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

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| JEFFREY BARHAM et al., Plaintiffs, v. CHARLES RAMSEY, et al., Defendants. | Case No.: 02-CV-2283 (EGS)(AK) |

**THE BARHAM CLASS' CONSOLIDATED REPLY TO DEFENDANT DISTRICT OF COLUMBIA AND CHARLES H. RAMSEY'S OPPOSITION TO BARHAM CLASS' RENEWED MOTION FOR SANCTIONS (DOC. NO. 538), AND TO DEFENDANT CHARLES H. RAMSEY'S RESPONSE TO BARHAM AND CHANG PLAINTIFFS' RENEWED MOTIONS FOR SANCTIONS (DOC. NO. 539)**

The dust is settling on the issues underlying sanctions, which is to say the facts are increasingly undisputed as to the scope of destruction and outrageous discovery abuse in this matter. The District does not argue, and indeed concedes, the facts as alleged by plaintiffs in terms of what materials were once, and are now no longer, in existence. The scope of destruction is undisputed. It is vast. The District cannot resurrect or recover that which was permanently destroyed. Yet it claims that the plaintiffs undertaking six months of additional discovery will repair, or suffice as sanction for, the extraordinary damage that the defendants have inflicted on this case, on plaintiffs' rights to a fair process, on this Court's resources, on plaintiffs' counsel, and the damage inflicted on the integrity of the litigation process and the rule of law.

Now, if ever, was the time for the District to come clean. Instead, it shamelessly seeks to mislead this Court in its defensive and false presentation leading to one and only one conclusion: that the District, far from cleaning up its act, seeks still to use its extreme misconduct to its litigation



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advantage. The only mitigation that the District is engaging in is the fallout to itself legally and politically from its misconduct. As discussed further herein, the recent deposition conducted this past Friday, October 23, 2009, which the District attempted to evade and only attended under compulsion of this Court's Order, was a stunning revelation of the ongoing reality of the District's discovery abuses.

The District's unabated efforts to minimize the severity of its loss, destruction and tampering of evidence, even at this late date, only emphasizes the need for meaningful and effective sanctions to issue.

It is an undisputed fact that the S.O.C.C. / J.O.C.C. running resume, in all its copies and formats, electronic and hard copy, is lost. Were the loss of this fundamental and comprehensive operational log and database to exist standing alone, it would justify the sanctions requested.

It is undisputed and "[t]he District concedes that these [radio runs or police recorded communication] audio tapes appear in some, **if not all**, instances to be incomplete recordings of the identified time periods." Opp. at 11 (emphasis added). Were this loss of selected data across multiple communication channels at the time of the arrest decision and execution to exist, standing alone, it would justify the sanctions requested.

As reflected in an October 28, 2009 deposition, taken only yesterday, (transcript as yet unavailable), there is a 40 minute break in the police video recordings of Pershing Park between 9:45 a.m. and 10:24 a.m., [1] encompassing the same time that the radio runs are missing the critical minutes.

In the October 23, 2009 records deposition, which proceeded over the District's objection and solely because of Court Order, the District conceded a stunning loss of electronic records including e-

[1] The police video recordings of Pershing Park produced by the District to the Barham plaintiffs reflect similar gaps to those outlined by Chang plaintiffs in their reply filing, which argument is incorporated by reference.

mails. It conceded that the e-mail search directed by the MPD Office of General Counsel was *limited to the search of e-mail subject lines* and did not encompass the body of e-mails. See Ex. 1, Rule 30(b)(6) Dep. of the District of Columbia (D.C. Deponent Kimberly Thorpe) at 189:19 – 190:12; 208:13 – 213:18. The District conceded that, furthermore, this wholly inadequate *search was only through those e-mails that remained then-existing on the network that had not been deleted* by users by an arbitrarily selected day in or around March, 2004 some eighteen months after the underlying events. Id. at 219:10 – 220:5. The District conceded *it did not search backup tapes, despite knowing that backup tape cartridges for no less than one year and possibly longer existed at the time of the e-mail search*. Id. at 227:6 – 229:20. The District conceded *that its search through computer files such as word processor documents was only to search for an exact match of a key word to a word in the document title only*, for those documents not already deleted by the user by the arbitrary search date in or around March, 2004. The body of documents was never searched. Id. at 157:11 – 158:7. *After this patently improper and inadequate "search" was performed all unrecovered and unsearched e-mail or document data was destroyed.*

Again, standing alone, this would justify severe sanctions.

Moreover, the District admitted that it had thousands of pages of material that were captured from this inadequate search, so much so that a flatbed dolly was necessary to transport it. Under plaintiffs' questioning the deponent then admitted that those thousands of pages were delivered to the office of the General Counsel of the MPD. To this date these thousands of pages have never been produced to plaintiffs, even after the July 29th sanctions hearing, even after the OAG had sworn to this Court that it was undertaking a comprehensive sweep and had represented to plaintiffs that the sweep was fully completed and the final documents were being produced. Yet these documents were never identified by the OAG, despite its claims of a comprehensive sweep, never produced, and are

now only coming to light because of the deposition that the *Chang* plaintiffs were forced to move to compel.

There is a mountain of proof of destruction, tampering, loss and secretion of evidence. The severity, scope and repetitiveness of the destruction, even across a broad range of circumstances, manifest purposeful allowance of loss or willfulness of destruction and secretion.

