. Chief Lanier called Mr. Nathan and told him that they thought there should be no IAD investigation. (Lanier SM, Mar. 19, at 11:24-12:2, 12:4-12; 12:18-24; Anzallo SM, Jan. 3, at 228:8-24.) Chief Lanier testified that she called Mr. Nathan because she disagreed with Mr. Ryan on whether the MPD should investigate the deletions and she wanted to "see how he felt." (Lanier SM, Mar. 19, at 12:4-12.) According to Asst. Chief Anzallo, who was in the room during the conversation but heard only Chief Lanier's part of the conversation, Chief Lanier wanted to run their decision by Attorney General Nathan because she was going to convey the decision to Mr. Ryan. (Anzallo SM, Jan. 3, at 228:8-24, 229:20-230:2.) Chief Lanier testified that Mr. Nathan agreed with her decision that IAD should not handle the investigation. (Lanier SM, Mar. 19, at 12:25-13:4, 26:17-22.)

134. Following the call with Mr. Nathan, Chief Lanier conveyed Mr. Nathan's agreement to Asst. Chief Anzallo and told him that she wanted the FBI to handle it. (*Id.* at 26:17-22, 27:9-10.) Chief Lanier testified that she made the initial call to the FBI and that she contacted Special Agent James McJunkin. (*Id.* at 26:23-27:10.) Lanier testified that, at this point, she thought the FBI would do both the imaging and the analysis of the servers.[19] (*Id.* at 27:12-16.)

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[18] Ms. Pressley claims that when she got back to Judiciary Square, she is sure she told her supervisors, Mr. Valentine and Ms. Efros, about what Mr. Bynum had found. (Pressley SM, Dec. 18, at 30:15-24.)

[19] According to Chief Lanier, the Secret Service ended up taking the servers because there was confusion over who was going to image the servers and someone contacted the Secret Service. (Lanier SM, Mar. 19, at 13:15-14:10.)

135. Mr. Nathan recalled having a telephone conversation with Chief Lanier, but, contrary to Chief Lanier's and Asst. Chief Anzallo's testimony, he had no recollection of her saying that the MPD would not be involved in the investigation. (Nathan SM, May 8, at 10:5-14, 64:3-11.) He also did not recall knowing that there was a difference in opinions between Chief Lanier and Mr. Ryan regarding the IAD investigating the deletions. (*Id.* at 65:3-4.)

136. Assistant Chief Anzallo testified that he also told Chief Lanier that the matter should be referred to the Judge to decide what entity he wanted to investigate the matter. (Anzallo SM, Jan. 3, at 230:3-9.) According to Asst. Chief Anzallo, both he and Chief Lanier agreed that there was a need for Judge Facciola to be told as soon as possible. (*Id.* at 230:14-16.)

137. At approximately 6:30 or 7:00 p.m., Chief Lanier called Mr. Ryan into the meeting with Asst. Chief Anzallo to discuss the need to inform the Court of the attempted deletions and the decision that IAD should not investigate the attempted deletions. (Ryan SM, Nov. 9, at 31:17-22, 57:12-17, 58:6-22.) Chief Lanier made it clear to Mr. Ryan that the FBI was going to handle the investigation. (Lanier SM, Mar. 19, at 27:20-23; Anzallo SM, Jan. 4, at 3:21-4:6.) According to Asst. Chief Anzallo, Chief Lanier "clearly said IAD is not going to be involved, and this has to be referred back to the Court." (Anzallo SM, Jan. 3, at 235:22-24.)

138. Mr. Ryan's testimony about this incident changed radically between the two times he provided testimony to the Special Master. During his November 9, 2012 testimony, Mr. Ryan recalled having a meeting with Chief Lanier and Asst. Chief Anzallo in the early evening where they said that the matter should be referred back to and handled by the judge. (Ryan SM, Nov. 9, at 31:7-9, 31:14, 31:17-22, 76:6-10.) During his January 3, 2013 testimony, however, Mr. Ryan recanted his previous testimony and testified that he did not recall Chief Lanier or Asst. Chief Anzallo saying that Judge Facciola should be informed about the attempted deletion. (Ryan SM, Jan. 3, at 82:3-9, 82:15-20; 85:23-86:6.)

139. Chief Lanier testified that she "was very surprised" when she later learned that Mr. Ryan did not recall her direction that IAD would not investigate. (Lanier SM, Mar. 19, at 16:20-17:24.) According to Chief Lanier, "[i]t's not typical for [Mr. Ryan] to forget." (*Id.* at 17:24.) Mr. Ryan testified that it is "not likely, but … certainly possible" that he could have forgotten a direct order from Chief Lanier. (Ryan SM, Jan. 3, at 98:2-5.) Mr. Ryan is not aware of having previously forgotten a direct order. (*Id.* at 98:12-14.)

140. At some point after the meeting with Chief Lanier and Asst. Chief Anzallo, and before the conference call with Judge Facciola the next day, Mr. Ryan spoke with Ms. Pressley and Ms. Frost. (Ryan SM, Nov. 9, at 86:12-15.) Mr. Ryan does not recall what he discussed with Ms. Pressley and Ms. Frost, but he "was always under the impression that at some point the Attorney General's office was going to communicate … [t]hat there was a potential deletion of information in the server." (*Id.* at 87:17-24.)

> Court: So you thought that in the conversation that would be held in May, the day after this meeting, somebody would tell Facciola, A, Bynum believes he has detected the presence on the server of the E Team data, and, B, he has also detected an attempt by someone to delete data.

> A: Yes.
>
> Court: And you thought, after you spoke to Frost and Pressley, Facciola would be told both?
>
> A: Yes.

(*Id.* at 87:25-88:8.)

3. May 4, 2011

> **Summary:** On May 4, 2011, the District files a Notice Regarding JOCC Running Resume, and the parties have a conference call with Judge Facciola. Ms. Pressley informs the Court of the discovery of the E Team data. No one from the District informs Judge Facciola or the Plaintiffs of the attempted deletions or Chief Lanier's order that the matter be referred to Judge Facciola.

141. On May 4, 2011, the Court and Plaintiffs' counsel were told about the discovery of the E Team data through a Notice filed by the District, as well as during a conference call with Judge Facciola and the other parties. (Chang SM (2012) Ex. 36; Chang SM (2012) Ex. 67; Ryan SM, Nov. 9, at 44:13-19.)

142. On the morning of May 4, 2011, the District filed its Notice Regarding JOCC Running Resume. (Chang SM (2012) Ex. 36.) Through the Notice, the District states, for the first time, that the E Team server was analyzed and that:

> The NC4 contractor has booted the system, searched for target data and located the data that was entered into the E-Teams server during the Fall 2002 IMF Weekend. The contractor is reasonably confident that all data entered during the weekend has been located and is now accessible on the server.

(*Id.*)

143. The May 4th Notice makes no reference to the attempted deletions.[20] (*Id.*; Ryan SM, Jan. 3, at 115:23-116:2.) The Notice also does not mention the fact that Mr. Bynum had surveyed the server in 2008 and that he was 95% certain the data was accessible then. (Chang SM (2012) Ex. 36.)

144. Mr. Ryan and Ms. Pressley are sure they talked prior to the conference call with the Court. (Ryan SM, Jan. 3, at 117:11-13; Pressley SM, Dec. 18, at 59:19-22.) However, they

[20] According to Ms. Frost, information pertaining to the attempted deletion and the IAD investigation were not included in the notice because "it's one sentence, but it's a sentence that would lead to many questions." (Frost SM, Jan. 11, at 68:1-8, 68:16-20.)

did not discuss the need to inform Judge Facciola about the attempted deletions.[21] (Pressley SM, Dec. 18, at 80:12-17; Ryan SM, Jan. 3, at 117:14-17.)

145. The District participated in the conference call with the Court and the other parties from Mr. Ryan's office.[22] (Pressley SM, Dec. 18, at 59:19-22; Frost SM, Jan. 11, at 71:25-72:3.) Ms. Pressley reiterated what had been stated in the Notice:

> [Mr. Bynum] analyzed the server yesterday, has located an event folder for the three-day weekend, 26, 27, 28, and have located what he believes to be – what he's reasonably confident is all of the data that was entered by operators using the E-Teams system during that three-day weekend.

(Chang SM (2012) Ex. 67, at 4:19-24.)

146. Despite having a clear opportunity to do so, and despite Mr. Ryan's understanding – though incorrect – that an IAD investigation of the attempted deletion was underway, the District did not reveal Mr. Bynum's discovery of the attempted deletions during the teleconference with the Court. (Chang SM (2012) Ex. 67; Frost SM, Jan. 11, at 72:5-8.) The District also did not reveal that it had learned in 2008 that the data could be retrieved, but failed to do so. (Chang SM (2012) Ex. 67; Frost SM, Jan. 11, at 72:9-12.)

147. According to Ms. Pressley, the issue of whether the information regarding the deletions needed to be disclosed to the Plaintiffs and the Court was "fully discussed" with the others with whom she was working, and that a collective decision was made to get the Court only that information that was needed in order to get answers and guidance on the handling of the E Team data, and no more. (Pressley SM, Dec. 18, at 67:13-68:3, 69:12-18.) But for that, the District may not have informed the Court of any of these developments, as Ms. Pressley goes on to testify that:

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[21] Mr. Ryan recalls having discussions with Ms. Pressley and Ms. Frost about informing the Court. (Ryan SM, Nov. 9, at 31:24-32:8.) He is unsure whether those discussions occurred on May 3, 2011 or at a later time, but he "just knew in [his] mind that there was going to be a communication to the Court at some point to inform the judge about what had, had initially been perceived to be an attempt to delete the information." (*Id.* at 32:9-17.)

[22] Despite the fact that Mr. Ryan's presence is not noted in the hearing transcript (Chang SM (2012) Ex. 67, at 3:9-11 (Ms. Pressley announcing her presence and noting that she had Ms. Frost with her)), Mr. Ryan, Ms. Pressley, and Ms. Frost were all present for the conference call with the Court. (Ryan SM, Jan. 3, 118:18-119:1; Pressley SM, Dec. 18, at 59:23-24; Frost SM, Jan. 11, at 72:02-04.) According to Ms. Pressley, Mr. Ryan was not introduced because he is not on the case. (Pressley SM, Dec. 18, at 74:8-13.) Mr. Ryan testified that he participated in the conference call to assist Ms. Pressley and Ms. Frost by listening and trying to understand any directions provided by the Court. (Ryan SM, Jan. 3, at 124:17-125:1.)

> And if we had not needed particular guidance at that point in order to move forward and extract data and keep it safe and et cetera, then I'm not certain that there would have been a call.

(*Id.* at 69:15-18.)

148. According to Mr. Valentine, testifying on behalf of the District, and Shana Frost, it was Ms. Pressley who made the decision to not tell the Court about the attempted deletion during the telephone conference. (Chang SM (2012) Ex. 42, at 98:15-21; Frost SM, Jan. 11, at 73:3-10.) Ms. Frost does not recall Ms. Pressley consulting with her about that decision. (Frost SM, Jan. 11, at 73:11-13.)

149. Mr. Ryan testified that the Court probably would have found the attempted deletion to be "significant." (Ryan SM, Jan. 3, at 128:9-11.) However, even though a member of the D.C. bar, he believed he only had an obligation to make sure that the OAG had the information it needed to inform the Court, and that the decision on when to inform the Court was up to the OAG. (*Id.* at 117:24-118:12.)

150. Ms. Pressley testified that it was clear to her that the Court needed to be told exactly what Mr. Bynum had found. (Pressley SM, Dec. 18, at 48:6-7.) However, "for many reasons, [she] believed the most appropriate way to proceed was to have Mr. Bynum be the person who testified … about what he as a witness had found." (*Id.* at 48:13-16.) Ms. Pressley testified that: "I felt like there was an obligation to do my job to the best of my ability for my clients, and I did not believe there was an obligation at that point to inform the Court and the parties of what Mr. Bynum's testimony would be." (*Id.* at 50:17-23.)

151. Although Ms. Pressley believed that the discovery of the attempted deletion should be disclosed through the deposition of Mr. Bynum, she made no efforts to tell Plaintiffs' counsel that they should depose Mr. Bynum as soon as possible. (*Id.* at 79:6-11.)

152. While Ms. Pressley testified she and Mr. Ryan had conversations after the teleconference regarding next steps (*id.* at 78:13-19), they never had a conversation regarding when the Court should be told about Mr. Bynum's discovery regarding the attempted deletions. (*Id.* at 78:20-23.)

153. After the conference call with the Court, Mr. Ryan testified that he, Ms. Pressley and Ms. Frost briefed Chief Lanier regarding the call and the items Judge Facciola directed the District to do. (Ryan SM, Jan. 3, at 135:21-25, 136:10-14, 136:23-24.)

154. Mr. Bynum returned to the MPD the morning of May 4, 2012, and again met Mr. Crawford. (Bynum SM, Nov. 28, 41:15-23.) Upon arrival, Mr. Bynum was asked to retrieve the data in order to make it available to the attorneys. (*Id.* at 98:2-6.) Mr. Bynum worked with Mr. Kant – who was in his home office – to extract the data. (*Id.* at 42:3-18.)

155. When Mr. Bynum left the MPD on May 4, 2011, he did not log out or shut down the E Team system. Mr. Bynum recalls closing the administrator application, but the computer was left on. (*Id.* at 80:22-25, 81:3-18.) No one from the District told Mr. Bynum that he needed to shut the computer down or secure it. (*Id.* at 81:22-25, 82:4-6.)

156. In May 2011, it took Mr. Bynum four hours to search for, locate and recover the data. (*Id.* at 75:18-21.) Mr. Bynum stated that it would have taken him the same amount of time in May 2008. (*Id.* at 75:22-76:1.)

C. For 70 days, the District Failed to Disclose that NC4 employee, Marc Bynum, Discovered That an Individual Had Attempted to Delete the E Team Data Related to the September 2002 IMF/WB Event.

1. May 12, 2011

Summary: On May 12, 2011, the District informed counsel for the United States, Chief Ramsey, and Assistant Chief Newsham that Mr. Bynum had discovered that someone attempted to delete information related to the September 2002 IMF Event from the E Team Server. The Court and Plaintiffs' counsel were not told for another 61 days.

157. On May 12, 2011, the District informed other defense attorneys of the attempted deletions. (Chang SM (2012) Ex. 22, at p. 10.) In its Objections and Responses to *Chang* Plaintiffs' Interrogatories, the District revealed that:

> [D]uring a telephone conference call on May 12, 2011 at 10:30 a.m., [the District] advised counsel for the United States, Chief Charles Ramsey, and Assistant Chief Peter Newsham of the attempted destruction of data or information from the E Team system.

(Chang SM (2012) Ex. 22, at p. 10.)

158. Despite knowing that there were allegations of destroyed evidence in the case, and that Plaintiffs believed Chief Ramsey and Asst. Chief Newsham had an interest in the evidence not being found, Ms. Pressley and Ms. Frost were not concerned about telling other defense counsel about the deletions.[23] (Pressley SM, Dec. 18, at 91:19-25; Frost SM, Jan. 11, at 84:19-85:8, 82:16-23, 84:15-18.) Ms. Pressley testified that she did not talk to IAD before disclosing the attempted deletion to the other defense counsel. (Pressley SM, Dec. 18, at 89:24-90:4.) In fact, Ms. Pressley took no steps to ensure that the individual defendants had been cleared of suspicion regarding the deletions before disclosing the discovery of the attempted deletions to their counsel. (*Id.* at 91:19-25.)

159. Neither the Court nor Plaintiffs' counsel participated in this conference call because, according to Ms. Pressley, "[i]t was a defense call." (*Id.* at 87:23-25.) The District does not inform the Court or Plaintiffs' counsel until July 12, 2011 – 61 days later. (Chang SM (2012) Ex. 22, at p. 10.)

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[23] This lack of concern existed even though Mr. Ryan testified that, in trying to figure out who some of the people were that might have potentially been involved, they came up with a list of people that included: Mark Beach, Stephen Bias, Stephen Gaffigan, Anna Moss Davis, Neil Trugman, Sean Pipia, Guy Poren, and Rai Howell. (Ryan SM, Nov. 9, at 28:18-29:9.)

2. Status Conferences of May 27, June 7, June 14, and June 22, 2011

Summary: Despite participating in status conferences with the Court on May 27, June 7, June 14, and June 22, 2011 surrounding the review of E Team data, the District still failed to disclose the attempted deletions to the Court and Plaintiffs' counsel.

160. Status conferences were held between Judge Facciola and the attorneys' for the parties on May 27, June 7, June 14, and June 22, 2011 to discuss the continued review of the E Team data. (*See* Docket, Minute Entries dated May 27, 2011, June 7, 2011, June 14, 2011, and June 22, 2011; Pressley SM, Dec. 18, at 102:18-103:4.)

161. Mr. Ryan and Ms. Frost did not participate in the status conferences held on May 27, June 7, June 14, and June 22, 2011. (Ryan SM, Jan. 3, at 146:20-147:12; Frost SM, Jan. 11, at 88:7-15.)

162. Despite having additional opportunities to disclose Mr. Bynum's findings pertaining to the attempted deletions, the District continued to withhold the information from the Court and Plaintiffs' counsel. (*See, e.g.*, Pressley SM, Dec. 18, at 102:18-103:9.)

163. While Mr. Ryan testified that he was concerned that nobody told Judge Facciola about the attempted deletion, he does not recall expressing these concerns to Ms. Pressley or Ms. Frost. (Ryan SM, Nov. 9, at 89:23-90:11.)

164. Mr. Valentine, testifying as a Rule 30(b)(6) witness on behalf of the District, said: "I think the longer this went, the more concerned we got well, you know, we need to get this information to the Chang Plaintiffs, and the decision was made not to disclose it, and that was the District government's position, that it should not be disclosed during that time period." (Chang SM (2012) Ex. 42, at 141:3-8.) Ms. Frost testified that she discussed this concern with Mr. Valentine, that they were hoping the process would move faster, but that "it was out of [their] hands." (Frost SM, Jan. 11, at 92:23-93:2.) However, Ms. Frost, or any of the District Counsel, could have picked up the phone and called Plaintiffs' counsel. (*Id.* at 93:6-11.)

165. According to Attorney General Nathan, he was not aware that Ms. Pressley had made the decision not to advise Judge Facciola about the attempted deletions. (Nathan SM, May 8, 14:23-15:12.) In fact, Attorney General Nathan thought the disclosure had been made because he had received reports about the Court being advised. (*Id.*)

3. July 12, 2011 Status Conference

Summary: On July 12, 2011, 70 days after the District was informed of the attempted deletions by Mr. Bynum, the District disclosed the attempted deletions to Plaintiffs' counsel and the Court. The District informed Plaintiffs' counsel during a short recess, and then only informed the Court after the issue was raised by Plaintiffs' counsel. Had Plaintiffs' counsel not mentioned it on the record, the District would not have told the Court on this day.

166. Judge Facciola and Plaintiffs' counsel were not told about the attempted deletion until July 12, 2011 – 70 days after the attempted deletion was discovered by Mr. Bynum. (Chang SM (2012) Ex. 75; Ryan SM, Nov. 9, at 88:11-13.)

167. Not telling the court for the 70-day period was "a judgment call that Ms. Pressley made." (Frost SM, Jan. 11, at 91:7-9.) Ms. Frost testified that she was not concerned that 70 days passed before Judge Facciola was informed because she "knew [they] were getting closer" to the day they would be back in court. (*Id.* at 90:15-24.) However, Ms. Frost testified that "[l]ooking back, I wish that we had been able to get before the Court earlier in a more formal setting. And do I – if I had to do it all over again, yes, I would probably do things differently." (*Id.* at 91:7-16.)

168. While Mr. Ryan did not wish to state his opinion as to whether informing the Court in July was fast enough, he testified that "the chief was probably expecting it to be done fairly quickly." (Ryan SM, Nov. 9, at 78:6-25.)

169. Ms. Pressley testified that she felt no pressure and that "there wasn't an exigency where this information was concerned" because "[t]he case was eight years old" "[a]nd so for a few weeks to go by in the discovery process was certainly not unheard of at this point." (Pressley SM, Jan. 9 a.m., at 110:10-22.)

170. Ms. Pressley and Ms. Frost were present at the July 12, 2011 Status Conference. (Chang SM (2012) Ex. 39, at 3:15-17; Frost SM, Jan 11, at 93:19-24.) Prior to the hearing, Ms. Pressley and Ms. Frost did not confer regarding the need to inform Judge Facciola about the attempted deletion. (Frost SM, Jan. 11, at 93:25-94:6.)

171. Despite several opportunities to disclose the attempted deletions to the Court during the July 12, 2011 hearing (*see, e.g.,* Chang SM (2012) Ex. 39, at 20:9-25), Ms. Pressley chose not to make such a disclosure until compelled to do so by Plaintiffs' counsel:

> Mr. Turley: Your Honor?
>
> Court: Yes.
>
> Mr. Turley: During our confer Ms. Pressley disclosed some information that we believe the Court should hear right away, and –
>
> Court: Please.
>
> ***
>
> Ms. Pressley: Actually, Your Honor, the reason that I was going to disclose it was so that you could do what you've already done, but since I'm –
>
> Court: Well, tell me anyway.

> Ms. Pressley: …One of the reasons why Mr. Bynum's testimony is important before find[ing]s are made is because when he went in to extract the data, he did see what appeared to be clear evidence that the E-Team's data files had been deleted by a user on February 26th [sic] of 20[03]….

(*See, e.g.*, Chang SM (2012) Ex. 39, at 26:14-27:10.)

172. If Plaintiffs' counsel had not raised the issue of the attempted deletion, Ms. Pressley was not intending on telling the Court at the July 12, 2011 hearing:

> Q (by Mr. Meitl): So without that prompting, is it correct that you were not intending to tell the Court of the attempted deletions on July 12?
>
> A: I don't think that I had made a decision to change course. I certainly knew that in telling counsel for Chang plaintiffs, that it would get to the Court through some other means than a witness. But I don't know that I had decided to do something different in just those minutes that unfolded. …
>
> Q: When you say –
>
> A: The transcript is there.
>
> Q: -- 'change course' or 'do something different,' you mean proceed as you had been proceeding, wait for the testimony.
>
> A: That the – that what was found and how it was found should come from the person who actually had the information.

(Pressley SM, Jan. 9 a.m., at 108:18-109:8.)

173. Ms. Pressley testified that she would have much rather informed the Court and Plaintiffs' counsel about the attempted deletions through testimony:

> I was very clear in my representations that I would have much rather it be done through testimony, and the only reason that it was stated in the manner it was, was because after I informed counsel for Chang plaintiffs, counsel for Chang plaintiffs raised it with the Court.

(Pressley SM, Dec. 18, at 110:22-111:2.) However, it was Judge Facciola, and not Ms. Pressley, who brought up the issue of Mr. Bynum needing to be examined. (Chang SM (2012) Ex. 39, at 17:23-18:1.)

174. During the conferral break at the July 12, 2011 hearing, Ms. Pressley also told Plaintiffs' counsel that the MPD was investigating the matter of the attempted deletion, which

she confirmed on the record (Chang SM (2012) Ex. 39, at 31:20-32:1.) Upon learning this information, Plaintiffs' counsel objected to the idea of the MPD investigating itself. (Chang SM (2012) Ex. 39, at 30:19-31:16.) In part, Plaintiffs' counsel stated:

> The District has always maintained there was no evidence of anyone trying to destroy evidence. There now is, and the MPD itself will be investigating that, which we think is inappropriate.

(Chang SM (2012) Ex. 39, at 31:14-17.)

D. The District's "Referral" of the Attempted Deletion of E Team Data Related to the September 2002 IMF Event to the FBI.

Summary: After the status hearing on July 12, 2011, Chief Lanier and Attorney General Nathan made the decision to refer the matter of the attempted destruction to the FBI.

175. Immediately after the status conference on July 12, 2011, Ms. Pressley and Ms. Frost walked over to Mr. Ryan's office at MPD. (Frost SM, Jan. 11, at 130:4-7.) Mr. Ryan was not present at the July 12, 2011 status conference, but he was informed afterwards that Ms. Pressley had told Plaintiffs' counsel and the Court about the attempted deletion. (Ryan SM, Jan. 3, at 149:18-150:1.)

176. Mr. Ryan, Ms. Pressley and Ms. Frost then went to Chief Lanier's office to brief her about what happened at the hearing. (Ryan SM, Jan. 3, at 159:16-25; Frost SM, Jan. 11, at 130:8-9.)

177. According to Mr. Ryan, later in the afternoon, Chief Lanier talked with Attorney General Nathan via telephone conference. (Ryan SM, Jan. 3, at 159:19-25.)[24] During this conference call, there was discussion about wanting to get the investigation away from the District "to avoid any kind of allegation or suspicion that there is a taint involved if the District is investigating itself." (*Id.* at 160:1-6.) Chief Lanier suggested that the FBI get involved. (*Id.* at 160:6-7.)

178. Chief Lanier recalled discussing, in July 2011, that there was deleted material that would be recovered. (Lanier SM, Mar. 19, at 28:16-17.) She also recalls there being confusion over the terminology and having the "meaning of deletion" explained to her by Mr. Ryan. (*Id.* at 28:12-39:3.) According to Chief Lanier, however, neither Mr. Ryan nor anyone else ever informed her that someone hit the delete button. (*Id.* at 30:17-25.) Had she been told, she would have "of course" been concerned about the potential for obstruction and a possible crime. (*Id.* at 31:1-7.)

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[24] Because of conflicting testimony, it is unclear who else was present when Chief Lanier called Attorney General Nathan. Mr. Ryan testified that in addition to Chief Lanier and himself, Ms. Pressley and Ms. Frost were also present. (Ryan SM, Jan. 3, at 159:16-25.) However, Ms. Frost indicated that she was not involved in a conversation where Mr. Nathan participated by telephone. (Frost SM, Jan. 11, at 131:10-16.)

179. In its Objections and Responses to *Chang* Plaintiffs' Interrogatories, the District stated that after the status hearing on July 12, 2011, Chief Lanier and Attorney General Nathan made the decision to refer the matter of the attempted destruction to the FBI, which opened an investigation. (Chang SM (2012) Ex. 22, at pp. 9-10.)

180. Chief Lanier then called Asst. Chief Anzallo and informed him of the decision to ask the FBI to open up a forensics investigation and take charge of the servers. (Anzallo SM, Jan. 3, at 240:2-7; Ryan SM, Jan. 3, at 160:8-9.) After receiving the call from Chief Lanier, Asst. Chief Anzallo contacted Ron Hosko, the then chief of the criminal division of the FBI Washington Field Office. (Anzallo SM, Jan. 3, at 240:2-12, 242:6-9, 242:12-20; Ryan SM, Jan. 3, at 160:8-12.)

