UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELIZABETH BOLGER, *et al.*	)	
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Plaintiffs,	)	
	)	
	)	
v.	)	Civil Action No. 03-906 (JDB)
	)	
	)	
DISTRICT OF COLUMBIA, *et al.*	)	
	)	
Defendants.	)	
_____	)	

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR SANCTIONS AND RELATED RELIEF FOR DISCOVERY ABUSE
PERPETRATED BY THE DISTRICT OF COLUBMIA

The defendants present the Court with an Alice in Wonderland like interpretation of events, in which plaintiffs are disinterested in and fail to press for discovery and are not "truly" interested in the role of the four or more FBI agents, and where in spite of this lack of diligence the defendant has persisted steadfastly of its own initiative to produce responsive materials. Nothing could be further from reality. Every additional document that has been produced by the District has been extracted through painstaking diligence by plaintiffs, repeated discovery conferences by the Court and only when discovery orders had been entered and the District feared that sanctions could be imminent.

The great deception now advanced upon the Court is the claim that the Office of the Attorney General, the Metropolitan Police Department Office of the General Counsel, and the command staff within the MPD were shocked, shocked to learn of the April, 2002 use and maintenance of the Joint Operations Command Center (J.O.C.C.) "running resume."

Much discussion herein focuses specifically upon the J.O.C.C. running resume, however the failure to produce that document is merely a manifestation of the greater problem, also addressed below, which is the refusal of the District of Columbia to undertake a thorough search of its collective knowledge

and records in response to discovery requests and also to be forthcoming in the production of the documents which it knows exists.

The running resume is the long-standing[1] information backbone of the Command Center. All significant information is required to be entered on the running resume. It is repeatedly identified in the J.O.C.C. Activation manual[2] as the "normal" and primary "chain of communication to [the J.O.C.C.] Command Desk."

The March 21, 2002 revision of the MPD Joint Operations Command Center Activation Procedures handbook unambiguously establishes the use and maintenance of the running resume during the timeframe of the April, 2002 protests. It is remarkable that the District could claim that no running resume was generated for the April, 2002 protests when the March 21, 2002 revision of the most relevant procedures manual is replete with references to the generation and primary reliance upon the running resume.

The running resume is projected onto a massive main video screen and is available also on the desktop computers of all JOCC stations. See Ex. 10, Rule 30(b)(6) deposition of District of Columbia (Jones), at 53:13 – 22. Everyone who was within the JOCC or who had knowledge of, or responsibilities related to, the JOCC knows that when the Command Center is activated, the running resume is generated.[3] The denials of the existence of the running resume are plainly unjustified and unjustifiable

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[1] The *1995* General Order establishing responsibilities for the MPD Command Information Center, requires production and distribution of a contemporaneously maintained "Command Information Center Activity Report," which is to transmitted to the Chief of Police every eight hours or as requested and which includes "[a] narrative description in chronological order of all essential police operational activities, public events, and any other pertinent information related to the event for which activation of the CIC occurred. The report shall be maintained and updated on a continual basis . . ." See Ex. 1, MPD General Order 803.6, "Activation and Operation of the Command Information Center," October 11, 1995.

[2] That manual was not produced until April 5, 2007 after plaintiffs' deposition of Sgt. Douglas Jones established the fact that J.O.C.C. manuals did, in fact, exist and have always existed but had never been produced in discovery.

[3] With so many eyes and minds focused on feeding information into, and reviewing data from, the running resume, it is just not feasible that there is any issue as to whether it ever existed or was well known.

The March 21, 2002 revision of the Joint Operations Command Center Activation Procedures manual is replete with references to the primary function of the running resume, reflecting that:

when one recognizes that the running resume literally dominates the J.O.C.C. room. It may be the largest continual display of information within the Command Center room. It is certainly the predominant information stream, monitored by all, and into which all significant events are entered.

Throughout the life of this case, including through the first quarter of 2007, the MPD Command Staff, the MPD Office of General Counsel, as well as counsel from the OAG have represented that the running resume either could not be produced or was not maintained until after September, 2002. See Ex. 3, Letter Dated June 1, 2006 from Ms. Lee to Mr. Messineo ("You are alerted that the production does not include running logs from the Command Information Centers because no such documents were created during the April 2002 protest."); Ex. 4, Letter dated July 31, 2006 from Mr. Schifferle to Mr. Messineo

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- The main video stations in the JOCC shall display the running resume, see Ex. 2, JOCC Activations Procedure manual at 1102;
- "The JOCC shall provide the command and control function by monitoring, coordinating, recording and reporting essential police operations" related to the event. Id. at 1103;
- The Assistant JOCC Commander is responsible to "[m]onitor running resume and inform JOCC Commander of decisions needed and actions taken." Id. at 1106;
- The Command Desk Executive Aid is "[p]rimarily responsible for categorizing and prioritizing the Group System running resume" and shall "[c]onstantly review Group System running resume." Id. at 1107;
- For the three Regional Operations Command desks, the "running resume serves as [the normal] communication channel to [the] Command Desk." Id. at 1109;
- The three ROC desks are responsible to "Receive information from ROC and update Group System running resume." Id.;
- For the Special Services Desk, the "Group System resume serves as [the normal] communication channel to [the] Command Desk." Id. at 1110;
- The Special Services Desk is responsible to "Receive information from Special Services Units and update Group System running resume." Id.;
- The Traffic Desk is responsible to "Review and prioritize traffic related information in running resume." Id. at 1112;
- The Deployment Desk is responsible to "Review deployment bucket [of the running] resume." Id. at 1113;
- For the Intelligence Desk, the "Group System [running] resume serves as communication channel to Command Desk." Id. at 1114;
- The Intelligence Desk is responsible to "[r]eview and monitor outside agency bucket [of the running] resume" and to "[m]onitor news accounts and enter information into resume" and to "[m]onitor Netview and enter information into running resume (especially bomb threats, suspicious packages, hazardous materials, **and demonstrations**)" and to "[m]onitor Intelligence Operations bucket [of the running resume] and bring[] to the attention of Executive Aide or Assistant JOCC Commander new and relevant information" Id. (emphasis added).

("no command center logs can be located . . . According to [Sgt. Nancy Cumberland], no command center logs (or "running resumes") were created until after September 2002."); Ex. 5, February 15 Transcript of Discovery Conference at 19 (Ms. Johnson: "I know plaintiffs' counsel is involved in many very similar cases and has conducted very similar discovery with the District. Many of these documents that he believes exist, don't.").

Yet, when these same responsible offices were summoned before the Council of the District of Columbia, which demanded to know why there was (as is required under MPD policy) no Mass Demonstration Commander's Log for any protest event during this same time period, *the explanation provided was that the requirement for such a log was satisfied by the fact that the J.O.C.C. created and maintained running resumes for all mass demonstrations.*

Chief Charles H. Ramsey attested in a November, 2003 written deposition:

> 38. State whether P.D. 759B (Commander's Mass Demonstration Event Log) forms were created and used for the April 2000 IMF/WB, the Presidential Inauguration 2001, and the September 2002 IMF/WB protests. If so, please provide copies of all such forms if they have not already been provided.
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> [Response of Chief Ramsey:] The Mass Demonstration Event logs were not used for the listed events. **Commander's Mass Demonstration Event logs have taken the form of running resumes produced by the department's Joint Operations Command Center.** The running resumes that have not been produced previously will be submitted on this date.