The District, in opposition, argues an absence of culpable intent in that destruction of evidence. It does not explain how material was destroyed or lost or withheld from plaintiffs while in the very possession of counsel. It does not explain who was responsible for what appears at points to be particular acts of unlawful and potentially criminal misconduct. It does not explain what concrete actions are being taken. Its brief can be summed up primarily as pushing two points: 1) whatever happened, it is of no real significance or prejudice, and 2) trust us to self-police.

The District, however, argues only in the abstract. The District's presentation suffers from the persistent and fatal flaw that *mens rea* cannot be disconnected from the underlying act(s) of destruction. Until the District admits the who, what, when and how of each act of destruction, it cannot meaningfully argue innocent intent. It cannot point to the particular circumstances of context that exculpate the actor or transform patterned acts of destruction or loss into individual situations of neglect.

The acts of destruction and/or loss, standing alone and collectively, give rise to the strongest of inferences of purposeful loss or destruction and, indeed, obstruction of justice.

Across the landscape of destruction, one circumstance returns over and over again: Following the custody of evidence and path of destruction leads to the doorstep or within the MPD's Office of General Counsel which is under the auspices of the Office of the Attorney General itself.

As reflected in the October 23, 2009 records deposition, which occurred after the OAG had indicated the completion of its recovery efforts, plaintiffs elicited that IT personnel had sent as many as ten boxes of electronic records culled just from their limited and defective search to the MPD Office of General Counsel. The volume was so substantial and the weight so great that they had to get assistance to transport the materials and had to use a flatbed dolly. Rule 30(b)(6) Dep. of the District of Columbia (D.C. Deponent Thorpe) at 177:12 – 178:20. That massive store of materials has apparently remained in the possession, custody or control of the MPD Office of General Counsel. Now that plaintiffs have forced concession of this store of materials, the OAG assures plaintiffs that it will be produced. But it was not produced in the course of the OAG's recent search and recovery efforts, which were supposedly already completed.

The OAG's search, which resulted in production of significant materials, has not independently resulted in production of all surviving materials.

The fact that a volume of previously unproduced materials has been belatedly produced does nothing to change the fact, as established again by the October 23, 2009 records deposition, that this volume is a fraction or portion of what did exist, of what was once was available.

While plaintiffs acknowledge the recent disgorgement of thousands of pages of previously undisclosed materials, stored and maintained *in the possession of defense counsel*, this comes years after the depositions in this case which occurred when recollections could be more reliably probed. Plaintiffs were entitled to this material during the course of this litigation. Not seven years after the underlying events.

The persistent fact remains: The scope of spoliation and destruction is massive, regardless of supplemental production in the year 2009.

The disturbing reality is that, even to date, the representations and argument of the OAG in its efforts to avoid sanction are unreliable, at times preposterous, and reflect a still unchecked willingness to say whatever they believe may divert this Court from its earlier statements of intent to impose sanctions of substantial severity, proportional to the underlying severity of discovery violations, abuses and failures.

*Editing of the Recorded Police Channel Communications*

The recorded police channel communications have been edited.

The District concedes the factual underpinnings of this unlawful evidence tampering. "The District concedes these audio tapes appear in some, **if not all,** instances to be incomplete recordings of the identified time periods." Opp. at 11 (emphasis added).

If the spoliation in this case was limited to the editing of the recorded police channel communications, it would be case-altering.

Consider the physicality of the editing process. So many tapes, so many channels, so many time periods. This was an analog recording system. All editing had to be done manually, in real time. To edit one hour worth of tapes required one hour to play that tape and additional ample time to effect the editing of selected transmissions throughout the tape. This was an impressive feat, if only for the requisite attention to detail, thoroughness and the dedication of what had to be substantial human intervention to accomplish. None of this suggests inadvertence.

The tapes were originally gathered by the MPD Office of General Counsel. Deputy General Counsel Ron Harris immediately recognized their litigation value, and *secured the tapes within one week of the mass arrest*. Harris claims he failed to preserve the original master media.

Harris was involved in procuring the Declaration of Denise Alexander, a materially false sworn statement submitted to this Court to divert its efforts at oversight and to avoid scrutiny or

sanction. Defense counsel had no compunction or apparent reservation about submitting this false affidavit to the Court attesting that there was no deficiency in the audio tapes. Compare that to the current concession in the opposition that "some, **if not all**" of the tapes are missing time, a concession to reality they have been forced to make only through the diligence of plaintiffs' counsel and persistence of multiple records depositions, the continued oversight of this Court, and the threat of sanction.

Even at this stage, the District's representations and arguments are unreliable.[2]

The District actually argues in its opposition that "Ms. Alexander *may simply have been unaware of the unusual gaps in the recorded transmission* based on 'her more limited operational knowledge and technical expertise in this area.'" Opp. at 13 (emphasis added).

Attached to the Alexander Declaration itself, in which it is attested that there is nothing deficient in the audio tape recordings, there is an e-mail from Denise Alexander to Ronald Harris in which *Ms. Alexander documented the gaps in the recorded transmissions*.

