UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAYMING CHANG, *et al.*,	:	
Plaintiffs,	:	
v.	:	Civ. Action No. 02-02010 (EGS\JMF) (Submitted to Magistrate Judge Facciola—Discovery)
UNITED STATES OF AMERICA, *et al.*,	:	
Defendants.	:	

DISTRICT OF COLUMBIA DEFENDANTS' MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENA FOR DEPOSITION OF LEAD TRIAL COUNSEL

Defendants District of Columbia, Michael J. Fitzgerald, Brian K. Jordan, Bryan DiGirolamo, Andre Harrison, and Michael Smith, and Chief of Police Cathy Lanier and Assistant Chief of Police Peter J. Newsham, in their official capacities, (hereafter "the District"), hereby moves this Court pursuant to Federal Rules of Civil Procedure 45(c)(3), 26(c), 26(b)(1), 26(b)(3)(B) and Local Rule 7, to issue a issue a Protective Order prohibiting the deposition of lead trial counsel, Senior Assistant Attorney General Monique Pressley, and an Order to quash the subpoena for a deposition (collectively, the "Subpoena") served upon her in the underlying action (the "*Chang* action"), by the *Chang* Plaintiffs on September 24, 2011.[1] The notice for her deposition and the subpoena are blatant and improper attempts to pierce the privileges of the District of Columbia and the individual District defendants. The District Defendants must be protected from such unseemly tactics and the subpoena directed to Ms. Pressley must be quashed.

[1] The Notice of Deposition for Ms. Pressley's deposition was served on District counsel on September 2, 2011.

Plaintiffs cannot meet the heavy burden imposed upon them to show a compelling necessity to depose counsel for District of Columbia, their party-opponent in the *Chang* action. With the close of the resumed discovery period and the close of the Special Master proceeding looming and the inevitability of a trial on the horizon, *Chang* Plaintiffs seek to depose OAG lead counsel regarding subjects that are all either privileged or irrelevant to the *Chang* Action. The District of Columbia has not waived its attorney-client, attorney work product and joint defense privileges and does not otherwise seek to rely on testimony by counsel in the *Chang* Action. As explained more fully in the accompanying memorandum of points and authorities, any facts or information that OAG counsel possesses either were obtained from employees and contractors of her institutional client, the Metropolitan Police Department, gathered in the course of her duties as the District's lead trial counsel in this case, or consist of her mental impressions, conclusions, opinions or legal theories shared only internally with District counsel or between co-defense counsel. As such, 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. Moreover, the *Chang* Plaintiffs have already obtained – and can still obtain – non-privileged information from numerous alternative testimonial and documentary sources with regard to the claims and issues in the *Chang* Action. Indeed, 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 counsel for *Chang* Plaintiffs' ongoing campaign to uproot District counsel in order to place themselves in better litigation posture rather than as a legitimate means of obtaining discoverable information.

As a matter of law, the deposition of OAG counsel will not lead to the discovery of admissible evidence. Accordingly, the District respectfully requests that this Court issue a

Protective Order precluding the deposition of the District Defendants' lead trial counsel and an Order quashing the Subpoena issued by the *Chang* Plaintiffs.

In support of this motion, the District relies upon its supporting Memorandum of Points and Authorities. A proposed Order is attached hereto.

Pursuant to LCvR 7(m), undersigned counsel conferred with counsel for Plaintiffs in an attempt to resolve this dispute. Counsel for Plaintiffs opposes the relief requested herein.

Respectfully submitted,

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RAYMING CHANG, *et al.*,	:	
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Defendants.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DISTRICT OF COLUMBIA DEFENDANTS' MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENA FOR DEPOSITION OF LEAD TRIAL COUNSEL

Pursuant to Federal Rules of Civil Procedure 45(c)(3), 26(c), 26(b)(1), 26(b)(3)(B) and Local Rule 7, Defendant District of Columbia and the individual District defendants ("the District") respectfully submit this Memorandum of Points and Authorities in Support of their Motion for a Protective Order prohibiting the deposition of lead trial counsel, Senior Assistant Attorney General Monique Pressley and to Quash Subpoena for Deposition (the "Subpoena") served upon her in the underlying action (the "*Chang* action") by the *Chang* Plaintiffs on September 24, 2011.[2] The notice of deposition for Ms. Pressley and the subpoena are blatant and improper attempts to pierce the privileges of the District of Columbia and the individual District defendants. The deposition must be precluded and the subpoena must be quashed.[3]