See Ex. 6, (Chief Ramsey's responses to written deposition questions, executed by the Chief on November 21, 2003 and transmitted to the D.C. Council by General Counsel Terry Ryan) (emphasis added).

This response was submitted to the D.C. Council accompanied by a cover letter from MPD General Counsel Terry Ryan, so it is clear that the Office of the General Counsel knew full well of the creation and usage of running resumes for mass demonstrations. Ramsey's written discovery responses have repeatedly been used by the Office of the Attorney General in connection with other related protest litigation and so it is equally established that the OAG knew full well of the creation and usage of running resumes for mass demonstrations during the relevant time period. Yet, in this case, the OAG and the OGC spun a different story.

That the MPD command staff and legal counsel knew that running resumes were created is also reflected by the fact that they declared them in privilege logs for other protests. See, Ex. 8, Redaction log in Alliance for Global Justice (identifying "IMF 2000/Command Center Resume . . . Running resume for 4/10/00" and each day through April 17, 2000); Ex. 20, Redaction Log in International Action Center v. United States (referring to the running resume for the 2001 Presidential Inauguration as the "S.O.C.C. log"). They have even produced, in the course of the D.C. Council's investigation finding a pattern of constitutional violations against protestors, documents that are explicitly identified and captioned as a "running resume." See Ex. 33 – 35 (identifying "IMF/World Bank Running Resume for Thursday, September 26, 2002" through September 29, 2002).

Yet counsel from the Office of the Attorney General has repeatedly represented the claim that running resumes were not used until *after* September 2002 or were not maintained.

That the MPD and the OAG specifically knew that running resumes were used and maintained for the relevant period, including during and prior to September, 2002 is established by the fact that the OAG has itself produced these running resumes in discovery within other protest related cases. In the course of discovery in other cases, the MPD, its Office of General Counsel and the OAG have produced running resumes from the April, 2000 IMF/WB protests, the January 20, 2001 Presidential Inauguration protests, and the September, 2002 IMF/WB protests.

That counsel in this case knew or should have known of this prior production of running resumes for the relevant period is established by the fact that AAGs Koger and Parris, each counsel in the Bolger case, were the lead counsels in the other protest cases. Furthermore, AAGs Koger and Parris reportedly provided the other legal counsel in the Bolger case with the "several boxes of documents previously provided to OAG by the MPD General Counsel's office in mass demonstration cases." The scope of this production encompassed the previously produced running resumes, placing anyone who reviewed or should have reviewed this material on personal and actual notice as to the well established practice of creating and maintaining JOCC running resumes (as well as the established ability of the MPD to locate and produce such materials).

The MPD and the OAG persisted in representing the claim that no running resumes were produced until after September, 2002, even though former Executive Assistant Chief Terrence Gainer testified in this very case that the command center produced running resumes in April, 2002 and that the logs should contain relevant information and be available for production.

> Q: Would you expect there to be entries in any of the running resumes or information nests that may be maintained by the J.O.C.C. or the S.O.C.C. as relate to the [alleged] unlawful entry in the private garage in the vicinity of 12th & K?
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> A: They would have had running logs, yes.

See Ex. 9, Dep. of Gainer at 68:15 – 20.

This deposition took place on January 17, 2006. The defendants were represented by the OAG at the deposition by both Thomas Koger and Caroline Mew.

With the knowledge that the running resume was, in fact, created, the production of the running resume is simply a matter of looking at the places where the running resumes are routinely stored. They were stored electronically on the S.O.C.C. computer server. See Ex. 10, Rule 30(b)(6) Dep. of District of Columbia (Jones) at 25:3 – 5. They are also stored in paper format and are routinely distributed up the chain of command from the Command Center Director up to and including the Chief of Police. Id. at 18:1 – 6, 20:13 – 19 (Gaffigan "passed these records that were generated during the activations to the command staff, more or less above him, which would be the Assistant Chief of Patrol Operations and the Chief of Police."). Not very hard to find, if that's what one wants to do.

As the undisputed evidence shows, the command center logs were not produced to plaintiffs' counsel even though they were twice transmitted to defense counsel in response to legal requests for information related to the April, 2002 protests.

The Defendants offer no explanation whatsoever about how or why the documents transmitted by Sgt. Jones in response to the *first* legal request became disappeared and were not produced. The defendants don't even *attempt* to offer an explanation. See Def's Opp. at 14.

Defendants do, however, falsely assert in their motion that "plaintiffs' characterization of Sergeant Jones' testimony - - that he sent the running resume 'to 'Legal' through his chain of command in

December 2003' - - is not accurate." Def's Opp at 14. The transcript of Jones' testimony establishes the following:

- "At or about the period [of] December 2003 or January 2004 when plaintiffs propounded discovery requests in this matter" J.O.C.C. Director Steven Gaffigan was consulted to ascertain whether he had any records that related to the April 2002 events. See Ex. 10, Rule 30(b)(6) Dep. of District of Columbia (Jones) at 21:14 – 20.
- This "first search was the result of a legal request, presumably prompted by one of plaintiffs' discovery requests." Def's Opp. at 14; id. at 27:2 – 8 ("It's my understanding that it was a legal request. . ." to which Gaffigan was responding)
- Gaffigan was specifically asked to search "for any information pertaining to JOCC activation for this event." See Id. at 22:15-17. This request encompassed the running resume. Id. at 22:18 – 20.
- Gaffigan "tasked his subordinates with finding that information." Id. at 22:21 – 23:1.
- "This information was provided to Mr. Gaffigan." Id. at 23:10 – 11.

It is fully accurate that Sgt. Jones, at or about the period of December 2003 or January 2004, sent the running resume back up through his chain of command (Gaffigan) in response to the legal request. Jones is uncertain whether he also sent the information directly to legal counsel, as he no longer has access to e-mail records from that time. His current practice would be to send the material simultaneously to the J.O.C.C. Director and directly to legal counsel. Id. at 27:9 – 28:15. Because Jones does not have access to his e-mail records from that time, he testified that he was "having difficulty remembering exactly" what the date of transmission was and the information sent. Id. at 26:22 – 28:6; Jones is clear that there were two legal requests that he satisfied. See also id. at 23:12 – 22 (Jones creates new directory for the running resume once he received the second, and repeated, request from legal).

The Defendants' "explanation" as to why documents transmitted in response to the *second* legal request (February, 2006) were also suppressed from production hardly provides any persuasive excuse as to why DGC Harris failed to produce the J.O.C.C. running resume or the two S.O.C.C. Daily Reports particularly given that *Harris admits to receiving and opening the e-mail in which the J.O.C.C. running resume and the two S.O.C.C. Daily Reports were transmitted to him*. See Affidavit of Harris, exhibit 1 to

the opposition filing, at 2, ¶5 ("I actually received two emails from him [Jones] on that date, *both of which I opened*. . .") (emphasis added).[4]

Harris "explains" that he did not produce the J.O.C.C. running resume (or, for that matter the S.O.C.C. Daily Reports) because Jones wrote "please find the requested ortho imagery, SOCC Reports and JOCC Activation Report." Id. at 2, ¶5. Attorney Harris says that, although Jones explicitly referenced the command center as responsive to the legal request, because technician Jones referenced the chronological command center log of events (the running resume) as a "JOCC Activation Report," Harris failed to recognize it as the "'running resume' sought in plaintiffs' discovery requests." Id. at 2, ¶6.