In the e-mail to Ronald Harris, attached to the Declaration, Ms. Alexander herself documents that at the time of the arrest decision and execution there are gaps in transmissions. "Unusual gaps" would be an understatement. After constant, rapid-fire transmissions about the protesters and police action, there is silence across multiple channels at the time of arrest decision and execution. Alexander's e-mail to Harris documents:

- In the 1D tape, 8:00 a.m. to 10:00 a.m., the recording ends at 9:35 a.m.
- In the TACT-1 tape, 8:00 a.m. to 10:00 a.m., the recording ends at 9:41 a.m.

[2] The District even argues that it provided tapes to a set of opt-out plaintiffs, and acknowledges that they were not then provided to the Barham class, nor expected to be provided to the Barham class through that production, and that yet this somehow evidences a failure on the part of the Barham plaintiffs. There being no logic to this argument, plaintiffs respectfully direct the Court's attention to its earlier filings detailing the Barham plaintiffs' efforts to obtain this material, to which the District fails to respond, as it cannot.

- In the TACT-2 tape, 8:00 a.m. to 10:00 a.m., the recording ends at 9:19 a.m. and does not pick up again until 10:12 a.m.

Not only was Ms. Alexander aware of the unusual gaps at the time she swore to the Court that there were no deficiencies, Ronald Harris was aware of the gaps. The attorneys who filed the Alexander Declaration were aware of the gaps, as they were documented in detail on pages 3 - 5 of the Declaration. See Ex. 8 to Pls' Renewed Mot., Alexander Decl. at 3 – 5.

All of these people proceeded to submit this Declaration to the Court with the hope that the Court would read and agree with the conclusion, clearly stated in the false Declaration, that there was nothing deficient in the audio recordings and consider the matter closed.

When, in its opposition filing, the OAG argues that Ms. Alexander may not have been aware of the gaps, that argument is unreliable and inaccurate.

That same e-mail to Ronald Harris, from Ms. Alexander, also documents that for every single tape evaluated there was an utter impossibility: Two hours or more of recorded radio time is documented as being presented on the sixty minute side, Side A, of each audio casssette. Not to suggest that even the entirety of thay sixty minute side A was used on each tape, as it was not.

Ms. Alexander, herself, documented that:

- The 2D tape purportedly presenting two hours of recordings from 6:00 a.m. to 8:00 a.m. was contained and presented on just Side-A of an audio cassette, i.e. two hours of recordings on no more than one hour of tape.

- The 2D tape purportedly presenting two hours of recordings from 10:00 a.m. to noon was contained on Side-A, no more than one hour of tape.

- For 1D between 8:00 a.m. and 10:00 a.m., two hours again on one side of tape with a maximum recording time of one hour.

- Same for the 1D tape for the two hours between 10:00 a.m. and noon.

The same impossibility is described for *every tape:* SOD, 0600-0800, is contained on Side-A, which is one hour of tape: SOD, 0800-1000, two hours of recordings on Side-A; TACT-1 0600-0800,

same; TACT-1, 0800-1000, same; TACT-1, 1000 – 1200, same. For the Citywide channel, an even more remarkable two and a half hours of transmission, from 0926 – 12000, are identified as being presented on Side-A, one hour of tape maximum. TACT-3, 0800-1000, same; TACT-3, 1000-1200, same; TACT-2, 0600 – 0800, same; TACT-3, 0800-1000, same; TACT-2, 1000-1200, same.

The District, while conceding that "these audio tapes appear in some, if not all instances to be incomplete recordings of the identified time periods,"Opp. at 11, proceeds with unmitigated gall and complete lack of remorse to argue that *plaintiffs* have failed to demonstrate the content of what was destroyed. Therefore, the District argues, the plaintiffs have failed to demonstrate prejudice.

This is enough to make one's head spin. Plaintiffs are blamed for not being able to produce what the District has destroyed.

The District's opposition is even further evidence, as if any was needed, of the necessity of severe sanctions to deter the District's future misconduct.

*The Secretion of the Scores of Hours of Recorded Interviews and Press Conference of Chief Ramsey*

The same remorseless, disingenuous arguments are made by the District to blame the plaintiffs for its wilful secretion and misrepresentations through counsel that the Office of Cable Television did not possess any recorded statements, press conferences or interviews of the Mayor or Chief Ramsey pertaining to protests.

The District does not dispute that the very first request for production from the Barham plaintiffs demanded production of all recordings of the statements and interviews of Charles Ramsey. The District does not dispute that plaintiffs directed the defendant to search specific potential repositories, including the Office of Cable Television specifically. The District does not dispute that *the OAG falsely represented*, repeatedly, that the OCT *had been searched* and that, upon diligent search, representation was made that *no such materials were stored* by that Office.

The underlying facts cannot be in dispute that it was not until 2009 that plaintiffs – after undertaking multiple records depositions – proved that the OCT had scores of hours of such material *and* that the OCT had *never been requested by the OAG* to search for such material.

Yet, in its opposition filing, the OAG argues *the plaintiffs* are at fault for any harm flowing from the District's secretion and misrepresentations.

Turning reality on its head, the District argues that *plaintiffs failed* to "have subpoenaed the documents from OCT and thus mitigated any alleged prejudice from the belatedly produced recordings." Opp. at 5.

