IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAYMING CHANG, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 02-2010 (EGS/JMF)
	)	(submitted to Judge Facciola)
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

OPPOSITION TO DISTRICT MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA FOR DEPOSITION OF MONIQUE PRESSLEY

For years, both the Court and counsel have raised and discussed the obvious and growing need to depose District Counsel regarding the destruction of, or tampering with, evidence in this case.[1] The record demonstrates that the *Chang* Plaintiffs have not lightly sought the deposition of District Counsel Monique Pressley ("Pressley") nor used discovery to harass counsel or breach valid claims of privilege. Plaintiffs seek to depose Pressley solely because she made herself a unique witness to certain aspects of the failure to preserve, destruction of, tampering with, and general spoliation of evidence by her client, the District of Columbia. She has evidenced this participation by signing declarations and making representations to the Court regarding the existence and handling of audio, video, and electronic data, all of which are the

[1] For example, at the March 30, 2010 Status Hearing, Judge Sullivan stated, "I'm not ruling out the possibility that every attorney associated with the District of Columbia will be subject to a deposition in an effort to determine what's been going on with the City's management of evidence and the City's loss of evidence in this case. I wouldn't rule that out at all, and I'm actually quite surprised that Plaintiffs' counsel have not asked to take depositions of various counsel in view of their in-court representations that have been conflicted by other City attorneys." (March 30, 2010 Status Hearing Tr. at 39:9-17.)

subject of the Special Master's inquiry.[2] This has included numerous statements later found to be untrue.[3] Pressley is the only person who can provide the background for and verify her past representations. Other District witnesses, including Rule 30(b)(6) witnesses testifying on behalf of the District, disclaim the ability to testify to the information that Pressley acknowledged having on these subjects, despite numerous efforts by Plaintiffs to obtain necessary testimony from them and other sources. Now, as the Court originally predicted would be necessary, it is clear that the knowledge of District counsel is at the heart of the controversies and discovery before the Court and the *Chang* Plaintiffs are left with no option but to notice Pressley's deposition. She is the only individual in possession of certain key information regarding missing and lost evidence and her testimony is vital to establishing conclusively what occurred in these areas.

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[2] Any doubt about whether this area of inquiry is properly within the scope of the Special Master's inquiry has been resolved by the Court's Orders of September 27, 2011, and October 3, 2011. In fact, Judge Sullivan has expressly ordered the Special Master to investigate (1) "any knowledge by counsel for the District of the effort to destroy the E Team data," and (2) "all the circumstances that pertain or relate to counsel's advising fellow defendants, plaintiff's counsel, and this Court of what counsel had learned about the effort to delete the data." (*See* October 3, 2011 Minute Order.) This Order followed a prior Order that specifically authorized the Special Master to examine and investigate misleading statements by District counsel so long as they relate to the three issues for which the Special Master was originally ordered to investigate. (*See* November 10, 2010 Minute Order.)

[3] As just one example, on October 27, 2009, in an email to *Chang* counsel, Pressley objected to certain noticed depositions by stating that "you have already been told multiple times that 3 of the 4 witnesses from the Electronic Surveillance Unit whose depositions have been noticed [Messrs. Lewis, Sterling, Acevedo and Yates] took no video footage and no still photographs on the day in question [September 27, 2002]." (Pressley email, dated October 27, 2009, attached as Exhibit 1.) When Lewis testified the next day, however, he stated that he was assigned to take video on September 27, 2002, but could not recall specifically what he did on that day. (Tr. of Lewis Dep. at 26:01-28:14.) He did not testify that he did not take video footage. Sterling testified similarly, stating that he could not recall with specificity what he did on that day but confirming that he was assigned to record video on September 27, 2002. (Tr. of Sterling Dep. at 30:06-20; 35:10-36:04.) During the Special Master hearings, both Acevedo and Yates testified that they, in fact, had recorded footage on September 27, 2002. (*See* Dkt. No. 754, proposed findings of fact 401-421.)

Chang Plaintiffs have no desire or intention to invade the District's legitimate privileges. Experience in this case has made clear that examination of District counsel can be done without upsetting such legitimate privileges. In fact, both the Special Master and Plaintiffs' counsel examined Thomas Koger, former lead counsel representing the District in this case, without a single objection based on privilege raised by District counsel. Examinations of MPD Office of General Counsel attorneys Ron Harris and Terry Ryan also were completed with few objections. A previous deposition of OAG attorney Stacy Anderson occurred with only a minimal need to seek the Court's ruling on privilege claims.