That which we call a running resume by any other name is still a running resume.

It is ridiculous to assert that DGC Harris reviewed the contents of the running resume and did not recognize it to be either a running resume or responsive to any discovery request. Even if he hadn't reviewed the running resume, the title "JOCC Activation Report" conveys that it is responsive to the discovery demand for "reports, or logs produced by a command center."

The requests to which Harris was responding were categorical and included:

- "All summaries, logs, running resumes, chronologies or other documents that reflect or document the activities or anarchists or persons perceived to be anarchists in connection with the April, 2002 protests.

  By way of illustration and not of limitation this request is intended to encompass **any 'running resumes' or 'categorizer' or 'nest' reports, or logs produced by an operations command center, logs which reflect the movement of police or protestors, and any information feeds or outputs or recordings of such activities.** If such information is contained in electronic format, please also provide hardcopies of the responsive information." See Ex. 11, Plaintiffs' First Set of Interrogatories and Requests for Production to the District of Columbia at 10, Request No. 24. (emphasis added).

[4] The OAG argues that Harris does not recall having received the e-mail and counsel suggests that he may not have received the e-mail. See Def's Opp. at 16 ("DGC Harris does not recall receiving this email . . ."); Id. ("*assuming* DGC Harris did receive the emails") (emphasis added). Harris actually attests that he does "not recall having received it via electronic mail from Sgt. Jones *on February 13, 2006*." Harris Decl. at 2, ¶5 (emphasis added). The assumption Harris makes appears to be about timing, and he assumes that he saw the e-mails at or about the time they were sent. Id. at 2 ¶6 ("Assuming that I saw the emails from Sgt. Jones around the time that he sent them. . ."). He unambiguously and specifically admits that he "actually received two emails from [Jones] on that date, both of which I opened . . .") Id. at 2, ¶5. Even if inartfully drafted, Harris' affidavit is unambiguous that he "opened" both e-mails on that day from Sgt. Jones.

- "All documents, reports, standard or non-standard forms, or logs that were generated or filled-in in connection with plaintiffs' arrests." Id. at 9, Request No. 9.

- "All documents or logs relating to conduct or presence of anarchists (or persons perceived to be anarchists) on the day of the arrests." Id., Request No. 13.

- "All documents constituting, reflecting, recording or relating to surveillance of anarchists or persons perceived to be anarchists." Id., Request No. 17.

- "All documents. . . reporting on the plaintiffs or their activities or groups that they were perceived to be with on April 20, 2002." Id., Request No. 19.

- "All documents related to or reflecting alleged unlawful conduct by any plaintiff." Id. at 10, Request No. 29.

- "All documents reflecting or relating to all intelligence information you possess or have access to that is related to any plaintiff or events related to this complaint or related to any claim or defense in this matter." Id. at 11, Request No. 31.

DGC Harris knows what the running resume is. He is very familiar with the documents in these protest related cases and has repeatedly been the affiant for the District's discovery responses.[5] In litigation stemming from the January 2001 Presidential Inaugural protests, DGC Harris himself signed interrogatory responses to which he attached the running resume as responsive. See, Ex. 14, Defendant District of Columbia's Supplemental Response to Plaintiffs' First Set of Interrogatories (executed under oath *by DGC Harris*, to which he attached pages from the running resume which he identified to be "the command post log entries") at 16, and attached page bates stamped nos. 883, 888, 889.

Harris' suggestion is false, that he simply erred because the Bolger running resumes were not identified in accordance with some rigid nomenclature used to the J.O.C.C. log. The command center event logs are referenced by a variety of ways, not just as "running resumes." See e.g., Exhibit 4, July 31, 2006 letter from Mr. Schifferle to Mr. Messineo (referring to document as "command center logs (or

[5] See Ex. 12, District of Columbia's Responses to Plaintiffs' First Set of Interrogatories in Alliance for Global Justice (sworn to by Ronald Harris on May 7, 2003); Ex. 13. Defendant's Responses to Plaintiff Robert Fish's First Set of Discovery Requests to the District of Columbia in Alliance for Global Justice (sworn to by Ronald Harris on June 10, 2003); Ex. 14, Defendant District of Columbia's Supplemental Response to Plaintiffs' First Set of Interrogatories in International Action Center v. United States (sworn to by Ronald Harris on May 29, 2002); Ex. 15, Defendant District of Columbia's Second Supplemental Response to Plaintiffs' First Set of Interrogatories in International Action Center (sworn to by Ronald Harris on June 21, 2002); Ex. 16, Defendant District of Columbia's Third Supplemental Response to Plaintiffs' First Set of Interrogatories in International Action Center (sworn to by Ronald Harris on October 1, 2002)

'running resumes')"; Ex. 17, Document Production Index and Privilege Log in Alliance for Global Justice v. District of Columbia, Civil Action 01-0811 (PLF)(JMF), at 5 (running resume identified as the "MPD Event Log" by Richard Love, Esq., Senior Counsel for the Office of Corporation Counsel); Ex. 18, June 2, 2003 letter from Martha Mullen to Zachary Wolfe (exhibit 6d, running resume identified as the "MPD Event Log" by Assistant Corporation Counsel Martha Mullen); Ex 19, Opposition to Plaintiffs' Motion to Compel Discovery From the District of Columbia at 8 (emphasizing that the District had produced "logs from the Synchronized Operations Command Center (S.O.C.C.)"); Ex. 20, Redaction Log in International Action Center v. United States (referring to document 73 as the "S.O.C.C. log").

While the two S.O.C.C. Daily Reports and the J.O.C.C. running resume or "activation report" were not produced to plaintiffs, Harris did choose to produce the aerial photograph that was attached to the same e-mail. See Harris Decl. at 2, ¶5; Def's Opp. at 9 n.3. Harris' selectivity further suggests intentionality in the failure to disclose either the command center reports.

It is hard to believe that Harris did not send over or communicate the existence of these documents to the OAG counsel on behalf of the District. Even if Harris did not want plaintiffs to receive possession of the documents, it would be expected that he would want to provide the District's trial counsel with the scope of information available about what happened on that day.

However, the attorneys of the Office of the Attorney General decline to attest by affidavit whether or not, or when, they knew of the existence of the running resume and to its chain of custody. They prefer to remain removed, to have another attorney argue implications and make representations without their having to be held accountable for those representations. This Court has stressed "it is very important when there are as many issues percolating as there are in this case, and as many problems that seem to be percolating in this case, that whoever is responsible for dealing with those problems be accountable." See Ex. 21, July 11, 2006 Transcript of Status Hearing at 35:23 – 26:2.[6]

[6] The Court, advised that Ms. Lee would be departing the OAG, encouraged the OAG to ensure that whomever would be the next lead counsel (Mr. Schifferle) be deemed "responsible and accountable" for conducting a sufficient search and for producing the command center logs, should they exist, by July 31, 2006. Id. at 35:20 – 37:9.