INTRODUCTION

Plaintiffs cannot meet the heavy burden imposed upon them to show a compelling necessity to depose counsel for the District of Columbia, their party-opponent in the *Chang* action. With the

[2] The Notice of Deposition was served on District counsel on September 2, 2011.
[3] The Notice of Deposition and the Subpoena are attached as Exhibits 2 and 3.

close of the resumed discovery period and the Special Master proceeding looming and the inevitability of a trial on the horizon, *Chang* Plaintiffs' Subpoena seeks to depose OAG lead counsel regarding subjects that are all either privileged or irrelevant to the *Chang* Action. The District of Columbia has not waived its attorney-client, attorney work product and joint defense privileges and does not otherwise seek to rely on testimony by an attorney in the *Chang* Action. As explained more fully herein, any facts or information that OAG counsel possesses was either obtained from employees and contractors of her institutional client, the Metropolitan Police Department, in the course of her duties as the District's lead trial counsel in this case, or consists of her mental impressions, conclusions, opinions or legal theories shared only internally with District counsel or between co-defense counsel. As such, 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. Moreover, the *Chang* Plaintiffs have already obtained – and can still obtain – non-privileged information from numerous alternative testimonial and documentary sources with regard to the claims and issues in the *Chang* Action. Indeed, 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 counsel for *Chang* Plaintiffs' ongoing campaign to uproot District counsel in order to place themselves in better litigation posture rather than a legitimate means of obtaining discoverable information.

As a matter of law, the deposition of OAG counsel will not lead to the discovery of admissible evidence. Accordingly, the District respectfully requests that this Court issue a protective order precluding the deposition of Ms. Pressley and quashing the Subpoena issued by the *Chang* Plaintiffs.

BACKGROUND

On September 24, 2011, Plaintiffs served upon counsel for the District a subpoena seeking to depose OAG lead trial counsel.[4] Ms. Pressley has served as lead trial counsel in the above-captioned matter since October, 2009. It is undisputed that counsel was not present in Pershing Park at the time of the Plaintiffs' arrests on September 27, 2002; that she was not a witness to Plaintiffs' confinement following their arrests; that she was not part of the decision to arrest or charge the Plaintiffs; and that she was not present in the Joint Operations Command Center at any time during the September, 2002 IMF protests. It is likewise undisputed that Ms. Pressley had no involvement in this litigation prior to her assumption of litigation duties in October, 2009, and thus was not part of the defense efforts or the discovery efforts for the first seven (7) years of this litigation. It is further undisputed that all information OAG counsel has regarding any facts pertaining to the incident at issue in this matter, including any disputes pertaining to discovery, the purported loss of evidence, or the recent recovery of the running resume, she learned solely by virtue of her role as lead counsel for the District Defendants, and in her duties of defending the District in this litigation.

After numerous unsuccessful attempts to convince this Court to call OAG lead counsel as a witness in the Special Master proceedings, *Chang* Plaintiffs have now subpoenaed her as part of ongoing discovery in the litigation—ongoing discovery permitted by the Court regarding belated discovery and sanctions issues which took place before OAG counsel became lead counsel for this case. *Chang* Plaintiffs' subpoena the deposition of lead counsel for the District of Columbia claiming (1) that she is a fact witness with respect to issues pertinent to the Special Master investigation, (2) that she has information that they are unable to obtain from any other

[4] Pending before the Court is the District's Motion to Stay Discovery Regarding JOCC Running Resume Data Extraction [Dkt. 817]. While the subpoena served by Plaintiffs on September 24, 2011 may also fall within the District's motion to stay, the District seeks, with the filing of this motion, additional protection for its trial counsel.

source, and (3) that there is not a likelihood that counsel's answers will be protected by privilege. *See* P. Meitl Email to S. Frost attached as Exhibit 1. Plaintiffs' claims are incorrect and preposterous. They are also pretense for *Chang* Plaintiffs' ulterior and transparent motive to continue their ongoing campaign to uproot District counsel in order to place themselves in better litigation posture. To employ such tactics as attempting to unnecessarily depose trial counsel is inexcusable, contemptible, and should not be permitted by the Court.