181. Assistant Chief Anzallo testified that Mr. Hosko did not agree to open up a full-blown investigation, but said he would open up a preliminary inquiry. (Anzallo SM, Jan. 3, at 242:20.) According to Asst. Chief Anzallo, the FBI always opens a preliminary inquiry first before starting a full investigation. (*Id.* at 242:21-243:2.)

182. Assistant Chief Anzallo got Mr. Hosko in touch with Mr. Ryan and they (Mr. Ryan and Mr. Hosko) spoke about how they were going to proceed. (*Id.* at 243:3-10.) Asst. Chief Anzallo testified the he called Mr. Ryan to let him know that Mr. Hosko would be contacting him. (*Id.* at 243:11-20.)

183. Assistant Chief Anzallo testified that he didn't give Mr. Hosko specific instructions and put him in touch with Mr. Ryan "because he obviously knew more about the case than I did." (Anzallo SM, Jan. 4, at 12:18-13:2.) Anzallo left it to Mr. Ryan to give Mr. Hosko the details as to what needed to be investigated. (*Id.* at 13:22-25.)

184. According to Mr. Ryan, the FBI referral concerned both the Group System Server and the E Team server. (Ryan SM, Jan. 3, at 168:7-9.) Mr. Ryan testified that he discussed the referral with four FBI agents and "briefed each of them about … the circumstances surrounding why we were looking for the assistance of the FBI to investigate this. That included all three servers." (*Id.* at 168:14-25.)

185. The referral made to the FBI was in part due to the status conference with Judge Facciola held the same day, and in part because there was "[j]ust a general belief that, because of the allegations, if we were to investigate this ourselves, that – and found no evidence of wrongdoing, we would be accused of not conducting an impartial investigation." (Frost SM, Jan. 11, at 133:6-13.) Mr. Ryan testified that the matter was referred to the FBI because a "decision was made internally that it would be best for some entity outside the District of Columbia that has criminal investigative authority to conduct the investigation." (Ryan SM, Jan. 3, at 158:4-7.)

E. District's Repeated Filings Stating that the FBI Was Investigating the Attempted Deletions of E Team Server Data – and that IAD Had Opened an Investigation.

Summary: From July 27, 2011 until April 11, 2012, the District filed a number of pleadings representing that the FBI was investigating the attempted deletion of data

from the E Team servers, and that the IAD had previously opened its own investigation.

186. On July 27, 2011, the District filed its "Response By District of Columbia to Chang Plaintiffs' Motion For A Protective Order To Preserve Evidence…," in which it stated:

> [T]he District of Columbia took appropriate steps at the time the attempted deletion was brought to the attention of the Metropolitan Police Department, and has now taken further steps to ensure that the matter is handled appropriately. Specifically, the MPD consulted with the United States Secret Service which performed forensic imaging of the E-Teams Server prior to the data being extracted, alerted the Internal Affairs Division immediately upon being notified that an attempted deletion of data had occurred, and on July 12, 2011, the information regarding the attempted deletion of the E-Teams server data and the missing Group Systems server data was referred to the Office of the United States Attorney ("OUSA") and the Federal Bureau of Investigation ("FBI") for further investigation.

(Chang SM (2012) Ex. 101, at 1-2.) This filing was signed by Ms. Pressley and Ms. Frost, and includes Attorney General Nathan's signature block. (Chang SM (2012) Ex. 101, at 6.)

187. On August 18, 2011, in its Memorandum In Support of District of Columbia's Motion To Stay Discovery Regarding JOCC Running Resume Data Recovery, the District stated that "the District of Columbia Metropolitan Police Department referred the matter of the attempted deletion of E-Teams server data and the missing Groupsystems server data to the FBI and OUSA for investigation on July 12, 2011." (Chang SM (2012) Ex. 97, at 1.) This filing was signed by Ms. Pressley and Ms. Frost, and includes Attorney General Nathan's signature block. (Chang SM (2012) Ex. 97, at 8-9.)

188. On October 4, 2011, the District stated in its Memorandum In Opposition to Chang Plaintiffs' Motion To Compel 30(b)(6) Witness Regarding the Attempted Deletion of E Team Data, that:

> As this court is aware, a contractor from NC4 informed the District that it appeared that someone with access to the E Teams system had attempted to delete the data on February 26, 2003. Thereafter, the District of Columbia referred the matter to the Office of the United States Attorney ("OUSA") and the Federal Bureau of Investigation ("FBI") on July 12, 2011.

(Chang SM (2012) Ex. 98, at 5.) This filing was signed by Ms. Pressley and Ms. Frost, and includes Attorney General Nathan's signature block. (Chang SM (2012) Ex. 98, at 8-9.)

189. On October 11, 2011, the District filed a Motion for Partial Reconsideration Regarding Minute Order and Motion to Stay or Close Further Proceedings. In that filing, it was stated that:

> …the Fall 2002 IMF JOCC Running Resume data stored on the E Teams server has been recovered and the remaining issues of the attempted deletion of the E Teams server data and the missing Groupsystems server data have been referred to the Office of the United States Attorney ("OUSA") and the Federal Bureau of Investigation ("FBI") for investigation since the Court's referral of the matter to the Special Master. Thus, since the Chang Plaintiffs now have the JOCC Running Resume data from the E Teams server, and the matter now has been referred for investigation to Justice (which was the stated purpose of the Special Master's investigation – to determine whether there should be a referral) the time has come for this Court to stay or, alternatively, to close further proceedings before the Special Master regarding the JOCC Running Resume….

(Chang SM (2012) Ex. 38, at 2.) The October 11, 2011 filing also stated that "the District of Columbia MPD initiated an internal investigation and ultimately referred the matter to the Office of the United States Attorney ('OUSA') and the Federal Bureau of Investigation ('FBI') on July 12, 2011." (*Id.* at 9.) This filing was signed by Ms. Pressley and Ms. Frost, and includes Attorney General Nathan's signature block. (Chang SM (2012) Ex. 38, at 15.)

190. On October 18, 2011, in its Memorandum In Support of District of Columbia's Objections To Order Denying Motion To Stay Discovery Regarding JOCC Running Resume Data Recovery, the District stated that it had "referred the matter of the attempted deletion of E-Teams server data and the missing Groupsystems server data to the FBI and OUSA for investigation on July 12, 2011." (Chang SM (2012) Ex. 99, at 2.) This filing was signed by Ms. Pressley and Ms. Frost, and includes Attorney General Nathan's signature block. (Chang SM (2012) Ex. 99, at 11.)

191. On April 11, 2012, the District filed a Notice of FBI Investigation that only references the efforts to investigate the Group Systems Server:

> On or about July 12, 2011, MPD and the Attorney General for the District of Columbia jointly requested the FBI to take possession of the Group System server and conduct an analysis of the server to determine if any data pertaining to the September 2002 IMF demonstrations could be found and retrieved from the server, and to determine if there was any evidence of any attempt to tamper, alter, or destroy data on the server. This analysis was conducted by the Washington Field Office of the FBI.

(Chang SM (2012) Ex. 26, at 1.)

192. On April 12, 2012, e-mails were exchanged between Plaintiffs' counsel and District counsel.[25]

> 9:05 a.m. – Following the District's Notice on April 11th, Chang Plaintiffs ask District Counsel questions about the scope of the original referral. The Email from Chang Plaintiffs was to both Mr. Causey and to Ms. Frost.
>
> 2:22 p.m. – Mr. Causey responds:
>
> > PJ – As the Notice clearly states, the District is looking to Special Master Facciola for direction on how to proceed in this matter. To the extent the Court directs the District to answer your questions, the District will do so, pursuant to a schedule set by the Court and not by the plaintiffs, subject to any privilege or work product objections that may apply.

(Chang SM (2012) Ex. 94, at 6-7.)

193. On April 23, 2012, in its Opposition To Chang Plaintiffs' Motion To Compel Completion of 30(b)(6) Deposition, the District states that "[t]his issue of what information, if any, was "deleted" was one of the principal reasons for the referral to IAD and then to the FBI." (Chang SM (2012) Ex. 100, at 6 n.9.) This filing was signed by Mr. Causey and Ms. Frost, and includes Attorney General Nathan's signature block. (Chang SM (2012) Ex. 100, at 9-10.)

F. There Was No IAD Investigation Into the Attempted Deletions

Summary: Despite the District's repeated statements to the Court that the IAD had opened an investigation into the attempted deletions, no such investigation took place. The District has not withdrawn or corrected any of its filings indicating otherwise.

194. Despite the Districts repeated filings indicating that the IAD had investigated the attempted deletions (*see supra* at PFOF ¶¶ 186-193), no such internal affairs investigation was ever opened. (Lanier SM, Mar. 19, at 32:13; Anzallo SM, Jan. 4, at 9:11-15.)

195. In its Amended and Supplemental Responses and Objections to Plaintiffs' Second Set of Interrogatories, the District explained:

> [A]fter Mr. Ryan arrived, the three of them discussed the issue for a few minutes and Mr. Ryan was informed of the decision to not open a formal IAD investigation. Also according to Assistant Chief Anzallo, it was decided that the better course of action was to inform the court of the fact that the E Team server had been successfully accessed by an E Team representative and that, according to Mr. Bynum, it appeared that there had been

[25] The e-mails were attached to a May 22, 2012 filing.

> 'deletions' of information from the system. It was also decided by Chief Lanier at this time to secure the servers and this was done immediately. However, Mr. Ryan has no present recollection of being told by Assistant Chief Anzallo and/or Chief Lanier that a decision had been made to not open a formal IAD investigation and, as a result, OAG attorneys defending the Chang case did not know about the decision to not open a formal IAD investigation.

(Chang SM (2012) Ex. 24, at 11.) Despite Asst. Chief Anzallo's testimony that Mr. Ryan was specifically told in the May 3, 2011 meeting that there would be no IAD investigation, and that he thinks the instruction to Mr. Ryan was pretty clear, Mr. Ryan testified that he has no recollection of that fact. (Anzallo SM, Jan. 4, at 3:21-4:6, Anzallo SM, Jan. 3, at 235:22-24; Ryan SM, Jan. 3, at 96:5-10.) Mr. Ryan has no explanation for why he doesn't recall something Asst. Chief Anzallo thinks was pretty clear. (Ryan SM, Jan. 3, at 93:1-6.) According to Mr. Ryan, the OAG attorneys did not know about the decision to not open a formal IAD investigation because he did not recall that a decision had been made and did not tell them. (*Id.* at 91:15-18.)

196. Despite acknowledging that she had a duty to conduct a reasonable investigation under Rule 26(g) (Frost SM, Jan. 11, at 110:6-10), Ms. Frost took no steps to confirm whether or not an IAD investigation was ongoing. (*See, e.g.*, Frost SM, Jan. 11, at 60:1-16, 104:08-12, 123:16-19.)

197. Ms. Pressley also took no steps to confirm whether or not an IAD investigation was ongoing. (Pressley SM, Dec. 18, at 81:23-82:16 (stating that "I didn't take any steps. What I saw and what I was told on May 3rd were the sum of my knowledge with respect to the existence of the investigation.").)

198. Despite the fact that Attorney General Nathan had been informed that IAD would not investigate the attempted deletions, and agreed with the decision (*see* Lanier SM, Mar. 19, at 11:24-12:2, 12:4-12, 12:18-24, 13:2-4, 26:17-22; Anzallo SM, Jan. 3, at 228:8-24), his signature block appears on the repeated filings that indicate such an investigation did occur. (*See supra* at PFOF ¶¶ 186-193.)

199. While Attorney General Nathan testified that he only learned "lately" that there was no IAD investigation, he has not ordered the withdrawal or correction of those incorrect filings. (Nathan SM, May 8, at 55:14-18 (stating that "I didn't order any withdrawal of previous filings.").)

200. Since there was never an IAD investigation of the attempted deletions, and no one was investigating the attempted deletions between May 4 and July 12, 2011 (Ryan SM, Nov. 9, at 41:16-18; Frost SM, Jan. 11, at 128:6-9), the District's repeated filings with the Court indicating that there was an IAD investigation, are false.

G. The FBI Report Indicates That No FBI Investigation Took Place Into the Attempted Deletion of E Team Server Data.

Summary: On April 23, 2012, the FBI issued its investigation report indicating that it only analyzed the Group Systems server, and not the E Team server. Thus, there was no investigation into the attempted deletions discovered by Mr. Bynum on May 3, 2011.

201. Despite the District's repeated filings indicating that the FBI was investigating the attempted deletions of E Team data related to the September 2002 IMF Event (*see supra* at PFOF ¶¶ 186-193), no such investigation took place.

202. On April 11 and May 14, 2012, the District filed two separate Notices regarding the FBI's investigation into the Group System server. (Chang SM (2012) Ex. 26; Chang SM (2012) Ex. 93.) On April 23, 2012, the FBI issued a report regarding its investigation into possible obstruction of justice by the MPD. (Chang SM (2012) Ex. 25.)[26]

203. According to the Notices and the FBI Report, the FBI could not retrieve all of the data from the Group Systems server and could not definitively determine whether there had been any alteration or destruction of data on the Group Systems server. (Chang SM (2012) Ex. 26, at 2; Chang SM (2012) Ex. 25, at 2 (stating that "[t]he Federal Bureau of Investigation Computer Analysis Response Team (CART), after exerting all reasonable resources, was only able to view the data from the group server in a raw format. This level of analysis did not make it possible to determine if and when entries were altered or deleted.").)

204. The Notices and the FBI Report also indicate that the District's referral to the FBI was artificially narrow and did not include a request to investigate the attempted deletion of E Team data. (Chang SM (2012) Ex. 26 (stating that "[o]n or about July 12, 2011, MPD and the Attorney General for the District of Columbia jointly requested the FBI to take possession of the Group System server and conduct an analysis of the server to determine if any data pertaining to the September 2002 IMF demonstrations could be found and retrieved from the server, and to determine if there was any evidence of any attempt to tamper, alter, or destroy data on the server."); Chang SM (2012) Ex. 25; Chang SM (2012) Ex. 93.)

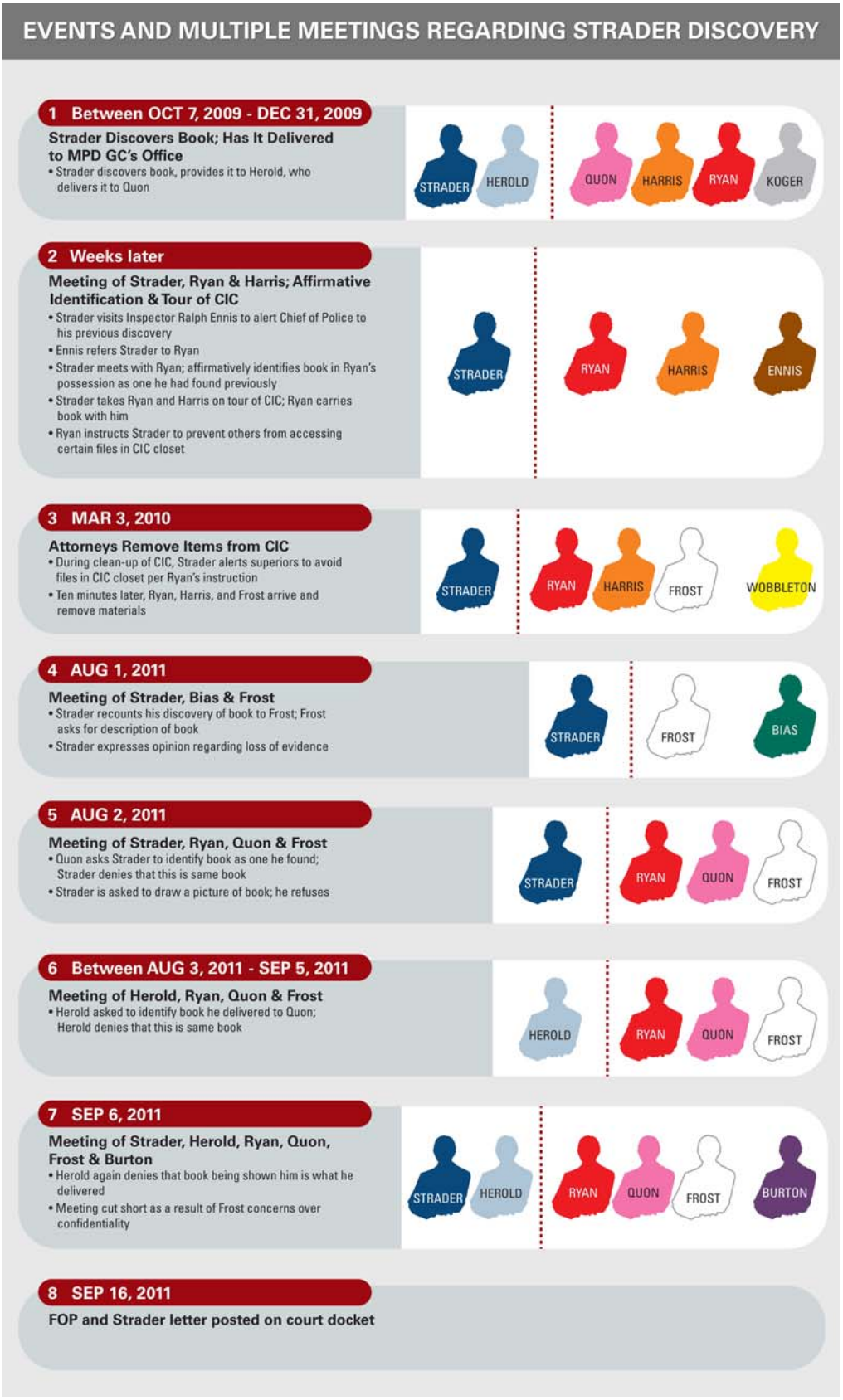
205. Chief Lanier testified that she was not aware of anyone telling the FBI not to investigate the attempted deletions on the E Team server. (Lanier SM, Mar. 19, at 45:20-23.) Chief Lanier wanted all the deletions investigated, and someone telling the FBI not to investigate the deletions on the E Team server would have gone against her orders. (*Id.* at 45:24-46:7.)

206. Since receiving the FBI Report, the District has not withdrawn or corrected any of its previous filings stating that the FBI was looking into the attempted deletions on the E Team server. In fact, Ms. Frost testified that she "can't recall" whether the District even discussed correcting what had been told to Judge Facciola. (Frost SM, Jan. 11, at 159:23-161:2.)

[26] This FBI Report was attached to the second Notice filed by the District. (Chang SM (2012) Ex. 93.)

207. Thus, the District's numerous filings informing the Court that both the "missing Group Systems server" and "the information regarding *the attempted deletion of the E-Teams server data*" were referred to the United State's Attorney and the FBI were misleading. (Chang SM (2012) Ex. 101, at 1-2 (emphasis added); *see also supra* PFOF ¶¶ 186-193.)

EXHIBIT 86: DEMONSTRATIVE – STRADER MEETINGS



VII. JOCC RUNNING RESUME[27]

A. Officer Strader's Discovery of the JOCC Running Resume

Summary: Officer Strader discovered a book labeled "JOCC Activation Running Resume" in the CIC in the Fall of 2009. He immediately delivered the book to Captain Herold who, in turn, immediately delivered the book to the MPD General Counsel's office. Teresa Quon, an MPD attorney, received the book on behalf of MPD General Counsel Terry Ryan.

208. On October 7, 2009, Officer Strader received an email from Sergeant Douglas Jones, requesting that to the extent he can locate any digital or hard-copy files of the September 2002 running resumes, he should provide them to MPD General Counsel Terry Ryan. (Chang SM (2012) Ex. 28.)

209. Officer Strader testified: "I had worked numerous JOCC activations and you always make hard copies. They go to the command staff." (Strader SM, Nov. 8, at 56:8-10.)

210. In the days or weeks following Officer Strader's receipt of Sergeant Jones' email (Chang SM (2012) Ex. 28), Officer Strader was instructed by Jeff Wobbleton, the MPD's Deputy Director of the Fusion Center, and Lieutenant Jesse Porter, to clean the CIC in advance of a visit by a congressional delegation. (Strader SM, Nov. 8, at 16:23-17:13.) There were two instructions from Mr, Wobbleton to clean the CIC. (*Id*. at 109:9-18; Chang SM (2012) Ex. 29). The second instruction was in March 2010. (*Id.*) The first instruction was in 2009. (Strader SM, Nov. 8, at 110:10-17.)

211. During the cleanup, Officer Strader accessed an older disorganized white filing cabinet within the CIC that sat between two windows and in which the CIC staff kept menus, snacks, and personal items. (*Id.* at 18:16-21, 19:2-4.) Officer Strader opened one of the drawers and discovered, on top of a number of other items and in the center of the drawer, three books, which included on top a blue book, bound on the side, that was entitled "JOCC Activation Running Resume" (hereinafter referred to as the JOCC RR Book). (*Id.* at 18:11-19:1, 19:12-15.)

212. Officer Strader had accessed the exact same filing cabinet and drawer the day before and had not observed the presence of the JOCC RR Book. (*Id.* at 19:5-11.)

213. Officer Strader found the JOCC RR Book sometime between October 7, 2009 and December 31, 2009. (*Id.* at 90:14-18; Ryan SM, Nov. 9, at 5:7-10.)

214. Officer Strader described the JOCC RR Book as a "bluish marbleized color … about the size of a legal paper." (Strader SM, Nov. 8, at 19:17-18.) It was not "like a three-ring binder." (*Id.* at 19:16-24; Herold SM, Jan. 3, at 213:4-6.) It had a top cover and a bottom cover. (Strader SM, Nov. 8, at 19:16-24; Herold SM, Jan. 3, at 213:7-10.) On the "binding side on the back" looked "like an accordion, like something that would expand." (Strader SM, Nov. 8, at

[27] Plaintiffs provide the demonstrative above – provided in Court as Exhibit 86 – for the Court's convenience in identifying the various meetings related to Officer Strader.

19:16-24.) In place of a three-ring binder, the book had metal clamps that came up through the paper and folded over to hold the pages. (*Id.* at 19:16-24.) The book was "[b]etween two and three inches thick." (*Id.* at 20:18.)

215. When he first opened the cover, he saw what appeared to be "a transcript of radio runs." (*Id.* at 20:21-22.) The JOCC RR Book also contained a portion that looked like a book. (*Id.* at 22:17-25.) Officer Strader looked through the book and, as he got approximately three-quarters of the way through the book, towards the bottom right side of the page, Officer Strader saw "September 27th, 2002, Pershing Park." (*Id.* at 20:21-21:5.) Officer Strader closed the book and took it to Lieutenant Porter, the watch commander, and told him that he thought he found the book Sergeant Jones was looking for. (*Id.* at 21:2-5.) Lieutenant Porter told Officer Strader to take the book to Sergeant Jones. (*Id.* at 21:6-7.)

216. Sergeant Jones had officially retired from the MPD in March 2010 and had left the MPD before that. (*Id.* at 109:23-110:12.) If the book had been discovered during the March 2010 cleanup, Lieutenant Porter would not have directed Officer Strader to provide the book to Sergeant Jones, who would have already left the MPD. (*Id.*)

217. Sergeant Jones was not in his office. (*Id.* at 24:6:-19.) However, Thomas Wilkins, the director of the MPD Fusion Center, was sitting in a conference room next to Chief Patrick Burke's office. (*Id.* at 24:16-20.) Officer Strader walked into the conference room to give Mr. Wilkins the book and saw that Captain Jeffrey Herold and Sergeant Christopher Yezzi were also in the conference room with Mr. Wilkins. (*Id.* at 24:16-25:7; Herold SM, Jan. 3, at 182:10-18.)

218. Officer Strader told Mr. Wilkins that he had the book Sergeant Jones was looking for – "the running resume for Pershing Park." (Strader SM, Nov. 8, at 25:1-6.) Mr. Wilkins "threw up his hands, rolled his chair back and he said, well, I don't want it." (*Id.* at 25:7-8; *see also* Herold SM, Jan. 3, at 182:23-183:2.) Captain Herold then stood up and told Officer Strader that he would take the book to Mr. Ryan. (Strader SM, Nov. 8, at 25:14-25; Herold SM, Jan. 3, at 183:1-2.)

219. Captain Herold "paged through [the book and] realized what [he] was looking at was a running resume, and immediately thought [he] should take it to [the MPD] general counsel." (Herold SM, Jan. 3, at 185:4-6.)

220. Captain Herold described the JOCC RR Book as "8 ½-by-11 inches with a cardboard cover bound with a piece of black tape." (*Id.* at 184:13-15.) "It did have a cover to it, a top and a bottom." (*Id.* at 213:7-10.) "It was not a three-ring binder." (*Id.* at 184:16-17.) The book appeared to be a "production of our in-house production unit." (*Id.* at 184:13-15.) Captain Herold does not recall the color of the book. (*Id.* at 212:14.) There was writing on the cover, but Captain Herold does not recall what the writing was. (*Id.* at 186:19-23.)

221. Captain Herold delivered the JOCC RR Book to Mr. Ryan's office, but Mr. Ryan was not present – everyone had gone to lunch. (Quon SM, Nov. 28, at 244:15-21.) Ms. Quon testified that Captain Herold "looked a bit shaken and a little concerned." (*Id.* at 244:19-20.)

222. Ms. Quon immediately recognized "this was something that was very serious, and that there were going to be implications, very serious implications for us having found this so late." (*Id.* at 245:9-16.)

223. Captain Herold gave the book to Teresa Quon. (*Id.* at 248:8-10.)

224. Captain Herold testified that when Ms. Quon looked at the book, "[s]he seemed surprised … She kind of sat back in her chair, and it was a non-verbal emotional response to looking at what she was seeing … [I]t's not that she jerked or something like that, but I could visibly see an emotional response to her looking at the document." (Herold SM, Jan. 3, at 206:5-19.)

225. Ms. Quon did not "look in depth [at the book] because [she] took … Captain Herold at his word at that point that this was the running resume for the Pershing Park incident." (Quon SM, Nov. 28, at 248:11-16.) Ms. Quon saw that there were "some documents that looked like radio transmissions and some running resumes." (*Id.*)

226. Ms. Quon was "too shaken" to focus on the document and determine if the document was the running resume for the September 2002 IMF Event. (*Id.* at 248:11-24.) She and Captain Herold spent approximately five to fifteen minutes discussing "the implications of [finding the Pershing Park running resume] … [a]nd that [the District] searched for this for so many years, that OAG had made certifications that there were searches done and that nothing could be found." (*Id.* at 247:4-22.)

227. Shortly after Captain Herold delivered the JOCC RR Book to Ms. Quon, OAG Attorney Thomas Koger, who had previously been removed from this case for his failures in handling discovery, "happened to come to [the MPD General Counsel's] office" and looked at the JOCC RR Book. (Ryan SM, Nov. 8, at 143:9-16; *see also* Quon SM, Nov. 28, at 246:8-11 (stating that Mr. Koger "just happened to walk by"); Herold SM, Jan. 3, at 185:17-20.)