The OAG's unsworn representations as to these issues are incomplete at best.

The OAG represents that "The first time AAG Koger **saw** the running resume was late March, 2007 . . . Ms. Parris left the OAG in April 2006 . . . and she has not **seen** the running resume to this day." Defs' Opp. at 16 (emphasis added). The issue is not when counsel first has seen or first possessed the running resume in hand. The issue is when did counsel know of the existence of the running resume, and then what may have been done with that knowledge.

There is not even such an unsworn representation regarding AAG Julie Lee who, in Court with Mr. Schifferle on May 2, 2006 represented that she was in possession of "half an inch to an inch" of documents constituting logs and other records of daily events. See Ex. 22, Transcript, Discovery Conference Before the Honorable John D. Bates United States District Judge, May 2, 2006 at 17.

There is no representation as to the knowledge of Section Chief Holly Johnson or AAG Michael Bruckheim. In May, 2006, DCG Harris advised Section Chief Johnson that "running resumes and logs" would be produced, a representation which acknowledged their existence and use. Defs' Opp at 10.

The OAG provides an unsworn representation that AAG Schifferle and Vricos learned for the first time of the existence of the running resume on March 20, 2007. Plaintiffs' counsel interprets this unsworn argument to mean that prior to this date they had no knowledge of the existence of the running resume, and not that on March 20, 2007 they first held the document in hand. Nevertheless, the argument is neither sworn nor executed by AAGs Schifferle nor Vricos.

The request by plaintiffs in the motion for sanctions was that counsels attest to when each learned of the existence of the running resume and to their knowledge of the chain of custody and receipt of the running resume that Sgt. Jones sent to Legal both in December, 2003 and February, 2006. This is a minimal but important representation, yet defense counsels decline to make such.

Underlying this motion is the need to sanction the conduct of the District of Columbia, its Office of the Attorney General, and/or the legal counsel for the MPD, and/or whoever is responsible for these abusive litigation tactics.

The conduct of the Bolger case has been dominated, certainly over the past fifteen months, by plaintiffs' persistent efforts to secure production of documents without a motion to compel or for sanctions and by the District of Columbia's persistent and repeated failures and/or refusals to produce documents responsive to discovery requests, including the primary command center document, its running resume. See e.g. Ex. 21, Transcript of July 11, 2006 Status Hearing at 35 (Court referring to the "many problems that seem to be percolating in this case" and stressing the need for counsels' accountability)

With the exception of the initial nine pages of documents, every document that has been produced in this case has been produced after the entry of a discovery order directing that the District supplement its deficient production or account for absent items or after plaintiffs forced disclosure by deposing individuals who happened to have documentary knowledge. The District's efforts to portray itself as deserving merit for having "ultimately found and produced the running resume," see Def's Opp. at 19, is disingenuous. It would have been "found" by plaintiffs in the deposition of Douglas Jones which was two business days away. That deposition was only because plaintiffs doggedly persisted in discovery. Disclosures have been forced, either by plaintiffs' efforts or by the directives and warnings of sanctions by this Court, and the District incredibly claims it eagerly produced the suppressed information.

Likewise, disclosure by the MPD as to who was on the scene of the arrests[7] or who engaged in video interrogations of plaintiffs have not been forthcoming or complete without court order or extraction by plaintiffs of evidence that others were on the scene through persistent discovery efforts.

[7] The OAG represents in its opposition filing that the District has not denied the presence of the FBI on the scene of the arrests prior to the discovery of the running resume. Defs' Opp. at 23. The District ignores its sworn discovery responses on May 6, 2005, March 9, 2006 and August 22, 2006 in which the MPD denied or refused to acknowledge that the FBI was on the scene. Actually, not only did the OAG deny the presence of the FBI, *the OAG explicitly denied allowing any interviews on videotape at all*. See, Ex. 23. June 16, 2006 e-mail from Ms. Lee to Mr. Messineo (AOG: "The District repeatedly has denied videotaping or authorizing videotaped interviews of the arrestees. The District is unaware of any such interviews.").

The OAG, in its argument accusing the undersigned of misrepresentation and in which it points to a prior filing in which plaintiffs contended that evidence establishes the presence of the F.B.I. on the scene, fails to recognize the distinction between an evidentiary argument and an admission.

The failure by the OAG to produce the command log and the S.O.C.C. Daily Reports is not aberrational nor exceptional. The OAG did not disclose in its discovery responses that uniformed MPD Officer Jeffrey Cadle was on the scene. This is a rather remarkable oversight. Cadle was directed by command staff to conduct on-scene witness interviews and to write the narrative to support the arrests. Cadle's notes were the first evidence[8] that the MPD actually met with and interviewed Jacob Leshner, the building employee who told police he invited them[9] into the garage and that they were there with his permission. That is not a crime.[10]

Jeffrey Madison testified that he recognized the two photographed agents as being on the scene and provided no other detail, notwithstanding the fact that he is the head of the Intelligence Unit and, according to a recent filing by the FBI, their intelligence agents were working subordinate to MPD's intelligence agents. This was simply an account of a witness, which is arguably far outweighed by the testimony of every other officer who does not recall such persons on the scene.

The District of Columbia itself *never* admitted the FBI was on the scene. See e.g. Ex. 2 – 4 of Pls.' Mot. Sanctions. Not even after plaintiffs fortuitously located a photo of two of the FBI agents.

Plaintiffs even requested *after disclosure of the running resume* that the OAG amend the District's interrogatory responses to reflect the presence of the FBI and other new details, *but the District of Columbia has refused to amend its discovery responses and make the appropriate disclosures and admissions that the FBI was on the scene (and was engaged in whatever activities the MPD is now willing to concede they were engaged in, now that the running resume has been produced).* See Ex. 24, March 30, 2007 letter from Mr. Messineo to Mr. Schifferle ("Plaintiffs request that the District immediately update its responses to discovery in light of the recently disclosed running resume, [with] all information derived from the running resume. . .").

[8] One might have expected that the interview of Leshner, and the fact that the MPD possessed the operative key card and Leshner's testimony that he authorized and invited the arrestees into the garage, would be reflected on the arrest narrative that Cadle wrote. Cadle interviewed five witnesses on the scene. All are duly identified and referenced in the arrest records, *except the interview and presence of Jacob Leshner is omitted by Cadle.* According to Cadle in deposition, this was simply a "mistake."

[9] Defendants pejoratively cast plaintiffs with the false claim that they were observed with gas masks, helmets and "defense shields" and this somehow informed their seizure or arrest, notwithstanding the fact that it is undisputed that no unlawful items were found on their persons, and the fact that Commander Beach - - who made the decision to arrest - - knows of no information about such items. See Ex. 44, Beach Dep. at 115:10 – 116:10. There were found (in an unlawful search incidental to an unlawful arrest) within a bag or bags two masks with ameliorative medicines to be used by street medics in the event of police misconduct consisting of a gas attack. It is unfortunate for plaintiffs that masks cannot protect against false arrest.

One arrestee wore a WWII style motorcycle helmet. There are no "defense shields," whatever those may be.