Experience through the long life of this litigation indicates clearly that the District's blanket claims of privilege lack credibility and have been little more than another effort to throw sand in the gears of this case as it slowly winds its way to resolution.[4] Moreover, the District cannot successfully argue that "there is a very high likelihood that *all* answers solicited during a deposition of OAG counsel by *Chang* Plaintiffs would breach attorney-client, attorney work-product and other privileges, and warrant protection from disclosure." (*See* Dkt. No. 836 at 5) (emphasis in original.) This is particularly true when District counsel has repeatedly made factual representations to the Court and many of the anticipated areas of inquiry are facially removed from protected areas, as discussed below.

Finally, to ensure the deposition proceeds smoothly, *Chang* Plaintiffs previously informed District counsel that they would support the scheduling of the deposition at the

[4] The District has been on the losing end of at least eight different motions regarding District assertions of privilege (*see* Dkt Nos. 434, 531, 532, 534, 573, 617, 635, and 640), with the Court commenting in one instance that certain claims "of privilege [were] inexplicable" and that other information, for which the District asserted a claim, "cannot possibly be privileged." (Dkt. No. 695.)

courthouse at a time when the Special Master would be available to consider claims of privilege, should they arise.

In the end, it is indisputable that the District's failures to preserve, protect, and safeguard evidence have forced the Court and the Plaintiffs to expend unprecedented resources and time investigating the District's discovery misconduct. At every turn, this examination has uncovered new and alarming evidence. In just the last several months, there have been disclosures – first by the District itself, and then by a veteran MPD employee – regarding intentional acts of spoliation and potentially criminal conduct directly related to various versions of contemporaneous records made during the illegal mass arrests of September 27, 2002, including the JOCC Running Resume. In each instance, Pressley and other District counsel have made statements and representations (or others have reported statements or actions by them) indicating that they possess relevant and unique knowledge pertaining to evidence spoliation. Pressley's deposition will aid the Special Master in his investigation of these issues, as it will likely narrow issues of concern, resolve claims of privilege, assist the parties and the Special Master in determining if any additional discovery is necessary relating to these topics, and inform the Court as to the appropriate sanctions to be administered in light of the District's actions.[5]

PROCEDURAL BACKGROUND

On September 2, 2011, the *Chang* Plaintiffs noticed the deposition of Pressley for Thursday, September 29, 2011. (*See* Notice of Deposition, attached as Exhibit 3 to Dkt. No.

[5] Once again, the *Chang* Plaintiffs must point out the extraordinary failure of District counsel to observe ethical and professional prohibitions against conflicts of interest highlighted by the instant motion. Pressley apparently participated in drafting the motion to preclude her own deposition. Particularly in light of Plaintiffs' claim that Pressley's deposition results in part from her failure to be fully truthful and candid with the Court and the parties in previous communications, there is simply no way that Pressley's interests and those of each and every one of the District defendants cannot be in conflict.

836.) After more than two weeks passed, on September 19, 2011, the District informed the Plaintiffs that they were preparing to file a motion for a protective order concerning Pressley's deposition and indicated that they would be filing such motion the same day. (*See* Email from S. Frost, dated September 19, 2011, attached as Exhibit 1 to Dkt. No. 836.) On September 23, 2011, the District demanded a subpoena for the Pressley deposition, despite the parties' previous agreement that subpoenas were not necessary for deponents currently employed by the District. The *Chang* Plaintiffs complied and served the subpoena on Pressley on September 24, 2011. (*See* Exhibit 2 to Dkt. No. 836.) On the evening of September 26, 2011 – only days before the deposition was to proceed – the District moved for a protective order to bar the deposition. (*See* Dkt. No. 836.) Following the filing of this motion, the *Chang* Plaintiffs agreed to postpone the deposition until the motion for the protective order had been resolved. (*See* Dkt. No. 838.)

LEGAL STANDARD

Depositions of opposing counsel are permitted when "the record shows that (1) no other means exist to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case." *Evans v. Atwood*, No. 96-2746, 1999 WL 1032811, *2 (D.D.C. Sept. 29, 1999) (citing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)); *see also Jennings v. Family Mgmt.*, 201 F.R.D. 272, 277 (D.D.C. 2001) (Facciola, J.).