The District's remarkable argument is that undersigned counsel and plaintiffs should have recognized the likelihood that the Office of Attorney General, and its predecessor the Office of Corporation Counsel, was repeatedly providing false information when they kept representing that such recordings did not exist and were not maintained by the Office of Cable Television. The damage flows not from their misrepresentations, according to the District's argument, but from plaintiffs' acceptance of the District's false statements conveyed in discovery responses and through the District's attorneys as officers of this court.[3]

This is a situation of severity that – to this day, and including consideration of the representations and arguments made in the opposition filing – demands sanction, for the sake of the plaintiffs standing before this Court *and* for the sake of the integrity of the Court and judicial process itself.

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[3] The District makes the absurd claim that plaintiffs have asserted that the District's deliberate withholding of the OCT materials was "oversight," pointing to an e-mail from plaintiffs' counsel to the OAG. The OAG omits that this reference is not to the OAG's discovery abuse but rather was an e-mail sent after the plaintiffs had caught the OAG in its misrepresentations about the OCT videos in the deposition of the director of the OCT which took place on April 3, 2009, and after the OAG had said that it would now produce the videos, and still had not fully produced them. The District produced an incomplete and deficient set of videos on May 4, 2009 and plaintiffs wrote thereafter to confirm that the rest of the videos were forthcoming as the District had repeatedly stated it would be producing them. The District finally produced these videos one month later, on June 5, 2009. The fact that throughout its brief the District still clouds the truth gives no comfort that the abuses of this litigation are over.

The day has come, now, that the the District of Columbia argues to the U.S. District Court of the United States that citizens, that plaintiffs who have suffered severe loss of constitutional rights and depirvations of liberty, are themselves at fault for relying on the integrity of the representations of the attorneys as officers of this Court. Plaintiffs, it is argued, failed to recognize the sham that was being perpetrated by these persistent misrepresentations and therefore are themselves responsible for the resulting damage.

The District's argument inaccurately projects that even more service of legal process upon the District – redundant and cumulative of the existing service of process – would result in something other than the misrepresentations that were issued, over and over again, in response to discovery demands. This is outrageous and shameful reasoning.

*Refusal to Acknowledge Its Secretion*

The District misrepresents the scope of its secretion of documents in the possession of counsel, all along. First it claims that it promptly produced the documents after discovering them. Opp. at 4. This is ridiculous. The OAG itself was in the possession of a vast trove of these withheld documents. It did not "find" them somewhere else and turn them over. The documents had been "found" years ago and had been given to the OAG which then did not produce them to plaintiffs and withheld them instead.

The District says that its production is largely duplicative. That is simply false. While there may be some limited duplication within the production, there is a huge amount of material that the

plaintiffs have never before been provided and have never before seen.[4] Evidently none of the production is "new" to the District, because it has had access to it for years. [5]

The District says its late production is also all irrelevant and there is no "smoking gun." Putting aside the fact the specious nature of this defense argument, as it happens, the documents have information of significant material interest. As only one example, consider the relevancy of the handwritten notation that "**Chief Decided to Make Arrests."** Ex. 2, Document Bates Numbered Prosec 00055.

The District argues, with equal lack of accuracy, that it could not have engaged in "secretion" of evidence because "it was the District that brought its discovery failures to the attention of the Plaintiffs and the Court. Such conduct is hardly consistent with Plaintiffs' theory of 'secretion.'" Opp. at 4.

The District exists in an altered state of reality if it can, in any semblance of good faith, actually submit in written filings to this Court that it was *the District* that brought its discovery misconduct to attention of the plaintiffs and the Court. They may as well be arguing that the Earth is flat. The record in this case speaks volumes as to who has brought this misconduct to light. The outstanding issue, however, is what the sanctions will in fact be.

Even while the District now has been forced to produce thousands upon thousands of new documents, and continues to do so, this does not alter the fact that it represents only a portion, if not a fraction, of what once existed.

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[4] The District asserts that its privilege log reflects minimal redactions. To the contrary, the new 30-page privilege log evidences extensive and improper withholding. These issues, not being addressed in substance in this briefing, are requiring an intense undertaking now thrust upon plaintiffs at this stage when the District should just be handing over its secreted documents.

[5] The District also misstates the plaintiffs' position regarding the Broadbent Binders. This material, willfully withheld for the full scope of discovery, contains substantially significant material. Having deprived plaintiffs of the extensive and detailed discovery necessitated by these documents, the District must be precluded from using this material. However, plaintiffs will explore this evidence as it goes to law enforcement's deliberate efforts at infiltration and disruption of protest activities on September 27, 2002.

In the October 23, 2009 records deposition, the District deponent admitted the underlying facts that establish that its search for responsive e-mails was painfully underinclusive and completely inadequate.

> Q: [I]f there was an e-mail, for example, from Charles Ramsey and the subject line said "September Arrest" and in the body of that e-mail it said, "After I gave the order to make the mass arrests at Pershing Park," and then continued.
>
> Am I correct to understand that the search that the MPD engaged in would not produce that as a result?
>
> A: Correct.

Ex. 1, Rule 30(b)(6) Dep. of the District of Columbia (D.C. Deponent Thorpe) at 209:3 – 10.

Yet even this flawed and limited search returned many records that – to this day – have remained undisclosed to plaintiffs.

The OAG has assured plaintiffs that the responsive materials *will* be produced, now that plaintiffs forced the occurrence of the records deposition and established through deposition that a flatbed dolly of such materials was sent to District counsel by IT staff.