[10] Defendants reference "a possible factual dispute as to what the building's security guard told police" refers to the fact that Mr. Johnson attests under oath that he observed the soon-to-be-arrested individuals passing quietly through the lobby without incident. See Ex. 45, Johnson Dep. at 7:12 – 14. Johnson did not request they be arrested and he testified that he had no reason to so request. Id. at 10:4 – 9. Defendants' claimed "possible factual dispute" is a red herring, given Beach's testimony that he did not believe security guard Johnson had the authority to state whether the plaintiffs had a lawful basis for being upon the premises. See Ex. 44, Beach Dep. at 43:16 – 44:17. In any case, a request to arrest from a security guard, even were there such, doesn't change the absence of probable cause.

Cadle was discovered by plaintiffs only because his signature appeared within records at the D.C. Superior Court. *Cadle testified that he produced his notes (and obviously was known to) counsel about a year and a half or two years prior to his November, 2006 deposition.* The OAG doesn't even attempt to offer an explanation for this suppression of evidence which, given the fact that the presence of Cadle was not even disclosed in written discovery, would never have discovered but for plaintiffs diligence.

The OAG does, however, falsely suggests that the nine pages initially produced by the OAG "may well be Officer Cadle's handwritten notes, which plaintiffs claim in their motion for sanctions were not produced for the first time until July 2006." Def's Opp. at 7, n2.

Plaintiffs have enclosed, as Ex. 4, the *July 31, 2006* letter from AAG Schifferle in which he writes "please find enclosed . . . the handwritten notes of Officer Jeff Cadle." See Ex 4. This was also the first admission by the MPD that Cadle was on the scene. Only after this date did the OAG even acknowledge that it the District also had in its possession Leshner's garage key card.

Yet, time and again, the District and its counsel have represented that its review of records was either complete, or completed by its supplementation. See Ex. 25, March 31, 2006 letter from Robert Spagnoletti by James Vricos to Mr. Messineo ("These items constitute a full supplementation of the District's responses to the Plaintiff's [sic] requests for production."); Ex. 3, June 1, 2006 letter from Ms. Lee to Mr. Messineo (providing or identifying materials constituting, as required by May 2, 2006 order, "all materials in defendants' possession that are responsive to plaintiffs' requests for production of materials relating to the April 20, 2002 protest activities in the District of Columbia"); Ex. 22, Transcript of May 2, 2006 Discovery Conference at 12:21 – 13:8 (Ms. Lee: "every document related to that April 2002 march was produced to Mr. Messineo on another occasion [related to other protest lawsuits against the District for violations on other dates]); Ex. 21, Transcript of July 11, 2006 Status Hearing at 4:17 – 20 (Ms. Lee: "The District's substantive response [to plaintiffs' request for confirmation that document production was complete] . . . was that we had produced all of the arrest records that the District of Columbia had."); Ex. 26, Transcript of September 13, 2006 Status Hearing at 5: 17 (Mr. Schifferle reports

that District had completed "a rather thorough and exhaustive process" of responding to the discovery issues).

Yet the documents which shed the most light on the timeline of events and the involvement of the F.B.I. were not produced until they were, essentially, forced to be produced by an imminent records deposition noticed by plaintiffs.

It is the position of the OAG that the abusive discovery tactics in this case are acceptable or at least free of penalty. The District and the OAG could have produced the running resume at any time. They were able to produce it just as soon as there was a records deposition that forced their hand. They knew who to find, who had knowledge of the existence and location of the running resume, who had knowledge of the Command Center procedures, and who to appoint pursuant to Rule 30(b)(6). That was Sgt. Douglas Jones. Sergeant Jones has *always* been available and, in fact, has been repeatedly been consulted in connection with the running resume.

The District and the OAG put up smokescreen after smokescreen to avoid production of the running resume. Their representations that no running resumes have ever existed - - a representation which terminates further scrutiny by the Court, which obviously cannot compel production of what has never existed - - not only were false, but were completely at odds with reality. Had the OAG conceded that running resumes were produced for this period, then the process would have been completely different. The running resume is not only stored on a computer server but multiple copies are distributed through the upper command. That's easy enough to track down, just as it was easy for the OAG to produce Sgt. Jones.

The District, in its defense, tries to deconstruct the occurrence of and responsibility for events. The OAG attorneys duly and repeatedly represented to this Court a claim attributed to Sgt. Cumberland, that no running resumes *ever* were produced until after September, 2002. No supporting affidavit has been filed that Cumberland made this claim.[11]

[11] Sgt. Cumberland served as the Special Services Command representative working within the Command Bus during mass demonstrations within this period of time, and was in a position of substantial responsibility and

For reasons stated at the start of this memorandum, the MPD, the OGC, and the OAG all knew that running resumes were routinely produced. All of these offices have copies of those running resumes and have produced them when deemed necessary. The OAG knew this claim, attributed to Sgt. Cumberland, to be false. Yet, by attributing this claim to Cumberland the OAG and its individual attorneys seek to establish distance from themselves and the false statements which they presented to the Court.

The OAG also relies on a representation purportedly made by Captain Brito on March 21, 2006 and on dates subsequent that, upon diligent search, no running resumes could be located. No supporting affidavit is provided. Sgt. Jones, however, testified that in February, 2006 he provided the running resume in response to a legal request and that it was his practice to "cc:" Captain Brito when he sent it up to the Office of the General Counsel. See Ex. 10, Rule 30(b)(6) Dep. of District of Columbia (Jones) at 28:7 – 15. Although DGC Harris submits an affidavit that relates to Jones' e-mail, no copy of that e-mail with its distribution list has been provided. Surely, had Brito not received a response from Jones to the "urgent request" from legal counsel, he can be expected to have followed up with Jones.

Even if Brito did not tell the truth to counsel and he did know of the running resume, had the OAG desisted its reference to the obviously false claim that running resumes were never created until after September, 2002, then locating a copy would have just been a matter of counsel of retrieving it from command staff files or the S.O.C.C. server.

The reality in this case, however, is that legal counsel *had* possession of the running resume. DGC Harris admittedly had it. OAG counsel won't attest to their knowledge.

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knowledge. The Special Services Command itself maintained the practice of itself circulating a "running resume" of intelligence related events fed into the JOCC for mass demonstrations prior to September, 2002. See, e.g., Exhibit 27 - 35, Special Services Command Running Resume for April 8, 2000 IMF/WB protests, for April 9, 2000 IMF/WB protests, for April 10, 2000 IMF/WB protests, for April 11, 2000 IMF/WB protests, for April 12, 2000 IMF/WB protests, for April 13, 2000 IMF/WB protests, for April 14, 2000 IMF/WB protests, for April 15, 2000 IMF/WB protests, for April 16, 2000 IMF/WB protests, for April 17, 2000 IMF/WB protests, for September 26, 2002 IMF/WB protests, for September 27, 2002 IMF/WB protests and for September 28, 2002 IMF/WB protests. Unlike the J.O.C.C. log, the Special Services running resume is, in fact, titled in all capital letters as the "RUNNING RESUME."

The explanation as to why Harris did not produce the document is unpersuasive on its own terms. Coupled even further with the fact that this was the *second* time that Sgt. Jones had sent the document in response to a legal request, the intentionality is undeniable. The running resume was covered up. That the running resume is created is known to everybody who has responsibilities with the J.O.C.C. or who as counsel has defended against claims in a protest case or anyone who has read Chief Ramsey's written deposition responses to the D.C. Council (issued through the OGC and used by the OAG) or who reviewed the litigation discovery boxes that were collected by the MPD and its OGC and given to the OAG, including to Bolger counsel.

