

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

RAYMING CHANG, <i>et al.</i> ,)	
)	Case No. 02-2010 (EGS)
)	
Plaintiffs,)	
)	
v.)	
)	
CHARLES RAMSEY, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

JEFFREY BARHAM, <i>et al.</i> ,)	
)	Case No. 02-2283 (EGS)
)	
Plaintiffs,)	
)	
v.)	
)	
CHARLES RAMSEY, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

DECLARATION OF PETER J. NICKLES

I, Peter J. Nickles, the Attorney General of the District of Columbia, hereby declare and state as follows:

1. I am over the age of twenty-one (21) years and competent to testify to the matters contained herein and testify based on my personal knowledge and information as well as my review of certain filings and declarations regarding this matter.

2. I make this declaration in response to this Court's Order of July 30, 2009, requiring me to address three distinct issues: "(1) the pattern of discovery abuses engaged in and repeatedly acknowledged by the District during the pendency of these cases; (2)

the District's plan for both promptly concluding discovery in these cases and assuring the Court, the parties, and the public that all discoverable materials have been turned over to plaintiffs in these actions; and (3) whether any investigations have been conducted into the discovery violations and missing and/or destroyed evidence in these cases and if not, why not." (Order, Dkt. No. 486).

3. At the outset, let me state that the Office of the Attorney General ("OAG") and I personally take the Court's concerns extremely seriously. Full discovery is an essential part of our system of civil justice and anything less compromises that system. The Court's criticisms severely impact the professional standing, integrity and reputation of the Office, and I commit to taking all necessary actions to assure the Court and the public that the problems at issue here will not reoccur. As discussed herein, the failures in discovery and the problems with preservation of evidence recited by this Court and plaintiffs will be thoroughly investigated.

4. Immediately after the status hearing on July 29, 2009, having then been informed of the Court's concerns and recently produced documents, I directed that an investigation be done both as to why documents belatedly were produced to plaintiffs in these actions as well as with respect to plaintiffs' allegations that evidence was missing and/or destroyed.

5. This declaration sets forth my actions with respect to these matters, as well as other steps that I have taken in an effort to assure the Court, the parties, and the public that all discoverable materials have been or will be produced to plaintiffs. I also will address plaintiffs' major complaints as they relate to missing or purportedly destroyed evidence. Because I have had only two weeks since the status conference to undertake

the investigation and to prepare this declaration, the actions set forth herein are preliminary. The investigation is continuing and as findings are made, or other actions are deemed necessary by me, we will so advise the Court. These further steps may include necessary disciplinary actions against attorneys and others who were directly responsible for discovery in these matters, as well as elsewhere within the District government, including with respect to issues concerning preservation of evidence.

6. As part of the effort to conclude discovery in these cases promptly and to assure the Court and the parties that all discoverable materials have or will be produced, I have asked one of the Assistant Deputies for the Civil Litigation Division, Ellen Efras, to assume the position of lead counsel in this matter. Ms. Efras joined OAG as a line attorney in late 2005 after 28 years in private practice handling complex litigation and became a supervisor in late 2006, early 2007. She has experience with large scale document production as well as management and trial of complex cases. Immediately after the status conference on July 29, 2009, Ms. Efras directed that a sweep be done of all documents produced to OAG in this case. Those efforts are discussed below. Ms. Efras also began direct communications and coordination with MPD and the Executive Office of the Mayor to ensure that all discoverable materials have been made available to OAG. Those efforts also are discussed in more detail below. I have the highest confidence in Ms. Efras and know that she will work cooperatively both with plaintiffs and the Court to resolve any outstanding discovery issues or other matters that arise during the continuing course of this litigation.