ARGUMENT

I. Legal Standard

The Federal Rules of Civil Procedure provide that "for good cause shown, the court…may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c). In addition to the rights conferred by Rule 26, Rule 45 provides that "the issuing court **must** quash or modify a subpoena that ... (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies or (iv) subjects a person to undue burden." *See* Fed. R. Civ. P. 45(c)(3)(A)(iii)-(iv). Although normally the party seeking to modify or quash a subpoena bears the burden going forward, "the burden shifts when the potential deponent is opposing counsel." *See Guantanamera Cigar Co. v. Corporacion Habanos, S.A.,* 263 F.R.D. 1, 8 (D.D.C. 2009). Accordingly, this court holds that **"when seeking to depose opposing counsel, the cards are stacked against the requesting party from the outset and they must prove the deposition's necessity."** *See id.* (emphasis added).

Indeed, this court has affirmed that "a party to the underlying action may move to quash the subpoena where the subpoena directly implicates the party's privilege or rights." *See Albany Molecular Research v. Schloemer,* No. 11-0096, 2011 U.S. Dist. LEXIS 40413, at *7 (D.D.C.

Apr. 14, 2011). All of the subjects which *Chang* Plaintiffs seek to depose OAG counsel directly implicate the District's rights, the attorney-client privilege existing between the District and OAG counsel, the attorney work product privilege and other privileges.

II. Plaintiffs Cannot Satisfy Their Burden of Demonstrating the Compelling Necessity to Depose Opposing Counsel

Recognizing that "counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent," this Court has stated that "depositions of opposing counsel are generally disfavored in federal courts." *See Guantanamera,* 263 F.R.D. at 8, 9 (quashing subpoena that sought to depose opposing counsel) (citing *Shelton v. Am. Motors Corp.,* 805 F.2d 1323, 1327 (8th Cir. 1986)); *accord Hickman v. Taylor*, 329 U.S. 495, 513 (1947) ("The practice of forcing trial counsel to testify as a witness, however, has long been discouraged"); *Klayman v. Freedom's Watch, Inc.*, No. 07-22433, 2007 U.S. Dist. LEXIS 91990, at *9 (S.D. Fla. Dec. 14, 2007) ("This Court [has] found that the depositions of attorneys inherently constitute an invitation to harass the attorney and to disrupt and delay the case"); *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990) ("Federal courts...have held that depositions of attorneys inherently constitute an invitation to harass the attorney and parties, and to disrupt and delay the case. Moreover, costs are added to the litigation, burdens are placed upon attorneys, and the attorney client relationship is threatened.").

In order for the Plaintiffs to satisfy their burden of proving the necessity of deposing opposing counsel, they are required to prove that "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *See Guantanamera,* 263 F.R.D. at 8 (quashing subpoena seeking deposition of opposing counsel because party seeking such deposition could not satisfy its burden to *"show* and *prove* the relevance and necessity of the

testimony sought") (emphasis in the original) (internal citations omitted); *see also Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc.,* No. 04-80090, 2007 U.S. Dist. LEXIS 7775, at * 11 (S.D. Fla. Fe. 2, 2007) (applying the three-part *Shelton* rule to determine whether party has satisfied its burden of proving that deposition of opposing counsel is warranted). The *Chang* Plaintiffs cannot meet the heavy burden of satisfying the criteria of this stringent test.