228. Mr. Koger withdrew as an attorney in this case on September 30, 2009 – before Captain Herold delivered the book to Ms. Quon. (Chang SM (2012) Ex. 47; *see also* Chang SM (2012) Ex. 48; *see* Strader SM, Nov. 8, at 90:14-18.)[28]

229. At this time, Ms. Quon knew that there were "serious" issues regarding Mr. Koger and that he was facing disciplinary action as a result of discovery failures. (Quon SM, Nov. 29, at 140:7-141:11.)

230. Captain Herold took the JOCC RR Book back from Ms. Quon and handed it to Mr. Koger.. (Herold SM, Jan. 3, at 185:21-23.) Ms. Quon testified that she handed Mr. Koger

[28] On September 29, 2009, former Attorney General Nickels and Assistant Deputy Attorney General Efros issued a letter to Mr. Koger that proposed to terminate Mr. Koger "as a result of [his] serious omissions in failing to identify and provide to plaintiffs documents that had been sought over a number of years in two class action lawsuits." (Chang SM (2012) Ex. 48, at 1.) Mr. Koger was ultimately suspended for forty-five days without pay rather than terminated. (*Id.* at 7-10.)

the JOCC RR Book. (Quon SM, Nov. 28, at 246:12-20.) Ms. Quon also testified that when she handed Mr. Koger the JOCC RR Book, she said, "I believe this is the running resume." (*Id.* at 246:12-14.)

231. Mr. Koger "confirm[ed] it was a running resume." (Herold SM, Jan. 3, at 187:22-23.)

232. Mr. Koger "paged through it, and within a few seconds, told [Captain Herold] that this was a running resume, but from a different matter … that had recently settled." (*Id.* at 187:13-16; Quon SM, Nov. 28, at 246:12-20 (stating that Mr. Koger "flipped through the pages.").) Mr. Koger looked at the document for approximately "30 seconds." (Herold SM, Jan. 3, at 207:4-7.)

233. After speaking with Mr. Koger and Ms. Quon, Captain Herold returned to his meeting with Mr. Wilkins. (*Id.* at 188:8-12.) Captain Herold left the book with Ms. Quon, and he has never seen it again. (*Id.* at 188:15-16.)

234. After Mr. Ryan returned from lunch, Ms. Quon took the JOCC RR Book to Mr. Ryan's office. (Ryan SM, Nov. 8, at 126:24-127:4; Quon SM, Nov. 28, at 251:2-8.)

235. Ms. Quon handed Mr. Ryan the book, and, in an effort to "pull a joke on him," implied that it was the JOCC Running Resume for Pershing Park. (Quon SM, Nov. 28, at 251:16-25.)

236. Mr. Ryan opened the book and started to look at it, but as he was browsing through the document Ms. Quon interrupted him to say that "it's thought to be the running resume for [ ] September 2002, but it is not." (Ryan SM, Nov. 8, at 128:2-11; *see also* Quon SM Nov. 28, at 251:16-25.) Mr. Ryan only "flipped through the document" and "could have" missed a couple pages. (Ryan SM, Nov. 8, at 147:1-5.) Mr. Ryan had only reviewed the document for a "couple of minutes maybe, max." (*Id.* at 137:22-138:2.)

237. Around the same time that Ms. Quon informed Mr. Ryan that the JOCC RR Book was not the September 2002 running resume, she also informed him that the JOCC RR Book had been reviewed by Mr. Koger. (*Id.* at 144:6-9; Quon SM Nov. 28, at 251:16-25.) Mr. Ryan did not talk to Mr. Koger that day about the JOCC RR Book, but may have done so at a later time. (Ryan SM, Nov. 8, at 154:10-17.)

238. At the time Mr. Ryan received the JOCC RR Book from Ms. Quon, and was informed that Mr. Koger had reviewed the book, Mr. Ryan was aware "that Mr. Koger had been the subject of various complaints about failure to disclose information and statements to the Court." (*Id.* at 145:9-13.)

239. Mr. Ryan was aware that Mr. Koger had withdrawn from the case at the time he received the JOCC RR Book from Ms. Quon. (Ryan SM, Nov. 9, at 5:2-14.) Mr. Ryan testified that he did not have trouble relying on Mr. Koger's determination that the document was not relevant to the *Chang* litigation because Mr. Koger had not been disciplined in relation to the *Bolger* litigation. (*Id.* at 10:13-12:9.)

240. Mr. Ryan understood Ms. Quon was playing a joke on him by "pretending that this was the [September] 2002 running resume." (Ryan SM, Nov. 8, at 259:19-23.)

241. Mr. Ryan then "wanted to surprise [his] colleague, Mr. Harris, with the book." (*Id.* at 137:8-16.) Mr. Ryan called "Mr. Ron Harris, to come down to [his] office" to look at the book. (*Id.* at 136:8-13; *see also* Quon SM, Nov. 28, at 252:4-20.) When Mr. Harris arrived, Mr. Ryan told him to "take a look at this, or words to that effect." (Ryan SM, Nov. 8, at 138:18-20; *see also* Quon SM, Nov. 28, at 252:4-20.) Mr. Ryan did not describe the book to Mr. Harris. (Ryan SM, Nov. 8, at 139:1-3.) Once Mr. Harris reached the end of the blue book, Mr. Ryan, Ms. Quon, and Mr. Harris "all laughed because [they] knew that [Ms. Quon and Mr. Ryan] had scared Mr. Harris a bit." (Quon SM, Nov. 28, at 252:13-20.)

B. The Book Remains In Mr. Ryan's Office For "A Great Many Days, Months."

Summary: In August 2009, Mr. Ryan filed a declaration with the Court that identified a number of steps the MPD had taken to correct past mistakes with document management and production, including indexing all documents submitted to the MPD General Counsel's office. Despite these promises, Mr. Ryan, Ms. Quon, and Mr. Harris did not index the book they received from Officer Strader and Captain Herold. The MPD General Counsel's office did not make a copy of the book, nor did anyone contact the OAG attorneys responsible for the *Chang* litigation to determine whether the information was responsive to discovery, nor did they inform the Court, Judge Sporkin, or the Special Master about the document..

242. On August 12, 2009, Mr. Ryan filed a declaration in this case addressing:

> (1) the pattern of abuses engaged in and repeatedly acknowledged by the District during the pendency of these cases; (2) the District's plan for both promptly concluding discovery in these cases and assuring the Court, the parties, and the public that all discoverable materials have been turned over to plaintiffs in these actions; and (3) whether any investigations have been conducted into the discovery violations and missing and/or destroyed evidence in these cases and if not, why not.

(Chang SM (2012) Ex. 88, at 1-2.)

243. In that declaration, Mr. Ryan informed the Court:

> On Monday, August 3, 2009, I directed MPD OGC staff attorneys to search all locations within the OGC offices where documents relevant to these cases could be or could have been stored.
>
> I then instructed MPD OGC staff attorneys to immediately begin scanning all of the documents obtained during discovery in these matters. These documents will be assigned OGC Bates numbers for identification purposes.

> I have also instructed the MPD OGC staff attorneys to create an index of every document obtained during discovery in these matters.
>
> Once the index is completed, it will be reconciled with the OAG production for the purpose of verifying that OAG has received and produced all non-privileged documents relevant to this case.

(*Id.* at 2.)

244. Mr. Ryan, himself, and his office ignored these representations to the Court when Officer Strader discovered the JOCC RR Book in the following months. Mr. Ryan did not scan or index the book he received from Ms. Quon in the Fall of 2009. (Ryan SM, Nov. 8, at 181:15-182:10; Strader SM, Nov. 8, at 90:14-18; Ryan SM, Nov. 9, at 5:7-10.) He did not copy "the book" until August or September of 2011 – which apparently by that time was a book different from what Officer Strader and Herold had given him. (Ryan SM, Nov. 8, at 161:14-25, 164:6-13.)

245. The description of document handling procedures in Mr. Ryan's declaration is consistent with portions of the ultimate Settlement Order entered in the *Barham* litigation on September 22, 2010. (*See Barham* Dkt. No. 640, at 4 (requiring that the OAG and MPD OGC "[m]aintain an index and log of any documents, items, [or] things" related to matters arising from mass demonstrations.)

246. By his own testimony, Mr. Ryan admitted that MPD is currently violating the Settlement Agreement and Order in *Barham*. (*See Barham* Dkt. 640, at 4.) MPD does not keep a log of items turned into the MPD OGC. (Ryan SM, Nov. 8, at 174:3-22 (stating "[w]e don't log things in. We keep track of it, I think, by maintaining a copy of it.").)

247. After the meeting in which Mr. Ryan, Mr. Harris, and Ms. Quon joked about the JOCC RR Book, "[t]he document just resided in [Mr. Ryan's] office for a great many days, months." (*Id.* at 140:19-21.) Mr. Ryan did not turn over the document to the OAG to produce to Plaintiffs "[b]ecause it didn't appear to [Mr. Ryan] and [his] colleagues to be responsive to discovery." (*Id.* at 151:17-23.) Mr. Ryan believed it was the same document that the OAG already had. (*Id.* at 151:1-4.)

248. Yet, Mr. Ryan did not dispose of the document either "[b]ecause it appeared out of nowhere in the fall of 2009, after we had asked the department, various units, to scour their, you know units to locate stuff, and this mysteriously appears after they previously had searched for it." (*Id.* at 152:1-7.) Mr. Ryan "figured [he] might as well hang on to it." (*Id.*)

249. Mr. Ryan planned to hold on to the document "[u]ntil this case is over," even for another decade. (*Id.* at 152:10-15.) This is despite the fact that Mr. Ryan viewed the document as "an internal joke in [the] office." (*Id.* at 260:13-261:3.) Mr. Ryan kept the "joke in [his] office for months … [t]o hold on to it, to make sure it didn't go anywhere else." (*Id.* at 260:13-17.)

250. Nonetheless, Mr. Ryan claims that, in the months before the disclosure of Officer Strader's allegations, he "preserved [the JOCC RR Book] because it was potentially a document that had been produced by somebody in connection with the [*Chang*] litigation." (*Id.* at 260:25-262:24.)

251. Mr. Ryan was aware, when he previously testified before the Special Master in 2010, that Officer Strader thought the book turned into the OGC contained material related to the September 27, 2002 running resume. (*Id.* at 266:12-22.) Yet, Mr. Ryan did not disclose any information related to Officer Strader or his discovery to the Special Master. (*Id.* at 263:13-266:19.) His awareness that Officer Strader believed he had found material related to the September 27, 2002 running resume was enough to have required the MPD OGC to scan and index the document at the time it was discovered.

252. Mr. Ryan also did not inform Judge Sporkin of Officer Strader's discovery or Officer Strader's claim that he had found the JOCC Running Resume. In fact, Mr. Ryan did not even provide Judge Sporkin with the book Officer Strader provided to his office – even though Judge Sporkin investigated the destruction of the JOCC Running Resume around the same time Officer Strader discovered the document.

253. Mr. Ryan's office was often open and he would be unable to tell if someone had taken a document from his office. (*Id.* at 184:8-12.)

254. Mr. Ryan "eventually [] put that joke in the file cabinet." (*Id.* at 260:25-261:3.) The document remained in Mr. Ryan's office "for a great many days, months." (*Id.* at 140:19-21.)

255. This is the only document that Mr. Ryan had in his office that he determined was not responsive to discovery, yet was going to retain as part of ongoing litigation. (*Id.* at 152:16-24.) Mr. Ryan preserved this document as "related to [the *Chang* litigation]." (*Id.* at 262:15-17.)

256. Mr. Ryan also never contacted Sergeant Jones, who was tasked with finding the September 2002 running resume, about the JOCC RR Book that Officer Strader had found. (*Id.* at 156:14-157:4.)

C. Officer Strader Positively Identifies The JOCC RR Book In Mr. Ryan's Office as the Book He Found and Provided to Captain Herold.

Summary: A few weeks following the book's discovery, Officer Strader identified the book in Mr. Ryan's office as being the book he delivered to Captain Herold. Officer Strader proceeded to lead Mr. Ryan on a tour of the CIC in a search for other responsive materials.

257. About three weeks after Officer Strader found the JOCC RR Book, Sergeant Rick Murray overheard some people talking in the CIC. (Strader SM, Nov. 8, at 26:3-18; 25:19-25.) Sergeant Murray approached Officer Strader and asked him if Chief Lanier was aware he found the JOCC RR Book. (*Id.*) When Officer Strader informed Sergeant Murray that he had not told Chief Lanier about the book, Sergeant Murray suggested that Officer Strader inform the Chief. (*Id.*)

258. As a result, Officer Strader contacted Chief Lanier's chief administrative officer, Captain Ralph Ennis. (*Id.* at 26:15-27:1.) Officer Strader went to Captain Ennis to explain what he found. (*Id.* at 27:3-17.) When Officer Strader explained what he found, Captain Ennis said that he didn't know what Officer Strader was talking about and made a phone call. (*Id.* at 27:18-20.)

259. Officer Strader does not know who Captain Ennis called; Officer Strader only heard what Captain Ennis said during the phone call. (*Id.* at 27:18-23.)

260. Captain Ennis told the other person on the call that Officer Strader was sitting in his office and telling him about a book that he found. (*Id.* at 27:21-23.)

261. After a pause, Captain Ennis said, "yeah, [Officer Strader] is a real good guy." (*Id.* 27:24-28:1.) After another pause, Captain Ennis responded "well, he will do what I tell him." (*Id.* at 28:1-3.) Captain Ennis then hung up the phone and told Officer Strader to go see Mr. Ryan. (*Id.* at 28:4-10.) Officer Strader did not know who Mr. Ryan was at the time, nor did he know where the general counsel's office was located. (*Id.*) Mr. Ryan does not, "in particular," recall receiving a telephone call from Captain Ennis. (Ryan SM, Nov. 8, at 157:17-25, 165:3-20.)

262. Officer Strader went to Mr. Ryan's office, as instructed. When Officer Strader arrived, he was greeted by Mr. Harris and Mr. Ryan in the conference room right outside Mr. Ryan's office. (Strader SM, Nov. 8, at 29:5-24.) Mr. Ryan recalls meeting Officer Strader "in the fall of 2009, or perhaps the Spring of 2010." (Ryan SM, Nov. 8, at 166:9-18.)

263. Mr. Ryan walked into his office, where he had a small conference table next to his desk that had a blue book on it. (Strader SM, Nov. 8, at 29:13-24.)

264. Mr. Ryan asked Officer Strader if he recognized the blue book. (Strader SM, Nov. 8, at 29:20-22.) After getting a closer look, Officer Strader said that it was the book he gave to Captain Herold. (*Id.* at 29:23-24; *see also* Herold SM, Jan. 3, at 208:7-209:9.)

265. Mr. Ryan then picked up the book, asked Officer Strader where he found the book, and asked him to show Mr. Ryan and Mr. Harris where he had found the book. (Strader SM, Nov. 8, at 30:10-15.)

266. Officer Stader asked if he found "something that wasn't meant to be found." (*Id.* at 30:16-17.) Mr. Ryan responded that Officer Strader "did the right thing." (*Id.* at 30:17-18.) Mr. Ryan added that "the problem is that numerous people have already testified that there is no more evidence to be found, and now you present this." (*Id.* at 30:18-20.) Mr. Ryan then said, "[W]e will deal with it." (*Id.* at 30:21.)

267. Not once during the search, while Mr. Ryan carried the JOCC RR Book, did Mr. Ryan tell Officer Strader that the book he was carrying "is not the JOCC running resume for the Pershing Park incident." (*Id.* at 37:6-10; *see also* Ryan SM, Nov. 8, at 172:2-10.)

268. In response to the Court's questioning, Mr. Ryan made it clear that he does not remember Officer Strader, during the search of the CIC shortly after Officer Strader's discovery,

"protesting that whatever book [Mr. Ryan] showed him couldn't possibly be the book that he had found, given to Herold, who gave it to Quon, who gave it to Ryan." (Ryan SM, Nov. 8, at 170:9-13.)

269. Mr. Ryan testified that he does not remember asking Officer Strader to identify the book he was carrying during the tour of the CIC. (Ryan SM, Nov. 8, at 167:7-20, 170:6-8, 170:20-171:9.) Instead, Mr. Ryan later provided an alternative explanation for why he would have carried the book with him during the tour without asking Officer Strader to identify the book he provided to Captain Herold:

> Q (By Mr. Turley): Well, Mr. Ryan, you suggest that you recall having the book with you, correct?
>
> A: I said I may have had the book with me. I think I did, but I am not positive.
>
> Q: All right. Why do you think you would have had the book with you?
>
> A: Because he said, this is the book he found, I just wanted to bring it with me.
>
> Q: And –
>
> A: And presumably in case we ran into anybody else to ask them, have you seen – you know, did you see this book previously? I just really don't remember.

(*Id.* at 169:4-15.)

270. After Officer Strader positively identified the book Mr. Ryan had as the book he found and provided to Captain Herold, Officer Strader proceeded to take Mr. Ryan and Mr. Harris upstairs to "show them every inch of the CIC, the JOCC, the intelligence office, the IT office, the conference room, everywhere except for Chief Burke's office." (Strader SM, Nov. 8, at 30:22-25; *see also* Ryan SM, Nov. 8, at 168:9-169:15.)

271. During the search within the CIC, Mr. Ryan opened a closet that had two brown filing cabinets. (Strader SM, Nov. 8, at 31:15:-16.) Mr. Ryan began opening the drawers, and when he got to the second drawer, there was "a bunch of vanilla folders … [that were] marked January through December 2002." (*Id.* at 31:16-20.) Mr. Ryan "went straight to the folder entitled September, pulled that out, took it out of the cabinet, [and] went to the page that said September 27th." (*Id.* at 31:21-23.) Officer Strader was able to see that an entry on September 27th said "For JOCC activation, see JOCC resume." (*Id.* at 32:12-16; *see also* Ryan SM, Nov. 8, at 184:17-187:1, 215:2-11, 216:23-220:3.)

272. Mr. Ryan took the document related to September 27th with him as they continued the search beyond the CIC. (Strader SM, Nov. 8, at 32:17-19.) Mr. Ryan did not leave any indication in the file cabinet that he took a file. (Ryan SM, Nov. 8, at 176:14-19.)

273. Next, Officer Strader took Mr. Ryan and Mr. Harris to the server room that is in the CIC complex. No records were stored in the room; only computer servers, satellite receivers for DIRECTV, Comcast, and similar items were in the room. (Strader SM, Nov. 8, at 32:20-24.)

274. The three men then went to the JOCC, where Officer Strader showed them "every cabinet," including the closet behind the television screens. (*Id.* at 32:25-33:10; Ryan SM, Nov. 8, at 187:5-13.) They did not find anything. (Strader SM, Nov. 8, at 33:4, 33:9-10.)

275. After searching the JOCC, Officer Strader, Mr. Ryan, and Mr. Harris went down the hall to the "IOC, the intel room," which is an office for "the fusion people." (*Id.* at 33:11-15.) There was a locked white cabinet, but Officer Strader did not have the keys. (*Id.*). In the intel room, there is another door that leads to the IT technician's office that the three of them went into. They came across Bruce Healy, an IT technician who was sitting at his desk. (*Id.* at 33:16-20.)

276. Officer Strader introduced Mr. Ryan and Mr. Harris to Mr. Healy and indicated they were searching for "stuff in reference to Pershing Park." (*Id.* at 33:20-22.) Officer Strader knew that MPD had recently remodeled IOC office, so he asked Mr. Healy whether they had "throw[n] anything away of importance or any MPD stuff." (*Id.* at 33:22-25.) Mr. Healy responded in a joking manner that he had thrown a number of things away. (*Id.* at 34:1-2.)

277. Mr. Ryan pulled out a page from the vanilla folder he had taken from the CIC, and told Mr. Healy that "this isn't a joke. This one page could have saved us $100,000." (*Id.* at 34:2-5.) After Officer Strader repeated that Mr. Ryan and Mr. Harris were attorneys and "they don't joke," Mr. Healy responded that he didn't throw anything away. (*Id.* at 34:6-9.)

278. Mr. Ryan recalls meeting Mr. Healy during the search, but does not have a "specific recollection" about any conversation that occurred with Mr. Healy. (Ryan SM, Nov. 8, at 192:22-193:24.)

279. Mr. Ryan testified that he "could have" made a comment to Mr. Healy about a document saving the MPD $100,000. (*Id.* at 193:16-18.) Mr. Ryan testified that it is "possible" he said it, because MPD "recently had settled one of the cases involving a missing document" for close to $100,000. (*Id.* at 193:25-194:8.)

280. Years earlier, before the IOC office was remodeled, Officer Strader had put two boxes of VHS videotapes inside a cabinet with a label of masking tape that said IMF 2002 written in black. (Strader SM, Nov. 8 at 34:15-19.) During the tour, there was a new cabinet in the office. (*Id.* at 34:20-35:20.) Officer Strader began to mention the old cabinet and the tapes, but before Officer Strader got to that point, "in mid-sentence, Mr. Harris looked at [Mr. Ryan] and said, that's where I found the videotapes." (*Id.* at 35:19-23.) Officer Strader ended the conversation because he thought "they already have the tapes, so there is no need for me to discuss tapes." (*Id.* at 35:23-25.) Mr. Ryan has "no recollection" of Mr. Harris making a statement about videotapes. (Ryan SM, Nov. 8, at 189:12-190:14.)

281. After Officer Strader, Mr. Ryan, and Mr. Harris finished the search, they returned to the CIC. (Strader SM, Nov. 8, at 36:6-7.) Mr. Ryan opened the brown cabinet where he had found the vanilla folder, placed the file he had removed back in the cabinet, shut the door, and instructed Officer Strader to "make sure that nothing disappears from" the cabinet. (*Id.* at 36:7-11.) Mr. Ryan also told Officer Strader that he had to "get a subpoena to come retrieve this stuff" from the cabinet. (*Id.* at 36:11-12.) Officer Strader pointed out that the watch commander

needed to be alerted "so that he can send up some directive to all the other shifts to know that nobody is allowed to go in this closet." (*Id.* at 36:13-20.) Mr. Ryan told Officer Strader to inform the watch commander. (*Id.* at 36:15-20.) Mr. Ryan does not recall giving any order regarding securing a filing cabinet. (Ryan SM, Nov. 8, at 194:13-21.)

282. Mr. Ryan took the JOCC RR Book with him when he left. (Strader SM, Nov. 8, at 36:9, 36:24-37:1.)

D. March 3, 2010 Cleanup of CIC – Ms. Frost, Mr. Ryan, and Mr. Harris Remove Documents From the File Cabinet.

Summary: During a second cleanup of the CIC, Officer Strader observed MPD employees about to begin cleaning out the cabinet that Mr. Ryan had directed no one should enter. When Officer Strader informed Mr. Wobbleton, Mr. Wobbleton made a phone call. Shortly after that phone call, Mr. Ryan, Mr. Harris and Ms. Frost arrived and began removing items from the CIC.

283. On March 2, 2010 at 5:21 p.m., Officer Strader received an email from Mr. Wobbleton directing MPD SOCC employees to clean up the CIC prior to a planned visit from a congressional delegation in the "very near future." (Chang SM (2012) Ex. 29; Strader SM, Nov. 8, at 37:13-38:8.)

284. As the officers were cleaning the CIC, Officer Strader "saw officers going to clean out the closet" that Mr. Ryan had returned the vanilla folder to and instructed Officer Strader that nobody should enter. (Strader SM, Nov. 8, at 38:24-39:8.)

285. Officer Strader informed Lieutenant Porter of Mr. Ryan's instruction not to enter the closet. (*Id.* at 39:4-8.) At the same time, Mr. Wobbleton entered the room and asked Officer Strader what the problem was. (*Id.* at 39:9-17.) After Officer Strader told Mr. Wobbleton that nobody was to go into the closet, Mr. Wobbleton made a phone call. (*Id.* at 39:14-19.) "[W]ithin ten minutes after hanging up the phone, Ms. Frost, Terry Ryan, and Ron Harris" walked into the room. (*Id.* at 39:18-22.) Ms. Frost was carrying two brown bags with her. (*Id.*) Mr. Ryan recalls very little of returning to the CIC, except that Ms. Frost was with him. (Ryan SM, Nov. 8, at 199:22-200:22.)

286. Ms. Frost stood outside the closet while officers handed paper out the door. (Strader SM, Nov. 8, at 40:4-10, 41:8-11.) Ms. Frost and Mr. Wobbleton went "through the papers, and she would put some in one bag, some in another." (*Id.* at 40:11-21; Ryan SM, Nov. 8, at 202:21 (stating "I think Ms. Frost took some files"); *see also* Frost SM, Jan. 9 p.m., at 63:2-64:2.) Ms. Frost did remove the vanilla folders that Mr. Ryan had returned to the closet during the search of CIC. (Strader SM, Nov. 8, at 42:10-16.) One of the bags was likely trash "because, as trash would come out, it went in a bag." (*Id.* at 41:6-7.)[29]

[29] Ms. Frost "vaguely" recalls being in the CIC in March 2010. (Frost SM, Jan. 9 p.m., at 40:6-10.) She "probably" met Officer Strader at the time "if [Officer Strader] was there." (*Id.*)

287. MPD did not keep a log identifying what was removed from the file cabinet. (Ryan SM, Nov. 8, at 203:1-7.)

E. August 1, 2011 – Officer Strader, Officer Bias, And Officer Perry Begin Searching For Documents In A Closet Of The CIC Complex.

Summary: Officer Strader and Officer Bias were tasked with searching for relevant documents in the CIC in August 2011. During that search, Ms. Frost stopped by to ask a few questions. During that meeting, Officer Strader informed Ms. Frost that he was the one who found the JOCC RR Book – not knowing that Ms. Frost did not know what he was talking about. After explaining what book he was referring to and describing it to her, Ms. Frost asked for his phone number and said she would be in touch with him about the book.

288. In July 2011, Officer Bias approached Officer Strader about searching a closet within CIC for "evidence in reference to a subpoena that the department had gotten in reference to E-Team." (Strader SM, Nov. 8, at 42:24-43:5.) The closet is located "right next to the conference room" where Officer Strader initially handed Captain Herold the JOCC RR Book. (*Id.* at 45:5-7.) Commander Crane had given the direction to search the closet, and suggested Officer Strader participate in the search. (*Id.* at 43:6-8.) After Officer Bias informed the watch commander of Officer Strader's temporary assignment, Officers Bias and Strader obtained the key to the closet to begin searching for documents. (*Id.* at 43:6-18.) The search went on for numerous days. (*Id.* at 43:23-24.) Officer Perry assisted in the search. (*Id.* at 44:25.)