7. Further, as part of the investigation into discovery violations and what further actions should be taken, I have asked the other Assistant Deputy of the Civil

Litigation Division, Samuel Kaplan, to review the actions taken and to advise me directly and independently to ensure that the problems that have arisen in this case do not recur and that any consequences from past lapses are mitigated going forward. Mr. Kaplan also will advise me directly and independently on actions to be taken in large-scale discovery cases in an effort to prevent these types of problems. Mr. Kaplan joined OAG in 2007 after over five years with the Federal Programs Branch of the United States Department of Justice. In addition to his experience with discovery while with DOJ and in private practice, he has addressed numerous discovery issues in his position as Assistant Deputy and, in particular, supervised the District's response to Chief Judge Lamberth's order granting the plaintiffs' motion to compel in *D.L. v. District of Columbia*, C.A. No. 05-1437. As with Ms. Efros, I have high confidence in Mr. Kaplan's ability to provide me an independent and objective assessment as to how OAG should manage large-scale discovery.

8. In addition to the above actions, former United States District Court Judge Stanley Sporkin has agreed to assume a position as an advisor/counselor to me to assist in improving the management of discovery in our massive class action cases. As this Court is well aware, Judge Sporkin has impeccable credentials and is well suited to this task. Judge Sporkin spent twenty years with the Securities and Exchange Commission, serving the last seven years as the Director of the Division of Enforcement. He then went to the CIA where he served five years as the General Counsel. He served as a United States District Court Judge for the District of Columbia for fourteen years. Upon retirement, Judge Sporkin then was a partner for six years with the international law firm of Weil, Gotshal & Manges. Through a wide variety of awards, Judge Sporkin consistently has

been recognized by the profession for his outstanding public service. Mr. Sporkin will independently review with me the discovery problems at issue here, as well as the allegations concerning destruction of evidence.

9. To address the Court's concerns, OAG has developed and is implementing a plan to conclude all discovery in these matters and to assure the parties, the Court, and the public that all surviving materials have been produced. To this end, immediately after the July 29, 2009, status conference, a team of attorneys, paralegals, and interns did a sweep of all locations on the 6th floor of the Civil Litigation Division where documents relevant to these cases could have been stored for the past several years. I understand that the sweep resulted in the discovery of additional documents, some of which appear not to have been internally reviewed and produced previously to plaintiffs in these cases. I also am informed that Ms. Efros, in addition to coordination with MPD and the Executive Office of the Mayor ("EOM"), caused a second sweep to be done of all areas of the Civil Litigation Division where documents related to this litigation were likely to be stored.

10. The documents discovered after the hearing currently are being Bates numbered, indexed for production, and reviewed for privilege. These additional documents will be produced to plaintiffs as promptly as possible, once we ensure that all documents from whatever source have been located and accounted for.

11. As part of my investigation, Ms. Efros again directed MPD to make inquiry of all relevant personnel, present and former MPD officers and officials with knowledge or involvement in the Pershing Park mass arrests, to search for any and all documents that have not been produced, including records of any type that relate to the

Joint Operations Command Center (“JOCC”) Running Resume of September 27, 2002, which is at issue here, as well as to search for any documents generated since MPD previously provided materials to OAG that consists of or relate to emails or correspondence relating to the policing of the September 2002 IMF/World Bank demonstrations. The Declaration of the MPD General Counsel Terrence D. Ryan outlining the latest efforts undertaken by MPD is submitted herewith.

12. Ms. Efros also requested the General Counsel for the Mayor to review plaintiffs’ discovery requests relating to the Pershing Park arrests and/or discovery and either to confirm that the Executive Office of the Mayor has no responsive documents or to provide such forthwith. The Declaration of Andrew T. Richardson, General Counsel to the Mayor, as to these activities is attached hereto.

13. As to documents recently produced to plaintiffs immediately before the July 29, 2009, status conference, they were found by Mr. Koger in reviewing materials and filings in anticipation of that conference. My understanding from talking with Mr. Koger and reviewing his declaration attached hereto is that he undertook that action because, upon reviewing the sanctions filings by Plaintiffs in preparation for the July 29, 2009 hearing, he concluded that document management had been unacceptably poor. Thus, he sought to organize the storage areas of documents related to the various mass demonstration cases, which house documents from the Pershing Parks cases, among others. In that process he found certain documents that previously had not been produced to plaintiffs. At the time of this activity, I understand that he did not identify any other documents responsive to this case. I also understand that he produced the responsive documents he found before the July 29, 2009, hearing, in some instances redacting

personal and cell phone numbers, among other information. Further, I understand that some of the documents found by Mr. Koger already were redacted in part. Other discovery efforts in these cases, including efforts to locate the J.O.C.C. running resume, are discussed at length in the accompanying Declarations of Mr. Koger and Ronald B. Harris, MPD Deputy General Counsel.