With regards to the first *Shelton* factor, this Court found in *Sadowski v. Gudmundsson*, 206 F.R.D. 25 (D.D.C. 2002) (Facciola, J.) that defendants could depose plaintiff's counsel in part because "[d]efendants have amply demonstrated that plaintiff himself is incapable of providing the factual information relevant to the copyright application, pointing to many gaps in his deposition testimony" and because "[counsel] has unique or superior knowledge of key

facts…." *Sadowski*, 206 F.R.D. at 27. In so holding, the Court found that "[w]here an attorney for a party has information concerning the underlying events supporting the suit, the attorney cannot shield relevant facts merely because he was an attorney for that party." *Id*. *See also Jennings*, 201 F.R.D. at 278-79 (permitting the deposition of counsel to be taken because she was "in a unique position to testify as to the information defendants s[ought].").[6]

In terms of the second *Shelton* factor, this Court has previously held that "Magistrate [Judge Facciola] correctly noted that a blanket assertion of the attorney-client privilege is inappropriate here, because the court cannot say that the plaintiffs cannot ask [counsel] *any* questions which are reasonably likely to lead to the discovery of non-privileged admissible evidence." *Evans*, 1999 WL 1032811, at *5 (emphasis in original) (permitting the deposition of USAID Counsel and stating that "the plaintiffs may be entitled to question [counsel] about underlying facts of which he has knowledge, even if those same facts were the subject of privileged communications between him and agency officials."). *See also Jennings*, No. 00-434, Memorandum Opinion and Order, at 5 (May 16, 2001) (Facciola, J.). In both *Evans* and *Jennings*, this Court held that privilege objections could – and, indeed, must – be raised on a "question-by-question" basis. *See Evans*, 1999 WL 1032811, at *5; *Jennings*, 201 F.R.D. at 279.

With regard to the third *Shelton* factor, this Court and others have typically performed a fact specific analysis of the information sought to be elicited through the deposition to determine

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[6] The District relies on *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 8 (D.D.C. 2009), to support its position that the subpoena should be quashed. In *Guantanamera*, the plaintiff sought to depose opposing counsel on two issues: (1) her relationship with defendant's expert, and (2) her knowledge of the Cuban legal system. *Id.* at 9. The Court quashed the subpoena because those two topics did not meet the *Shelton* test. In terms of the first topic, the court held that "[i]t is entirely clear that information regarding meetings and a relationship between two people are in fact known to both people." And in terms of the second topic, the court held that plaintiff's conclusory assertions as to why the information was relevant and necessary "d[id] not meet its burden." *Id*. As discussed below, the facts and issues presented in this case demand a different result.

whether it constituted "crucial" information. *See Evans*, 1999 WL 1032811, at *4 (finding that "[counsel] had a crucial role in organizing and implementing the RIF and his knowledge is at the heart of the controversy regarding the alleged discrimination."). *See also E.E.O.C. v. CRST Van Expedited, Inc.*, No. C07-0095, 2009 WL 136025, *5 (N.D. Iowa Jan. 20, 2009) ("the Court believes that the information sought by CRST is relevant to the issue of witness credibility. The issue of credibility is particularly crucial in this case because in many instances the only witnesses to the alleged harassment will be the claimant and her instructor."); *Pastrana v. Local 9509, Commc'ns Workers of Am., AFL-CIO*, No. 06cv1779 W, 2007 WL 2900477, *2 (S.D. Cal. Sept. 28, 2007) ("it is clear that Defendants' have satisfied … the third requirement of the *Shelton* test that the information be crucial to the preparation of the case. Mr. Keramati['s] conversations with Ms. Reynolds are crucial to Defendants['] statute of limitations defenses."); *Raytheon Aircraft Co. v. U.S.*, No. 05-2328, 2007 WL 1115198, *5 (D. Kan. Apr. 13, 2007) (finding that the information sought was crucial to Plaintiff's preparation of its case since "the information in [counsel's] possession at the time she prepared the USACE's responses to EPA is probative of whether those responses were recklessly or intentionally false.").

ARGUMENT

1. The Typical and Efficient Way to Proceed is to Depose Pressley at the Courthouse.

Both this Court and the *Chang* Plaintiffs have previously elicited testimony from District counsel. In each such instance, the Plaintiffs and the Court have successfully managed the process "to insure that the plaintiffs secure from [the attorney witness] the information to which they are entitled without invading any legitimate privilege or other inhibition the District will claim." (Dkt. No. 604 at 4 (J. Facciola's Memorandum Opinion denying District Motion for Protective Order and to Quash Subpoena and ordering the deposition of OAG Attorney Stacy Anderson to proceed).) There is no reason to believe – and the District offers none – that the

Plaintiffs and the Court cannot just as effectively and successfully manage the deposition of Ms. Pressley.[7]

This Court has received voluminous sworn testimony from nearly ten lawyers representing the District in this case. Specifically, each of the following District lawyers has submitted one or more sworn declarations to this Court:

- Current OAG lead trial counsel Monique Pressley (Dkt. No. 723);
- Prior OAG lead trial counsel Thomas Koger (Dkt. No. 490-2);
- Prior OAG trial counsel Chad Copeland (Dkt. No. 543-1);
- OAG counsel Stacy Anderson (Dkt. No. 13-1);
- Former Attorney General Peter Nickles (Dkt. Nos. 490-1 & 543-1);
- Deputy Attorney General George Valentine (Dkt. No. 724);
- MPD General Counsel Terrance Ryan (Dkt. No. 490-4); and
- MPD Deputy General Counsel Ronald Harris (Dkt. Nos. 490-3 & 765[8]).