289. The closet was in disarray. (*Id.* at 43:25-44:2.) The officers would take a stack of documents to the conference room next door. (*Id.* at 45:3-12.) They put a box in the middle of the conference room table and anything they felt was relevant was placed in the box. (*Id.*)

290. At the end of each day, Officer Bias would email a record of what was placed in the box to Officer Strader, Officer Perry, and himself "so [they] would all have a record." (*Id.* at 46:4-12.) Officer Strader recalls finding a few documents related to E Team, but nothing specific to E Team being used during the September 2002 IMF Event. (*Id.* at 46:18-20, 47:1-8.)

291. Officer Strader also discovered a receipt for the Navy related to Pershing Park. (*Id.* at 47:10-13, 50:2-11.) The document was a contract "between Mr. Gaffigan and an official at Bolling Naval Base in the District, that the Navy would provide a satellite, encrypted phones for the command staff, and that they would beam video from the scene to the JOCC." (*Id.* at 50:6-11.)

292. On August 1, 2011, while Officers Strader, Bias and Perry were reviewing documents in the conference room, Ms. Frost came into the conference room, introduced herself, and began asking questions. (*Id.* at 52:4-12, 55:2-6.)

293. Ms. Frost asked Officer Strader if he had "an opinion on why somebody would want to delete information, dispose of information." (*Id.* at 55:10-12.)

294. Officer Strader explained that "[e]verybody has always heard that Chief Ramsey initiated the arrests, gave the order for the arrests. … And that the rumor is Chief Newsham took the fall for it." (*Id.* at 55:16-19.)

295. As Officer Strader made clear, he does not have personal knowledge of these rumors, but his response to Ms. Frost's question in August 2011 provides context to the District's motivation for the systematic destruction of audio recordings, video recordings, electronic copies of the JOCC Running Resume, and hard copies of the JOCC Running Resume – and is consistent with Judge Sporkin's belief that the destruction of evidence was likely the result of "intentional mischief."

296. During the August 1, 2011 meeting, Officer Strader pointed out that he had met Ms. Frost before, in March 2010, when she came to the CIC with Mr. Ryan and Mr. Harris to remove documents. (*Id.* at 52:20-22.) Officer Strader also mentioned the JOCC RR Book that he had found and given to Captain Herold, who then gave the book to the MPD General Counsel. (*Id.* at 52:22-53:2.) Officer Strader had not mentioned the JOCC RR Book in their previous meeting because he "figured if something was turned over, you would already know about it" since "you [attorneys] all work together." (*Id.* at 52:25-53:1.)

297. It "was obvious to [Officer Strader] she didn't know about" the JOCC RR Book. (*Id.* at 53:2; *see also* Frost SM, Jan. 9 p.m., at 44:24-45:2, 46:20-24.)

298. Ms. Frost asked Officer Strader to describe the book. (Strader SM, Nov. 8, at 53:4.) He described the book to her while she took notes. (*Id.* at 53:4-12; Frost SM, Jan. 9 p.m., at 47:3-9.) During this August 1, 2011 meeting with Ms. Frost, Officer Strader also recounted his meeting with Mr. Ryan and Mr. Harris in which he led them on a tour of the CIC in search of documents and positively identified the book in Mr. Ryan's possession as the book he discovered. (Frost SM, Jan. 9 p.m., at 48:17-49:19.)

299. Ms. Frost obtained Officer Strader's phone number during this meeting. (Strader SM, Nov. 8, at 57:3-6.)

300. When she returned to her office, Ms. Frost discussed Officer Strader's prior discovery of the JOCC RR Book with Ms. Efros. (Frost SM, Jan. 9 p.m., at 47:3-11.) Ms. Frost testified that she called Mr. Ryan, on Ms. Efros's instruction, to discuss what Officer Strader had conveyed to her. (*Id.* at 52:11-23.) However, Mr. Ryan testified that Ms. Efros contacted him to let him know that an "issue had been raised and there was a complaint that [MPD] had the document in [its] office." (Ryan SM, Nov. 8, at 160:7-25.)

301. Ms. Frost described the book to Mr. Ryan and instructed him to conduct an immediate search. (Frost SM, Jan. 9 p.m., at 53:12-16.) At no time during the initial conversation did Mr. Ryan mention "any jokes" about the book Officer Strader discovered. (*Id.* at 54:8-11.) His only statement to Ms. Frost was that he would begin a search and discuss it with Mr. Harris. (*Id.* at 53:17-25.)

302. Sometime later, Mr. Ryan called Ms. Frost back to let her know that "he believes he found the book that Officer Strader was referring to." (*Id.* at 76:8-16.)

303. It was only at this time – sometime around August/September 2011 – that Mr. Ryan made a copy of the book removed from the storage area. (Ryan SM, Nov. 8, at 161:14-25, 164:6-13.) The MPD OGC does not keep a log of items turned in related to mass demonstration cases. (*Id.* at 174:8-23 (stating "We don't log things in. We keep track of it, I think, by maintaining a copy of it").)

304. Ms. Frost went "immediately across the street" to MPD to meet with Mr. Ryan and review the book. (Frost SM, Jan. 9 p.m., at 77:20-78:10.)

305. After looking over the book, Ms. Frost wanted to present the book to Officer Strader for identification. (*Id.* at 79:11-20.)

306. Ms. Frost left the book with Mr. Ryan. She contacted Officer Strader the next day to arrange a meeting. (*Id.* at 81:22-82:9, 84:17-19.) The meeting was scheduled to take place in Mr. Ryan's office. (*Id.* at 82:5-9.)

F. August 2, 2011 – Meeting of Officer Strader, Ms. Frost, Mr. Ryan, and Ms. Quon.

Summary: Following her meeting with Officer Strader on August 1, 2011, Ms. Frost contacted the MPD General Counsel's Office regarding the book that Officer Strader delivered in the Fall of 2009. In response, Ms. Quon and Mr. Ryan provided a book to Ms. Frost. Instead of meeting separately with Officer Strader to ask him whether what Ms. Quon and Mr. Ryan had given her was the book Officer Strader had discovered in the CIC, and turned over to Captain Herold, Ms. Frost arranged to meet with Ms. Quon, Mr. Ryan, and Officer Strader, all at the same time. At the start of the meeting, Officer Strader immediately stated that the book was not the same book he provided to Captain Herold, nor was it the book he positively identified to Mr. Ryan just weeks after he discovered the book. During the course of the meeting, however, Ms. Quon began badgering Officer Strader and repeated numerous times during the meeting that "that's the book," before eventually making a request that Officer Strader "draw" the book.

307. On August 2, 2011, while Officer Strader and Officer Bias took a break from searching for documents in the closet, Officer Strader received a voice message from Ms. Frost about scheduling a meeting with herself and Mr. Ryan "to get both of you in a room and then look at this document and then just go from there." (Chang SM (2012) Ex. 30, at 187:9-188:1; Strader SM, Nov. 8, at 57:1-14.) Officer Strader received the message on August 2, 2011, at 9:52 a.m. (Chang SM (2012), Ex. 30 at 188:3-7.) When Officer Strader returned her call, Ms. Frost told Officer Strader that she "would like to get you and Terry Ryan in the same room and have you identify a book that you believed you gave to Captain Herold that you believe he gave to Terry Ryan." (Strader SM, Nov. 8, at 57:7-14.)

308. Officer Strader went to Mr. Ryan's office that same day – sometime before his shift ended at 1:30 p.m. (*Id.* at 69:15-25.)

309. Ms. Frost testified that Mr. Ryan and Ms. Quon also attended the meeting because Ms. Quon and Mr. Ryan were "thought to have custody of th[e] book" at some point. (Frost SM, Jan. 9 p.m., 83:3-19, 85:14-18.)

310. Ms. Frost had already heard Ms. Quon's and Mr. Ryan's account of the book *before* the meeting. (*Id.* at 86:9-23 (adding that they attended because "they were pieces of the puzzle.").)

311. According to Mr. Ryan, Ms. Frost requested the meeting with Mr. Ryan, Ms. Quon, and Officer Strader. (Ryan SM, Nov. 8, at 203:13-25.) However, Ms. Frost later testified that she did not recall whether she was the one who called for the meeting. (Frost SM, Jan. 9 p.m., at 83:20-84:1.)

312. When Officer Strader arrived, Ms. Frost, Mr. Ryan, and Ms. Quon were already in the conference room adjacent to Mr. Ryan's office. (Strader SM, Nov. 8, at 60:5-61:13.) Ms. Frost and Ms. Quon were seated at the table, while Mr. Ryan had been standing in the doorway when Officer Strader arrived. (*Id.*)

313. Ms. Quon testified that the purpose of this meeting with Officer Strader was to "sit down and discuss and try to figure out is this the running resume." (Quon SM, Nov. 28, at 259:18-21.)

314. As Officer Strader began to sit down he "heard a thump." (Strader SM, Nov. 8, at 61:15-20.) He looked up and saw a book lying on the conference table. (*Id.*) The book was "a three-ring binder about a quarter-inch thick, bluish in color, with a lot of writing on it." (*Id.* at 61:21-23.) "It was obvious to [Officer Strader] this wasn't what I gave to Captain Herold." (*Id.* at 64:9-13.)

315. When Officer Strader looked up, Ms. Quon stated, "Officer Strader, that's the book you gave Captain Herold." (*Id.* at 64:19-22.)

316. Officer Strader clearly stated to Ms. Frost, Mr. Ryan, and Ms. Quon that the book on the table was not the book he provided to Captain Herold. (*Id.* at 64:23-65:5; Ryan SM, Nov. 8, at 207:16-21, 208:10-12; Quon SM, Nov. 29, at 183:3-8.; Frost SM, Jan. 9 p.m., at 84:20-85:1.)

317. Officer Strader responded, "No, ma'am. No way, shape or form." (Strader SM, Nov. 8, at 64:23-24.)

318. Ms. Quon repeated her previous statement – "that's the book." (*Id.* at 64:25-65:5.) Officer Strader stated again, "[N]o, ma'am, that's not the book." (*Id.*)

319. After Ms. Quon explained that Captain Herold had delivered the book to her and that she had delivered the book to Mr. Ryan, Officer Strader clearly said, "[W]ell, that's not the

book that I gave Captain Herold." (*Id.* at 65:10-11; *see also* Frost SM, Jan. 9 p.m., at 85:19-24.)[30]

320. Officer Strader then turned to Mr. Ryan and added, "[N]or is that the book that I know that Captain Herold gave you, Terry … because if you recall, three weeks after I found the book, I was called to your office, and you had me identify the book. And you physically picked the book up, and I said, yes, that's the book I gave Captain Herold." (Strader SM, Nov. 8, at 65:10-16.)

321. Ms. Quon "kept telling [Officer Strader], "that's the book." (*Id.* at 66:1.) Officer Strader said, "no." (*Id.* at 66:1-2.)

322. "[O]n the fourth time she asked, [Officer Strader] said, "[M]a'am, all due respect, I don't even know you, [ ] but why are you asking me? Ask [Mr. Ryan]." (*Id.* at 66:2-5.) Ms. Quon did not ask Mr. Ryan. (*Id.* at 66:6.)

323. Officer Strader became extremely upset. (*Chang* SM (2012) Ex. 30, at 147:4-7; Ryan SM, Nov. 8, at 209:16-23 (stating "I think he got a little agitated"); *but see* Quon SM, Nov. 29, at 65:5-12 (stating that "[Officer Strader] was getting a little defensive, so I tried to assure him … no one is trying to get anyone in trouble"), 183:16-19 (same); Frost SM, Jan. 9 p.m., at 88:1-4 (stating that Officer Strader did not seem comfortable.).)

324. Officer Strader asked Mr. Ryan, "[W]here is the book?" (Strader SM, Nov. 8, at 66:6-7.) Mr. Ryan "had no response. He stood in the corner with his arms folded the whole time." (*Id.* at 66:7-10.)

325. Ms. Frost looked at Officer Strader, "put her hands on her face, looked at [Mr. Ryan] and then looked back at [Officer Strader] and said, 'I wonder if this could [be] with Tom [Koger's] things.'" (*Id.* at 66:11-16.)

326. Officer Strader, after pointing out he did not know who Mr. Koger was, told Ms. Frost to look at her notes from the meeting they had the previous day, during which Officer Strader described the book to her. (*Id.* at 66:20-67:3.) Officer Strader said, "[I]f you look at your notes, you will see that that is not the book that I described to you, nor is that the book I gave Captain Herold." (*Id.* at 67:1-3.)

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[30] Ms. Frost testified that "[n]o one was trying to convince [Officer Strader] it was the book." (Frost SM, Jan. 9 p.m., at 85:22-23.) However, this testimony is inconsistent with her other testimony that it was her belief that the book Mr. Ryan and Ms. Quon had was the book Officer Strader found. For example, Ms. Frost testified that there was confusion in the meeting after Officer Strader said it was not the book and that "[w]e [Ryan, Quon, and Frost] were just trying to figure out if there really was another book or if this was just a memory lapse." (*Id.* at 85:19-24.) But Ms. Frost also testified that she "believe[d] that this was the book that Officer Strader found and that he recalled it differently." (*Id.* at 87:12-13.) Her "belief … [was] because [she] had just been told that Mr. Ryan and Ms. Quon said it was the same book and [she] took their word for it." (*Id.* at 87:14-17.) She believed them "[b]ecause nothing else made sense." (*Id.* at 87:4-8.)

327. Officer Strader then turned to Mr. Ryan and asked, "Did Captain Herold give you a book?" (*Id.* at 67:4-5.) Mr. Ryan responded, "Captain Herold gave me many books." (*Id.* at 67:5-6.)

328. Officer Strader also told Mr. Ryan to "just call Captain Herold and have him come down here and he can tell you whether or not that's the book." (*Id.* at 69:6-12.) Mr. Ryan declined to call Captain Herold. (*Id.*)

329. Mr. Ryan's initial silence, followed by his evasive answer that "Captain Herold gave me many books" (*id.* at 67:4-5), is clear evidence that he could not refute Officer Strader's statements.

330. Ms. Quon then "slid three blank white pieces of paper across the table … with an ink pen and a magic marker" and asked Officer Strader to draw a picture of the book. (*Id.* at 67:7-10; *see also* Ryan SM, Nov. 8, at 210:11-14, 240:11-243:1; Quon SM, Nov. 29, 64:12-23; Frost SM, Jan. 9, at 88:23-89:8.) Officer Strader declined the request to draw a picture of the book. Then, he noticed that it was close to the end of his shift, and told everyone it was time for him to go home. (Strader SM, Nov. 8, at 67:11-19; Quon SM, Nov. 29, at 64:20-65:22.)

331. Officer Strader "was mad when [he] left the meeting because [he] wasn't sure what had just took place and … [he] thought that [Mr. Ryan and Ms. Quon] wanted [him] to say something that wasn't true." (Strader SM, Nov. 8, at 68:16-22.)

332. When this meeting was complete, Ms. Frost knew she had "a problem," but merely chalked it up to a "misunderstanding." (Frost SM, Jan. 9 p.m., at 97:7-23.)

333. After Officer Strader left, Ms. Frost, Mr. Ryan, and Ms. Quon had "some discussion" about getting "Captain Herold in here and try to figure this out." (*Id.* at 92:20-23.) It also never occurred to Ms. Frost to create an "independent process" from Ms. Quon and Mr. Ryan because their version of events was so different than Officer Strader's. (*Id.* at 96:14-18.)[31]

334. When Officer Strader got home, he "called Captain Herold and left him a message" that mentioned the meeting he just had with the attorneys and that "something didn't feel right" that may require him to have a lawyer. (Strader SM, Nov. 8, at 68:23-69:4.)

335. Captain Herold returned Officer Strader's call on August 3, 2011, on his way to work. (*Id.* at 69:15-20.) Captain Herold indicated he was on his way to Mr. Ryan's office to identify the book. (*Id.* at 69:21-25.) Officer Strader told Captain Herold, "I don't know what they are going to show you. All I can tell you is what they showed me is not the book that I gave you, nor the book that I know you gave to Terry Ryan, because I had seen Terry with the book after giving it to you." (*Id.*) Officer Strader also asked Captain Herold to call after the meeting

[31] It is clear that, throughout the effort to resolve the identity of the book, Ms. Frost's attempt to "figure this out," considered only a scenario in which Captain Herold and Officer Strader confirmed Mr. Ryan's and Ms. Quon's account because Ms. Frost "didn't have any question really in [her] mind this is the same book." (Frost SM, Jan. 9 p.m., at 93:8-11, 98:10-99:17.)

to tell whether the book they show him is the same book that Officer Strader gave Captain Herold. (*Id.* at 70:6-9.)

336. A couple days later, Captain Herold called Officer Strader and informed him that it was "not the book." (Strader SM, Nov. 8, at 70:10-17.)

G. August 2011 - Meeting of Captain Herold, Ms. Quon, Mr. Ryan, and Ms. Frost

Summary: After the August 2, 2011 meeting with Ms. Frost, Ms. Quon, Mr. Ryan, and Officer Strader, Captain Herold was called to a meeting with Ms. Frost, Ms. Quon, and Mr. Ryan to discuss the book he provided to Ms. Quon in the Fall of 2009. Ms. Frost, Ms. Quon, and Mr. Ryan presented him with a book and Captain Herold emphatically denied that the book was the same book he provided to the MPD Office of General Counsel.

337. Captain Herold does not recall when the meeting occurred, but he testified that he attended two meetings in the General Counsel's office regarding the JOCC RR Book that Officer Strader gave to him. (Herold SM, Jan. 3, at 189:13-25.) The meeting likely occurred within a few days of the meeting held with Officer Strader on August 2, 2011, and Officer Strader recalls that Captain Herold, the day after Officer Strader met with Mr. Ryan, Ms. Frost, and Ms. Quon, headed to a meeting to identify the book. (Strader SM, Nov. 8, at 69:21-25, 70:5-17.) Mr. Ryan called Captain Herold and "asked [him] to come into the [General Counsel's] office to talk about the document" he turned into Ms. Quon. (Herold SM, Jan. 3, at 189:13-25.)

338. Captain Herold's first meeting lasted approximately "half an hour" and was in Mr. Ryan's office. (*Id.* at 190:14-17.) Mr. Ryan, Ms. Frost, and Ms. Quon also attended the meeting. (*Id.* at 190:6-13.)

339. Ms. Quon denied attending this meeting and Ms. Frost testified she does not recall attending this meeting, even though Captain Herold and Mr. Ryan stated that this meeting took place. (Quon SM, Nov. 29, at 200:23-201:4; Frost SM, Jan. 9 p.m., at 99:18-24.)[32]

340. During this meeting, Mr. Ryan and Ms. Frost did most of the talking. (Herold SM, Jan. 3, at 192:14-15.) They "were discussing the book that Officer Strader gave [Captain Herold], and there seemed to be a problem locating the document." (*Id.* at 190:19-21.)

341. They showed Captain Herold a three-ring binder and asked him "if this is what [he] turned over to Ms. Quon." (*Id.* at 190:18-23.) Captain Herold testified that he was likely

[32] Ms. Frost also testified that there was a decision following the August 2, 2011 meeting with Officer Strader that someone would contact Captain Herold about the book. (Frost SM, Jan. 9 p.m., at 99:25-100:10.) However, she does not recall who contacted Captain Herold – even though Ms. Quon and Mr. Ryan would have been clearly inappropriate choices to contact Captain Herold. (*Id.* at 100:11-24.) Even though Ms. Frost testified she took notes contemporaneous with various meetings during this time period, she did not review those notes in preparation for her testimony. (Frost SM, Jan. 11, at 4:4-16.)

shown what was marked as Exhibit 31 by the District during the 2012-2013 Special Master Hearings. (Herold SM, Jan. 3, at 191:10-18; *see* District (2012) Exhibit 31.) Captain Herold told Mr. Ryan, Ms. Frost, and Ms. Quon that it was not the book he provided to Ms. Quon in the Fall of 2009. (Herold SM, Jan. 3, at 190:22-23.)

342. Mr. Ryan asked Captain Herold, "a couple times, 'are you sure? Are you sure?'" (*Id.* at 193:11-19.) Ms. Frost also asked "essentially … the same [questions]" that Mr. Ryan asked. (*Id.* at 193:20-22.) Captain Herold told them it was not the book he provided to Ms. Quon. (*Id.* at 193:11-19; *see also* Ryan SM, Nov. 8, at 237:14-238:25.)

343. After Captain Herold informed them that the book he was shown was not the book he provided to Ms. Quon, they questioned him about the circumstances surrounding his receiving the book from Officer Strader and then delivering the book to Ms. Quon. (Herold SM, Jan. 3, at 191:24-192:8.)

H. Tuesday, September 6, 2011 – Meeting of Officer Strader, Captain Herold, Mr. Ryan, Ms. Quon, Ms. Frost, and Sergeant Delroy Burton.

Summary: After both Captain Herold and Officer Strader previously stated that the book they were shown was not the book they turned over to the MPD General Counsel's office, Ms. Frost, Mr. Ryan, and Ms. Quon decided to have a meeting with all potential witnesses present at the same time – even though Officer Strader and Captain Herold had been clear that it was not the same book Officer Strader discovered in the Fall of 2009. Furthermore, Ms. Frost planned to use the guise of attorney-client or work-product privilege to keep secret any discussions that took place at this meeting.

344. After the August 2, 2011 meeting, Officer Strader contacted the president of the union. Office Strader described what had occurred, and explained that he may need representation through the union. (Strader SM, Nov. 8, at 71:23-72:2.) Sergeant Burton was Officer Strader's union representative. (*Id.*; Burton SM, Nov. 29, at 11:20-12:4.)

345. Officer Strader expressed his concern to Sergeant Burton that he was being asked to identify the document presented to him (District SM (2012) Ex. 31), as the same document he discovered, even though "he was adamant that that was not the document that he found and had given to Captain Herold." (Burton SM, Nov. 29, at 13:14-19.)

346. Ms. Frost initiated a meeting for September 6, 2011, with all four potential witnesses – Ms. Quon, Mr. Ryan, Officer Strader, and Captain Herold – even though Officer Strader and Captain Herold had previously stated that the book produced by Ms. Quon and Mr. Ryan was not the book they originally provided to Ms. Quon and Mr. Ryan. (Ryan SM, Nov. 8, at 207:20-21, 244:3-5; Herold SM, Jan. 3, 193:4-10; Strader SM, Nov. 8, at 64:23-65:5; Frost SM, Jan. 11, at 6:6-7 (stating that she does not recall who initiated the meeting.).)

347. Ms. Frost claims the purpose of the meeting was "[t]o get everyone in one room to look at the book and try [to] figure out what had happened and why there was this disconnect" – even though Ms. Frost did not "seriously question Ryan's and Quon's account that this [was] the book." (Frost SM, Jan. 11, at 6:15-23.) Nonetheless, Ms. Frost had no interest in

investigating the matter further because she fully believed Mr. Ryan and Ms. Quon. (*Id.* at 12:24-13:20 (explaining that the difference between this dispute and the Special Master's hypothetical involving three different accounts of a potential excessive force event was that what Ms. Frost "was faced with at the time was two individual[s] [Quon and Ryan] who were my colleagues who I had worked with over the years, who were known to me to always be very diligent.").) Instead of taking basic steps to protect her independence and ethical duties, Ms. Frost chose simply to believe Mr. Ryan and Ms. Quon. (Frost SM, Jan. 11, at 16:10-17:15.)

348. Ms. Quon described the purpose of this meeting as "a witness conference." (Quon SM, Nov. 29, at 66:19-21.) Even though Officer Strader had been clear in the prior meeting, Ms. Quon testified that "Ms. Frost wanted to ask questions of Officer Strader in preparation for the case." (*Id.* at 66:22-24.)

349. At this time, there were no scheduled hearings, nor any immediate need to prepare witnesses. (*See, e.g.*, Plaintiffs' Request for Resumption of Special Master Hearings, Dkt. No. 877 (Mar. 13, 2012).) Additionally, Officer Strader and Captain Herold already had denied that District (2012) Exhibit 31 was the book Officer Strader discovered and Captain Herold turned over to the MPD OGC. (*See* PFOF ¶¶ 307-343.)

350. Sometime after the August 2, 2011 meeting, Mr. Ryan called Officer Strader to ask if Officer Strader "could come help Captain Herold and him search his office for the book." (Strader SM, Nov. 8, at 70:23-71:16; *see* Herold SM, Jan. 3, at 192:24-193:3.)

351. Officer Strader agreed, but brought Sergeant Delroy Burton with him to the meeting. (Strader SM, Nov. 8, at 71:17-72:7; Burton SM, Nov. 29, at 18:13-24.)

352. Nobody else knew Sergeant Burton would attend this meeting until Sergeant Burton arrived. (Burton SM, Nov. 29, at 46:17-25.)

353. Officer Strader, Captain Herold, Segeant Burton, Ms. Frost, Mr. Ryan, and Ms. Quon were in attendance. (Strader SM, Nov. 8, at 71:17-18, 73:9-15; Herold SM, Jan. 3, at 194:9-16.)

354. Sergeant Burton's impression was that this second meeting was for Officer Strader to identify the document produced by MPD OGC as the book Officer Strader discovered in the Fall of 2009 – the same thing that occurred at the prior meeting on August 2, 2011. (Burton SM, Nov. 29, at 22:2-18.)

355. Mr. Ryan testified that he asked Captain Herold to be present at this meeting "to have [Captain] Herold [] reassure Officer Strader that he was not going to be placed in any jeopardy by cooperating with us." (Ryan SM, Nov. 8, at 244:7-18.) In contrast, Captain Herold testified that "Mr. Ryan called me, asked me to come to the meeting – and tried to determine what happened to the book or make a determination whether this was the actual book that I turned over." (Herold SM, Jan. 3, at 192:24-193:3.)

356. Captain Herold had already communicated to Ms. Frost, Mr. Ryan, and Ms. Quon that the book was not the book he provided to Ms. Quon. (*Id.* at 193:7-8.) Captain Herold "couldn't say" why there was a need for a second meeting. (*Id.*)

357. After everyone introduced themselves, either Mr. Ryan or Ms. Frost began the meeting by asking Officer Strader to discuss the book and how he found it. (Strader SM, Nov. 8, at 73:16-19; *see also* Herold SM, Jan. 3, at 194:16-21; Burton SM, Nov. 29, at 19:3-11; Frost SM, Jan. 11, at 8:22-9:17.) As Officer Strader began to answer, Ms. Frost interrupted to say that there was a problem with Sergeant Burton being present. (Strader SM, Nov. 8, at 73:19-24; Ryan SM, Nov. 8, at 245:24-256:2-8; *see also* Herold SM, Jan. 3, at 196:16-19; Quon SM, Nov. 29, at 67:24-68:2; Burton SM, Nov. 29, at 19:5-23; Frost SM, Jan. 11, at 9:6-17.) She then asked Sergeant Burton why he was at the meeting. (Strader SM, Nov. 8, at 73:16-19; Frost SM, Jan. 9, at 10:16-25.) Sergeant Burton responded that he was present to ensure that Officer Strader's union rights were not violated. (Strader SM, Nov. 8, at 74:1-4; Burton SM, Nov. 29, at 19:20-23.)[33]

358. Officer Strader "seemed somewhat apprehensive" about the meeting. (Herold SM, Jan. 3, at 196:11-13; *see also* Frost SM, Jan. 11, at 20:5-21:2.)