The District of Columbia, the Office of the Attorney General, the MPD and the MPD Office of General Counsel were required to have produced the running resume.

The J.O.C.C. running resume is only the sharp tip of the underlying discovery issue, which is the refusal to conduct and accurately certify a complete search and production of responsive documents and information in discovery. This has been emphasized by plaintiffs:

- By letter dated February 7, 2006 to Ms. Mew in which Mr. Messineo wrote "It appears that the District has not undertaken an adequate search in response to our discovery requests. This is very problematic, particularly where depositions have been pushed to the end of the discovery period, that in each of the depositions important deficiencies in disclosure or production are revealed. . . . The obligation of the District is to have undertaken an adequate search in response to our discovery requests. The District has certified that it has done so, however it is beginning to appear in the depositions that the search was not sufficient. Do you assert that the District has undertaken a sufficient review of its records and has disclosed and produced all relevant information in response to our discovery requests?" See Ex. 36, February 7, 2006 letter from Mr. Messineo to Ms. Mew.

- In the February 15, 2006 status conference, in which Mr. Messineo represented there "to be inadequate search for information and material in response to discovery requests. That encompasses both requests for production. . ." See Ex. 5, Transcript of February 15, 2006 Discovery Conference at 6:16 – 21.

- By letter dated April 12, 2006 after the March 31, 2006 deadline for supplementation, in which Mr. Messineo wrote to Ms. Lee, "I need to reiterate that the essence of our complaint is that there has been an incomplete search and review of records and personnel in response to our discovery requests in general. These examples in my status report are merely examples. . . . The District needs to conduct a proper search of personnel and records *and to provide a privilege log.*" See Ex. 37, April 12, 2006 letter from Mr. Messineo Ms. Lee (emphasis in original).

- By letter also dated April 12, 2006 to Ms. Lee, Mr. Messineo reiterated "Our status report contained specific documents that we believe are important examples of records or documents that should either have been produced in discovery or be identified on the District's privilege log if withheld based on objection. The referenced examples do not constitute all that plaintiffs are demanding, and I do not want the District's understanding of plaintiffs' demands to be limited by these examples.

  Plaintiffs are demanding that the District of Columbia undertake a thorough and proper investigation, or review of its personnel and records, sufficient from which to provide accurate and comprehensive responses to plaintiffs' discovery requests." See Ex. 38, April 12, 2006 letter from Mr. Messineo to Ms. Lee.

- By letter dated April 18, 2006 to Ms. Lee, after telephonic discussions, Mr. Messineo sent a memorializing letter in which he wrote, "I wanted to confirm plaintiffs' position, as discussed earlier today, which is that the appropriate step for the District to take is now to engage and complete a proper search for and review of documents and personnel in response to plaintiffs' discovery requests, and to produce a privilege log as was promised by Ms. Johnson at the last discovery conference. . . .

  [T]he discovery search in this case is so incomplete that ad hoc discussions about specific items that we believe do or should exist will be less productive than a systematic search by the District, the production of a privilege log, and specific communications between counsel to identify and, hopefully, eliminate disputes." See Ex 39, April 18, 2006 letter from Mr. Messineo to Ms. Lee.

- In the May 2, 2006 discovery conference, in which Mr. Messineo represented "[T]his goes back to what we said when we first came here, which is that there has not been an adequate search through records and personnel in response to our discovery request. That's clear. They have not done a comprehensive systematic search." See Ex. 22, Transcript of May 2, 2006 Discovery Conference at 21:7 – 10.

- At the July 11, 2006 status hearing, in which Mr. Messineo represented "Our demand in this respect is to ask the District of Columbia to properly review its collective knowledge to provide this information [responsive to discovery demands]. And I don't [think] that [this] has been done." See Ex. 21, Transcript of July 11, 2006 Status Hearing at 22:14 – 17.

- By letter dated March 6, 2007, in which Mr. Messineo wrote "Recent depositions have disclosed that documentary production by the District of Columbia is deficient." See Ex. 40, March 6, 2007 letter from Mr. Messineo to Mr. Schifferle.

- By letter dated March 22, 2007, in which Mr. Messineo wrote to Mr. Schifferle that "This extremely late production of the command center log is of serious concern . . . . This again raises concerns about the quality of the District's production of documents to date and interrogatory responses. . . . With respect to all the issues above, including discovery related sanctions or motions, we reserve the right to seek whatever relief is appropriate from the Court." See Ex. 41, March 22, 2007 letter from Mr. Messineo to Mr. Schifferle.

- By letter dated April 6, 2007, in which Mr. Messineo wrote to Mr. Schifferle, "We will, of course, be forthright in representing to the Court any forward progress made by the District in producing responsive material. However at this date - - after all the depositions that have been taken without benefit of the running resume, which is the only contemporaneous chronology and narrative of selected events - - it is not acceptable for the District of

> Columbia to trickle out documents and information only when compelled by plaintiffs' persistence or by the District's self-serving desire to avoid sanction for its sanctionable misconduct." See Ex. 42, April 6, 2007 letter from Mr. Messineo to Mr. Schifferle.

This Court directed that undersigned counsel provide to the OAG a description of what plaintiffs would consider sufficient to establish certification by the District that its search was thorough and its production is complete.

Undersigned counsel proposed to defense counsel as follows below. The District of Columbia has outright rejected this proposal. Plaintiffs' counsel wrote,

> "It is my expectation that some number of persons employed within the MPD have been tasked with securing documents and things in response to our requests for production. Each such person I expect may be responsible for more than one of the numbered requests.
>
> Plaintiffs request that each of those individuals execute an affidavit in which she or he attests to: which requests she or he was responsible for satisfying; that she or he has identified and consulted all persons who are believed likely to know what responsive materials do or have ever existed; and that the production or identification of records in response to the discovery request is comprehensive to the best of the knowledge of the District of Columbia and MPD.
>
> I have considered requesting that the District disclose all sources and persons consulted with respect to each discovery request. However, plaintiffs do not want to impose an excessive burden upon you. I am requesting that you, as counsel, keep records of the specific scope and conduct of the review in the event that becomes material in the future and so that your representations to the Court regarding the scope of review are as accurate as possible."

See Ex, 43, April 17, 2007 letter from Mr. Messineo to Mr. Schifferle.

The Defendants refuse to certify the completeness of its search for responsive materials. Instead Defendants shift the burden onto plaintiffs and require that plaintiffs conduct depositions to establish what has been done and what is outstanding. Under this regiment, plaintiffs may perhaps keep whatever relevant documents they may find in the course of an exhaustive and resource-intensive series of depositions focused on location and identification of records. If plaintiffs can find it, wherever it may be hidden within the MPD, then the document will then and only then be produced by the defendants.

This turns the table upside-down as to how discovery is to be conducted under the Federal Rules of Civil Procedure. The defendants' proposal presupposes that plaintiffs have the knowledge of what

documents or materials are, or have been, in the possession of the MPD for this particular event. The reason why discovery requests are categorical is because plaintiffs cannot be expected to know what exists inside a defendant's files or computer records. The burden shifted upon plaintiffs, were defendants' proposal in fact the manner by which discovery is to be undertaken, constitutes an enormous expense in time and resources.