Indeed, several of these declarations were specifically required by the Court in order to address issues of discovery misconduct or impropriety in this case – which could be explicated only via sworn testimony from District counsel. (*See* Dkt. No. 486, Judge Sullivan ordering former Attorney General Nickles to file a sworn declaration addressing, among other things, "the pattern of discovery abuses engaged in and repeatedly acknowledged by the District during the

[7] In fact, the District appears to concede this point – perhaps unwittingly – when it stated "*Chang* Plaintiffs have already had the opportunity to examine the MPD General Counsel, MPD Assistant General Counsel, and the prior OAG lead trial counsel during the evidentiary hearings before the Special Master regarding *the same exact subject* matter for which they claim to desire to depose current counsel." (Dkt. No. 836 at 17) (emphasis in original).

[8] The declaration at Dkt. No 765 subsequently was stricken by the Court as an improper attempt to "supplement, explain or clarify his sworn testimony" before the Special Master without the opportunity for cross examination. (Dkt. No. 776 at 2.)

pendency of these cases;" and Judge Facciola's Minute Order dated November 11, 2010, ordering District lawyers "Pressley and Valentine [to] submit declarations to the Court under oath that … explain why they made [certain representations to Judge Sullivan concerning videotapes] in light of the evidence now elicited in the hearings that have taken place before me that raises at least serious questions about whether originals of videotapes pertinent to this case ever existed.".)

Judge Facciola also called three District lawyers to testify before him during the Special Master hearings, namely attorneys Koger, Ryan, and Harris. (*See* Dkt. No. 662 at 2, listing Koger, Harris, and Ryan as the second, third, and fourth individuals, respectively, from whom the Special Master intended to take sworn testimony; and Minute Entries dated October 14, 15, and 18, 2010, recording Ryan's, Harris's, and Koger's appearance and testimony before the Special Master). Each of these three individuals appeared before Judge Facciola and gave sworn testimony. None of these examinations raised insurmountable, or even problematic, objections or privilege issues. In fact the District did not assert any privilege objection during the examination of its former lead trial counsel, Mr. Koger.[9] To the contrary, the examinations proceeded efficiently, with either no or very few objections – all of which the Court disposed of quickly – and resulted in the collection of information critical to this case.

In addition to these numerous declarations and testimony, this Court has ordered – over the objection of the District – that the *Chang* Plaintiffs be permitted to take the deposition of OAG counsel Stacy Anderson. (*See* Dkt. Nos. 603 & 604.) In so ruling, the Court specifically rejected the District's argument, largely identical to the argument that it makes with regard to Pressley's deposition, that permitting the deposition to proceed would necessarily invade the

[9] During Koger's examination, District counsel raised only two objections, neither of which were based on privilege grounds and both of which were overruled.

District's attorney-client privilege and work product protection. Holding that "[i]t is impossible and useless to predict how [the Court] will rule until [the Court] hear[s] the questions" asked, the Court directed that the deposition proceed such that Judge Facciola could "supervise the deposition of Ms. Anderson on (if necessary) a question-by-question basis…." (Dkt. No. 604 at 4.)

The Anderson deposition took place at the courthouse as ordered and, despite the District's dire predictions, generated relatively few privilege objections, all of which were easily and efficiently resolved by the Court during the deposition. The effectiveness of this procedure is demonstrated by the fact that the District interposed fewer than two-dozen privilege objections (several of which were duplicative) during a deposition that lasted nearly six hours and filled more than 240 transcript pages. Of those District privilege objections that the *Chang* Plaintiffs challenged and raised to the Court, the Court overruled approximately half. This procedure – of taking the deposition of District counsel at the courthouse and raising contested privilege objections to the Court contemporaneously – worked exceedingly well in the Anderson deposition. This procedure should be similarly successful in managing any issues that may arise during the Pressley deposition.

Given this record, there is no reason to question the Court's ability to manage effectively Pressley's deposition.[10] To the extent that privilege issues arise, there will be ample opportunity

[10] Further, this history refutes the District's hyperbolic claim that Pressley's noticed deposition is a "blatant," "transparent," and "undisguised concerted strategy" by the *Chang* Plaintiffs to pierce the privileges of the District. (Dkt. No. 836 at 4, 7, 9.) District counsel also curiously argues that the "timing of the subpoena suggests that it is being used as a tool for harassment and disruption of opposing counsel and as part of … an ongoing effort to uproot District counsel." (*Id*. at 5.) There is no such timing issue. Trial has not been set; there are no pending dispositive motions; and this case will not be delayed as a result of this deposition. There is no basis for claiming that the *Chang* Plaintiffs wish to replace the counsel representing the District (which is a separate issue from whether, ethically, Pressley should be represented by

to address them at that time. And just as was the case in Anderson's deposition and the Special Master examinations, any such issues are likely to be minimal and disposed of easily. Accordingly, the Court should reject the District's dire – but unspecific and unsupported – privilege fears and order that Pressley's deposition proceed.