14. The discovery lapses at issues here are inexcusable and should not have occurred. Even my preliminary investigation discloses that OAG personnel responsible for discovery made serious errors in managing and producing documents in these cases. Thomas Koger, a Senior Assistant Attorney General, was lead counsel in these cases and the person in charge of discovery. As such, the responsibility for the errors here falls on him. He, and those he supervised, misplaced documents and, because they were not indexed upon receipt, lost track of them. Thus, the documents were not timely produced. Although the loss and belated recovery of such materials is attributable to multiple factors, including the failure to timely index these materials when received from MPD and other sources, failure to timely review documents upon receipt, the lack of an OAG document management protocol or system, failures to keep control over documents provided to OAG, and the repeated movement and relocation of documents and reassignments of space within the Civil Litigation Division in response to the current and changing needs of the Office, such mistakes cannot be condoned. I state unequivocally that significant, remedial actions will be taken to address these issues and to prevent their reoccurrence, including proper disciplinary action. I also can state that promptly upon discovery and review of the belatedly discovered documents, they have been and will continue to be produced to plaintiffs.

15. Without in any way excusing the unacceptable discovery lapses in this case, I do want to express my continuing support for our lawyers and staff as talented, hard working, committed professionals who strive, often under difficult and overwhelming circumstances, to provide high-quality representation for the District. In this case, and many of our other massive class action cases, OAG faces formidable adversaries with staffing and resources that far exceed those of this Office. The OAG has suffered for years from under-staffing and lack of resources to manage discovery in large scale class action cases.

16. When I was a partner at Covington, litigating against the District in various class actions cases, I, too, as plaintiffs here, was frustrated by the seemingly endless discovery problems which often resulted in the continuation of litigation long after any logical end date. I now recognize, however, the critical resource limitations of the Office and the severe constraints on OAG attorneys and support staff in their continuing efforts to comply with massive discovery requests. The problem is exacerbated by agency counsel offices that also are understaffed. The Fenty administration made substantial efforts to have money allocated for a District-wide document management system that also would have addressed OAG document management needs and have provided resources for our attorneys. These efforts, however, were not supported by the Council for the District of Columbia and the funds were redirected to other projects. The Office still suffers from limitations on staffing and support which has been exacerbated by the current fiscal crisis facing the City.

17. I wish I could represent to the Court that there will be immediate improvements in resources, including staffing and document management technology,

made available to the OAG to prevent some of the problems that have occurred in this case from occurring in the future. Unfortunately, given the current District budget problems, and notwithstanding my best efforts, I am disappointed to report that for Fiscal Year 2009 the Council reduced the OAG budget by over two million dollars, and for Fiscal Year 2010, the Council has reduced the OAG budget further by almost three million dollars, which certainly will result in a reduction in force of present staff.

18. I now want briefly to address a number of concerns that plaintiffs have presented about the apparent loss or destruction of evidence by MPD. These issues also will be the focus of my investigation. I rely to some extent on what is stated herein on the Declarations of Thomas Koger and Ronald Harris submitted herewith, although I want to make clear that I have not yet had the opportunity to corroborate what is stated in those declarations. My investigation will focus on what appears to be the apparent and highly problematic failures of MPD to maintain evidence related to these cases as well as conflicting accounts as to such missing evidence. If this proves to be true, not only will I recommend disciplinary measures against those responsible, but, with Judge Sporkin's assistance, I will conduct an evaluation of current MPD protocols and procedures for ensuring that such evidence is properly secured.