This is not what the District has promised the Court: that of its own initiative and volition, the OAG had conducted comprehensive sweeps of all locations where unproduced discovery may exist.

The compelled deposition also revealed that the MPD Information Technology technicians appear to have preserved the text of pager communications. Id. at 78:4 – 79:9, 203:5 – 204:4. This material has not been produced.

As for Mobile Digital Computer communications: none produced to date. The deponent lacked knowledge as to the preservation or search of such electronic records. Id. at 220:7 – 221:6.

Even where the OAG has promised the Court and the plaintiffs to deliver whatever discoverable materials it recovers, that effort is evidently not sufficient of its own initiative to identify and produce the entirety of the massive stockpile of missing and secreted evidence.

*The Destruction of the Running Resume*

The District, in its opposition, offers no specifics as to the destruction of the running resume. The underlying facts are conceded: At the time of the events, the Command Center utilized the running resume database system as a primary means of information communication and recording. It had a retention period of 3 years. Multiple computer copies were stored redundantly on multiple computer servers. A primary hard copy was required to be maintained physically within the Command Center. Up to a dozen hard copies were, as a matter of practice, distributed to top officials including Chief Ramsey. Yet, all of these multiple formats and copies were destroyed.

In Bolger v. District of Columbia, CA No. 03-906 (JDB), the District's attorneys denied that the running resume existed for April, 2002 protests. After years of plaintiffs' persistence and discovery hearings and repeated misrepresentations by the District, Sergeant Douglas Jones located the copy that he had transmitted to the MPD Office of General Counsel. It was located in the possession of Ronald Harris. Harris admitted requesting it. After Jones found the copy he had provided him, Harris admitted receiving it.

In this case, Sgt. Jones testified that the MPD Office of General Counsel communicated a request to him for the Pershing Park running resume. He satisfied that request. Again, the trail goes cold at the doorstep of the MPD Office of General Counsel. MPD Deputy General Counsel Harris admits he requested the running resume, but denies receipt. Jones is unable to independently recover it, as he did in Bolger.

In its opposition filing, the District argues that plaintiffs have not proven the contents of the admittedly destroyed running resume and therefore have demonstrated no prejudice from its destruction.

Its arguments are duplicitous. The District argues that the plaintiffs are not harmed by its destruction because the D.C. Council was able to have "reached its own conclusions without benefit of the JOCC Running Resume." Opp. at 15.

The District does not seek to explain why defendants misled the Council, misrepresented another document to be the running resume, and failed to advise that the running resume was missing (as they now claim to have known at the time). They succeeded in avoiding the enforcement of the Council subpoena through affirmative misrepresentation and now actually argue to this Court that – having succeeded in that obstruction of legal process and justice – they are entitled to the same advantage over plaintiffs.

On one hand, the District and former Chief Ramsey argue that the plaintiffs should be satisfied with the fact that the Council made certain findings and admissions adverse to the municipal defendant in this case. On the other hand, the District and Ramsey argue that the Council's findings are inadmissible. Opp. at 15 n. 14 (citing the District's own motion to exclude the Council Report in another case but not an adjudication in the District's favor on this point). The defendants also argue that the Council report is without basis in fact. [6]

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[6] Ramsey contends that the Barham "Plaintiffs would have this Court make a factual finding that Ramsey arrived on the scene at Pershing Park at approximately 9:15 a.m., in time according to have observed the events in and around the park for some time before arrests were ordered." Ramsey Opp. at 7 (citing Barham Pl's Mot at 32). That is demonstrably false. The Barham plaintiffs have not asked the Court to make the factual finding that Ramsey arrived at 9:15 a.m. The citation to page 32 of the Barham motion is to the following text which, among other things, is relevant to the adverse inference prerequisites:

> "The destruction or loss of the running resume data compilation deprives plaintiffs of relevant evidence related to practically every material fact and issue. A non-exhaustive selection of affected issues follows below, including. . . [p]roof that Ramsey arrived at Pershing Park by no later than 9:15 a.m."

Pls' Renewed Mot. at 31 - 32.

Indeed, the Barham plaintiffs' motion does not move the Court to make a factual finding that the Chief arrived at 9:15 a.m. The Barham plaintiffs explicitly ask the Court to "defer the particulars of the adverse inferences until pre-trial when the posture of the case, litigants, issues and facts will be at its most defined." Barham Renewed Mot. at 46. Likewise, the Barham motion requests the Court "defer specific findings of fact until pre-trial." Id.

In all ways, the District seeks to engage in its misconduct and reap the rewards of its misconduct without sanction. Again, the District returns to its contention that if plaintiffs cannot prove what was in the running resume then plaintiffs may not argue that any particular information was likely to be contained therein.

A particular focus of the District's opposition is on the movements of Chief Ramsey and the time of his arrival at the scene. This is a notable area of focus, as an object of the secretion and destruction of evidence from the very start has been obfuscating Chief Ramsey's role and participation in the arrest decision.

Indeed, there is a substantial and persuasive basis on which to believe that the effort to secrete the running resume database, like many other immediate efforts by the MPD, had as a primary function the elimination of evidence of the Chief's role in ordering the mass arrest. The D.C. Council concluded that "evasions and misstatements by senior officials including Chief Ramsey, [give] rise to the appearance of an attempt to cover up Chief Ramsey's role in ordering the Pershing Park arrests." Ex. 61 to Pls' Renewed Mot., Council Report at 78.