2. No Other Means Exist to Obtain the Information.

The information sought in Pressley's deposition resides apparently with her alone. The *Chang* Plaintiffs have spent considerable time and resources questioning witness after witness, including designated Rule 30(b)(6) witnesses for the District on specific topics, only to find that the witnesses (testifying on behalf of the District) did not know the answer or simply obtained the answer from Pressley. The following three examples illustrate this point:

> Example 1: On January 21, 2010, the *Chang* Plaintiffs took the Rule 30(b)(6) deposition of the District regarding video footage taken by the District on September 27, 2002. During the deposition, video anomalies (including apparent time travel, gaps, and clear editing) were shown to the deponent and to Pressley, representing the witness as District counsel. These anomalies suggested, of course, that the video footage produced to the Plaintiffs was not a true copy of the original video footage. In response, it was Pressley – not the deponent – who stated "[c]ounsel for the District … ha[s] the original videotape onto which Sergeant Yates recorded video on September 27, 2002." (Tr. of Bray Dep. at 83:01-20.) *Chang* counsel demanded an inspection of that original video footage, a request which Pressley refused to act upon. (*See* email dated February 4, 2010, attached as Exhibit 2.) Approximately one month later, in front of the Court, Pressley repeated her

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the same counsel representing the District and other District Defendants in connection with this motion). This case will be decided on the merits, not on the identity of counsel representing the parties.

claim, stating that "[w]hat we additionally have in our possession is the original for the footage that was taken by the electronic surveillance unit." (Tr. of February 21, 2010 hearing at 60:07-09.) When pressed on this issue, however, Pressley stated, in a declaration to the Court, that her references to the District's possession of original video footage had been "mistaken" and were based on her own review of the tape labeling. (Dkt. No. 723 at 2.) Among the things Pressley would be questioned about in her deposition is how it came about that Pressley continued to assert – even to the Court – that the footage in the District's possession was the original footage despite the fact that she had personally observed the anomalies and presumably reviewed the tapes outside of the deposition. It was not until March 4, 2010, that District counsel conceded that the District had lost or destroyed the original video footage, causing a substantial expenditure of time and effort of several months to resolve that simple factual issue. *Chang* counsel intend to question Pressley regarding her knowledge and statements, based on her own observations and actions, pertaining to the existence of original video footage maintained by the District, which is both relevant to this litigation and particularly pertinent to the question of sanctions in this case.

Example 2: On November 1, 2010, in response to a Special Master Order, Pressley informed the Court, through a filing, that District counsel had contacted NC4 and had been told that NC4 was "cautiously optimistic, based on a survey" of the data, that the E Team data "was capable of being extracted." (Dkt. No. 718.) In so informing the Court, Pressley omitted, however, the crucial fact that NC4 had reached this conclusion not in October or November 2010 but in May 2008. Thus, the District – and presumably Pressley since at least the time of her entry on the case – were well aware that the E Team

data that finally was located in May 2011 could have been located and extracted at least three years earlier, likely shortening and possibly avoiding numerous rounds of sanctions briefings, eight days of Special Master hearings, and countless other hearings and depositions on this topic. (*See* Tr. of Bynum Dep. at 82:12-84:21; *see also* 8/19/2011 Turner 30(b)(6) deposition.) Pressley never disclosed this fact to the Court. Instead, the Court only learned the information when the Plaintiffs highlighted it after first learning of it during the Bynum deposition. The *Chang* Plaintiffs intend to question Pressley regarding the timeline of this information and the decision not disclose it to the Court.

Example 3: For several weeks, starting on June 22, 2011, the *Chang* Plaintiffs sought a list or key of E Team users that accessed, used, modified, or altered information in the E Team system related to events from September 27, 2002. At a July 12, 2011 Status Hearing, the Court instructed the District to provide this information to the *Chang* Plaintiffs. The *Chang* Plaintiffs subsequently repeated their request for the information, both informally (through communications with District counsel) and formally (through document requests). Nonetheless, the District failed to produce the requested information for approximately six additional weeks, hindering previously planned depositions and other discovery. Pressley claimed that the sought-after information could be obtained by the third-party contractor within 24 hours after the search began, but blamed the delay on "procurement" issues and the vacation schedule of Marc Bynum – the NC4 contractor responsible for doing the technical work. Pressley's version of the facts was directly contradicted by a District Rule 30(b)(6) deponent – in testimony binding on the District – who responded to the *Chang* counsel's inquiry regarding the District's business dealings with NC4 as follows:

> Q Do you know of any reason why NC4 would be unable to perform the work that the District requested other than NC4's own scheduling?
>
> A No.
>
> . . . . .
>
> Q Previously the District indicated there was a delay in providing these services due to procurement problems. Are you aware of what those procurement problems were?
>
> A No.