A. The Information Sought is Both Privileged and Irrelevant.

1. The Proposed Deposition Subjects Infringe Upon The District's Attorney-Client Privilege and Are Irrelevant

As a threshold matter, the attempted deposition of lead trial counsel is, on its face, an undisguised concerted strategy to obtain privileged information. *Chang* Plaintiffs, however, have failed to do the minimum required which is to provide specific topics in the subpoena (or notice of deposition) in order to show a compelling need for the deposition. "[A] party seeking to depose its adversary's counsel must demonstrate the propriety of and need for such a deposition." Evans v. Atwood, 1999 WL 1032811, at *2 (D.D.C. Sept. 29, 1999); Jennings, 201 F.R.D. at 277 ("a party seeking to depose an adversary's counsel must prove its necessity"). "Because deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for obtaining a…protective order unless the party seeking the deposition can show both the propriety and need for the deposition. This procedure is superior to requiring the attorney to submit to a deposition and make his objections at that time." N.F.A. Corp., 117 F.R.D. at 85. Because *Chang* Plaintiffs seek the deposition of opposing trial counsel, they not only have the normal obligation to confer in good faith to resolve differences (as does the District), but *Chang* Plaintiffs have the special obligation imposed by the settled case law to identify the specific topics upon which the deposition of opposing litigation counsel is sought, and to explain both why they considers the deposition of

opposing litigation counsel on those topics to be crucial to preparation of their case, and why they cannot obtain the required information by other means, as well as to seek only relevant, non-privileged information. As is clear from the deposition notice and subpoena, *Chang* Plaintiffs request is empty. Whether due to ignorance or hubris, this failing alone is enough to justify an order quashing the subpoena and precluding the deposition.

However, in an effort to adhere to its duty to confer, the District pressed *Chang* Plaintiffs for additional information and received an email from counsel for *Chang* Plaintiffs in which Mr. Meitl takes great pains to do the opposite of what is required under well-settled law. In pertinent part, the email states:

> **While we will not be supplying the questions that we intend to ask in the deposition, we have previously described some of the witnesses' knowledge and the deposition will focus on her actions and communications (including with other counsel in this litigation) in relation to the areas currently being investigated by the Special Master. This includes counsel's efforts to locate and secure key evidence. Without limiting the deposition in any way, some of the topics to be addressed can be found in previous Court filings, including Dkt. No. 728.**

See Exhibit 1.

Because *Chang* Plaintiffs would not supply all topic areas and are not in favor of "limiting the deposition in any way", the District relies upon what can be gleaned from the email exchange and the filing referenced by Mr. Meitl in drafting the instant motion.

All of the topics in the email from Mr. Meitl and in Dkt. 728, *Chang Plaintiffs Response to Declarations of Monique Pressley and George Valentine*, seek to obtain information that is

plainly protected by either the attorney-client privilege, work product doctrine or the joint defense privilege. "The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *See Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 206 (D.D.C. 2007) (internal citations omitted). Moreover, "[t]he privilege applies to disclosures made by a client to an attorney as well as an attorney's written communications to a client." *See id.*

Here, the *Chang* Plaintiffs state that they seek information pertaining to "issues pertinent to the Special Master investigation." *See* Exhibit 1. However, even if plaintiffs were indeed seeking this information, it is not relevant to the merits of the *Chang* Action. None of the topic areas alluded to by *Chang* Plaintiffs is relevant to the proof of their false arrest case against the District of Columbia. Privileged information regarding OAG counsel's knowledge and/or lack of knowledge, her mental impressions, her communications with clients and co-counsel are not relevant to the case on the merits and will not lead to the discovery of relevant evidence. *Chang* Plaintiffs, far from legitimate fact finding, instead desire to dissect and expound upon issues previously examined by this Court and, where counsel's knowledge is concerned, fully addressed in a court-ordered declaration. *See* Pressley Declaration and Supporting Documents attached as Exhibit 4. Upon receiving the declaration, this Court had no further questions regarding counsel's statements and/or knowledge. Indeed, the declaration and its attachments exposed the frivolous and harassing efforts of *Chang* Plaintiffs to conjure up issues implicating OAG counsel where there are none and where matter have long since been explained. The attachments, in particular, clearly show that OAG counsel was relying upon documents, physical evidence and other information provided to her by MPD employees. However, *Chang* Plaintiffs insisted on responding (absent leave of the Court) to OAG counsels' declarations with issues they believe the

declarations failed to discuss. Mr. Meitl, in his email regarding counsel's deposition, refers to these issues as "some of the topics to be addressed". Excerpts of the questions proffered in *Chang* Plaintiffs' response are as follows:

> • In her declaration, Ms. Pressley does not discuss or address whether she examined the video footage labeled "Orig." or "Original," compared it the video footage provided to *Chang* counsel, or made any further inquiry as a result of the deposition.
>
> • In her declaration, Ms. Pressley does not discuss or address whether she examined the video footage labeled "Orig." or "Original," compared it the video footage provided to *Chang* counsel, or made any further inquiry after she and Mr. Valentine realized that the versions produced to the Plaintiffs were compilations.
>
> • Whether previous District counsel had, at any point prior to March 2, 2010, reviewed the tapes marked "Orig." or "Original" and made any determinations as to whether that video footage was in fact original video footage.
>
> • What information was conveyed to Ms. Pressley or Mr. Valentine by previous District counsel regarding the existence of original video footage when they each entered the case as counsel for the District of Columbia.
>
> • What information was conveyed to either Ms. Pressley or Mr. Valentine by MPD employees regarding the existence of original video footage from September 27, 2002.
>
> • What information was conveyed to either Ms. Pressley or Mr. Valentine by the Office of the General Counsel for the MPD regarding the existence of original video footage from September 27, 2002. As the Court may recall, the District produced new video footage to the *Chang* Plaintiffs on December 12, 2007, and the District Rule 30(b)(6) deponent at the time stated that the footage had been previously maintained in the Office of the General Counsel for an extended period of time.
>
> • The dates of Ms. Pressley's conversations with relevant witnesses, including Donald Yates, Jorge Acevedo, and Nathaniel Britt. According to Ms. Pressley's declaration, she contacted Mr. Yates shortly after March 2, 2010, and learned that "it was impossible for the VHS tapes in the District's possession to be originals." *Chang* Plaintiffs had noticed Mr. Yates deposition in October 2009 (five months before Ms. Pressley contacted Mr. Yates in March 2010), and scheduled the deposition shortly after Ms. Pressley entered the case.[2] *Chang* Plaintiffs also noticed the deposition of Jorge Acevedo at the same time, but Mr. Acevedo was unable to appear because of medical issues. Mr. Yates failed

> to appear for his deposition. Ms. Pressley does not address whether she communicated with Mr. Yates or Mr. Acevedo at that time, and if so, what was discussed concerning the existence of original video footage. An October 27, 2009 email from Ms. Pressley suggests that she was in contact with Mr. Yates at that time.
>
> • What efforts were undertaken to locate the original video footage recorded by the ESU officers.

See Dkt. 728.

The privileges implicated by the above questions are patently obvious. *Chang* Plaintiffs' sense of entitlement to such information is astounding. As demonstrated above, they seek to inquire regarding the impressions of opposing counsel, investigations by opposing counsel, knowledge and actions of prior trial counsel (one of whom has testified in the Special Master hearings), communications between current and prior trial counsel, communications between District of Columbia employees and their attorney in defense of the litigation, communications between OAG agency counsel and OAG trial counsel in defense of the litigation, and communications between District of Columbia employee witnesses and trial counsel in preparation for depositions in defense of the litigation. Of the entire list of 15 "issues" in the filing, there was not one that did not implicate privileges and a number of the "issues" either have been previously addressed or could easily be addressed through another witness. Moreover, attempts to discover information with regard to the analysis, investigations, and assessments of the opposing counsel are misguided and will not lead to the discovery of admissible information. *See West Peninsular,* 132 F.R.D. at 303 ("As this Court is well aware, innocent inquiries at deposition often implicate work product or attorney-client privileges.").