Under oath on February 25, 2003, Ramsey testified that he was not a part of the mass arrest decisionmaking and that "when I came up on the scene, actually, that was already practically in progress." Ex. 61 to Pls' Renewed Mot., Council Report at 59. Around the same time as this testimony the command center database seems to have gone missing, and all redundant copies mysteriously disappeared.

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Ramsey then argues that the D.C. Council had no basis on which to find that Ramsey arrived at the scene at approximately 9:15, well in advance of his approval of the order of mass arrest. Indeed, the Council references the deposition of Assistant Chief Michael Fitzgerald who arrived with Ramsey and who testified that he and Ramsey met with Newsham at the scene "prior to the order to arrest." Ex. 3, Judiciary Committee Interview of Michael J. Fitzgerald at 32:16 - 19. When that approval meeting occurred, the arrests were still in "planning." Id. at 51:4. There weren't even arrest busses at the scene at this time. Id. at 51:15 - 17. Fitzgerald also describes substantial activity with Ramsey at the scene prior to the arrest decision.

Under inquiry from the Special Counsel Mary Cheh, on December 18, 2003, Chief Ramsey conceded that at the time of arrest he did support the decision to mass arrest "100 percent." Asked "Did you approve of [Newsham's] decision to arrest the persons in Pershing Park," Ramsey answered "Yes." Ex. 4, Ramsey Dep., Sept. 18, 2007 at 34:9 – 35:12. In deposition in this case, on September 18, 2007, Ramsey was asked "did you approve the decision to make the mass arrest?" To which, he replied, "No." Id. at 35:20 – 22.

The time at which Ramsey arrived or was present on the scene is centrally relevant to this litigation, to establishing Ramsey's state of knowledge of readily observable circumstances, and his participation in the mass arrest decision. Pls' Renewed Mot. at 31 – 32.

The District and Ramsey argue that the running resume would "not . . . necessarily track – much less report – the movement of the Chief," Opp. at 17, claim that therefore the Chief's time of arrival would be neither reported nor recorded, and extend this argument even further to conclude that there would be no information or entry in the running resume reflecting the Chief's physical presence on the scene.

In its motion, plaintiffs submitted a highlighted excerpt of the April, 2000 running resume. See Ex. 69 to Pls' Renewed Mot. Highlighted in yellow are running resume entries which document, with great detail, the movements to the scene of the commanding officer (identified in MPD nomenclature as "W/C" for "Watch Commander" or as "A/C WPM" for Assistant Chief McManus); his presence on the scene; and details pertinent to that arrest situation. The District asks the Court to ignore this running resume, claiming that it is not a "true" running resume because it was created within the running resume system prior to the command center being renamed to be the "Joint Operations Command Center" as distinguished from the "Synchronized Operations Command Center." The Court is free to review the multiple submitted running resumes, all of which were

produced by the same system, and to observe their substantial similarities in format. Indeed, the MPD General Counsel Terrance Ryan himself referred to the command center running resume from September, 2002 as the "S.O.C.C. / J.O.C.C. running resume." The running resume by any other name would still be as relevant. The nomenclature may vary, the command center running resume remains substantially the same.

The District argues that "options discussed in arriving at that [mass arrest] decision or the reasoning articulated in support of the decision would not be reflected in the Running Resume." Opp. at 17. Yet, the Demonstration Manual clearly requires the documenting of all demonstration related events "that could be considered significant" and all "tactical orders issued to personnel" and all "Orders [to CDU Commanders] received from higher authority" and all "incidents involving mass arrest." See Ex. 63 to Pls' Renewed Mot., Mass Demonstration Manual at 33, DC 01875. It is conceded that the running resume is a "compilation of decisions made by commanders, things that were decided at certain times on how to handle certain situations." Ex. 50 to Pls' Renewed Mot., Herold Dep., Nov. 16, 2007 at 176:1 – 6.

In this case, we know that J.O.C.C. Commander Alfred Broadbent denied Peter Newsham's request for additional resources to engage in a mass arrest. According to Broadbent, "I recommended to him at the time, from where I was sitting, that he should not make arrests." Ex. 5, Broadbent Dep. at 94:1 – 96: 17. Broadbent had asked, and Newsham had responded in the negative, as to whether protestors were hurting anyone, whether officers were being injured and whether property was being destroyed. Id. at 96:14 – 17. This well may have been reflected in the running resume, which would also provide relevant information as to the time and sequence of decision making. "CDU Coordinator Lieutenant Jeffrey Herold also advised command officials on the scene at Pershing Park that they should *not* effectuate a mass arrest because he 'could not see how they established probable cause,'

and also recommended alternatives to mass arrest." Barham v. Ramsey, 338 F. Supp. 2d 48, 59 (D.D.C. 2004). This, or related matters, may have made it into the running resume and would, therefore, inform the commander's base of actual or readily available knowledge.

The District keeps returning to the argument that it is "conjecture" for the plaintiffs to assert prejudice from the complete destruction of all copies of the running resume command center database because – by virtue of the comprehensiveness of the District's destruction – plaintiffs do not have the running resume.