The defendants' proposal is one which appears more calculated to avoid production of discoverable materials and information than even to avoid burden upon itself. The defendants' plan also increases the burden upon defendants, who will have to staff all of the necessary depositions rather than simply make and certify a proper internal search and production.

In order for plaintiffs to determine, through their own search and discovery, what remains outstanding the plaintiffs will need to undertake a substantial number of otherwise avoidable records depositions. The scope of the existing Rule 30(b)(6) deposition may be expanded in order to encompass the whole scope of discovery requests. Plaintiffs will seek to identify the mid-level analysts and technicians whose daily tasks involve management of information and records, and depose those individuals. If necessary, plaintiffs will seek to examine records as they are maintained in the ordinary course of operations.

If this must be done because the defendants refuse to complete discovery in the manner contemplated by the Federal Rules of Civil Procedure, then an appropriate remedy for this extraordinary effort is the imposition of reasonable associated fees and costs.

Plaintiffs would prefer, however, that defendants conduct a proper search of its collective knowledge and records and provide satisfactory affidavits that will both establish personal accountability and document that the defendants have satisfied their discovery obligations.

Defendants argue that plaintiffs' motion should be denied because it lacked a certification of good faith efforts to resolve the underlying discovery issues.

This discovery dispute did not start in March, 2007. For *over fourteen months*, plaintiffs have been diligently engaged in repeated efforts to narrow and resolve the underlying discovery disputes over

the District's patently deficient production of and search for documents, including specifically related to the command center running resume. If anything, plaintiffs have been remarkably restrained, moving for sanctions just before the scheduled close of discovery when all other efforts had been exhausted and there was new evidence of the District's ongoing suppression or secretion of evidence.

The plaintiffs did initiate contact with chambers regarding the District's failure to search for and produce documents, including specifically the running resume. That contact led to the extraordinary series of discovery conferences with the Court, including on February 15, 2006, May 2, 2006, July 11, 2006, and September 13, 2006. Attorney after attorney from the OAG represented, time and again, that production of documents was complete or that responses to interrogatories were now complete with supplementation.

Outside the Court, plaintiffs' counsel has been consistently and diligently engaged in reasonable and flexible efforts to get the District to produce what it is obligated to produce under the rules.

There is no dispute that during the period between May, 2005 (when the District propounded its responses without accompanying documents) and the end of 2005, undersigned counsel and AAGs Koger and Parris were engaged in active management of discovery production and obligations in a set of protest related lawsuits, including two class actions. Communication was very frequent between counsels, even daily, about discovery and related issues in these multiple cases.

Defendants point to a December 9, 2005 letter from Mr. Messineo to show a lack of concern by plaintiffs about discovery in this case, because plaintiffs' counsel referenced in that letter that production of materials relating to Beach were a priority. See Def's Opp. at 6. Defendants are correct that at that time there was not articulated a "concern" that the District would not follow through on its representation that it would supplement its non-production of documents. *Supplementation was promised no less than forty separate times in the District's discovery responses and plaintiffs' counsel expected that to occur.* See Ex. 7, Defendant District of Columbia's Responses to Plaintiffs' Second Request for Production of Documents and Things. The December 9, 2005 letter, identifying certain production as a priority because of imminent related depositions, reflects the appropriate and flexible communication in which plaintiffs'

counsel was engaged. See Ex. 52, May 2, 2005 e-mail from Mr. Koger to plaintiffs' counsel (requesting parties stipulate to enlarged period within which to produce responses); Ex. 52, May 3, 2005 e-mail (plaintiffs' counsels' agreement); Ex. 53, May 5, 2005 e-mail from plaintiffs' counsel to defense counsel (cooperatively managing discovery); Ex. 54, May 5 e-mail from Mr. Koger to plaintiffs' counsel (same); Ex. 46, May 13, 2005 e-mail from Mr. Koger to plaintiffs' counsel (requesting enlargement of discovery beyond August, 2005 in light of intense discovery demands in other protest cases); Ex. 48., September 8, 2005 e-mail from Ms. Parris to Mr. Messineo (asking for additional time for discovery because Ms. Parris was taking off time during the holidays and because deponents are difficult to schedule around the holiday period); Ex. 49, December 9, 2005 letter from Mr. Messineo to defense counsel (indicating discovery priorities as part of ongoing management of discovery); Ex. 55, January 5, 2006 letter from Ms. Kim to Ms. Mew (offering accommodations to Ms. Mew in light of her re-assignment as lead counsel); Ex. 56, January 10, 2006 e-mail from Mew to plaintiffs' counsel (extending appreciation for offer of accommodation, requesting certain enlargements).

When Ms. Mew was reassigned, she conveyed her view that the District would not be producing additional documents. This led plaintiffs' counsel to contact chambers, and to the February 15, 2006 discovery conference.

Throughout this period, plaintiffs' counsel engaged in cooperative efforts and communications about discovery. See, Ex. 36, February 7, 2006 letter from Mr. Messineo to Ms. Mew (detailing specific areas of documents believed to exist); Ex. 57, February 9 e-mail from Mr. Messineo to Mr. Schifferle; Ex. 58, February 13, 2006 e-mail from Ms. Parris to Mr. Messineo (referencing ongoing discussions with Mr. Koger to resolve discovery disputes); Ex. 59, February 14, 2006 e-mail from Section Chief Johnson to Mr. Messineo (expressing pleasure that the parties had "made great progress with regard to the issues that might arise tomorrow in our discovery conference").

On February 15, 2006, the Court ordered the District supplement to make its complete responses to discovery by no later than March 31, 2006. See Minute Order, February 15, 2006. The District represented that it had made "full supplementation," see Ex. 25, but that "full supplementation" was not

anywhere near complete, see Plaintiffs' April 7, 2006 status report (docket entry no. 63), and critical documents were still suppressed *without any disclosure in a privilege log*. But see defendant's April 7, 2006 status report (docket entry no. 61) (without reservation, reporting that responses to discovery had been produced).

Plaintiffs' counsel continued to be responsive to defense counsel in all efforts related to discovery, even where it appeared that defense counsel was making frivolous objections and requests. See Ex. 60, April 10, 2006 letter from Mr. Messineo to Ms. Lee (responding to the District's objection to discovery requests that contained references to "anarchists" or persons perceived to be anarchists); Ex. 37, April 12, 2006 letter from Mr. Messineo to Ms. Lee (eight page single spaced response to Ms. Lee's demand that plaintiffs identify, for each asserted discovery deficiency, the specific associated discovery requests).

Plaintiffs' counsel continued in active telephonic and written communications to avoid filing a discovery motion. See Ex. 38 April 12, 2006 letter from Mr. Messineo to Ms. Lee (urging District undertake proper search); Ex. 39, April 18, 2006 letter from Mr. Messineo to Ms. Lee (same).