(Tr. of Turner Dep. at 94:01-04; 100:08-12.). To close the circle, *Chang* counsel inquired during the deposition of Marc Bynum (the individual assigned by the third-party contractor, NC4) as to the reason for delay to complete the work:

> Q After you received it, was there a reason for the delay in starting the project?
>
> A The ability to access the server, and I was also on vacation.
>
> Q When were you on vacation?
>
> A Last week.
>
> Q For one week?
>
> A Yes.

(Tr. of Bynum Dep. at 126:14-21.) Thus, contrary to Pressley's representation, Bynum's vacation – which took place between August 13-19, 2011 – did not account for the vast majority of the delay in providing the information to the Plaintiffs between June 22, 2011 and the date Bynum left for vacation (August 13th). Only Pressley can explain this seven week delay in engaging NC4 and getting them to produce the requested information, and can describe what steps, if any, were taken in the meantime to manipulate the underlying data, which would likely be itself evidence or could lead to evidence relevant to the question of sanctions.

These are not exclusive examples of the information that Pressley appears to uniquely possess and which the *Chang* Plaintiffs are unable to otherwise obtain through the testimony of other witnesses. *Chang* Plaintiffs have sought this information over a period of years and have consistently been blocked by unverified, unsubstantiated, and often apparently plain wrong statements by Pressley. Noticing her deposition is not a short-cut to information; it is the end of a very long road. *Chang* counsel have worked for years to seek information from other sources despite the Court's suggestion that depositions of District counsel would be necessary to resolve these issues. The Pressley deposition is the last resort after repeated efforts by *Chang* counsel, including numerous depositions, to develop information concerning District evidence handling and spoliation from unprepared Rule 30(b)(6) witnesses and emphatic and, as of now, unsupported statements by District counsel.

3. The Information Sought is Relevant and Not Privileged.

The deposition will focus on Pressley's activities and efforts as they relate to the topics currently before the Special Master. The District argues that "this information … is not relevant to the merits of the *Chang* Action." (Dkt. No. 836 at 11.) This tired argument purposefully ignores the past 18 months' worth of Special Master proceedings looking into the District's failure to protect – and its apparent destruction of or tampering with – substantial evidence relevant to this case, and the impact resulting sanctions may have on its ultimate resolution. Moreover, this argument has been repeatedly rejected by the Court. (*See, e.g.*, Dkt. No. 659 at 9, where the District argued that the personnel files of witnesses with information relevant to the destruction of evidence were "wholly irrelevant;" and August 9, 2010 Minute Order stating that

"[t]he District provides absolutely no support for its conclusory argument that the records of the eight individuals at issue are irrelevant.").[11]

Courts have found that "issues regarding destruction of evidence … have a direct relationship to the merits of [a] case." *Nursing Home Pension Fund v. Oracle Corp.*, No. C01-00988 MJJ, 2007 U.S. Dist. LEXIS 84000, at *18 (N.D. Cal. Oct. 31, 2007). The case of *Raytheon Aircraft Co. v. U.S.* is also instructive on this issue. In that case, the plaintiff sought to take the deposition of the opposing party's attorney, Catherine Sanders, who had signed a letter containing interrogatory responses by the defendant. *Raytheon*, 2007 WL 1115198, at *1. The plaintiffs claimed that these "responses were at best un-researched and incomplete, and possibly even deliberately untrue." *Id*. at *4. The court applied the District of Kansas's version of the *Shelton* test, which mirrors that employed by this Court. *Id*. at *2. In analyzing the "relevance" of the sought-after information, the court found that "information as to Ms. Sanders' knowledge at the time when the [] responses [] were prepared is relevant towards Plaintiff's claim that those responses were not adequately researched or were intentionally deceptive." *Id*. at *4. The Court further found that whether the responses were misleading "may have a direct bearing on the ultimate issue in this case." *Id*. Similarly, Pressley's deposition will focus, in part, on alleged misstatements made by Pressley regarding destroyed or lost key evidence – which could impact the ultimate resolution of this case.