19. The first issue is the loss or destruction of the J.O.C.C. Running Resume for September 27, 2002. Although I have not yet had an opportunity to investigate the issue independently, I have been informed that MPD Deputy General Counsel Ronald Harris began trying to obtain the document after receiving a subpoena issued in September 2003, from the District of Columbia Council on the Judiciary specifically seeking the Running Resume for the September 2002 International Monetary Fund/World

Bank protests. It has been represented to me that the MPD Office of the General Counsel (“OGC”) did not receive, much less lose or destroy, the Running Resume. The reason, however, for its nonexistence is not clear. There is conflicting testimony regarding the existence of paper copies, and part of my investigation will attempt to untangle the various accounts as to why multiple copies of the J.O.C.C. Running Resume no longer exist. The non-existence of such evidence, whatever its probative value may be, appears to be inexcusable. I can state, however, that the current OAG protocol for issuance of litigation “hold letters,” is much more stringent than it was through late 2003, when the Running Resume could not be located for production to the D.C. Council or to the Civil Litigation Division. The existing protocol should be well suited to prevent a reoccurrence of such a loss of evidence, but, if I determine it is not, with the advice of Judge Sporkin, further preventative measures will be implemented.

20. I note from the Declaration of Thomas Koger that this Office attempted to obtain the missing J.O.C.C. running resume by other means. The Judiciary Committee Report on Investigation of Metropolitan Police Department’s Policy and Practice in Handling Demonstrations in the District of Columbia, authored in March 2004 by now Councilmember Mary Cheh, stated (at p. 49), that the Committee “reconstructed the events of September 27, 2002, by reviewing live media footage of that day, as well as published press reports, listening to MPD radio runs, reviewing MPD after-action reports, and the Department’s ‘running resume’ that logs events reported throughout the day * * *.” Unfortunately, OAG was denied access to these materials. This Office, which did not have the J.O.C.C. running resume, sought it and any other documents it did not have, through a subpoena. However, now Councilmember Cheh, who had served as Special

Counsel to the Committee prior to the service of the subpoena, opposed the subpoena pursuant to an assertion of legislative privilege regarding her copies of the documents, and the subpoena was quashed by this Court.

21. Plaintiffs also expressed concern about having been provided recordings of MPD radio communications containing gaps at critical time frames in the Pershing Park events, and have asserted that the District has attempted to mask these deficiencies by submitting a false declaration to this Court. I take very seriously plaintiffs' assertions that this Office has attempted to persuade this Court with a perjured declaration from an MPD employee. Again, I have not yet taken an independent investigation of this issue, nor have I yet untangled the again conflicting reports as to whether and why gaps may exist in these recordings. This will be a focus of my investigation.

22. Plaintiffs further state that they were not timely provided certain videotapes pertaining to the Pershing Park events, and that they were only provided a compact disk of such videos this July. I understand from the Koger Declaration that the cd contains no new material; it provides five previously produced videos in a more convenient format. I understand that three of the videos, those reflecting the police activities at Pershing Park and other protests that day, were first produced in March 2004 to attorneys at the law firm of Covington & Burling in response to the *Abbate, Chang, and Diamond v. District of Columbia* Plaintiffs' First Set of Consolidated Requests for Production of Documents, with the understanding shared by the District and by *Abbate and Diamond* counsel that the three joint requesters were to share the production. I have been informed that the *Chang* plaintiffs did not avail themselves of these materials or the audiotapes provided at that time.

23. I understand that Mr. Koger has discussed his mishandling of MPD Field Arrest Forms and related documents in responding to plaintiffs' motions for sanctions in these cases and in his Declaration of this date. Regarding documents that have yet to be produced, Mr. Koger has explained in this preliminary investigation, as he has to the Court regarding documents that were produced immediately prior to the July 29, 2009 status hearing, that the handling of these materials suffered from mismanagement and lack of sufficient controls, all of which will be addressed further in my investigation, with preventative measures and appropriate discipline implemented to ensure that such problems do not reoccur.