At the May 2, 2006 discovery conference, plaintiffs continued to provide specific identification of discovery issues, including specifically the running resume, records of non-plaintiff arrestees, radio runs and more. See Ex. 22, Transcript of May 2, 2006 Discovery Conference. The District conceded it possessed approximately nine inches volume of undisclosed material, including up to one inch of logs and other records of daily events. Id. at 17:5 – 12. The Court, again, ordered the District to make a complete production by June 1, 2006 and to make disclosure by May 9, 2006 related to radio runs. See docket entry no. 70.

On May 9, 2006, the District advised it needed more time on the radio runs and promised to provide a sworn statement regarding any destruction or unavailability. See Defendants' May 9, 2006 Discovery Update (docket entry no. 71)..

The June 1, 2006 production was made and, again, did not include radio runs or an affidavit regarding their destruction, command center logs, or arrest records for non-plaintiff arrestees. Plaintiffs'

counsel continued in efforts outside of court to secure satisfactory production of materials and eliminate discovery disputes between counsel. See, e.g., Ex. 61, June 8, 2006 letter from Mr. Messineo to Ms. Lee; Ex. 51., June 16 letter from Mr. Messineo to Ms. Lee ("It should not be incumbent upon the plaintiffs to have to extract, deposition by deposition, additional disclosures regarding who was, in fact, involved in these events and present at the scene. It has been the obligation of the District, in response to discovery requests, to provide such information."); Ex. 62, June 20, 2006 letter from Mr. Messineo to Ms. Lee; Ex. 63, July 6, 2006 e-mail from Ms. Kim to Ms. Lee.

On July 11, 2006, the Court again ordered the District to produce documentary responses and warned of sanctions should such materials suddenly appear after his final, July 31, 2006 deadline. See, Ex. 21, Transcript of July 11, 2006 Status Hearing at 26:3 – 10; July 11, 2006 Discovery Scheduling Order (docket entry no. 80).

Only after the clear threat and reference to sanctions by the Court at the July 11, 2006 hearing did the District then undertake what appeared to be a sufficient effort to determine who was on the scene. Nevertheless, despite appearances the District failed to identify the presence of Detective Efrain Gonzalez, who the FBI now claims was an MPD intelligence agent involved in the video interviews. Gonzalez' presence was disclosed on April 27, 2007. See, Ex. 64, April 27, 2007 letter from Mr. Schifferle to Mr. Messineo. The District has never asserted any explanation why it did not initially make disclosures as to who from MPD was on the scene.

On July 31, 2006, the District supplemented its discovery responses, but again failed to disclose the J.O.C.C. running resume or the S.O.C.C. daily reports.

Plaintiffs continued to depose witnesses, some number of whom identified unproduced documents. See, e.g., Ex. 57, November 1, 2006 e-mail from Ms. Kim to Mr. Schifferle (regarding documents referenced by Sergeant Candace Neal); Ex. 40, March 6, 2007 letter from Mr. Messineo to Mr. Schifferle (regarding range of documents whose existence was indicated by the testimony of Sergeant Donald Yates).

From the first day that the running resume was acknowledged on March 22, 2007, plaintiffs diligently sought a copy that was redacted in the same limited manner that running resumes typically are when produced in litigation or even released publicly through the D.C. Council. There is not much involved with that redaction and release. The redaction is limited and any OAG attorney has many previously disclosed running resumes (from other cases and circumstances) as models.

On Thursday, March 22, 2007, when the heavily redacted resume was produced, Mr. Messineo immediately responded immediately with efforts to resolve the issue and notified defendants that plaintiffs reserved the right to seek discovery related sanctions,

> "[T]here is no need or basis for you to redact the running resume. I have virtually unredacted running resumes from the District that describe underlying events and the related police response or initiatives at other mass demonstrations. We do not object to the redaction of telephone numbers, if any may be found in this particular resume. If the redaction you are envisioning is so limited, that is fine. If, however, you anticipate any substantial redaction of material from the running resume, we strongly object and request that you provide the basis for any such redaction now so that we may address it with the Court as soon as possible rather than suffer further delay from the District. *With respect to all the issues above, including discovery related sanctions or motions, we reserve the right to seek whatever relief is appropriate from the Court"*

See Ex. 41, March 22, 2007 letter from Mr. Messineo to Mr. Schifferle.

On Monday, March 26, 2007, Mr. Messineo again communicated with Mr. Schifferle about the need for a much less redacted copy of the running resume. The entire week passed and there was no further disclosure by the District, even though such limited redaction could be accomplished quickly.

On Friday, March 30, 2007, Mr. Messineo again wrote to Mr. Schifferle and again advised that the District had not responded to the demand for an unredacted copy of the resume. See Ex. 60, March 30, 2007 letter (transmitted by e-mail) from Mr. Messineo to Mr. Schifferle.

Only after the close of business on Friday March 30, 2007, with no further response or any supplemental production by the District, did plaintiffs file their motion for sanctions.

Like every other time, the District's production came only after the threat of sanctions was apparent. Plaintiffs duly informed the Court that a less redacted copy was produced.

The prejudice suffered by the ongoing failure to conduct and certify a complete review of the District's knowledge, as well as the failure to produce the running resume or to disclose who really was on the scene and what they were doing, is severe. Plaintiffs are not in a position to identify the existence of documents not yet acknowledged, but plaintiffs are aware, by means of just a few examples, that: Officer Arthur Brown confirmed that in police trainings the MPD conveys information that he described as a "profile of anarchists," including manner of dress, yet no documents have been provided; Terrence Gainer testified that the MPD had trainings that touched upon the subject of anarchists or anarchism, yet no such training materials have been produced; Gainer testified that he associated plaintiffs' manner of dress with the "black bloc," a reference to anarchists or persons perceived to be anarchists, but there has been no documents produced relating to the "black block," or anarchists or persons dressed in this manner, wearing black and/or displaying political slogans; Gainer testified that the District deployed police in covert capacity to infiltrate or monitor protestors, but no related documents have been produced; Gainer testified that he believed policies existed restricting the conduct of police in plain clothes or undercover capacity, but no related documents have been produced. These are just examples. There has never truly been a proper review of records to produce responsive and discoverable material. The running resume is a blatant example of that. To this day, there is no reliable representation or certification that such a review has been completed *and that responsive materials have been produced*. There has been no accountability on persons obligated to conduct such search or make such certifications, and the District is counting on that and allowing disclosures of critical information only when forced to.

Plaintiffs have taken deposition after deposition without the ability to either examine witnesses based on the running resume or to use that document to refresh the recollections of officers, who with near uniformity represent that they saw no FBI agents and no questioning on video, political or otherwise. The resume provides additional detail about the timeline, which is critical to establishing the time of the arrest decision and the scope of information that was known at the time of arrest or discovered thereafter while plaintiffs were still at the scene.

Even with the running resume, the District continues to argue that there was no political interrogation. Now, even the FBI has been forced to admit that their intelligence agents were at the scene and conducted video interviews. The reality is that plaintiffs came before this Court because their constitutional rights were violated. The claims made by the plaintiffs continue to be borne out to be true, because their claims are true. They seek from this Court judicial intervention that will hold accountable the District of Columbia and those persons who have suppressed evidence, including the running resume which was admittedly in the possession of the MPD's Office of General Counsel, and to ensure that proper and thorough review and disclosure of discoverable records is made.

May 18, 2007

Respectfully submitted,

_/s/_____

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