359. Ms. Frost stated that it was a confidential, privileged meeting, and that Sergeant Burton could not remain unless he agreed the meeting was subject to the attorney-client privilege. (Burton SM, Nov. 29, at 20:24-21:12; Frost SM, Jan. 11, at 18:9-19:8.) Sergeant Burton stated that he was present as Officer Strader's FOP representative, and that anything discussed would not be privileged. (Burton SM, Nov. 29, at 19:16-23.)

360. Ms. Frost stated that she had to check with her boss before continuing the meeting. (Strader SM, Nov. 8, at 74:5-6.) Ms. Frost went to Mr. Ryan's office, presumably to make a phone call, and when she came back the meeting continued for a short time. (*Id.* at 74:7-9.) Ms. Frost then stopped the meeting again. (*Id.* at 74:10-15; Ryan SM, Nov. 8, at 248:11-13.)

361. Mr. Ryan then had a private conversation with Sergeant Burton in a separate office. (Strader SM, Nov. 8, at 74:23-75:11; Ryan SM, Nov. 8, at 245:19-23.) Mr. Ryan was aware of Officer Strader's concern that "he was going to be somehow exposed to some disciplinary action from the [MPD]." (Ryan SM, Nov. 8, at 226:20-23; *see also* Burton SM, Nov. 29, at 27:9-17; Herold SM, Jan. 3, at 188:23-189:12.) Officer Strader would not discuss the JOCC RR Book if Sergeant Burton would not be permitted to remain in the meeting. (Herold SM, Jan. 3, at 196:11-19.)

362. Sergeant Burton believed Officer Strader's concerns about potential discipline were valid because, in his experience in the MPD, "discipline rolls, as they say, downhill to the lowest person" – which, in this case, would have been Officer Strader. (Burton SM, Nov. 29, at 28:15-29:24.)

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[33] Captain Herold recalls that there "was a discussion of whether or not [Sergeant] Burton … could continue in the meeting" but "that didn't really involve [Captain Herold], so [he] paid little attention to it." (Herold SM, Jan. 3, at 195:20-24.) Captain Herold does recall "trying to convince [Officer Strader] to talk to the attorneys, to let them know that this was not the document" Officer Strader discovered. (*Id.* at 196:3-10.)

363. Mr. Ryan and Mr. Burton discussed potential ways to provide Officer Strader with an assurance that he would not be retaliated against in relation to the discovery of the JOCC RR Book. (*Id.* at 29:25-30:2; Ryan SM, Nov. 8, at 248:22-249:8.) Sergeant Burton suggested three alternative options. First, the meeting could proceed without confidentiality attached. (Burton SM, Nov. 29, at 30:4-8.) Second, the meeting could proceed without Sergeant Burton present, but the FOP would file a grievance or unfair labor practice complaint pursuant to the MPD collective bargaining agreement. (*Id.* at 30:4-15.) Third, Sergeant Burton suggested that if the MPD provided something in writing that Officer Strader would not face any disciplinary action, the meeting could occur without Sergeant Burton present. (Burton SM, Nov. 29, at 31:1-32:11; Ryan SM, Nov. 8, at 249:4 (testifying that such a letter "may have been discussed.").)

364. Despite concern about maintaining the attorney-client or work product privilege, there were no discussions during the meeting regarding who the attorney-client relationship existed between. (Ryan SM, Nov. 8, at 249:22-25, 250:15-19.) In fact, Mr. Ryan made it clear that he believed Officer Strader was not OAG's client and, therefore, he was not "concerned about who in the room was watching after [Officer Strader's] legal interests." (*Id.* at 250:11-17.) Mr. Ryan also did not believe he had a duty, as the MPD General Counsel, "to determine who would protect [Officer Strader's] legal interests at that meeting." (*Id.* at 250:23-25.)

365. Following the meeting between Sergeant Burton and Mr. Ryan, Sergeant Burton and Officer Strader went to the basement of the building to discuss Officer Strader's options. (Strader SM, Nov. 8, at 75:10-76:6.)

366. Sergeant Burton informed Officer Strader that Mr. Ryan had asked whether Officer Strader would agree to excuse Sergeant Burton from the meeting if Chief Lanier "was willing to put in writing that no retaliation would" take place against Officer Strader relating to the book. (Strader SM, Nov. 8, at 75:16-76:21; *see also* Burton SM, Nov. 29, at 31:6-21.) Officer Strader was willing to accept such a statement from Chief Lanier, but would not have required it to be in writing. (*Id.*) When Officer Strader and Sergeant Burton returned to the meeting, Officer Strader informed Mr. Ryan that he would accept Chief Lanier's word. (*Id.*)

367. Mr. Ryan then asked if Officer Strader would accept the same offer if the letter was written by Inspector Ennis. (Strader SM, Nov. 8, at 76:13-18; Burton SM, Nov. 29, at 32:16-33:4.) Sergeant Burton informed Mr. Ryan that a letter from Inspector Ennis would be acceptable, "if Inspector Ennis is acting as the chief of police and has the authority to be the chief of police." (*Id.*)

368. Mr. Ryan informed Sergeant Burton that he "would contact [him] the following day with the draft proposal for the immunity grant." (Burton SM, Nov. 29, at 33:16-24; *see also* Strader SM, Nov. 8, at 76:19-21.) Officer Strader has never heard from Mr. Ryan regarding a letter from Chief Lanier or Inspector Ennis. (*Id.*)

369. Mr. Ryan did not take any steps to secure such a letter following the meeting and, therefore, Officer Strader and Sergeant Burton have never been contacted regarding the immunity grant. (Ryan SM, Nov. 8, at 249:9-12; Burton SM, Nov. 29, at 33:16-24.)

370. During this meeting, Officer Strader and Captain Herold did not search for the JOCC RR Book that Officer Strader found in the Fall of 2009. (Strader SM, Nov. 8, at 76:25-77:1; Herold SM, Jan. 3, at 195:14-19.)

371. The meeting "continued for a short time after" Officer Strader and Sergeant Burton left the room. (Herold SM, Jan. 3, at 197:5-8.) All of the discussion following Officer Strader's departure concerned the book Ms. Quon and Mr. Ryan produced (District SM (2012) Ex. 31), with questions addressed to Captain Herold such as, "Are you sure it's not the right book? Could you be mistaken? Do you remember looking at the contents of it?" (Herold SM, Jan. 3, at 197:16-24; *see also* Frost SM, Jan. 11, at 30:24-31:6.) Captain Herold repeatedly reaffirmed that District SM (2012) Exhibit 31 is not the book he delivered to Ms. Quon. (*Id.* at 197:16-24, 215:10-12.) While clearly an exaggeration, Captain Herold's response to Mr. Schwartz's final question is telling. When Mr. Schwartz asked, "But in any case, the book that you turned over to the general counsel's office is not [District] Exhibit 31?" Captain Herold answered, "For the 850th time, no, [it] is not the same book." (Herold SM, Jan. 3, at 215:10-12.)

372. The testimony of both Officer Strader and Captain Herold is clear that collectively they were repeatedly asked questions by Mr. Ryan, Ms. Frost, or Ms. Quon, that were nothing more than "Are you sure?" or "Could you be mistaken?" (Herold SM, Jan. 3, at 193:11-19 (first Herold meeting), 197:18-21 (second Herold meeting); Strader SM, Nov. 8, at 66:1 (first Strader meeting).) There is no indication from any witness that Ms. Frost similarly questioned Mr. Ryan or Ms. Quon. Ms. Frost's "investigation" amounted to little more than an effort to convince Officer Strader and Captain Herold to agree that District SM (2012) Exhibit 31 was the book they provided to the General Counsel's office in the Fall of 2009.

373. Officer Strader has not seen the book he delivered to Captain Herold since he positively identified the book approximately three weeks after finding the book – when he led Mr. Ryan and Mr. Harris on the search for documents in the CIC. (Chang SM Ex. 30, at 176:21-177:8.)

374. Captain Herold has not seen the book he delivered to Ms. Quon since leaving the General Counsel's office in the Fall of 2009. (Herold SM, Jan. 3, at 188:15-16.)

I. The District Excludes Ms. Frost From Participation as an Attorney on Matters Related to Officer Strader's Discovery of the JOCC RR Book. Nonetheless, Ms. Frost Appears as Counsel on Behalf of the District for Officer Strader's and Mr. Ryan's Testimony.

Summary: The District recognized, by December 2011, that Ms. Frost was a potential witness regarding Officer Strader's discovery of the JOCC RR Book. As a result, the District instructed Ms. Frost not to participate in Officer Strader's deposition. She also did not read the deposition transcript. In spite of this, Ms. Frost was in the courtroom on the first day of the resumed Special Master hearings for Officer Strader's testimony on November 8, 2012. It was not until the end of the second day (November 9), after Mr. Ryan's account of the same events, that Ms. Frost left the courtroom, and then only as the result of the Special Master's direction.

375. The District recognized that, based on her involvement in the meetings regarding the book Officer Strader discovered, Ms. Frost was a potential witness in the Special Master proceedings. (Frost SM, Jan. 11, at 32:7-33:4.)

376. Prior to Officer Strader's deposition, on December 15, 2011, the District and Ms. Frost decided that Ms. Frost would not attend, or read the transcript of, Officer Strader's or Captain Herold's deposition. (*Id.* at 32:22-33:9.) The District and Ms. Frost did not take a similar position regarding her potential interaction with Mr. Ryan and Ms. Quon. (*Id.* at 33:13.)

377. Despite the District's recognition that Ms. Frost was a potential witness in the Special Master proceedings, Ms. Frost was in the courtroom during all of Officer Strader's testimony. (*Id.* at 37:1-38:8.) Even when she appeared on the first and second days of the resumed Special Master proceedings, and sat through Officer Strader's testimony as well as the first portion of Mr. Ryan's testimony, Ms. Frost "underst[oo]d that [she was] still a potential witness in November" 2012. (*Id.* at 38:2-8.) Nothing had changed that would have supported Ms. Frost's resumption as counsel. (*Id.* at 37:1-22.)[34]

378. Ms. Frost was also present for all of Mr. Ryan's initial testimony on November 8-9, 2012 – having been excluded from the courtroom only minutes before Mr. Ryan elected to suspend his testimony to retain independent counsel. (Ryan SM, Nov. 9, at 91:18-25.) In fact, Mr. Ryan did not respond to any additional substantive questions after Mr. Frost left the room until his testimony resumed on January 3, 2013. (Ryan SM, Nov. 9, at 92:1-19.)

VIII. THE DISTRICT'S INVOLVEMENT IN COORDINATION OF TESTIMONY AND THE CREDIBILITY OF WITNESSES

A. The District's Involvement in the Coordination of Testimony

Summary: The District engaged in misconduct in its handling of evidence, its investigation into the existence of evidence, and its preparation of witnesses. At best, the District tainted key witness testimony through inappropriate and repeated group witness-preparation sessions. In either event, it demonstrates the testimony from Mr. Ryan, Ms. Quon, and Ms. Frost is not reliable.

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[34] The District also represented during a bench conference that "[t]his is not the first time we have thought about this question. The Office of [Attorney] General … sought and obtained a legal opinion on the ethical issues involved here, and we were informed that it would be appropriate for Ms. Frost to remain as counsel of record *as long as she was not involved in matters that would involve her testimony*." (Statement of William Causey, Jan. 9 p.m., at 40:24-41:5 (emphasis added).) Despite obtaining such a legal opinion, however, Ms. Frost was permitted to appear in Court as an attorney on behalf of the District on November 8 and 9, 2012, when Officer Strader and Mr. Ryan testified extensively about the events surrounding the various meetings, in which Ms. Frost, as she recognized, was involved. This gave her yet another opportunity to impermissibly coordinate her testimony with that of other witnesses. (Strader SM, Nov. 8, at 3:12-14, Ryan SM, Nov. 9, at 3:13-14 (noting Ms. Frost's appearance for the record).)

379. When Officer Strader informed Ms. Frost that he had discovered the JOCC Running Resume for the September 2002 IMF Event, Ms. Frost organized a meeting for Ms. Quon and Mr. Ryan – two persons also involved in the chain of custody of Officer Strader's discovery – to confront Officer Strader with the book they claimed was turned into the OGC. (*See* PFOF ¶¶ 307-336.) Officer Strader was clear that the book presented to him by the General Counsel of the MPD was not the book he discovered and submitted to the MPD OGC. (*See* PFOF ¶¶ 315-322.)

380. Even though Officer Strader was clear in his first meeting with Mr. Ryan, Ms. Quon, and Ms. Frost that the book he was shown was not the book he discovered and provided to Captain Herold, Ms. Frost relied on what she had been told by her colleagues, Mr. Ryan and Ms. Quon, to conclude he was mistaken. Accordingly, she organized additional meetings "to determine why there was a disconnect." (*See* PFOF ¶ 347.)

381. After the first meeting with Officer Strader, Mr. Ryan, and Ms. Quon, Ms. Frost arranged to have a meeting with Captain Herold, with Mr. Ryan and Ms. Quon present, to allow Captain Herold to give his account of Officer Strader's discovery. (*See* PFOF ¶¶ 337-343.)[35] Like Officer Strader, Captain Herold clearly stated that the book presented to him was not the book he received from Officer Strader and provided to Ms. Quon. (*See* PFOF ¶¶ 341-342.)

382. Following Captain Herold's unequivocal denial, Ms. Frost organized yet another meeting, this time with Mr. Ryan, Ms. Quon, Officer Strader, and Captain Herold all to be present to discuss the events surrounding the discovery of the book. (*See* PFOF ¶¶ 346-348.) Ms. Frost sought to exclude Officer Strader's union representative by claiming the meeting was protected by an attorney-client privilege, but Officer Strader's union representative refused to leave the meeting without assurances that Officer Strader would not face discipline. (*See* PFOF ¶¶ 365-374.)

383. In spite of Officer Strader and Captain Herold unequivocally stating that the book they provided to the MPD OGC was not the same book provided by Ms. Quon and Mr. Ryan, the District continued to hold joint meetings including Mr. Ryan and Ms. Quon to discuss their potential testimony regarding the book. (*See* PFOF ¶¶ 384-392.) As a result, Ms. Quon and Mr. Ryan were able to hear, and potentially coordinate, each other's version of events and conform their testimony. (*See* PFOF ¶¶ 384-392.)

384. Ms. Quon met more than twelve times with Mr. Ryan to discuss the controversy regarding the JOCC RR Book Officer Strader discovered. (Quon SM, Nov. 29, at 78:6-16; Ryan SM, Jan. 3, at 7:24-8:16.)

385. "Mr. Causey was prepping [Ms. Quon]" for her testimony while Mr. Ryan was present, even though they both were to be witnesses. (Quon SM, Nov. 29, at 79:3-24.)

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[35] As noted above, Ms. Frost and Ms. Quon deny being present for the meeting with Captain Herold, but Captain Herold and Mr. Ryan are both clear that this meeting occurred.

386. These meetings occurred sometime after December 7, 2011, when Mr. Causey entered an appearance in the case. (*Id.* at 85:20-86:22, 91:7-93:1; Ryan SM, Jan. 3, at 87:24-88:16; *see also* Dkt. No. 870.)

387. It was obvious to Ms. Quon, at the time, that Mr. Ryan also had relevant testimony regarding the document discovered by Officer Strader. (Quon SM, Nov. 29, at 91:13:24.) She was also aware that his testimony may have been "different" from her testimony. (*Id.* at 91:25-92:9.) Yet, Mr. Ryan had multiple opportunities to listen to Ms. Quon's account of the events involving the book Officer Strader discovered. (*Id.* at 92:10-13, 101:7-12.)

388. Mr. Ryan believed "it was probably likely that [he and Ms. Quon] would be called as witnesses" regarding the document discovered by Officer Strader. (Ryan SM, Jan. 3, at 8:24-9:3.) Yet, it never occurred to Mr. Ryan that there might be a problem with two witnesses discussing their testimony together. (*Id.* at 9:23-10:2.) Mr. Ryan testified that decisions to maintain separation of potential witnesses are the responsibility of the litigator – in this case, Mr. Causey. (*Id.* at 10:16-11:20.)

389. Specifically, during the preparation session in which Mr. Causey, Mr. Ryan, and Ms. Quon were present, the three "did talk about the joke that was played upon Mr. Harris." (Quon SM, Nov. 29, 99:4-16.)

390. These meetings with Mr. Causey, Mr. Ryan, and Ms. Quon occurred after Officer Strader denied, in two separate meetings, that the book produced by the MPD OGC was the same book he discovered in the Fall of 2009. (*Id. at* 207:13-208:18**.)**

391. These meetings, which Mr. Causey held to prepare the testimony of Mr. Ryan and Ms. Quon, occurred after Captain Herold denied, in two separate meetings, that the book produced by the MPD OGC was the same book Officer Strader provided to him in the Fall of 2009, which he then submitted to Ms. Quon. (*Id.*)

392. Mr. Ryan's and Ms. Quon's testimony was remarkably identical regarding their description of the book turned in by Officer Strader and Captain Herold. Mr. Ryan describes the book he received from Ms. Quon as having a "blue cover and backing" in "sort of a mottled" pattern "almost like a marbling effect." (Ryan SM, Nov. 8, at 128:16-17, 128:25-129:1.) The book had two or three rings in it and was "probably less than three-quarters of an inch thick." (*Id.* at 128:17-185, 129:2-8.) It had "some magic marker writing" on the front. (*Id.* at 128:18-19.) Ms. Quon's direct testimony was plainly rehearsed to the word. In response to the question, "What did [Captain Herold] give you?", Ms. Quon answered:

> "He gave me a three-ring binder. It was light blue in color, approximately one half, two inches thick. The paper, it was an old time paper cover. It was mottled blue, M-O-T-T-L-E-D. And it was a little frayed and there was some black writing on the cover."

(Quon SM, Nov. 28, at 243:21-244:1.) Ms. Quon's unprompted spelling of the word "mottled," matching Mr. Ryan's use of the same word, cannot be just a coincidence, and indicates either an intentional effort to coordinate testimony, or a failure by District counsel to ensure the testimony

of these two witnesses, about the same subjects, was not tainted. At a minimum, it raises serious questions about the reliability of the testimony of both witnesses.[36]

393. Sometime in early 2012, Mr. Ryan and Mr. Causey met with Asst. Chief Anzallo prior to his deposition in this case. (Ryan SM, Jan. 3, at 99:7-111:3) During the meeting, Asst. Chief Anzallo recounted that he and Chief Lanier had directed that IAD would not investigate the attempted deletion of E Team data. (*See id.*) Rather than Mr. Causey arranging to meet with Chief Lanier separately, Mr. Causey, Mr. Ryan, and Asst. Chief Anzallo immediately met with Chief Lanier to hear her account of the same events. (*See id.*) These examples of repeated group preparation sessions raise serious questions about the District's disinterest in ensuring the integrity of testimony before the Special Master. By itself, this raises serious questions about the reliability of the District's witnesses' testimony.

B. Credibility of Witnesses

394. District employees and witnesses provided conflicting testimony that raises serious questions about the reliability of those witnesses and the credibility of their testimony.

395. Mr. Ryan testified that, on May 3, 2011, after NC4 contractor Marc Bynum discovered an attempted deletion relating to the September 2002 IMF Event, a meeting occurred among Mr. Ryan, Ms. Pressley, Ms. Frost, and Chief Lanier. (Ryan SM, Nov. 9, at 51:24-54:2.) Mr. Ryan testified that, at this meeting, he informed Chief Lanier "[t]hat there was a potential problem with someone attempting to delete information from the computer." (*Id.* at 53:1-4.) Ms. Pressley and Ms. Frost both testified that they did not attend such a meeting. (Pressley SM, Dec. 18, at 52:11-17, 53:17-54:21; Frost SM, Jan. 11, at 56:20-57:1.) While Chief Lanier recalls meeting with Mr. Ryan, she does not recall whether anyone else was also in attendance. (Lanier SM, Mar. 19, at 7:17-8:3.) Chief Lanier refuted Mr. Ryan's testimony that he informed her

[36] Ms. Quon also lied under oath. In response to the question, "Does Mr. Ryan play any role in determining, for example, whether you get raises or any type of bonuses?", Ms. Quon responded, "…As for bonuses, the Office of the Attorney General does not have money for bonuses." (Quon SM, Nov. 29, at 102:8-14.) Ms. Quon then added, "We do have evaluations, but there have been no bonuses." (*Id.* at 102:17-18.) This testimony by Ms. Quon is false. On December 14, 2009, the Washington City Paper reported on Thomas Koger receiving a bonus while facing disciplinary action for his discovery failures in the *Chang* litigation. (*See* Jason Cherkis, *Pershing Park Case: OAG Scapegoat Awarded Cash Bonus*, Washington City Paper, Dec. 14, 2009, attached as Exhibit A.) That article also included a link to a spreadsheet compiled of other DC employees receiving bonuses. Included on that spreadsheet are two entries for "Hyden, Teresa Quon" for bonuses awarded on January 29, 2008, and October 20, 2009, in the amounts of $2,306.04 and $2,470.95 respectively. (*See* Exhibit B, at 38.) The second bonus payment, made on October 20, 2009 was made at approximately the same time as Captain Herold delivered the book to her office – and which Captain Herold has never seen again. (*See*, *infra* at PFOF ¶¶ 208-221.) Since her testimony was only in relation to Officer Strader's discovery of the book, her testimony denying a bonus received around the same time she received the book from Captain Herold has no innocent explanation. Ms. Quon's testimony served to deny a system by which Mr. Ryan could reward or penalize lawyers in his office.

"someone" attempted to delete information from the system. (*Id.* at 24:4-7.) In fact, Chief Lanier learned for the first time during her testimony before the Special Master that someone had selected the delete button for the information the contractor discovered. (*Id.* at 42:20-43:2.)

396. Mr. Ryan also testified that later on May 3, 2011, he attended a meeting with Asst. Chief Anzallo and Chief Lanier to discuss who would investigate the attempted deletion discovered by Mr. Bynum earlier in the day. (Ryan SM, Nov. 9, at 31:17-22, 58:6-60:19, 63:22-64:5.) Even though both Asst. Chief Anzallo and Chief Lanier testified that they clearly informed Mr. Ryan that MPD IAD would not investigate the attempted deletion, Mr. Ryan (after first testifying that he had communicated this decision to OAG line attorneys (*id.* at 87:10-91:17)),[37] testified that he does not recall Chief Lanier or Asst. Chief Anzallo informing him of that decision. (*Compare* Anzallo SM, Jan. 3, at 235:22-24; Anzallo SM, Jan. 4, at 3:21-4:10 & Lanier SM, Mar. 19, at 13:15-14:14, 27:20-23, *with* Ryan SM, Jan. 3, at 82:3-20 & Chang SM (2012) Ex. 24, at p. 11.) Mr. Ryan's testimony is even less credible when one considers Chief Lanier's testimony that "[i]t's not typical for Terry [Ryan] to forget." (Lanier SM, Mar. 19, at 17:24.)

397. Ms. Frost and Ms. Pressley also directly contradicted each other regarding who was present when Mr. Bynum informed those present that someone had attempted to delete the September 2002 E Team data. While Mr. Ryan and Mr. Bynum both testified that Ms. Pressley

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[37] Mr. Ryan first testified that the OAG was directed to inform the Court about the attempted deletion of information from the E Team server. (Ryan SM, Nov. 9, at 90:18-91:16.)

> J. Facciola: But at that point there are now people in the Attorney General's office and you who know that Facciola does not know of the attempt to delete it?
>
> Mr. Ryan: Yes.
>
> J. Facciola: I thought the chief had directed that Facciola was to be told that?
>
> Mr. Ryan: Yes, the Court was supposed to be informed.
>
> J. Facciola: Okay. The Court, this is the Court. I'm Facciola, okay?
>
> Mr. Ryan: Yes.
>
> J. Facciola: Did someone say tell Facciola? I know my name is hard to pronoun[ce]. But did it occur to someone to tell Facciola?
>
> Mr. Ryan: Again, Judge, it was the Office of the Attorney General communicating with you, not me.

(Ryan SM, Nov. 9, at 91:1-91:16.)

was present, Ms. Pressley testified that she was in her office when Ms. Frost called her to tell her she needed to come over to MPD headquarters. (*Compare* Bynum SM, Nov. 28, at 36:15-24, 37:14-16, 95:19-96:1 & Ryan SM, Nov. 9, at 21:6-10, *with* Pressley SM, Dec. 18, at 17:25-18:2, 23:15-24:9.) Ms. Frost testified that Ms. Pressley was at MPD headquarters when Mr. Bynum arrived. (Frost SM, Jan. 11, at 44:22-23, 45:7-9.) In any event, either Ms. Frost or Ms. Pressley provided false testimony. It is clear that either Ms. Pressley or Ms. Frost simply attempted to minimize personal responsibility for taking appropriate action following Mr. Bynum's discovery.

398. Furthermore, Chief Lanier and Attorney General Nathan provided conflicting testimony surrounding the conversation on May 3, 2013, regarding Chief Lanier's decision that MPD IAD would not investigate the attempted deletion of E Team data. Chief Lanier testified that she placed the telephone call to Attorney General Nathan because she disagreed with Mr. Ryan's position (that MPD should investigate the attempted deletion). (Lanier SM, Mar. 19, at 11:24-12:12.) According to Chief Lanier, she called Mr. Nathan because he is the "arbiter" or tie-breaker when she disagreed with Mr. Ryan regarding the appropriate action to take. (*Id.* at 12:4-12:12.) Asst. Chief Anzallo previously testified that Chief Lanier was direct in informing Attorney General Nathan that MPD would not investigate the attempted deletions. (Anzallo SM, Jan. 3, at 228:10-229:5.) In contrast, Mr. Nathan testified that he was never informed MPD IAD would not investigate the attempted deletion. (Nathan SM, May 8, at 10:5-23, 64:3-11.)

399. Finally, NC4 Contractor Eric Kant provided biased and misleading testimony. Mr. Kant's claim that the "delete" button was merely an easier way to move events to a history view (and removed from the active view) within E Team is unsupported and inconsistent with other testimony. Mr. Kant's claim that it involved fewer clicks to "delete" an event than to "close" an event did not stand up to cross-examination. (*See* Kant SM, Nov. 28, at 179:25-180:13 (stating that the alleged extra effort to close an event "makes a big difference" for users).) On cross-examination, Mr. Kant admitted it was the same number of clicks – two – to "delete" and to "close" an event. (*Id.* at 188:19-189:3 (testifying that it was the "same number of clicks").)