24. As a last point relating to discovery problems and deficiencies in these cases, including the apparent loss of evidence, let me state that the investigation of the Pershing Park mass arrest and the collection of pertinent documents within MPD commenced shortly after the October 24, 2002 public hearing of the Committee on the Judiciary. However, even as these efforts were underway, no formal litigation "hold letter" was generated. Civil Litigation Division protocols in effect at that time were not as stringent as they are now regarding the issuance of hold letters. Now it is mandatory that when litigation is filed, litigation hold letters are sent directly to all affected agencies. This practice is an effective safeguard against such future omissions.

25. In addition to the current protocol with respect to litigation hold letters, additional remedial steps have and are being implemented to avoid a recurrence of the problems experienced here with document management. These include a written directive from the Division Deputy to all division staff prohibiting the relocation of any boxes or files without coordination among managers and staff attorneys to ensure that the

files and records are properly identified and relocated to a space which is appropriately marked and identified and:

- (a) Development of protocols with the administrative office of OAG to ensure that the upcoming renovation of the 6th floor space does not result in the relocation of records and files without a specific relocation plan. This plan is to ensure that files and records remain intact as the renovation work is in progress.
- (b) Coordination with IT services on utilizing Concordance for discovery related document management. Although funding has been reduced substantially for this activity, OAG will identify “best practices” within existing funding limitations to use Concordance at least for the document intensive cases, including all class action lawsuits.
- (c) In the event OAG available funding does not permit the use of Concordance or only limited use, the division’s paralegals and support staff will be trained on a division-wide protocol that establishes a uniform system for manually storing, tracking and copying documents.

26. Finally, I will discuss settlement efforts because the Court emphasized the importance of resolving these cases. The District has recognized the importance of settling these cases from early on and has, in fact, succeeded in providing relief through settlement offers or offers of judgment to resolve the *Abbate*, *Burgin*, and *Franklin Jones* cases, the claims of three *Chang* plaintiffs, and the claims of the four *Barham* non-class member plaintiffs. The District has expended significant resources to try and settle these cases on a reasonable basis. Moreover, it still is committed to doing so especially since, as this Court observed, in January 2008, the Court of Appeals’ decisions were effectively

controlling against the District on the common law false arrest claims. Indeed, the District filed a proposed judgment against itself on those claims in January 2008, with my authorization.

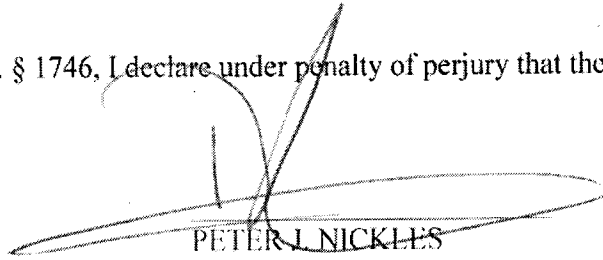
27. Offers have been made in these cases that equal and/or exceed offers accepted and approved by this Court in *Burgin* and *Abbate* and the Rule 68 offer accepted by the four non-class member *Barham* plaintiffs. The Declaration of Thomas Koger provides further details concerning these settlements.

28. This Court, to date, has awarded these plaintiffs \$97,203.71 in attorney fees, subject to further order. Unfortunately, to date, settlement offers modeled on previous settlements successfully achieved, which would include reasonable attorneys fees to be determined by this Court and provide for even greater compensation to class members than provided for by the *Burgin* settlement, have failed to resolve these two cases. Nevertheless, the District remains committed to pursuing amicable resolution of these remaining cases on reasonable terms and to engaging in mediation as a means of accomplishing this. To this end, I intend personally to meet with plaintiffs' counsel and any mediators that may jointly be selected by the parties, with the approval of this Court.

29. Again, in closing, I state unequivocally that I am committed to a vigorous and independent investigation of what happened and remedial action intended to ensure that the mistakes do not occur again. I plan to attend the September 29 status conference in these cases and to address the Court directly on these issues as well as any continuing concerns that it may have.

Nothing stated herein is intended to waive any applicable privileges or work-product protections with respect to this investigation, or the handling of discovery in these cases, or the litigation.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
is true and correct.



PETER J. NICKLES

Date: August 12, 2009