Finally, the Special Master hearings regarding this topic have concluded. OAG counsel submitted her declaration (Dkt. 723) on November 29, 2010. *Chang* Plaintiffs filed their unsolicited response (Dkt. 728) on December 13, 2010. In a hearing held July 12, 2011, the Court

determined to conclude the Special Master proceedings as to referral topics 2 and 3 (video and audio tapes), and thereafter issued a minute order directing the defendants to file their proposed findings of facts and conclusions of law. Not once did the Court express a desire to hear further testimony on either of these issues, let alone testimony from trial counsel. To the contrary, the Court expressed the desire to conclude the portions of the referral which it could in order to be able to submit its recommendations to Judge Sullivan. By August 11, 2011, all parties had submitted proposed findings of facts, conclusions of law, and objections. A claim by *Chang* Plaintiffs that the need for opposing counsel's deposition is compelling in order to address an almost year-old declaration and other related baseless allegations is farcical. Not only is OAG counsel's testimony on the above topics privileged and irrelevant as to the merits of plaintiffs' case, it is also not needed to aid in a proceeding which is closed. As this Court stated in its April 15, 2011 Order, "[j]udicial proceedings have beginnings, middles, and ends." *See* April 15, 2011 Order of Special Master at 2.

With respect to underlying subjects, all communications OAG counsel had regarding the loss and/or recovery of evidence in this case were made within the bounds of the attorney-client relationship and in connection with the District's defense of this matter or to secure legal advice. Thus, any questioning of OAG counsel would threaten to disclose confidential communications made to her for the purposes of defending this matter. Moreover, all the information OAG counsel possesses was obtained from employees of the Metropolitan Police Department – she possesses no first hand information. Accordingly, any information Plaintiffs seek is available from other sources – sources that do not implicate the "significant concerns [that] are raised at the prospect of an attorney acting as both an advocate and fact witness." *C&E Services, Inc. v. Ashland Inc.*, 2008 WL 1744600, at *2 (D.D.C. Apr. 14, 2008). One such "concern is that the

party calling its opposing party's counsel to testify may be doing so in order to gain an unfair advantage by causing that counsel to withdraw or be disqualified, which could have a devastating impact on the opposing party." *C & E Services*, 2008 WL 1744600, at *2 (citations omitted). Here, this concern is particularly heightened in light of the Plaintiffs' prior unsuccessful attempts to disqualify trial counsel in this case. *See* Plaintiffs' Mot. to Disqualify Office of the Attorney General for the District of Columbia [Dkt. 234].

In light of the fact that OAG counsel has no first hand information regarding this case, and that any information she does possess is known first-hand by other sources within the District, and that information OAG counsel has is protected from disclosure by virtue of the fact that it was communicated to her during the course of her representation of the District in this litigation, Plaintiffs should be required to obtain the information they seek from trial counsel through other non-attorney sources with first-hand information.

2. The Proposed Deposition Subjects Implicate the Protections of the Attorney Work Product Doctrine and the Joint Defense Privilege

"[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." *See* FED. R. Civ. P. 26(b)(3). This court recognizes that "fact work product" can only be produced if the party seeking discovery can show substantial need *and* that they are unable to obtain the substantial equivalent of the materials by other means. *See In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 4 (D.D.C. 2002) (citing Fed.R.Civ.P. 26(b)). Opinion work product, which contains the opinions, judgments, and thought processes of counsel, "receives almost absolute protection from discovery" that can only be overcome by "extraordinary justification." *See id.*

Here, based upon Mr. Meitl's reference to Dkt. 728, as discussed above, *Chang* Plaintiffs seek information regarding the evaluations, investigations, assessments and mental impressions of

multiple OAG attorneys, acting as counsel for the District, in connection with a variety of litigation-related issues. *See* Exhibit 1. These topics, on their face, seek the opinions, judgments, and thought processes of counsel in anticipation of litigation. *See id.* Accordingly, the work product doctrine additionally bars disclosure of the information sought by the Plaintiffs.

Moreover, per Mr. Meitl's email, *Chang* Plaintiffs intend to question OAG counsel regarding communications with other counsel in this litigation. However, OAG counsel represents in their official capacity two of the District defendants (Commissioner Charles Ramsey and Assistant Chief Peter Newsham) who are represented by outside counsel in their individual capacities. Inquiry regarding OAG counsel's ongoing communications with co-defense counsel implicates the joint defense privilege. This court has stated that:

> [t]he joint defense privilege, often referred to as the common interest rule, is an extension of the attorney-client privilege that protects from forced disclosure communications between two or more parties and/or their respective counsel if they are participating in a joint defense agreement. It permits a client to disclose information to her attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege and is intended to preclude joint parties and their attorneys from disclosing confidential information learned as a consequence of the joint defense without permission.