400. It was also NC4 policy – and previously E Team's policy – that employees would not select "delete" without explicit instructions from the client, MPD, to do so. (Bynum SM, Nov. 28, at 61:24-62:4; Kant SM, Nov. 28, at 185:24-186:25.) Mr. Kant's testimony that pressing the "delete" button is merely a storage function, is not credible. (Kant SM, Nov. 28, at 146:24-147:12.) When a user selects the "delete" button, a "little pop-up box" appears "and says are you sure." (*Id.* at 187:24-188:10.) The user must then confirm their selection. (*Id.* at 188:8-12.) Indeed, Mr. Bynum testified that he is not aware of any instances in which clients use "delete" as a storage function. (Bynum SM, Nov. 28, at 33:21-23, 80:17-20.)

401. Furthermore, only high-level users, such as Neil Trugman, would have delete rights or even make decisions to delete events. (Kant SM, Nov. 28, at 183:18-186:8 (explaining that delete rights were historically provided to a small number of individuals and Mr. Trugman would have almost certainly been one of those users with delete rights).)

402. The District had the motivation to ensure Asst. Chief Newsham could take "the fall" for Chief Ramsey and the District.

CONCLUSIONS OF LAW

I. Duty to Preserve Evidence

Applicable Law:

Since well before the start of this litigation, it has been undisputed that litigants in this Circuit are obligated to preserve all relevant evidence. Indeed the duty to preserve evidence has been well recognized in District of Columbia case law since at least 1992. *Jeanblanc v. Oliver T. Carr Co.*, No. 91-0128, 1992 WL 189434, at *2 (D.D.C. July 24, 1992) (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"), *aff'd*, 62 F.3d 424 (D.C. Cir. 1995). In *Jeanblanc*, the D.C. Circuit found that a duty arose where the plaintiff – an attorney – willfully destroyed evidence after he knew that a lawsuit was pending, which resulted in the defendant being unable to "effectively cross-examine" the plaintiff to "ascertain which documents he had in his possession." 1992 WL 189434, at *3. As a result, the court dismissed the portion of the plaintiff's claims that related to the destroyed evidence. *Id*. at *4. This legal principle has continued and been strengthened in this Circuit ever since. *See Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 172 (D.C. Cir. 2013); *see also Miller v. Holzmann*, No. 95-1231, 2007 WL 172327, at *3 (D.D.C. Jan. 17, 2007). "[A] plaintiff has a legally protectable interest in the preservation of evidence required for securing recovery in a civil case." *See Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 848 (D.C. 1998).

Reflecting this line of cases, the Sedona Conference defined "Preservation" in this context as "[t]he process of retaining documents and ESI, including document metadata, for legal purposes and should include suspension of normal document destruction policies and procedures." *Sedona Conference Glossary: E-Discovery & Digital Information Management (Third Edition)* 41 (Sept. 2010). Evidence may be relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401; *see also United States v. Khanu*, 664 F. Supp. 2d 35, 41 (D.D.C. 2009). The U.S. Court of Appeals for the D.C. Circuit recently stated that in the context of determining the relevance of spoliated evidence "it is sufficient to draw an inference of relevance where, as here, a party's destruction of evidence has made it more difficult for the plaintiff to establish the relevance of that evidence to the disputed issue of material fact." *Gerlich*, 711 F.3d at 172.

The duty to preserve evidence extends broadly to all evidence that the litigant "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." *Arista Records, Inc. v. Sakfield Holding Co., S.L.*, 314 F. Supp. 2d 27, 33 n.3 (D.D.C. 2004); *see also Gerlich*, 711 F.3d at 170-71 (explicitly adopting the Second Circuit's reasoning in *Kronish v. United States*, 150 F.3d 112 (2d Cir. 1999). In particular, the D.C. Circuit has held that the duty to preserve evidence attached prior to the start of litigation, to handwritten annotations on applications relating to potentially improper hiring practices because lawyers "working for a department regularly involved in litigation" had

"fair warning … that the Department's investigation of such allegations and future litigation were reasonably foreseeable, indeed likely" before the handwritten annotations were destroyed. *Gerlich*, 711 F.3d at 171. Importantly, the court in *Gerlich* noted that the controversy "began boiling up" months before the applications and appended printouts were destroyed. *Id.* at 171.[38]

The duty to preserve extends to "anyone who anticipates being a party or is a party to a lawsuit...." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) *("Zubulake IV"); see also Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 13 (D.D.C. 2011) (defendant had a "clear obligation to preserve the video evidence," two days after the incident, when the plaintiff wrote letter to defendant indicating intent to sue).

Moreover, a party has an obligation to preserve originals of all relevant documents and evidence, as opposed to merely preserving copies. *See Shepherd v. Am. Broad. Cos.*, 151 F.R.D. 194, 199 (D.D.C. 1993), *vacated in part*, 62 F.3d 1469 (D.C. Cir. 1995); *see also Zubulake IV*, 220 F.R.D. at 217 (observing that a party to a lawsuit must not destroy "unique, relevant evidence, that might be useful to an adversary"); *Baliotis v. McNeil*, 870 F. Supp. 1285, 1290-91 (M.D. Pa. 1994) (stating that "[a]t a minimum, … an opportunity for inspection should be afforded a … party before relevant evidence is destroyed.").

"A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010). Similarly, a "failure to collect evidence" or to perform a diligent review that results in "loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful." *Id.* at 465.

The discovery obligations discussed above apply not only to litigants, but also to their counsel. *See Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("Zubulake V") ("Counsel must take affirmative steps to monitor compliance [with litigation holds and document retention and identification obligations] so that all sources of discoverable information are identified and searched."). Put simply, "counsel is responsible for coordinating her client's discovery efforts." *Id.* at 435; *see also Phoenix Four, Inc. v. Strategic Resources Corp.*, No. 05-cv-4837, 2006 WL 1409413, at *5 (S.D.N.Y. May 23, 2006) ("counsel's obligation is not confined to a request for documents; the duty is to search for *sources* of information") (emphasis in original); *Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579, at *6 (S.D.N.Y. Aug. 11, 2005)

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[38] In the District's Supplemental Proposed Findings (Dkt. No. 944), the District argues that, despite ongoing litigation, its routine destruction of evidence is excusable because it did so pursuant to a document retention policy. (*See* Dkt. No. 944 at ¶¶ 48-53.) Not surprisingly, the District did not provide any legal support for this position. Indeed, the law of this Circuit provides no such exception for purported compliance with a document retention policy. The D.C. Circuit has instead expressly adopted the Second Circuit's approach that the duty to preserve arises when a "party has notice that the evidence is relevant to litigation – most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party *should have known* that the evidence may be relevant to future litigation." *Gerlich*, 711 F.3d. at 170 (emphasis in original).

("The preservation obligation runs first to counsel, who has 'a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.'") (citation omitted).

As other courts have noted, for the purpose of discovery sanctions, an attorney's conduct is imputed to his client. *See Lincoln Diagnostics, Inc. v. Panatrex, Inc.*, No. 07-cv-2077, 2009 WL 3010840 (C.D. Ill. Sept. 16, 2009) (citing *Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848-49 (7th Cir. 2009), *cert. denied*, 558 U.S. 1147 (2010)).

A. Failure to Preserve the JOCC Running Resume Officer Strader Discovered

1. As noted in the Plaintiffs' 2011 Findings, the District knew or should have known that the JOCC Running Resume, was relevant to foreseeable litigation on September 27, 2002. (*See* 2011 PCOL ¶ 3.)

2. In any event, the District knew, at the very latest, that litigation was foreseeable on October 15, 2002, when Plaintiffs served their complaint. (*See* 2011 PCOL ¶ 4.)

3. As the 2010 Special Master Hearings also made clear, the District utilized a program named Group Systems to create a JOCC Running Resume that has never been produced. (*See* PFOF ¶¶ 36-50.)

4. The District had a duty to preserve the Group Systems JOCC Running Resume for the September 2002 IMF Event, but failed to do so.

5. In the 2010 Special Master Hearings, there was evidence suggesting that someone in the MPD intentionally deleted the electronic copy of the Group Systems JOCC Running Resume. (*See* 2011 PFOF ¶¶ 146-152.) The evidence of someone twice affirmatively clicking the "delete" button with regard to the E Team data around the same time Mr. Trugman requested access to the Group Systems JOCC Running Resume is significant and compelling evidence verifying Sergeant Jones' prior testimony that a Group Systems JOCC Running Resume existed but subsequently may have been intentionally deleted. (*See* PFOF ¶¶ 63-71.)

6. The evidence of someone twice affirmatively clicking "delete" on the E Team data also bolster's Judge Sporkin's conclusion that:

> We find quite troubling some of the contradictory evidence that surfaced during the inquiry. We are particularly disturbed by the fact that not only have we been unable to retrieve a hard copy of the Running Resume but also that the electronic copy was purged from the system. We have no way of knowing whether this was an act of intentional mischief or reflects a benign action. We do not believe it was the later.

(*See* Chang SM (2010) Ex. 1, at 15.)

7. Notably, when Judge Sporkin wrote these words in December 2009, the District was aware that the previous year, Mr. Bynum had located an electronic copy of one of the

resumes on one of the systems, and was virtually certain it could be recovered. Moreover, the District did not reveal that in 2009, despite Mr. Ryan's assurance that every effort was being made, the District decided not to pay an additional $200 to retrieve the E Team data, and never informed Judge Sporkin. Putting aside these failures of disclosure by the District, the computer record discovery shows an obvious lack of serious effort to retrieve the record despite proceedings before Judge Sullivan and the investigation of Judge Sporkin.

8. When Officer Strader discovered what he thought was a hard copy of the JOCC Running Resume, the District had an on-going and continuing duty to preserve that document.[39]

9. In the Fall of 2009, Officer Strader discovered a book he testified had "JOCC Activation Running Resume" written on the cover and contained references to the events in Pershing Park on September 27, 2002. (*See* PFOF ¶¶ 211-215.)

10. After Officer Strader, through Captain Herold, provided the book to the MPD OGC, that book disappeared. Since then, District officials and lawyers have sought to claim an entirely different book was what Officer Strader found and Captain Herold produced to the MPD OGC. (*See* PFOF ¶¶ 307-343.)

11. Despite Ms. Quon's testimony that Captain Herold told her when he originally handed her the book that it was the September 2002 Running Resume, Ms. Quon, Mr. Ryan, Mr. Koger, and Mr. Harris all failed to log-in, preserve, or maintain a copy of the book. (*See* PFOF ¶¶ 225,303.)

12. It was not until approximately two years later – after the book was placed in and then removed from storage – that Mr. Ryan had a copy made of the book. (*See* PFOF ¶ 303.) Officer Strader and Captain Herold both emphatically deny this second book, that Ms. Quon and Mr. Ryan presented, was the same book they provided – rendering irrelevant any last minute efforts to copy and index the document. (*See* PFOF ¶¶ 307-343.)

13. The District's failure to index and copy the document located and provided by Officer Strader (via Captain Herold) was in direct contradiction to representations to the Court Mr. Ryan made in his declaration in August 2009 – just a few months before Officer Strader discovered the book. (*See* PFOF ¶¶ 242-256.)

14. By August 2009, the District was acutely aware of its duty to preserve evidence in this case. (*See* PFOF ¶¶ 242-243.) Yet, when Officer Strader provided the book that he believed was relevant to the September 2002 IMF Event, the District did not take the minimum steps necessary to ensure compliance with its duty to preserve evidence. (*See* PFOF ¶ 244.)

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[39] The District's claim that hard copies of the JOCC Running Resume did not exist is refuted by the testimony. (*See* PFOF ¶¶ 31-34.) Even when, in later years, the District operated only the E Team system, the District continued to create and maintain hard copies of the JOCC Running Resume. As Officer Strader testified, "I had worked numerous JOCC activations and you always make hard copies. They go to the command staff." (Strader SM, Nov. 8, at 56:8-10.)

15. Despite claiming in a joking fashion that it was the long-missing JOCC Running Resume, no one in the MPD OGC mentioned the discovery to Judge Sporkin – who was investigating the destruction of the JOCC Running Resume around the same time. (*See* PFOF ¶ 252.)

16. In fact, the District's handling of the document in such a cavalier and unprofessional fashion suggests either a total disregard for the District's discovery obligations, amounting to gross negligence, or a deliberate effort to destroy critical evidence the District claimed it had searched for over the years and could not find. After Officer Strader and Captain Herold denied that the book presented to them by attorneys in the MPD OGC was the same book Officer Strader discovered and Captain Herold delivered in the Fall of 2009, the District convened a number of meetings (some under the guise of attorney-client privilege) with all potential witnesses to meet and discuss each witness's recollection and potential testimony in an effort to develop a uniform version of the facts to which, it was hoped, each witness could subscribe. (*See* PFOF ¶¶ 379-392.)

17. As a result, not only did the District destroy evidence, or permit evidence to be destroyed through indifference; it then took steps to develop a storyline that was intended to mislead the Court and the parties regarding its actions. (*See* PFOF ¶¶ 379-392.)

B. Failure to Preserve the September 2002 E Team Data

18. It is undisputed that (1) someone affirmatively selected the delete function with regard to the September 2002 IMF Event E Team data and (2) that the attempted deletion did not occur until February 12, 2003. (*See* PFOF ¶¶ 112-115.)

19. Since the duty to preserve attached, at the very latest, on October 15, 2002, the District's failure to preserve and produce the E Team data until after May 4, 2011, was itself evidence of the District's gross failure to comply with its duty to preserve relevant evidence. (*See* PFOF ¶ 113.)

20. Even had the "delete" function employed in connection with the E Team data been nothing more than a "save" mechanism, as the District now claims but Plaintiffs dispute, that does not explain or justify the District's failure to produce the E Team data until after May 4, 2011 – years after substantive discovery in the case, except for the Special Master's proceeding, had concluded. (*See* PFOF ¶¶ 76-103.)

21. In particular, the District claims it conducted extensive searches for E Team data over the years – including Mr. Crawford searching the E Team server using the EnCase software. (*See* 2011 PFOF ¶¶ 212-213.)

22. To the contrary, there is compelling evidence that someone connected with the MPD or the District intentionally attempted to delete the E Team data at around the same time the Group Systems Running Resume was deleted. (*See* PFOF ¶¶ 112-113; 2011 PFOF ¶¶ 143-151.) The indications that the failure to produce the E Team data was more than inadvertence, but resulted from a conscious effort to destroy evidence and obstruct the Court proceeding, is relevant to the nature and severity of appropriate sanctions.

23. While the District's initial failure to preserve and produce the September 2002 E Team data cannot be excused, the District doubled-down in its efforts to obstruct discovery by failing again in 2008 and 2009 to investigate the retrievability and then produce the E Team data, or even inform the Court and the parties that such was a possibility.

24. The District failed to disclose the existence and recoverability of the E Team data for over two more years before eventually disclosing the data's existence, despite the attempt to delete it. *(See* PFOF ¶¶ 76-103.) The District's failure to disclose the existence of the E Team data, or produce the data, violated the Court's Order compelling the production of the JOCC Running Resume. (*See Chang* SM (2012) Ex. 73, Dkt. No. 351, Oct. 30, 2007.) If the E Team data is the JOCC Running Resume, which the District claims but the Plaintiffs dispute, the production of this data in 2008 could well have saved the Court, the District, and the parties significant expense by avoiding a substantial portion of the Special Master's proceedings. That fact alone is sufficient basis for awarding substantial sanctions against the District, including at least Plaintiffs' attorneys' fees and costs from at least May 2008 forward.

25. In continuing to violate the Court Order compelling production, the District again withheld the E Team data when it declined to contract with E Team (subsequently, NC4) to search for the data in 2009 as a result of a dispute over $200. (*See* PFOF ¶¶ 90-96.) The District failed again to bring this information to the attention of the Court or the parties. The District's current claims of the significance of the E Team data are belied by its cavalier handling of this data. The District's obvious artifice is only made more evident by the District's misleading statements about the extent of its search for E Team data (2011 PFOF ¶¶ 212-13), and the District's withholding from the Court and the Plaintiffs information pertaining to Mr. Bynum's prior efforts to search for the data and his subsequent discovery of the attempted deletion. (*See* PFOF ¶¶ 76-103.)

II. Duty To Search For And Retrieve Relevant Evidence.

Applicable Law:

"During discovery, the producing party has an obligation to search available electronic systems for the information demanded." *McPeek v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001) (citing Fed. R. Civ. P. 34(a), which provides that the term "document(s)" includes "data compilations from which information can be obtained"); *see also Peskoff v. Faber*, 244 F.R.D. 54, 62 (D.D.C. 2007) (same).

Any claims that searching for, preserving, and producing the three most important types of contemporaneous evidence in this case – the Running Resume, the audio tapes, and the video tapes – would be too burdensome are simply inconsistent with the clear discovery requirements imposed by the Rules of Civil Procedure and this Court. For example, this Court has previously ordered a defendant to "conduct a search of all depositories of electronic information in which one may reasonably expect to find all emails to [the Plaintiff], from [the Plaintiff], or in which the [Plaintiff's name] appears … Defendant must also file a statement under oath by the person who conducts the search, explaining how the search was conducted, of which electronic depositories, and how it was designed to produce and did in fact produce all of the emails…." *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007). Furthermore, Fed. R. Civ. P. 26(b)(2)(C)

would have provided the District an opportunity to seek this Court's limitation on the search for particular documents or types of documents if the District really believed it was being subjected to an undue burden. *See McBride v. Halliburton Co.*, 272 F.R.D. 235, 241 (D.D.C. 2011).

"The [C]ourt applies a 'reasonableness' test to determine the 'adequacy' of a search methodology[.]" *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998) (quoting *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). Although an agency need not search every record system, an "agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

26. The 2010 Special Master Hearings provided clear evidence of the District's failure to search for and produce the Group Systems JOCC Running Resume, the audio tapes, and the video tapes. Additionally, as disclosed in the 2012-2013 Special Master Hearings, the District was aware that E Team data related to the September 2002 IMF Event existed, and could have been recovered, in at least May 2008.[40] (*See* PFOF ¶¶ 76-86.)

27. Once the District became aware, in at least May 2008, that E Team data for the September 2002 IMF Event existed on servers at MPD headquarters, the District (and its counsel) had a duty to search for and produce the data.

28. Instead, the District did nothing to retrieve that data or to inform the Court and the Plaintiffs that the data existed. (*See* PFOF ¶¶ 76-96.) As a result of this failure to attempt to retrieve the data in 2008, the District's search was neither reasonable nor adequate.

29. The District only disclosed the existence of its search for the E Team data when it responded to the Court's October 25, 2010 Minute Order. (*See* Chang SM (2012) Ex. 41; *see also* Chang SM (2012) Ex. 11 (stating that NC4 is "cautiously optimistic, based on a survey of one of the servers, that information on the server from the relevant time period is still capable of being extracted" but failing to disclose that the referenced survey occurred more than two years earlier in 2008.).)

30. The District ignored its ongoing obligations to supplement discovery (*see infra* § III), comply with the Court's Order to produce the E Team data, which it now claims was the JOCC Running Resume, or to describe in detail the nature and scope of the District's search. (Chang SM (2012) Ex. 73.)

[40] As mentioned above, the District failed to take steps to search for, preserve, and produce the E Team data even though it existed as an active event in the E Team system until February 12, 2003. If the "delete" function was truly a save function that was commonly used by MPD or NC4 employees, the District should have discovered and produced the data long before 2011. Indeed, the District's failure to conduct a reasonable search for the E Team data following the Court's October 30, 2007 Order (Chang SM (2012) Ex. 73), is emblematic of the District's ongoing and extensive discovery failures in this case.

III. Duty to Supplement Discovery

Applicable Law:

Federal Rule of Civil Procedure 26 imposes a continuing obligation on parties and their counsel to supplement or correct a disclosure "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 66 (D.D.C. 2010).

In *Elion v. Jackson*, 544 F. Supp. 2d 1, 7 (D.D.C. 2008), this Court found that the defendants had a duty to disclose a witness's identity under Fed. R. Civ. P. 26(b), even if her testimony was "intended to be used solely for impeachment." Moreover, the Court found that, even if the relevance of her testimony was not known to the defendant at the time it responded to an interrogatory, Fed. R. Civ. P. 26(e) imposed a duty to disclose her identity "as soon as it became known to defendant or as soon as defendant understood" that her testimony fell within the scope of the plaintiff's interrogatory. *Id.*; *see also Kifle v. Parks & History Ass'n*, CIV.A. 98-00048(CKK), 1998 WL 1109117 (D.D.C. Oct. 15, 1998) (at the point when plaintiffs received treatment for emotional distress, plaintiffs had a duty to supplement initial disclosures that stated that plaintiffs did not have documents related to damages for emotional distress); *Oliviere v. McGraw Edison Co.*, CIV.A. 87-600, 1987 WL 25452 (D.D.C. Nov. 20, 1987) (awarding attorney's fees under Rule 11 in a lost wage case, where plaintiff's attorney did not disclose to defendants that plaintiff dropped out of college in the Fall semester after an expert testified at a deposition in July that the calculation of damages was premised on plaintiff graduating).

31. Beyond the District's well documented failures to preserve audio recordings, video recordings, and the Group Systems JOCC Running Resume, the District's continued failures to disclose in a timely fashion the E Team data or the JOCC RR Book Officer Strader discovered are strikingly similar to the behavior for which the District was sanctioned in *D.L. v. District of Columbia*, 274 F.R.D. 320, 323 (D.D.C. 2011). There, the court sanctioned the District for violating Rule 26(e) because the District continued to produce documents on a "rolling" basis, including up to the eve of trial. 274 F.R.D. at 323 ("the District apparently 'decided it would file an incomplete answer and then supplement it whenever it pleased.'").

32. Over the ten years since the *Chang* litigation began, the District consistently has ignored its duty to supplement discovery by not producing documents called for by discovery or producing them at its whim, sometimes only unsuccessfully attempting to keep relevant information completely hidden. (*See* Plaintiffs' Motion for Sanctions, Dkt. No. 418, Jan. 16, 2009; *see also* Plaintiffs' Renewed Motion for Sanctions, Dkt. No. 505, Sept. 15, 2009.) This continued even despite the initiation of a Special Master investigation into the District's repeated violations of discovery rules and orders. *See D.L.*, 274 at F.R.D. 328 ("How many times can a

litigant ignore his discovery obligations before his misconduct catches up with him?") (citing *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1319 (10th Cir. 2011)).

33. The District kept hidden the E Team data for over two-and-one-half years. (*See* PFOF ¶¶ 76-103.)

34. The District kept hidden the existence and nature of Officer Strader's discovery for approximately two years. It required a letter from the Fraternal Order of Police to Judge Sullivan – which the District desperately sought to bar from the public record – before the incident involving Officer Strader's discovery, and subsequent disappearance, of critical evidence in this case came fully to light. (*See* Chang SM (2012) Ex. 32, Dkt. No. 826.)

A. The District Had a Duty to Disclose the Fact that the E Team Data Could Be Retrieved When The District Learned That Information in May 2008; Nevertheless, the District Withheld That Information for Over Two Years.

35. On October 30, 2007, Judge Sullivan ordered "that the District of Columbia shall produce the Joint Operations Command Center (J.O.C.C.) running resume for September 27, 2002, before the close of discovery on November 16, 2007; and [further 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." (*See* Chang SM (2012) Ex. 73.)

36. As previously described, all hard copy and electronic versions of the Group Systems JOCC Running Resume have disappeared, as the result of either gross negligence or intentional destruction. (*See* 2011 PFOF § IV, H-R.) In addition, at least in May 2008, the MPD knew of the existence of the E Team data, which the District now claims was the "real" JOCC Running Resume, yet did not inform the Court or the parties of its existence. (*See* PFOF ¶¶ 76-86.)

37. Even though Mr. Bynum conducted a survey of MPD's servers in May 2008 and concluded that he was 95% certain the data could be recovered, the District did not inform Plaintiffs or the Court of this discovery. (*See* PFOF ¶ 102.)

38. In 2009, the District again sought information from NC4 regarding the recovery of the same E Team data that Mr. Bynum discovered in 2008. Yet, even after Mr. Ryan and others in the MPD Office of General Counsel learned that NC4 would need to visit the District (again) to review MPD's servers, the District did not contract for NC4's services due to a purported dispute over $200. (*See* PFOF ¶¶ 87-96.)

39. The District failed to inform the Court or the Plaintiffs regarding the existence of E Team data until November 2010. (*See* Chang SM (2012) Ex. 11.)

40. The District's failure to supplement its responses to the Court's October 30, 2007 Order is a plain violation of Fed .R. Civ P. 26(e) and the District's duty of candor to the Court under D.C. Bar Rule 3.3.

41. Only three reasonable conclusions can be drawn from the District's failures regarding the E Team data:

i) the District did not view the E Team data as relevant evidence or evidence likely to lead to relevant evidence;

ii) the District was aware that the E Team data could be found and retrieved but, by providing false statements to the Court, sought to withhold that information from the Court; or

iii) the District was aware that there had been an attempt to delete the E Team data and recognizing that such actions could be a criminal law violation, as well as deeply embarrassing to the District and its lawyers, sought to withhold the information about the attempted deletion from the Court.

42. Under any such scenario, the District's recent claims that the E Team data is the only JOCC Running Resume created for the September 2002 IMF Event lacks credibility, particularly in light of the District's failure to inform the Court in 2008 of the existence of the E Team data, and its refusal to pay an additional $200 to retrieve the supposedly critical document. For the District's claim to be correct, it must concede its intentional violation of Judge Sullivan's Order to Compel and the its failure to comply with its obligations to the parties and the Court under the Federal and Local Rules.

B. The District Had a Duty to Disclose the Existence and Nature of Officer Strader's Discovery.

43. The District failed to supplement its discovery responses to disclose Officer Strader's discovery of relevant evidence.

44. The District knew in 2009 of Officer Strader's and Captain Herold's statements that the book they discovered and delivered was relevant to the September 2002 IMF Event. (*See* PFOF ¶¶ 208-241.)

45. Nonetheless, despite the District's claims of lengthy searches for the JOCC Running Resume, the District withheld any information regarding the document Officer Strader discovered – from the time of Judge Sporkin's investigation through the Special Master's first round of hearings – even though the District allegedly maintained the book Officer Strader found (or the book the District claims Officer Strader found) in Mr. Ryan's office because it was "related" to the *Chang* litigation. (*See* PFOF ¶¶ 246-252.)

46. In fact, had the Fraternal Order of Police not submitted a letter to Judge Sullivan detailing Officer Strader's discovery, or had the District successfully prevented a public airing of the FOP letter, Officer Strader's discovery would never have become known to the Special Master or the Plaintiffs. (Chang SM (2012) Ex. 32.)