The case law does not countenance what the District proposes, which is to not sanction it for the destruction of the running resume and then to allow it the benefit of its own spoliation. See Synanon Church v. United States, 820 F.2d 421 (D.C. Cir. 1987) (destruction of evidence raises the presumption that disclosures would have been damaging) (citing, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350-51 (1990)); See also Arista Records, Inc. v. Sakfield Holding Co., 314 F. Supp. 2d 27, 36 (D.D.C. 2004) ("Destruction of evidence raises the presumption that disclosure of the materials would be damaging."). On the contrary, the presumption does not fall against the plaintiffs, who have been deprived of access to relevant information, "a party's bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable *to the party responsible for its destruction. . . .*" Rice v. U.S., 917 F. Supp. 17, 19 (quoting, Battocchi v. Washington Hospital Center, 581 A.2d 759, 765-66, 9 (D.C. 1990)).

The strong inference is that the command center running resume would have been preserved were it not adverse to the District's or its Chief's position. On this record, it is indeed unbelievable that there is no preserved copy. The attention to detail had to have been substantial to so comprehensively render unavailable so many copies in so many locations and formats.

*Field Arrest Forms*

With respect to the field arrest forms, which evidence significant discrepancies and problems, plaintiffs respectfully refer the Court to their renewed motion filings and presentations of facts. Plaintiffs requested these materials repeatedly; the District obfuscated. They were produced only after Officer John Hansohn's testimony establishing that they were possessed by the District's counsel. Pls' Renewed Mot. at 7 – 9. That the District, in September of 2009 – two years after it was forced to produce the documents – finally relented in its completely unjustifiable refusal to bates stamp them in an attempt to stave off sanctions, hardly changes the circumstances of the damage.

**Conclusion**

The essence of the District's opposition is that this Court should find that the massive scope of evidence loss or destruction or failure to timely produce did occur, as acknowledged and undisputed, that it was all inadvertent, that the thousands of pages of late produced materials are irrelevant, and that there is no prejudice.

The District submits no affirmative evidence of "inadvertence." The District's representations in its filings, like those submitted even under affidavit, are unreliable.

The District proceeds at length, in footnote nine of its opposition, to assert that there was no OAG/MPD "conspiracy" to destroy documents. The word conspiracy is presented in quotation marks, as if plaintiffs used that term in their Motion for Sanctions when they did not.

As plaintiffs have documented – not alleged, but *documented:* the evidence of obstruction of justice and secretion and destruction of evidence leads a trail to the OAG and the MPD General Counsel's office.

The remedies requested so far by the Barham plaintiffs are very well tailored to the issue that has been obfuscated by the destruction, which is the particular command decisions, the timing of the

decisions, the knowledge of policymakers including Chief Ramsey, the evidence that makes up the basis for Monell or municipal liability. Prohibiting the District from defending against the municipal liability charges is, consequently, tailored and appropriate.[7]

The District argues that an award of fees[8] for the supplemental discovery period combined with the supplemental discovery itself is all that is warranted in terms of sanction.

This disregards the permanent impairment to the record that comes from the loss or destruction of the running resume database and from the editing of the recorded police channel communications.

This disregards the fact that plaintiffs and their counsel have spent nearly seven years litigating this case including many years of hard fought discovery which now is poisoned by the withholding of thousands of pages of significant evidence, in addition to the further delay that defendants' conduct is imposing on plaintiffs' right to have adjudication of this case.

This is completely dismissive of the burden on the Court's resources and the consumption of *pro bono* counsel's time that could be well spent serving others who also need assistance in defense of their constitutional rights rather than devoting resources to attempting to remediate the District's egregious misconduct.

To the extent that the secretion can be partially remedied by extremely late disgorgement of materials that have been sitting all along in the possession, custody or control of District attorneys, that still does not substitute either for full disclosure (as it is amply evident that a quantum of

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[7] The District wrongly states that the plaintiffs seek a ruling on the proper measure of hourly rates as a sanction. The plaintiffs have sought *attorneys fees* as a sanction. The appropriate measure of fees is attendant to the awarding of fees. The District's previous opposition to the CPI-adjusted Laffey rate in its filings was based on the false claim that the case lacked sufficient complexity. Given that the District now claims that the case is so complex and overwhelming that its entire office couldn't properly handle it, the District's contradictory position should be struck and the CPI-adjusted rates should be the appropriate measure.

[8] Throughout its brief the District foreshadows that it intends to turn the issue of fees for this discovery period into yet another litigation battle with extensive and time consuming briefing which will again forestall real resolution and this sanction itself.

materials has not "survived") or timely disclosure when materials could have been more effectively used in depositions when recollections where fresher. Notably, in the October 28, 2009 deposition of MPD videographers, *they could not even recall if they were at the Pershing Park events* - - and that's *with* video recordings available to refresh their recollection.

That the MPD only preserved e-mails that had certain key words in the subject line is astonishing, and was a choice made with reckless disregard for the preservation of the relevant electronic records the body or substance of which pertained clearly to the Pershing Park arrests. That the MPD destroyed and did not search the then-existing backup tapes also was a decision made with reckless disregard for the preservation of the relevant electronic records contained in the backups. As it stands, the search as effected could only recover records that fell into the subject-line filter *and* which had not been deleted in the 18 months between the underlying events and the date of search. That the MPD and the OAG still did not turn over the results of that inadequate search, even after all the District's representations to this Court about the thoroughness of its sweeps, is incredible.