United States v. Hsia, 81 F.Supp. 2d 7, 16 (D.D.C. 2000). "It protects communications between the parties where they are 'part of an on-going and joint effort to set up a common defense strategy' in connection with actual or prospective litigation." *Minebea Co. v. Papst*, 228 F.R.D. 13, 15 (D.D.C. 2005). "[T]he rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine." *Id*. at 16 (quoting *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)). Communications between OAG counsel and co-defense counsel are protected communications and are not an appropriate area of inquiry for deposition.[5]

[5] Likewise, *Chang* Plaintiffs would certainly object to discovery requests or deposition notices from the District to counsel for *Chang* Plaintiffs for the purpose of inquiring into communications between counsel for *Chang* Plaintiffs

B. Alternative Means Exist to Obtain the Information Sought

As discussed above, the potential deposition subject matters referenced by *Chang* Plaintiffs all seek privileged and non-relevant information from counsel for the District. To the extent that any non-privileged or relevant information *does* exist with regard to any of the subjects for which they seek to depose OAG trial counsel, the District is obviously the source of that information. Indeed, the Chang Plaintiffs have already obtained copious amounts of information from the District in both documentary and testimonial evidence. The District has produced tens of thousands of pages of documents containing non-privileged information to the *Chang* Plaintiffs over the course of the past 9 years. They have been and still are free to depose employee fact witnesses within the District's control as well as former employees and contractors. Additionally, due to the unique circumstances of this case, *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. If *Chang* Plaintiffs sought answers with respect to what information prior counsel provided to current counsel or what information the MPD General Counsel's office provided to current counsel—albeit all objectionable improper lines of questioning—they have already had an opportunity to ask such questions of alternate sources.

Moreover, even if the video tape inquiry or other inquiries as to the existence of, search for, or recovery of evidence were compelling enough to justify the deposition (though they are not), the source of such information is clearly the District. *Chang* Plaintiffs have had the opportunity to depose each and every member of the MPD Electronic Surveillance Unit as well as other District employees responsible for creation and maintenance of audio tapes and the JOCC Running Resume. Additionally, many of the same employees appeared before the Special Master and were examined by counsel for

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and counsel for *Barham* plaintiffs during the years in which *Barham* counsel were actively involved in the case.

Chang Plaintiffs during that proceeding. *Chang* Plaintiffs cannot cure a perceived deficiency in the testimony of District witnesses by attempting to access the privileged communications and mental processes of counsel. Under these circumstances, *Chang* Plaintiffs' Subpoena must be quashed and the District's motion for a protective order should be granted. *See Guantanamera,* 263 F.R.D. at 8 (granting motion to quash subpoena of opposing counsel because "[o]bviously, other means exist to obtain the information than to depose opposing counsel"); *West Peninsular,* 132 F.R.D. at 303 (granting defendants' motion for protective order precluding depositions of opposing counsel because plaintiffs had obtained documents in discovery "concerning the evidence they seek to obtain" through the depositions").

C. The Information Sought Is Not Crucial to Plaintiffs' Case

The final prong of the *Shelton* test provides that a party may depose the opposing party's counsel only if "the information is crucial to the preparation of the case." *See Guantanamera,* 263 F.R.D. at 8. *Chang* Plaintiffs cannot satisfy this prong. As discussed at length above, because the matters about which *Chang* Plaintiffs wish to depose OAG counsel are privileged and not relevant to their case, and because there are ample alternative non-attorney sources for any non-privileged, relevant information sought by the *Chang* Plaintiffs, the privileged information within the knowledge of OAG counsel simply does not qualify as "crucial" within the meaning of the *Shelton* test. *See id.*

CONCLUSION

Given that all the information sought by the notice of deposition and the Subpoena to Ms. Pressley is either privileged or irrelevant, and that the attempted deposition of lead trial counsel clearly is a tool for harassment and disruption, the District requests that *Chang* Plaintiffs be precluded from

taking the deposition of Ms. Pressley and that the subpoena served on Senior Assistant Attorney General Monique Pressley be quashed.

Respectfully submitted,

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