IV. The District's Failure To Preserve and Produce Discovery Prejudiced Plaintiffs.

Applicable Law:

"Prejudice" is defined as "[d]amage or detriment to one's legal rights or claims." Black's Law Dictionary (9th ed. 2009). Although it does not appear that D.C. courts have specifically defined prejudice in terms of spoliation, other courts have stated that "[t]he prejudice inquiry 'looks to whether the spoiling party's actions impaired the non-spoiling party's ability to go to trial or threatened to interfere with the rightful decision of the case.'" *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (quoting *Wiltec Guam, Inc. v. Kahaluu Constr. Co.*, 857 F.2d 600, 604 (9th Cir.1988)); *see also Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 532 (D. Md. 2010) ("Generally, courts find prejudice where a party's ability to present its case ... is compromised."). 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 plaintiffs case may have suffered because of defendant's obstructive tactics," and, for that reason, concluded that prejudice could be presumed even without a showing of actual prejudice. In that case, the events that led to the suit arose eight years prior, and "every day of delay caused by the defendant's misconduct [made] it less likely that plaintiff will be able to locate the witnesses and documents he needs to build his case." *Id*. at 6.

A party who fails to comply with its discovery obligations, or actively conceals or destroys relevant discovery, cannot rely on the non-production of that discovery to claim an absence of prejudice to the party seeking the discovery. *Ashford v. E. Coast Express Eviction*, No. 06-cv-1561 RJL/JMF, 2008 WL 4517177 (D.D.C. Oct. 8, 2008). In *Ashford*, the defendants argued that, because no employment records existed that would have shown whether plaintiffs worked for them, the plaintiffs must not have worked for them. *Id*. at *2 (stating that "it is self contradictory (besides taking a remarkable amount of *chutzpah)* for the Butch Defendants to claim that the absence of the records they did not keep shows that the plaintiffs did not work for them."). This Court held that "it is settled beyond all question that at common law the destruction, alteration, or failure to preserve evidence in pending or reasonably foreseeable litigation warrants the finder of fact inferring that the destroyed evidence would have been favorable to the opposing party." *Id*. (internal citations omitted). The *Ashford* defendants had known since "at least the filing of the complaint" that "payroll records and work requests were at the very heart … of the lawsuit," and defendants either did not keep the records in the first place or the records were destroyed despite the pending lawsuit. As a result, this Court entered an adverse inference in favor of the plaintiffs. *Id*. at *3. The same reasoning and result should apply here.

47. Despite the recent discovery of the E Team data, which the District treated as unimportant until 2011, there is still significant and compelling evidence that the Group Systems JOCC Running Resume was destroyed, along with audio recordings, video recordings, and countless other documents, as a result of the District's discovery failures. (*See* 2011 PFOF ¶¶ 128-136.) It is clear it would have been the Group Systems version of the JOCC Running Resume that would have contained detailed information highly relevant to this case and potentially confirmatory of Chief Ramsey's role in the mass arrests, long disputed by the District. (*See* 2011 PFOF ¶¶ 84-103.)

48. Each time the District failed to produce discovery in a timely manner, produced discovery long after it was due or long after it was useful, or forced Plaintiffs to expend the time and expense of proving the District's spoliation, separately prejudiced the Plaintiffs. In addition, each such incident constituted a new and separate violation of the Court's Rules and a continuing failure by its lawyers to comply with their professional responsibilities.

49. For example, the District's failure to disclose the existence of Officer Strader until years after he became a relevant witness – waiting until only after the FOP submitted a letter to Judge Sullivan detailing allegations of witness tampering and destruction of evidence by the MPD OGC – forced the Plaintiffs to confront conflicting and coordinated testimony and required many additional months of preparation and participation in the Special Master's proceedings. Similarly, had the District disclosed the existence of the E Team data in 2008 or 2009, a major portion of the Special Master's proceedings may not have been necessary.

A. The District's Failure to Preserve and Produce The Book Officer Strader Discovered Prejudiced the Plaintiffs.

50. It was not until over two years after Officer Strader discovered the JOCC RR Book that the Court and the Plaintiffs learned of Officer Strader's existence and his discovery.

51. The District also failed to perform the minimal tasks of cataloging and indexing the book Officer Strader discovered in the Fall of 2009 – as Mr. Ryan had represented he would do in his Declaration to the Court in August 2009. (*See* Chang SM (2012) Ex. 88.)

52. When Officer Strader was presented with a book in August 2011, he emphatically denied it was the same book he provided to the MPD OGC (through Captain Herold) in 2009. (*See* PFOF ¶¶ 307-336.) Captain Herold provided a similar response. (*See* PFOF ¶¶ 307-343.)

53. Following Officer Strader's clear statements that the book Ms. Quon and Mr. Ryan presented was not the same book he discovered, District counsel had a direct and improper hand in allowing, if not encouraging, witnesses to coordinate testimony. Specifically, Ms. Frost organized meetings for Mr. Ryan and Ms. Quon to be present for Captain Herold's account of Officer Strader's discovery. (*See* PFOF ¶¶ 379-381.) When Captain Herold also denied he was presented with the same book he provided to Ms. Quon, Ms. Frost organized yet another meeting – this time with Mr. Ryan, Ms. Quon, Officer Strader, and Captain Herold present. (*See* PFOF ¶ 382.) After that meeting was stopped because Officer Strader would not relinquish his union rights, Mr. Causey held a series of meeting with Mr. Ryan and Ms. Quon that allowed each of them to discuss their recollection of events and coordinate their testimony. (*See* PFOF ¶¶ 383-393.)

54. Not only was the document Officer Strader discovered not logged in and preserved as evidence (until years later), but Mr. Ryan and the other MPD OGC attorneys admitted that the document remained on tables and the desk of Mr. Ryan over the course of months. They further admitted that people routinely entered Ryan's office alone to retrieve or leave documents.

55. Because Officer Strader is clear that the book contained references to Pershing Park September 27, 2002, and had JOCC Activation Running Resume written on the cover, this

Court's precedent requires that all reasonable inferences regarding the contents of the book found by Officer Strader be drawn against the spoliator – the District.

B. The District's Failure to Preserve and Produce the E Team Data When Mr. Bynum First Discovered it in 2008 Prejudiced the Plaintiffs.

56. In 2008, Mr. Bynum could have performed the very same tasks he performed in 2011, which would have resulted in the District's recovery and production of the E Team Data. (*See* PFOF ¶ 156.)

57. The District did not disclose the existence of the survey until Mr. Bynum's deposition in August 2011. (*See* PFOF ¶ 102.) The evidence of attempted deletions could have been discovered in 2008.

58. As a result of the District's failure to preserve and produce the E Team data in 2008, Plaintiffs were unable to investigate spoliation claims at an earlier time, when recollections would have been fresher and whatever evidence existed in the E Team data could have been thoroughly explored.

V. The District Violated Its Duty to Conduct A Reasonable Investigation Before Responding to Discovery and Made Affirmative Misrepresentations to the Court.

Applicable Law:

Under Fed. R. Civ. P. 26(g), every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response or objection "must be signed by at least one attorney of record." Fed. R. Civ. P. 26. By signing, the attorney certifies that, "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry," the disclosure "is complete and correct as of the time it is made." *Id*. In *Jankins v. TDC Mgmt. Corp., Inc.*, 131 F.R.D. 629, 634 (D.D.C. 1989), the court imposed sanctions and awarded attorneys fees to a plaintiff after a defendant failed to respond to interrogatories, and "engaged in a pattern of conduct evidencing deliberate and willful disregard of the requirements of the Federal Rules and the orders of a court." The court found that "the history of the conduct" of defendants' counsel was a "deliberate failure to comply" with Rules 26(g) and Rule 11. *Id; see also Brock v. Cnty. of Napa*, No. 11-0257, 2012 WL 2906593 (N.D. Cal. July 16, 2012) (finding a violation of the duty to conduct a "reasonable inquiry" when the defendant claimed its failure to produce documents was an "oversight," noting that "Rule 26(g) does not require an intentional violation.").

Similarly, in *Perkinson v. Houlihan's/D.C., Inc.*, 108 F.R.D. 667, 674 (D.D.C. 1985), the court granted plaintiffs attorneys' fees after the defendant's attorney committed a number of discovery violations – especially in violation of Rule 26(g). 108 F.R.D. at 674. In *Perkinson*, the District Court sanctioned the defendant for, among other things, violating Rule 26(g) and Rule 11 for failing to seek documents from his client *prior* to responding to the plaintiff's discovery requests. *Id.* Such a shoot-first approach to discovery violates the requirement that an attorney's response was "formed after reasonable inquiry." *Id.* The attorney's Rule 26(g) and Rule 11 violations ultimately led to the client destroying the documents called for in the plaintiff's discovery response. *Id.* The court awarded attorney's fees and sanctions, finding that

"the sheer number of abuses" and acts of "discovery obstruction" contradicted defense counsel's claims that it "acted in good faith" throughout the litigation and showed a "continuing serious disregard" for the court's authority and Rules of Civil Procedure. *Id*. at 675. Here, the District's actions in this case are similar to those in *Perkinson.*

Furthermore, the District's counsel violated D.C. Rule of Professional Conduct 3.3(a)(1), which says, "[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer...." As comment 2 to Rule 3.3 makes clear, "There may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." This Court constitutes a "tribunal" for purposes of this obligation, as Rule 1.0(n) defines that term. D.C. Rule of Professional Conduct 3.3(a)(4) provides that "[a] lawyer shall not knowingly offer evidence that the lawyer knows to be false...." Rule 3.3(d) further provides that "[a] lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take remedial measures, including disclosure to the tribunal...."

As the district court said in *Shepherd v. American Broadcasting Company*:

> Just as an attorney should not submit any pleading or motions to the court without believing them to be well-grounded in law and fact, Fed. R. Civ. P. 11, so too should an attorney submit only those declarations made by witnesses who have personal knowledge and are credible.

151 F.R.D. at 209, *vacated on other grounds*, 62 F.3d 1469 (D.C. Cir. 1995); *see also Robertson, ex rel. Robertson v. District of Columbia*, No. 01-01405, 2006 WL 2244593, at *3 (D.D.C. Aug. 4, 2006) ("Attorneys have an affirmative duty to ensure that representations they make to courts are accurate and correct.").

"An assertion purported to be made by the lawyer, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." D.C. R. Prof. Conduct 3.3, cmt. 2. Moreover, "[t]here may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. If the lawyer comes to know that a statement of material fact or law that the lawyer previously made to the tribunal is false, the lawyer has a duty to correct the statement." *Id*.

In *Act Now to Stop War & End Racism Coal. v. Dist. of Columbia*, 286 F.R.D. 117, 122-23 (D.D.C. 2012), the court found that the District had violated Rule 3.3 by propounding interrogatories that related to claims that had been dismissed, and later refused to withdraw interrogatories that related to the dismissed claims. The District defended its interrogatories by claiming that the Court's Scheduling Order "did not impose any such [discovery] limits on the District, much less prohibit the District from propounding any discovery at all." *Id*. at 119. The court imposed sanctions on the District because it violated the Scheduling Order, which did not authorize the District to propound any discovery. *Id*. (reminding the defense counsel from the Office of the Attorney General that "they owe a duty to the people of the District of Columbia to act prudently and honestly on their behalf").

59. The District failed to disclose the existence of two key pieces of evidence, which may have led to the further destruction of evidence, inadvertent or otherwise.[41]

60. The District's failure to reasonably investigate the completeness of its responses to discovery – especially its Supplemental Responses to Plaintiffs' Interrogatories (Chang SM (2012) Ex. 24) – thwarted Plaintiffs' ability to timely inquire into certain events before memories faded with time or were clouded through joint witness preparation sessions.

61. The District's repeated discovery violations evidence a continuing disregard for this Court's authority and the Rules of Civil Procedure, and are so egregious as to warrant severe sanctions, including the awarding of attorneys' fees under Rule 26.

62. In addition to the numerous instances of false or misleading statements made in District pleadings, declarations, or statements before the Court that Plaintiffs noted in the 2011 Proposed Findings, the District has continued to violate its duty of candor to this Court and to the Plaintiffs.

63. On May 4, 2011, the District informed the Court that E Team data had been discovered on the E Team server by an NC4 contractor. In disregard of its obligation of candor to the Court, the District failed, however, to inform the Court or the Plaintiffs that the E Team data showed evidence that someone had affirmatively selected the delete function for that data in February 2003.

64. Ms. Pressley, counsel for the District and a member of the D.C. Bar, made the decision to withhold the attempted deletions from the Court and the Plaintiffs. (*See* PFOF ¶¶ 147-148.) Another counsel for the District and a member of the D.C. Bar, Ms. Frost, joined with Ms. Pressley in filing the notice with the Court on May 4, 2011, which also failed to include the fact that Mr. Bynum discovered attempted deletions on the E Team data. (Chang SM (2012) Ex. 36.)

65. Ms. Pressley and Ms. Frost noted their appearance during a status conference with the Court on May 4, 2011, which occurred via teleconference. During this status conference, neither Ms. Pressley nor Ms. Frost informed the Court of the attempted deletions Mr. Bynum had discovered. (*See* PFOF ¶¶ 145-148.)

66. Mr. Ryan, also a member of the D.C. Bar, was also in the room with Ms. Pressley and Ms. Frost during the May 4, 2011 teleconference with the Court, although he did not note his appearance for the record. (*See* PFOF ¶ 144.) Mr. Ryan had been so concerned about the evidence of an attempted deletion that he requested an immediate IAD investigation. (*See* PFOF ¶¶ 117-118.) Nonetheless, despite the fact that he had been told there would be no IAD investigation and, instead, was ordered by Chief Lanier to provide the information of the attempted deletion to Judge Facciola, he failed to inform the Court of the attempted deletions that Mr. Bynum discovered.

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[41] These two recent examples are in addition to the pattern of destruction related to audio recordings, video recordings, the Group Systems JOCC Running Resume, and the plethora of electronic and hard copy document discovery the District failed to preserve and produce.

67. Under the circumstances, the District's failure to disclose Mr. Bynum's findings constituted a misrepresentation to the Court under D.C. Rule of Professional Conduct 3.3.

68. The District continued that misrepresentation for 70 days and through four intervening additional status conferences. (*See* PFOF ¶¶ 157-166.) Despite this, the District disclosed the information concerning Mr. Bynum's findings to counsel for the individual defendants approximately one week after the discovery. (*See* PFOF ¶¶ 157-159.)[42]

69. When the District finally disclosed Mr. Bynum's discovery, District counsel, without any basis and after making no effort to confirm the accuracy of their statements, falsely represented to the Court that MPD IAD was conducting an investigation into the attempted deletions of the E Team server. (*See* PFOF ¶ 174.) This constituted a misrepresentation to the Court and a failure reasonably to determine the accuracy of their representations to the Court in violation of D.C. Rule of Professional Conduct 3.3 and Federal Rule of Civil Procedure 26(g).

70. Subsequently, the District represented to the Court and the Plaintiffs that the District had referred the attempted deletions of the E Team data to the FBI for investigation when, in fact, District counsel reasonably knew, or could have determined, the FBI did not investigate the attempted deletion. Despite this, the District, through its counsel, relied on the existence of an FBI investigation in their efforts to close or stay the Special Master's investigation during the pendency of the claimed FBI investigation. (*See* Chang SM (2012) Ex. 38.) This constituted a misrepresentation to the Court and a failure to determine the accuracy of their representation to the Court in violation D.C. Rule of Professional Conduct 3.3 and Federal Rule of Civil Procedure 26(g).

71. Following the Special Master's denial of the Motion to Stay Discovery, the District continued to seek affirmative relief from the Court on the basis of the alleged existence of an FBI investigation into attempted deletions of the E Team. (*See* P-FOF ¶¶ 186-193.) Each of these subsequent filings constituted a misrepresentation to the Court and a failure to determine the accuracy of their representation to the Court in violation D.C. Rule of Professional Conduct 3.3 and Federal Rule of Civil Procedure 26(g).

72. For over two years, the District was aware of Officer Strader's existence and his claim that he discovered the long-missing JOCC Running Resume for the September 2002 IMF Event. Despite the fact that Special Master hearings were held in the Fall of 2010, and that there were subsequent disclosures related to the E Team data, the District did not disclose Officer Strader's discovery. Under the circumstances, the District's failure to disclose Officer Strader's discovery constituted misrepresentation to the Court in violation D.C. Rule of Professional Conduct 3.3 and this Court's prior discovery order compelling the production of the JOCC Running Resume.

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[42] The District's claim that it wanted Mr. Bynum to disclose the information during a not-yet-scheduled deposition is unpersuasive. Without any indication from the District that the information had been the subject of an affirmative attempted deletion, whether Plaintiffs would have elicited such information from Mr. Bynum was left entirely up to chance.

VI. Attorney General Nathan Violated His Duty of Supervision Pursuant to D.C. Bar Rule 5.1.

Applicable Law:

Under D.C. Rule of Professional Conduct 5.1, an attorney having direct supervisory authority over another lawyer shall make "reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Moreover, the supervising attorney is responsible for another lawyer's violation of the Rules of Professional Conduct if the supervising attorney "knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." *Id*.

Importantly, the duty to supervise applies even if the supervising attorney did not know of the misconduct. *In re Cohen*, 847 A.2d 1162, 1166 (D.C. 2004) ("[T]he 'reasonably know' provision was carefully crafted to encourage – indeed to require – supervising attorneys to reasonably monitor the course of a representation … denying them the ostrich-like excuse of saying, in effect, 'I didn't know and didn't want to know.'"). *In re Cohen* involved an associate at a law firm who made a materially false statement by withdrawing a trademark application, which did not accurately represent the client's position and resulted in the client's trademark application being abandoned. *Id*. The *Cohen* defendant – the supervising partner at the law firm – was sanctioned by the D.C. Bar, and was suspended from practice for one month. *Id*.

73. Attorney General Nathan was the direct supervisor of Mr. Ryan, and the indirect supervisor of Ms. Pressley and Ms. Frost (as well as Mr. Causey), and his name appears on the District's briefs and other filings in this case. (*See* PFOF ¶ 4.)

74. In this case, Attorney General Nathan violated D.C. Rule of Professional Conduct 5.1 for failing to monitor the professional conduct of Ms. Pressley, Ms. Frost, and Mr. Ryan as they took actions in clear violation of the Federal and Local Rules and their individual professional responsibilities as members of the D.C. Bar. This relates particularly, but not exclusively, to representations they made or did not make pertaining to the E Team data.

75. Nor is this a situation where Attorney General Nathan's involvement in this case was only hypothetical, or where he possessed no unique knowledge critical to the information disclosed to the Court. Chief Lanier and Asst. Chief Anzallo testified that Chief Lanier informed Attorney General Nathan that MPD would not investigate the potential deletion of E Team data. This was critical information that was inaccurately conveyed to the Court by District counsel, and they share blame for the failure to make reasonable efforts to investigate the veracity of their representations. Yet, Mr. Nathan – the ultimate supervisor of the District's trial team and a person whose name appears on their filings with the Court – took no steps to inform his line attorneys of the Chief's decision, nor did Mr. Nathan inquire with OAG attorneys to ensure they had received the accurate information. *See Monroe*, 135 F.R.D. at 8 (stating that it was appropriate to punish the District for discovery abuses of a single counsel because, in part, the trial attorney's superiors were familiar with past discovery abuses and their names "appear above his name on every document he has filed").

76. Like the situation in *Monroe*, in which the court imposed default judgment against the District, Attorney General Nathan was "certainly aware" of the OAG's attorneys' "past problems with the discovery process," yet Mr. Nathan took no steps to ensure the District lived up to its discovery obligations in this case, and even blamed the Plaintiffs for the resulting delays in completing the litigation. (*See* Nathan SM, May 8, at 60:25-61:2.)

77. Moreover, Mr. Nathan's conduct is in direct contrast with that of his predecessor, who personally appeared several times before Judge Sullivan to assure the Court that the District took seriously the discovery abuse that has occurred in this case and would seek to investigate and correct them. Mr. Nathan has abandoned any such recognition of his supervisory role that Mr. Nickles had promised to the Court and Judge Sullivan had sought. (*See* Chang SM (2012) Ex. 107, at 32:25-33:1; *see also*, D.C. Code § 1-301-8-1 (providing the Attorney General with statutory responsibility for all litigation on behalf of the District.).)

78. Finally, Mr. Nathan allowed OAG counsel to file numerous pleadings with the Court that contained false and misleading information regarding the existence of IAD and FBI investigations into the E Team data, when no such investigations ever occurred. One of these misleading pleadings included a request to close the Special Master proceedings entirely. (Chang SM (2012) Ex. 38.) Mr. Nathan's name remained on the signature block of each of these filings by District counsel, lending his personal credibility, and the credibility of his office, to these misrepresentations.

79. All of these misrepresentations were directly contradicted by information Mr. Nathan personally learned from Chief Lanier. (*See* PFOF ¶ 133.)

VII. Mr. Harris's Conduct Violated D.C. Bar Rule of Professional Conduct and Raised Serious Concerns Under Applicable Criminal Laws.

Judge Sullivan and the Special Master have previously received evidence of how a false declaration was filed on behalf of Ms. Alexander on the audiotape evidence in this case. This evidence included false statements originally made by District Counsel and witnesses on the tampering or alteration of these tapes. The matter reached a new level with the testimony of Ms. Alexander. After first invoking her Fifth Amendment privileges (*see* Dep. of D. Alexander, Dkt. No. 948-5), Ms. Alexander secured counsel separate from the OAG and ultimately testified that Mr. Harris drafted the declaration and pressured her to sign it. (*See* 2011 PFOF ¶ 306.) She testified that she never stated the facts included in the statement by Mr. Harris and that in fact the declaration was false on critical issues. (*See* 2011 PFOF ¶ 309.) The false declaration has never been withdrawn by the District. (*See* 2011 PFOF ¶ 316.)

This intentional inclusion of possible perjurious statements on the record has been discussed in previous filings. They also feature prominently in the course of misconduct described in these proceedings. The potential violations range from criminal violations for perjury and obstruction of justice to violations of D.C. Rules of Professional Conduct 3.3 and 8.4. Given the focus on the most recent violations, Plaintiffs refer the Special Master to the prior record and filings for a complete description of the allegations against Mr. Harris. (*See, e.g.*, 2011 PFOF ¶¶ 292-317.)

VIII. Mr. Ryan Violated D.C. Bar Rule of Professional Conduct 1.7.

Applicable Law:

Rule 1.7(b)(4) states: "Except as permitted by paragraph (c) [requiring informed consent from the client and the lawyer's reasonable belief that his representation will remain diligent and competent], a lawyer shall not represent a client with respect to a matter if: (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by … the lawyer's own financial, business, property, or personal interests." As comment 11 to Rule 1.7 says, "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." Under Rule 1.7(b)(4), the lawyer is barred from representing the client "in the absence of informed consent." Rule 1.7, cmt. 1. As defined by Rule 1.0(e), informed consent requires the lawyer to communicate "adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."

80. Mr. Ryan continued to act as an attorney representing the District and the MPD in matters related to the document Officer Strader discovered, despite a clear conflict of interest under Rule 1.7(b)(4).

81. Once Officer Strader denied the book he was shown was the same book he provided, via Captain Herold, to the MPD General Counsel's office, Mr. Ryan had a personal interest – his credibility. (*See* PFOF ¶ 320 (stating that Officer Strader clearly implicated Mr. Ryan's knowledge of having received the actual book Officer Strader discovered by referencing the tour of the CIC while Mr. Ryan held the real book.).)

82. Mr. Ryan failed to withdraw as attorney or limit or clearly define his role during later meetings with Officer Strader and Captain Herold.

83. Mr. Ryan also failed to obtain informed consent from the District – at a minimum either from the Chief of Police or the Attorney General, after full disclosure – before continuing his role as an attorney on these matters.

84. Mr. Ryan also had a clear conflict of interest related to the discovery of attempted deletions of the E Team data in 2011.

85. Mr. Ryan knew of the existence of the E Team data in 2009. Even after filing a declaration in August 2009 that he would begin a search for the E Team data (Chang SM (2012) Ex. 88, ¶ 8), he did not update the Court on the status of that search, even though it was clear that the data apparently could have existed on MPD servers. In fact, by 2008 the District had become aware that NC4 was virtually certain it could recover the data.

86. The discovery of the E Team data in 2011 called "the probity of [Mr. Ryan's prior] conduct" into "serious question." The clear conflict that existed is best demonstrated by Mr. Ryan's withholding of key information from his immediate client, Chief Lanier – the fact that it was clear someone had selected the "delete" button on the data.

87. Mr. Ryan not only failed to obtain informed consent related to clear personal conflicts, but his role as an attorney for the District was compromised in a significant manner.

88. Mr. Ryan's continued involvement as an attorney related to these two matters was a clear violation of Rule 1.7.

IX. Ms. Frost Violated D.C. Bar Rule of Professional Conduct 3.7.

Applicable Law:

Rule 3.7 states: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client." None of these exceptions apply to this case. As this Court recognized in *Healy v. Labgold*, No. 00-0465, 2002 WL 32901631 (D.D.C. Apr. 4, 2002), it is inappropriate for counsel to serve both roles as witness and counsel in sanctions proceedings pursuant to Rule 11. The circumstances here are no different. The Special Master's proceedings are akin to a trial for purposes of Rule 3.7. *Id.* at *4 (noting that counsel who were representing clients at a Rule 11 sanctions hearing would be required to withdraw from representation if the attorneys were to testify).

89. Earlier, Ms. Frost and Mr. Causey had recognized that Ms. Frost was a "likely" witness as a result of her conducting joint interviews of a number of witnesses regarding the book Officer Strader discovered.

90. The District recognized her status as a "likely" witness in December 2011 when the District and Ms. Frost decided that she would not participate in Officer Strader's or Captain Herold's deposition. (*See* PFOF ¶¶ 375-378.)

91. But even though "nothing changed" between December 2011 and November 8, 2012, Ms. Frost appeared as counsel for the District for the 2012-2013 Special Master Hearings. (*See* PFOF ¶ 377.)

92. As Ms. Frost knew, Officer Strader was the first witness scheduled for the resumed proceedings on November 8, 2012. Mr. Ryan was the second scheduled witness. (*See* PFOF ¶¶ 377-378.) Both witnesses were directly involved in the series of meetings that Ms. Frost had held in August and September 2011 regarding Officer Strader's discovery. (*See* PFOF ¶¶ 377-378.)

93. Yet, Ms. Frost remained in the courtroom as counsel for the District throughout the first two days of testimony. At the end of Officer Strader's testimony, the Court directed a number of questions to Ms. Frost regarding Officer Strader's testimony, seeking clarification based on her presence in the very meetings Officer Strader just testified about. (Strader SM, Nov. 8, at 118:15-119:20.) It was only after she heard all of Officer Strader's testimony and

most of Mr. Ryan's testimony, that Ms. Frost left the courtroom – and then only because she was ordered by the Court to leave due to her role as a witness.[43]

94. Not only was her appearance as counsel improper when she and the District knew she was a "likely" witness, but her appearance necessarily allowed her an opportunity to hear Officer Strader's and Mr. Ryan's testimony and, thereby, shape and influence her own testimony. (*See* PFOF ¶¶ 377-378.)