The *Chang* Plaintiffs do not intend to invade any legitimate areas of privilege maintained by the District. In their motion, the District broadly argues that all topics that the *Chang*

[11] Further discussion of the relevance of the anticipated testimony from the Pressley deposition is discussed in Section 4 below regarding the "crucial" test set forth under *Shelton*. The District also argues that the questioning of Pressley on these topics is irrelevant because "the Special Master hearings regarding this topic have concluded." (Dkt. No. 836 at 13.) But, as the District is now aware, Judge Sullivan has ordered the Special Master to investigate specific areas of District counsel's knowledge. (*See* Minute Order dated October 3, 2011.)

Plaintiffs might touch upon would be that of a privileged nature. In essence, the District argues that any information possessed by the District's lead counsel must be privileged, regardless of the actions taken by that counsel pertaining to the collection and protection of relevant evidence. Such an argument ignores some obvious facts. First, Pressley has already submitted a declaration in this matter, which addresses the statements she made to the Court and actions that she took in relation to video footage relevant to this litigation. There should be no question that Pressley can be questioned about the subjects discussed in her declaration, which she has already either determined are not privileged or as to which privilege has been waived. Furthermore, the submission of this declaration, without objection, indicates that the District's arguments are exaggerated when it claims that there simply are no topics on which Pressley can be examined in a deposition without violating any legitimate privilege claim. Finally, the District cannot have it both ways. It cannot use counsel to make factual representations to seek the disposition of issues and then refuse to allow questions as to the basis for those representations. This would allow the District to give testimony while shielding it from discovery – the very definition of unallowable conclusory proof.

The Special Master's examination of Thomas Koger suggests that there are substantial topics and areas of inquiry to be explored with opposing lead counsel in this case that do not invade privilege. His testimony lasted the better part of a day and consumed 141 transcript pages. He freely, and without privilege objections, delved into several areas, including (1) efforts to locate the JOCC Running Resume, (2) discussions with MPD General Counsel Terry Ryan and MPD Deputy General Counsel Ronald Harris, (3) Koger's discussions with his superiors regarding his efforts to locate missing evidence, (4) Koger's role in responding to certain subpoenas, and (5) the role of other District attorneys in relation to the case. Pressley

represented Koger during his examination and made **zero** objections on the grounds of privilege during his testimony. Presumably, the same privileges and principles would apply to Pressley's testimony as applied to Koger's. Considering the manner in which Koger's examination proceeded, the District's vociferous objections to the Pressley deposition are inconsistent and lack credibility.

Without in any way limiting the scope and nature of the deposition, the following lists some of the likely topics for Pressley's deposition: [12]

- Her previously submitted declaration in this matter. (Dkt. No. 723.)
- Any knowledge by District counsel regarding the effort to destroy the E Team data.[13]
- Efforts taken by Pressley and other District counsel to preserve evidence in this case. *Chang* counsel will not inquire as to the precise communications but will seek information on this topic related to dates of such actions and the scope of employees who received such instructions. To the extent such communications have already been disclosed or produced (there have been several such documents), *Chang* counsel will seek to inquire with additional follow-up questions that avoid issues of privilege.
- Pressley's review of video footage in this matter and statements made by her to defense counsel and the Court based on her review of that footage. This area of inquiry will focus on Pressley's personal knowledge and observations as opposed to information she gleaned through communications with MPD or District employees.
- Inaccurate statements made by Pressley and other OAG counsel at previous appearances before Judge Sullivan and Judge Facciola.
- The events leading to the delay in completing the work of NC4 in searching for and extracting the E Team data and any actions taken with regard to that evidence in the

[12] District counsel asserts that *Chang* Plaintiffs intend to question OAG counsel regarding communications with other counsel in this litigation. (Dkt. No. 836 at 16.) It is unclear precisely as to what the District is referring, but the *Chang* Plaintiffs do intend to elicit the substance of communications between various defense counsel outside of the OAG. Even if there exists a valid joint defense agreement among defense counsel that could bar inquiry into the substance of those discussions – which has yet to be established – it would not prevent Plaintiffs' counsel inquiring into the time, date, identity of participants, and topics of such communications.

[13] Judge Sullivan has also ordered the Special Master to investigate this issue, among others.

meantime. Issues related to this topic have been addressed in the depositions of other witnesses but it appears District counsel is in possession of unique information on this issue. In any event, such information would not appear to be privileged as it would not address legal advice given to OAG's clients, but instead relates to administrative and procedural matters with a third-party vendor. Moreover, the District has already testified and produced numerous documents relating to this issue.

- District Counsel's failure to notify either the Court or the Plaintiffs of the attempted deletion of E Team data for 69 days after the District first learned of it. District counsel appears to have unique factual information related to this topic.[14]

As evidenced by these topics, the *Chang* Plaintiffs will carefully avoid inquiring into privileged areas and will focus on non-privileged information that is uniquely in Pressley's possession. To the extent that the District argues certain information is covered by an applicable privilege, the parties can raise such concerns contemporaneously with the Court for efficient resolution, just as they did in the deposition of Stacy Anderson.