The District argues that the "discovery lapses were not the result of willful noncompliance with the District's discovery obligations." Opp. at 20. On the contrary, the efforts to destroy all copies of the running resume, the willingness to falsely represent to the D.C. Council another document to be the running resume, all evidence intentionality and consciousness. The mass editing of the recorded police channel communications likewise evidence a comprehensive approach that evidences intentionality. The District contends that massive "human error" was the cause of precise and massive editing. The possibility of that being the case is about as likely as a thousand monkeys eventually typing out the works of Shakespeare. The possibility of this editing being the function of random inputs of human error is not possible.

The District also argues that it has been subject to public criticism that will serve to deter future discovery abuses. Yet, the District has never come forward with a true and thorough investigation that discloses the who, what, where and how of the spoliation, even now when it has been given more than ample time to do so. The District points to Judge Sporkin as a basis for the Court to withdraw from needed sanctions and an independent investigation. However, Judge Sporkin has directly expressed to plaintiffs' counsel that his efforts are not comensurate with a thorough investigation, as descibed by the District in its Opposition, and that such an endeavor is not his intention.

Who edited the recorded police channel communication? How did it occur? When did it occur? Who knew of the editing? Who within the MPD Office of General Counsel, now under the direct supervision and control of the Office of the Attorney General, was involved? Who, within the OAG, acquiesced to or knew of the editing? How could the materially false declaration of Denise Alexander have been submitted?

How were the multiple and redundantly stored electronic copies of the command center running resume destroyed? How and when was the primary hard copy, required to be maintained within the Command Center, destroyed? Which attorneys, along with the former Chief, knew of the misrepresentation to the D.C. Council? Why didn't the MPD General Counsel Terrance Ryan, the MPD Assistant Deputy General Counsel Ron Harris, and Senior Assistant Attorney General Thomas Koger affirmatively represent to the Council, upon subpoena, what they now claim to be true, that they believed at the time of the subpoena that the running resume was missing. If they really did believe the running resume to be missing back in 2003, why was there not an effort at recovery then? Why was there not a thorough examination of computer servers then? How could the primary hard copy have disappeared from the Command Center at that time, so close to the underlying events?

Who has known of the existence of the late-produced materials, that all appear to have been in the possession and custody of the MPD Office of General Counsel all along?

There has not been any accountability for these matters. Much as Mr. Koger bears responsibility, he cannot stand as the sole fall guy. This does not constitute sanction nor does it contitute, as the District contends, sufficient deterrence to prevent recurrence. All that the District has accomplished is protected those who were personally involved, who the District has never identified or held accountable.

The District has obstructed discovery at every turn. The six months of discovery that plaintiffs are now entering into does not roll back the hands of time to the year 2004 and allow depositions to proceed with benefit of the thousands of pages of documents and scores of hours of recorded interview material produced for the first time long after the close of discovery.

The District's current stated posture does not un-destroy the running resume database.

The District cannot undo the false representations, which can be viewed as nothing less than knowing misrepresentations from the District to the D.C. Council claiming in response to subpoena that a different document was, indeed, the running resume database.

The District cannot un-edit the radio runs or recorded police channel communications. It cannot resurrect the directives, the orders, the admissions that have been deleted apparently to secrete from disclosure the particularities of command decisions with respect to the mass arrest.

The acknowledgment of discovery abuse occurring over the prior approximately seven years of litigation does not resurrect that information which has perished, has been destroyed, edited from existence and yes, *secreted* from this Court and plaintiffs.

The plaintiffs request for sanctions from the Court is, indeed, far more limited than the severity of the misconduct justifies in terms of proportionality**.** Opp. at 1.

Default is proportional to the misconduct.

Plaintiffs do not seek default, not because the scope of destruction has not been effective and wide-spread, but because of the particularities of proof in a false arrest claim, where the burden does fall upon the police to demonstrate probable cause for this mass group arrest.

The gross magnitude of the underlying constitutional sweeping civil rights and constitutional rights violations has led – after years of aggressive defense – to the concession to liability on the common law false arrest claim, that there was an absence of probable cause.[9] Plaintiffs are entitled to a trial on damages against the municipality and participating individuals.

Evidence with respect to municipal liability and the Chief's direct order and active approval of the mass arrest has been substantially destroyed and impaired. The Court's calendar has been substantially impacted by this malfeasance. The entire function of discovery to date has been undermined and, perhaps more to the point, might have been rendered largely unnecessary had there not been this massive destruction. This is a case that, with the originally existing evidence intact, may have been resolved upon summary judgment at the onset or at least primary claims would have been. This has imposed an incredible waste of judicial and litigant resources, and has prolonged the resolution of the claims of hundreds of persons who were swept off the streets and hog-tied in a massive and overt violation of constitutional rights at the direction of a Police Chief who had done this before and expressed no reluctance to do it again.

For the reasons stated herein, and based on the record to date, plaintiffs' motion should be granted.

[9] The District claims that the plaintiffs rejected a proposed entry of judgment, and omits that it encumbered its "offer of judgment" with ambiguous evidentiary conditions as to its implications.

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Respectfully submitted,

/s/

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