95. Ms. Frost should have known that, as a potential witness, she was subject to the Special Master's admonition to witnesses not to discuss their testimony with other witnesses. The rule on witnesses "exercises restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid." *Benn v. United States*, 801 A.2d 132, 140-41 (D.C. 2002) (citing *Geders v. United States*, 425 U.S. 80, 807 (1976)).

96. The purpose of the rule is to guarantee that the recollection of one witness is not affected by the testimony of an earlier witness. *Id*; *see also* John H. Wigmore, 6 *Wigmore on Evidence* § 1838, at 463 (Chadbourn ed., 1976) ("when all allowances are made it remains true that the expedient of sequestration is (next to cross examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."). In *Minebea Co., Ltd. v. Papst*, 374 F. Supp. 2d 231, 235 (D.D.C. 2005), the court refused to allow an attorney/witness to sit in the courtroom during witness testimony, because the court's "concern about the tailoring of testimony or coaching of witnesses," which it believed would occur, "based on the conduct of counsel … during discovery and the history of the case."

97. Ms. Frost sat through a number of breaks during the first two days of testimony in which this Court admonished the witnesses not to discuss their testimony with other witnesses – a role Ms. Frost knew she was "likely" to attain but, nonetheless, failed to respect. *(See* PFOF ¶¶ 375-378.)

[43] Mr. Ryan did not testify further on November 9, 2012, following Ms. Frost's expulsion from the courtroom. Following the Court's suggestion, Mr. Ryan conferred with District counsel and requested personal counsel before continuing his testimony in January 2013. Mr. Ryan's testimony on November 8th and 9th went into great detail regarding the events surrounding Officer Strader's discovery – giving Ms. Frost an opportunity to hear both witnesses recount their recollections.

X. The Special Master Should Refer This Matter for Investigation of Possible Obstruction of Justice and Prosecution as Warranted.[44]

Applicable Law:

18 U.S.C. § 1512(b) provides: "Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to (1) influence, delay, or prevent the testimony of any person in an official proceeding … shall be fined under this title or imprisoned not more than 20 years, or both." Similarly, 18 U.S.C. § 1512(c) provides: "Whoever corruptly (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so … shall be fined under this title or imprisoned not more than 20 years, or both." Importantly, an attempt is a violation of § 1512(b) and (c) regardless of success. "Official proceeding" means, as relevant here, "a proceeding before a judge or court of the United States." 18 U.S.C. § 1515(a)(1)(A).

Courts have imposed a nexus requirement – that is, the defendant's conduct must "have a relationship in time, causation, or logic with the judicial proceedings." *United States v. Reich*, 479 F. 3d 179, 185 (2d Cir. 2007); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-08 (2005) (requiring a nexus between the conduct and the official proceeding for purposes of § 1512). In other words, "the endeavor must have the natural and probable effect of interfering with the due administration of justice." *Reich*, 479 F.3d at 185 (citing *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (requiring a "nexus" under a similar statute, 18 U.S.C. § 1503)). In *Reich*, the Second Circuit held that sufficient evidence existed to uphold the defendant's conviction under § 1512(c) for causing a forged Court order to be served on opponents in litigation in an attempt to obstruct official proceedings. *Reich*, 479 F.3d at 185-87 (finding the nexus requirement satisfied based on the natural chain of events that occurred following the service of the forged court order).

In *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996), the D.C. Circuit upheld a conviction under § 1512(b) because the defendant "tried to 'corrupt' [a witness] by exhorting her to violate her legal duty to testify truthfully in court." In that case, the Court held that the "manner of influencing" another to testify falsely was important, but it did not require the use of

[44] As *Chang* Plaintiffs stated during the final hearing on May, 8, 2013, it is appropriate for the Special Master to recommend referrals of various District Counsel to the D.C. Bar for its investigation of ethical violations that call into question the attorneys' fitness to practice law. Based on the record developed throughout the Special Master's proceedings, there is sufficient evidence for the Special Master to recommend referral of Mr. Ryan, Mr. Harris, Ms. Quon, Mr. Koger, Ms. Pressley, and Ms. Frost for investigation by Bar Counsel. In light of his failure to supervise the ethical practices of his line attorneys, and his proclaimed satisfaction with their conduct in this case, a referral of Mr. Nathan's conduct may also be appropriate. So as not to unnecessarily hamper the District's ability to defend itself, Plaintiffs take no position as to a possible referral of Mr. Causey, other than to point out that, once he assumed the position of lead counsel for the District, Mr. Causey participated in a number of the same actions for which the professional ethics of other District counsel have been questioned.

threats or intimidation. *Id.* at 629-30; *see also United States v. Darif*, 446 F.3d 701, 711-712 (7th Cir. 2006) (finding jury instructions sufficient that required the jury to find "that Defendant attempted to corruptly persuade [a witness] to provide false testimony" and "acted knowingly with intent to influence [the witness's] testimony" relating to "a particular proceeding"). In *United States v. Norris*, 719 F. Supp. 2d 557, 564 (E.D. Pa. 2010), the Court found the indictment sufficient when it alleged the defendant "and his co-conspirators 'discussed and agreed' to create and tell a story in connection with the grand jury investigation."

As explained in *United States v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994), intent may be proved circumstantially. "The statute only requires that the jury be able reasonably to infer from the circumstances that [the defendant], fearing that [an official proceeding] had been or might be instituted, corruptly persuaded persons with the intent to influence their possible testimony in such a proceeding." *Id.* (citing *United States v. Shively*, 927 F.2d 804, 811 (5th Cir. 1991) ("Under this statute, intent may, and generally must, be proved circumstantially.")).

A. Destruction of Evidence

98. As Ms. Quon testified, when Officer Strader discovered the book in the Fall of 2009, it "was something that was very serious, and … there were going to be implications, very serious implications for us having found this so late." (Quon SM, Nov. 28, at 245:9-16; *see also* PFOF ¶¶ 222-226.) The implications were well-known throughout MPD. When Officer Strader sought out Sergeant Jones to deliver the book upon discovery, Mr. Wilkins told Officer Strader, "[i]f I were you, I would wipe my prints off of it, drop it in an envelope, put it in the mail and address it to the general counsel's office." (Strader SM, Nov. 8, at 25:7-13.) Mr. Ryan was well aware of the seriousness of Officer Strader's discovery. (Ryan SM, Nov. 8, at 177:4-14.)

99. Ms. Quon and Mr. Ryan knew of the existence of ongoing discovery proceedings in this case when Officer Strader discovered the book. (*See* PFOF ¶¶ 222-226, 247-250.)

100. Ms. Quon and Mr. Ryan failed to log in, maintain, or produce the book Officer Strader found, and sought to substitute another in its place. Whether this was through specific intent by both or either of them to destroy, hide, or otherwise suppress the book and evidence of its existence, or through willful blindness to their obligations to the Court and the parties, should be the subject of a law enforcement investigation. These actions, and an apparent conspiracy to further these actions, continued at least until their disclosure by the FOP to the Court in 2011.

B. Witness Tampering

101. Ms. Quon, Mr. Ryan, and Ms. Frost knew of the existence of ongoing proceedings in this case in August 2011.

102. When organizing the various meetings in August and September 2011, Ms. Quon, Mr. Ryan, and Ms. Frost were aware that Officer Strader, Captain Herold, Ms. Quon, and Mr. Ryan would likely be called as witnesses in future proceedings in this case. (*See* PFOF ¶¶ 387-388.) Ms. Frost testified that she wanted to "get everyone in one room to look at the book and try [to] figure out what had happened and why there was this disconnect" – even though Ms. Frost did not "seriously question Ryan's and Quon's account that this [was] the book." (Frost SM, Jan. 11, at 6:15-23.)

103. The District's organization and participation in numerous joint witness preparation sessions was a potential violation of § 1512(b). *Darif*, 446 F.3d at 711-12; *Norris*, 719 F. Supp. 2d at 564.

104. The District knowingly utilized improper means, such as joint witness meetings, when it was clear that credibility would be at issue, and thereby failed to ensure that the testimony of its witnesses, including Ms. Quon, Mr. Ryan, and Ms. Frost, was not influenced, or could not delay or prevent truthful testimony before the Special Master in this case regarding the discovery of the JOCC RR Book discovered by Officer Strader. (*See* PFOF ¶¶ 379-392.)

105. By organizing meetings with Officer Strader, in which he was confronted and pressured by two other witnesses telling him "That's the book," the District may have improperly sought to influence Officer Strader's and Captain Herold's testimony in a manner that could violate the witness tampering statute.

106. It is clear that Officer Strader felt significant pressure to say something that wasn't true. (*See* PFOF ¶ 331.) So much so that after his initial meeting with Mr. Ryan and Ms. Quon, he sought the assistance of his union representative. (*See* PFOF ¶¶ 344-345.)

107. The District's clear efforts to convince Officer Strader and Captain Herold to change their testimony should be referred for investigation as a possible violation of 18 U.S.C. § 1512(b).

108. Even when the meetings with Officer Strader and Captain Herold ceased in September 2011, Ms. Quon and Mr. Ryan continued to have joint witness meetings to discuss their testimony. These meetings occurred in the presence of Mr. Causey, after he entered an appearance in this case on December 7, 2011. (*See* PFOF ¶¶ 383-391.) These meetings occurred well after Officer Strader and Captain Herold disputed the recollections of Mr. Ryan and Ms. Quon. (*See* PFOF ¶¶ 383-391.)

109. District counsels' efforts to organize meetings for Ms. Quon and Mr. Ryan to recount their recollections in front of each other should be referred for investigation as possible obstruction of justice under 18 U.S.C. § 1512(b) because of the apparent effort to coordinate their testimony.

XI. Recommended Sanctions

Applicable Law:

"It is settled beyond all question that at common law the destruction, alteration, or failure to preserve evidence in pending or reasonably foreseeable litigation warrants the finder of fact inferring that the destroyed evidence would have been favorable to the opposing party." *Ashford*, 2008 WL 4517177, at *2 (citing *United Med. Supply Co.*, 77 Fed. Cl. at 263). Thus, when a party either fails to preserve or destroys relevant or potentially relevant evidence in foreseeable litigation, it can be deemed to have engaged in the "spoliation of evidence," and a trial court may impose an appropriate sanction. *See Jackson v. Fedders Corp.*, No. 94-0344, 1996 U.S. Dist. LEXIS 7306 (D.D.C. May 21, 1996). Put more forcefully, when relevant records are not collected, reviewed, and produced, "the integrity of the judicial process is harmed

and the courts are required to fashion a remedy." *Pension Comm.*, 685 F. Supp. 2d at 461-62; *see also Victor Stanley*, 269 F.R.D. at 525 (noting that "the duty to preserve evidence relevant to litigation of a claim is a duty owed to the *court*...") (emphasis in original).

Courts are encouraged to consider many factors in deciding upon sanctions, and the "choice of sanctions should be guided by the 'concept of proportionality' between offense and sanction." *United States v. Philip Morris U.S.A., Inc.*, 327 F. Supp. 2d 21, 25 (D.D.C. 2004) (quoting *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996)). In fashioning sanctions, 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). Additional "major consideration[s] in choosing an appropriate sanction" are "punishing [the wrong-doer]," "deterring future misconduct," and "restor[ing the injured party] to the position that [it] would have been in had [the wrong-doer] faithfully discharged its discovery obligations." *Zubulake V*, 229 F.R.D. at 437.

Available sanctions, which "include dispositive sanctions, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence," are divided "into two categories: (1) punitive or penal sanctions; and (2) issue-related sanctions." *D 'Onofrio v. SFX Sports Grp.*, No. 06-687, 2010 WL 3324964, at *5 (D.D.C. Aug. 24, 2010) (citing *Shepherd*, 62 F.3d at 1475, 1478 (citing Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse §* 28(A) (2d ed. 1994))). Punitive or penal sanctions, such as dismissal, default or summary judgment, contempt orders, and attorneys' fees awards, require a finding of "clear and convincing evidence of the predicate misconduct." *Id.* (citing *Shepherd*, 62 F.3d at 1478). Issue-related sanctions, such as adverse evidentiary determinations and evidence preclusion, on the other hand, are "fundamentally remedial rather than punitive" and can be imposed "whenever a preponderance of the evidence establishes that a party's misconduct has tainted the evidentiary resolution of the issue." *Id.* (citations omitted); *Chen*, 839 F. Supp. 2d at 11. The *Chen* court found the plaintiff met her burden of showing "clear and convincing evidence" of defendant's misconduct, because "negligent spoliation sufficed," and the defendant had destroyed video evidence after receiving a letter from the plaintiff indicating her intent to bring suit. 839 F. Supp. 2d at 14. As a result, the court granted plaintiff reasonable attorney's fees. *Id*. at 17.

Preclusion can "ensure that a party will not be able to profit from its own failure to comply" with discovery rules or mandates set forth by the Court. *Butera v. District of Columbia*, 235 F.3d 637, 661 (D.C. Cir. 2001) (citing *Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir. 1977)). "Preclusion can take two forms. It may be affirmative (a party is precluded from proving a fact) or negative (a party is precluded from disproving what the other party's evidence establishes)." *D 'Onofrio*, 2010 WL 3324964, at *7. Preclusion may be necessary to "guard against abuses of the judicial process," deter discovery misconduct, and "discourage[e] sloppiness, a significant consideration in a world where too many businesses still may not have efficient and useful record-keeping policies." *Id.*

110. Based on the facts of this case, both issue-related and punitive sanctions are warranted and appropriate.

111. The evidence establishes by clear and convincing evidence that the District violated its discovery obligations and that that misconduct has tainted the evidentiary resolution of the *Chang* Plaintiffs' claims.[45]

112. The District's actions were the result of either intentional misconduct or gross negligence by the District and its counsel.

113. The *Chang* Plaintiffs clearly were prejudiced by the above breaches of discovery obligations owed by the District. Indeed, in a mass arrest case, the three most important forms of evidence are the running resume, videotape evidence, and audiotape (or radio run) evidence. In this case, each of these forms of evidence has been found to have been lost or destroyed or altered by the District over the course of years of contested discovery.

114. Accordingly, the Court should enter three types of sanctions in this case: 1) default judgment against the District on its *Monell* liability; 2) evidentiary sanctions; and 3) financial compensatory sanctions.

A. Default Judgment Against the District on its *Monell* Liability

115. The entry of default judgment is appropriate here because there is "clear and convincing evidence" that the District engaged in systematic document destruction that would have been relevant to the District's *Monell* liability. In *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, No. 10-1929, 2013 WL 2172117 (D.D.C. May 20, 2013), the District Court entered default judgment, dismissed a counterclaim, and awarded attorneys' fees to the plaintiff for expenses caused by defendant's failure to comply with discovery orders. The Defendant, among other things, responded to interrogatory requests six weeks late, and produced only 104 pages of documents in response to 85 discovery requests.

Additionally, the court explained justifications that support sanctions in the case of discovery violations:

> The D.C. Circuit has articulated three basic justifications to support the use of dismissal or default as a sanction for misconduct. *Id.* First, such sanctions may be justified if the Court determines that the ability of the non-offending party to present or defend its case has been severely prejudiced by the actions of the party to be sanctioned. *Id.; see also D.L.*, 274 F.R.D. at 325. Second, the Court may consider whether the party's misconduct has put "an intolerable burden" on the Court by requiring it to modify its own docket and operations in order to accommodate the party's delays. *Id.* Finally, the Court may consider the need "to sanction conduct that is disrespectful to the court and to deter similar misconduct in the future.

[45] For the reasons stated in the 2011 Findings, the evidence establishes (by a margin far exceeding a preponderance) that the District and the individual District Defendants violated their discovery obligations to ensure discoverable materials were preserved.

Ugwuonye, 2013 WL 2172117, at *4. (citing *Shea v. Donohoe Const. Co.*, 795 F.2d 1071, 1077 (D.C. Cir. 1986) ("We have recognized in the past that attorney misconduct that does not give rise to actual prejudice to the other party, or even a presumption of prejudice, may still put an intolerable burden on a district court by requiring the court to modify its own docket and operations in order to accommodate the delay.")).

116. The District's behavior – on a par with that described in *Ugwuonye* – occurred over the course of ten years, and in fact has not stopped.

117. The District's pattern of destruction is directly related to evidence that would otherwise demonstrate Chief Ramsey, a person with policymaking authority, was present for and ordered, or specifically ratified the order, to illegally arrest approximately 400 people in Pershing Park on September 27, 2002. Chief Ramsey's role in the illegal arrests of approximately 400 people is supported by other evidence in the record. (*See*, *e.g.*, Aff. of Detective Paul Hustler, Dkt. No. 560-1 at ¶ 2, Nov. 18, 2009 (stating that he heard Chief Ramsey say that the MPD was "going to lock them up and teach them a lesson"); Dep. of Captain Ralph McLean, Mar. 3, 2010, at 38:2-43:18 (the relevant excerpt filed at Dkt. No. 617-11) (testifying that Chief Ramsey said "lock those motherfuckers up.").) The sworn testimony of these two officers is also corroborated by other evidence in the record. (*See* Report on Investigation of the MPD's Policy and Practice in Handling Demonstrations in the District of Columbia, *Barham* Dkt. No. 264-8 & -9 (stating that Chief Ramsey was present approximately 30 minutes before the decision to arrest was made.).)

118. The District disputes Chief Ramsey's role in the arrests, seeking to avoid *Monell* liability by placing sole blame for the arrest on a lesser officer, Assistant Chief Newsham. Plaintiffs do not agree that, even if Chief Ramsey did not give the direct order to arrest, that the District would escape *Monell* liability.

119. What is significant for these purposes, however, is that the District failed to preserve documents (2011 PCOL ¶¶ 6-33); failed to conduct a reasonable search for documents (2011 PCOL ¶¶ 37-40); misrepresented the scope of its search for documents (2011 PCOL ¶¶ 34-36); and misrepresented the nature and existence of relevant evidence (2011 PCOL ¶¶ 60-62, 73-81) – all of which potentially would have confirmed Chief Ramsey's role in the arrests. Furthermore, when its failures were discovered, the District denied any of its misconduct was material to the case (Dkt. No. 944 at ¶ 204.), and, when all else failed blamed Plaintiffs. (Nathan SM, May 8, at 60:25-61:2.) *See Monroe v. Ridley*, 135 F.R.D. at 8 (entering default judgment against the District for willful failure to comply with discovery orders); *see also Webb v. District of Columbia*, 189 F.R.D. 180, 186 n.8 (D.D.C. 1999) (imposing default judgment after the District "argued, and insisted that the Court should impose no sanction whatsoever" after significant evidence of discovery failures).

120. There is clear and convincing evidence that the District destroyed, altered or failed to produce audio recordings, video recordings, and the Group Systems JOCC Running Resume, all of which were the most relevant, contemporaneous records relevant to the Plaintiffs' claims. The absence of that evidence has substantially prejudiced the Plaintiffs.

121. A local government can be held liable under § 1983 if "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" can be causally related to the alleged unconstitutional conduct of the employee. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978).

122. Determining who has final policymaking authority is resolved by the court as a matter of state law. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) ("Reviewing the relevant legal materials, including state and local positive law, as well as 'custom or usage having the force of law' … the trial judge must identify those officials … who speak with final policymaking authority for the local government [entity] concerning the action alleged to have caused the particular constitutional or statutory violation at issue.").

123. Evidence of final policymaking power can also be established by "custom or usage" by presenting evidence that the official customarily made policymaking decisions of the kind in question. *See, e.g., Robertson v. District of Columbia*, 2003 U.S. Dist. LEXIS 26517 (D.D.C. 2003) (the court looked to evidence in depositions, evidence about the routine practices of the Department of Corrections and the Board of Education, and other circumstantial evidence presented to determine whether officials had final policymaking authority).

124. It is clear that Chief Ramsey had policymaking authority for the District. 6A D.C.M.R. 800.7 ("Subject to applicable laws, rules, regulations, and orders of the Mayor or directives pursuant to orders of the Mayor, the Chief of Police shall have full power and authority over the department and all functions, resources, officials, and personnel assigned thereto."), *available at* http://www.dcregs.dc.gov/Gateway/FinalAdoptionHome.aspx?RuleVersionID=733725.[46]

125. The missing audio recordings, video recordings, and JOCC Running Resume are the most relevant pieces of evidence that would have allowed Plaintiffs to prove Chief Ramsey's role in the arrests, and thus the District's liability pursuant to *Monell*. Without conceding that *Monell* liability would not apply if Chief Ramsey were not involved in the arrest order, the result of the District's destruction, alteration and withholding of evidence has been to severely prejudice the Plaintiffs in their ability to offer evidence and prove the District is subject to liability pursuant to the Supreme Court's decision in *Monell*.

126. There is also an abundance of evidence to suggest the systematic destruction was, in the words of Judge Sporkin, due to, at a minimum, "intentional mischief." (Chang SM (2010) Ex. 1, at 15-16.) Indeed, the District had the motivation to intentionally destroy evidence in an effort to escape *Monell* liability. (*See* PFOF ¶ 402.)

127. Furthermore, despite the overwhelming evidence of massive evidence spoliation, the District now claims it did nothing wrong (*see, e.g.,* Dkt. No. 944 at ¶ 204) – making a default judgment even more appropriate.

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[46] *See also* 6A D.C.M.R. 800.4 ("The Chief of Police shall, when necessary, immediately proceed to the scene of any riot, tumultuous assemblage, or other unusual occurrence and take command of the force and direct its efforts in the work at hand.").

128. These practices by the District are not new. In fact, they were described exactly almost fourteen years ago by Judge Lamberth in ordering a default judgment against the District for discovery violations: "The unmistakable message from Corporation Counsel to the Court was that the defendant was unconcerned with the Court's frustration and unwilling to timely participate in the Court's efforts to see that justice was fairly administered." *Webb*, 189 F.R.D. at 186 n.8.

129. Put simply, "The Court cannot reclaim the time and resources lost baby-sitting defendant's discovery efforts, nor could an award of attorney's fees avoid the disruption to the Court's schedule necessitated by continuing a trial date and extending discovery." *Id.* at 192.

130. Furthermore, the District destroyed nearly every piece of significant, contemporaneous evidence that would establish specifically who gave the illegal order to arrest nearly 400 people in Pershing Park on September 27, 2002: audio recordings, video recordings, and the JOCC Running Resume.

131. An order of default against the District on the issue of *Monell* liability is appropriate.

B. Evidentiary Sanctions

132. The entry of evidentiary sanctions is appropriate regarding all other remaining issues – including individual liability – in this case.

133. Plaintiffs proposed a number of evidentiary sanctions in their 2011 Findings (Dkt. No. 777-1 at 35-38), that remain appropriate in this case.[47]

134. Plaintiffs believe those evidentiary sanctions are adequately supported by the record before the Special Master. *Id.*

135. In addition, the Court should preclude the District and each individual District Defendant from using any documentary evidence, deposition testimony, or other forms of evidence produced or elicited at the end of the discovery period (post-November 13, 2007), after the close of discovery, or which has yet to be produced. The preclusion of E Team data is especially appropriate in light of the District's view of the data until 2011 – irrelevant and unofficial. (*See* PFOF ¶¶ 76-96.)

136. The District has previously stated that such a preclusion order is "a just sanction" and that the District "does not object to its imposition." (*See* Dkt. No. 426 at 37.)

[47] As explained in Plaintiffs' 2011 Proposed Findings, it is appropriate for the Court to direct that designated facts be taken as established for purposes of the action pursuant to Federal Rule of Civil Procedure 37. (*See* Dkt. No. 777-1 at 35 n.13.)

C. Financial Compensatory Sanctions

137. The District should be ordered to reimburse the *Chang* Plaintiffs for the cost of all prior discovery, which has been made useless or incomplete because of the District's discovery abuses and destruction of evidence. Such sanctions would not only compensate Plaintiffs for their substantial, but ultimately devalued, discovery efforts to date, but also would stand as a deterrent for future misconduct by the District in this and other cases by making perfectly clear to the District and other litigants that violations of discovery obligations come at a considerable cost.

138. Judge Sullivan has previously indicated that the District would be responsible for all of the costs of discovery during the resumed discovery period – which began on September 29, 2009, and continues to this day. (*See* Tr. of July 29, 2009 Hearing at 43.) Indeed, in response to *Chang* Plaintiffs' suggestion that the Court force the District to reimburse the Plaintiffs for "all discovery," the Court responded that such a suggestion "may not be an unreasonable sanction at all." (*Id.* at 22-23.)

139. The imposition of the costs of discovery both before Judge Sullivan and the Special Master appears to be the only way to make the District understand that it cannot continue to ignore its obligations to the Court and to make its lawyers understand their professional obligations to the Court, the parties, the bar, and the citizens of the District. A major imposition of costs should make clear that the District cannot simply run up the costs for litigants and delay litigation as a tactic to grind its opponents into submission. Until the costs of such conduct is imposed on the District, this trend will continue.[48] Conversely, the imposition of costs of discovery will deter the District from future violations.

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[48] One of the most disturbing aspects of this litigation is that the Court and Special Master were hearing testimony of willful violations of orders and federal rules in this case while other judges were describing the same misconduct and negligence by the OAG in other cases. Judges in this District have criticized the OAG for such dilatory and obstructive tactics for years, but the OAG continues to engage in the same practices undeterred. (*See, e.g.*, *Huthance v. District of Columbia*, 793 F. Supp. 2d 177, 180 (D.D.C. 2011) ("Indeed, the District's behavior in this case may have surprised Huthnance, but it wouldn't surprise anyone familiar with the District's unique approach to the discovery process. This sort of behavior is quickly becoming the rule for the District—not the exception. It's no exaggeration to say that to be on the safe side, the District's litigation adversaries would be well advised not to begin preparing for trial until after it's under way because it's very likely that the District will not produce key discovery until then—at the earliest."); *D.L.*, 274 F.R.D. at 327 ("Instead, the District failed to produce documents for over two years, violated multiple Court Orders in the process, and instead of informing the Court of the situation at any point along the way, it simply sprung the news on the first day of trial. The District's complaints of lack of resources and time pressure fall on deaf ears because it failed to seek relief through any of the Rule-based mechanisms discussed above. Accordingly, it is without excuse."). These practices continue because the District is not required to bear the cost – and the responsibility – for delaying cases and withholding evidence. Such costs should be imposed before trial to establish a bright line for the District that such conduct will not be tolerate in this case or future cases.

Respectfully submitted,

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Dated: July 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2013, I caused copies of the foregoing to be served by electronic means on all counsel of record through the Court's CM/ECF system.

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