4. The Information is Crucial to the Preparation of the Case.

The District argues that the information to be sought in Pressley's deposition "simply does not qualify" as being crucial to the preparation of the case. (Dkt. No. 836 at 15.) The District does not explain its analysis, other than to argue that because the sought-after deposition will not focus solely on the events on September 27, 2002, the planned topics must be irrelevant and inconsequential to the resolution of this matter. Of course, the District's position makes little sense. Taken to its extreme, the District's position would mandate that, even if Pressley was the sole witness to the destruction of video footage establishing who ordered the arrests on September 27, 2002, her deposition (which would focus on such destruction) would not be crucial to the preparation of the case.

[14] This is not an exhaustive list but provides the framework for the deposition and an outline of the careful approach planned by the *Chang* Plaintiffs.

Further, this Court has previously rejected the exact same arguments made by the District. For example, earlier in this case, the *Chang* Plaintiffs sought discovery regarding the Attorney General's decision to terminate or discipline Thomas Koger, the District's previous lead attorney in this case, for his handling of discovery in this case. The Court reviewed the materials and determined that, because such matters related to the apparent discovery failures in this case, the documents should be disclosed to the Plaintiffs because they were "**crucial** to the resolution of this case." (*See* Court order at Dkt. No. 732) (emphasis added.)

In response, the District appealed the Special Master's Order, and similar to its tactics in the instant matter, moved for a protective order, arguing:

> The District respectfully disagrees with respect to the relevance of the documents to the resolution of this case. This case is about 4 out of approximately 400 people who were arrested on the morning of September 27, 2002 at Pershing Park, whether those 4 persons' arrests were effectuated falsely, and whether those 4 persons' arrests violated their constitutional rights.

(Dkt. No. 734 at 7.) Judge Sullivan reviewed Judge Facciola's Order and denied the District's objections and motion for a protective order, finding that the documents are relevant. (*See* Minute Order dated February 18, 2011.) The mere fact that Judge Sullivan appointed a Special Master – in this case – to review the Plaintiffs' allegations regarding the loss and destruction of evidence reveals the importance and relevance of the issues being investigated by the Special Master to the ultimate resolution of this case. Thus, both Judge Facciola and Judge Sullivan have already ruled with regard to the importance of issues related to the potential destruction and loss of evidence in this case. They are relevant. They are crucial.[15]

[15] Other courts have found that deposition testimony of opposing counsel is "crucial" in similar circumstances. In *Rahn v. Junction City Foundry, Inc.*, No. 002128 KHV, 2000 WL 1679419 (D. Kan. Nov. 3, 2000), the court found that a deposition of opposing counsel was

Further, the fact that District counsel possesses unique information on these topics, and has, in the past, refused to provide such information to the Court and the Plaintiffs in a timely manner – to the extent it was disclosed at all – indicates the underlying importance of her testimony. For example, on May 3, 2011, NC4 contractor Marc Bynum extracted the E Team data and discovered the efforts to delete that information. According to Bynum, he conveyed these findings to District counsel.[16] That counsel possessed unique information crucial to this case – the deletion of key evidence. Yet, the District failed to disclose this destruction of evidence for 69 days. Regardless of the depositions the *Chang* Plaintiffs took, they were unlikely to uncover evidence of what Pressley did or what she knew and when that occurred.[17] Based on the numerous topics discussed above, and the practice of the District refusing to supply relevant, responsive, and discoverable information until absolutely forced to do so, there is crucial information in Pressley's possession.

CONCLUSION

The District's Motion for a Protective Order should be denied. The parties should immediately confer with the Court to select an appropriate date for Monique Pressley's deposition.

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crucial because it would allow the deposing party to determine the extent of certain investigations undertaken by the deponent.

[16] Bynum stated that MPD employees George Crawford and Stephen Bias may have also been present at various points during the extraction of the data, but it is unclear whether they were informed of the attempted destruction, and there is no reason to think they received the full de-briefing that District counsel reportedly received.

[17] Moreover, the District is now challenging Plaintiffs' ability to examine Rule 30(b)(6) witnesses or other fact witnesses on these subjects, contending that the information that they possess is irrelevant and privileged. (*See* Dkt. No. 841.) Thus, even if the *Chang* Plaintiffs are able to identify the correct witnesses, the District seeks to bar discovery from those witnesses on the basis of the same privilege arguments that it asserts in the instant motion.

Dated: October 7, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 7, 2011, I filed the foregoing with the Court's electronic filing system, which will serve notice upon all counsel of record.

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