

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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RAYMING CHANG, ET AL Docket No. 02-2010
 Plaintiffs,
 v. Washington, D.C.
 November 17, 2009
 10:05 a.m.

UNITED STATES OF AMERICA, ET AL
 Defendants;

and

JEFFREY BARHAM, ET AL Docket No. 02-2283
 Plaintiffs,
 v.
DISTRICT OF COLUMBIA, ET AL
 Defendants.

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STATUS HEARING

*BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE*

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19 Proceedings recorded by mechanical stenography, transcript
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1 P-R-O-C-E-E-D-I-N-G-S

2 (10:05 A.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Civil Action 02-2010, Rayming
4 Chang, et al versus United States of America, et al, and Civil
5 Action 02-2283, Jeffrey Barham, et al versus District of
6 Columbia, et al.

7 Would counsel please identify yourselves for the
8 record.

9 MR. TURLEY: Good morning, Your Honor. Jonathan
10 Turley for the *Chang* Plaintiffs. With me are my co-counsel,
11 Mr. Dan Schwartz and P.J. Meitl of the law firm of Bryan Cave.

12 THE COURT: All right. Good morning, Counsel.

13 MS. VERHEYDEN-HILLIARD: Good morning, Your Honor.
14 Mara Verheyden-Hilliard on behalf of the *Barham* Plaintiff
15 class, and with me at counsel table is Carl Messineo and
16 Radhika Miller.

17 THE COURT: All right. Good morning.

18 MR. NICKLES: Good morning, Your Honor. Peter
19 Nickles appearing on behalf of the District of Columbia, and
20 with me is Ellen Efros, Chad Copeland and the newest addition
21 to our team, Monique Pressley.

22 THE COURT: All right. Good morning, Counsel.

23 MR. DESO: Good morning, Your Honor. Robert Deso
24 for Peter Newsham.

25 THE COURT: Mr. Deso.

1 MR. TUOHEY: Good morning, Your Honor. Mark Tuohey
2 and my colleagues John Faust and Robert Boxie appearing on
3 behalf of Former Chief Charles Ramsey.

4 THE COURT: All right. Good morning, Counsel.

5 MS. BRASWELL: Good morning, Your Honor. Marina
6 Braswell here representing the Federal Defendants, and I have
7 with me Randolph Myers from the Solicitors Office of the
8 Department of the Interior.

9 THE COURT: Good morning.

10 MR. FRANCUZENKO: Good morning, Your Honor. Alex
11 Francuzenko on behalf of Fairfax County Sheriff's Office.

12 THE COURT: Good morning, Counsel. All right. I
13 take it from your presence you haven't settled either of these
14 cases, so there has been a lot of activity.

15 MR. NICKLES: I can speak to that issue, Your Honor.

16 THE COURT: I'm sorry?

17 MR. NICKLES: I can speak to that issue.

18 THE COURT: You want to speak to that, sure, go
19 right ahead. Sure.

20 MR. NICKLES: Good morning, Your Honor. May it
21 please the Court, Peter Nickles appearing on behalf of the
22 District of Columbia.

23 Let me start first with one of the four commitments
24 I made to the Court at the last status conference and in light
25 of the declaration I have filed with the Court. No. 1, we

1 have been working very hard at settlement. We settled the
2 *Bolger* case in front of Judge Bates, and that matter now has
3 been dismissed with prejudice and full payment has been made.

4 I think it fair to say that we've had very
5 productive discussions with the Partnership for Civil Justice.
6 I look forward to meeting with Mr. Turley with respect to the
7 *Chang* part.

8 THE COURT: You've not had a chance to meet with
9 Mr. Turley yet?

10 MR. NICKLES: Not yet, Your Honor, because of a
11 variety of matters, but I will. I think I can say that at the
12 moment we are very close to settling the *Becker* case before
13 Judge Friedman. I hope to have it --

14 THE COURT: I'm happy for my colleagues, but I'd
15 like to be happy.

16 (LAUGHTER.)

17 MR. NICKLES: I think we'll make you happy, Your
18 Honor, because I may not make Thanksgiving, which was my
19 target with respect to *Barham*, but I think, I feel confident
20 that we'll have an agreement in principle by the end of next
21 week in the *Barham* case. Given the very --

22 THE COURT: Let me stop you for a moment.

23 Do you share that optimism?

24 MS. VERHEYDEN-HILLIARD: I believe, Your Honor, that
25 we will -- we are likely to soon have an agreement in

1 principle in the *Becker* case. We are having productive
2 discussions in *Barham*.

3 THE COURT: *Barham*.

4 MS. VERHEYDEN-HILLIARD: But I can say that only for
5 the -- obviously the Plaintiff class because I understand
6 there have been no meetings with *Chang* Plaintiffs, but for the
7 *Barham* class --

8 THE COURT: We'll get to the *Chang* Plaintiffs, but
9 you share some optimism, though, correct?

10 MS. VERHEYDEN-HILLIARD: We are cautiously
11 optimistic, but that's --

12 THE COURT: All right. You've had productive
13 meetings. You are smiling and you've had productive meetings.

14 MS. VERHEYDEN-HILLIARD: We are having productive
15 meetings.

16 THE COURT: That's a positive sign. All right.
17 Okay. Good.

18 MS. VERHEYDEN-HILLIARD: Yes.

19 MR. NICKLES: In my job, Your Honor, I have to be
20 more than cautiously optimistic. I'm quite optimistic, and I
21 think we'll get it done, and all of these are part of a total
22 effort to resolve all the demonstration cases and --

23 THE COURT: And let me say -- Let me ask you this.
24 Are you speaking for the City as well as the Former Chief?

25 MR. NICKLES: Absolutely. Yeah, I'm going to settle

1 this on behalf of all the Defendants. This case is going to
2 go away.

3 THE COURT: With the exception of the Federal -- and
4 the Federal Government, too?

5 MR. NICKLES: The Federal government will be part of
6 that as well. This case will be off your docket.

7 THE COURT: I think the optimism is slipping away
8 over here. I'll hear from them in a second.

9 MR. NICKLES: Well, I think we'll get it done. I
10 just wanted to also just touch very briefly upon the other
11 commitments I made to the Court.

12 First, I made the commitment that we would install
13 the document management system called Concordance, which we
14 did in a timely way, and we will have all the documents with
15 respect to these demonstration cases in the base data model by
16 the end of November. That will be done.

17 Thirdly, Judge Sporkin told me today that he's -- I
18 don't know what's in the report. It's been completely
19 independent. The only job that I had, and happily Judge
20 Sporkin did not call upon me, if anyone got -- was not
21 completely cooperative, I told Judge Sporkin to tell me and
22 I'd take care of that problem.

23 He has not called me. He told me yesterday that
24 he's editing and will have it this week. And then finally,
25 Mr. Copeland has borne the great burden of the documents, but

1 we looked, as my supplemental declaration indicates, at all
2 the hundreds and thousands of boxes we went back to look at
3 over again in order to assure that we had dealt with the
4 document production.

5 THE COURT: What about those tapes that the
6 Plaintiffs claim --

7 MR. NICKLES: That's what Judge Sporkin is looking
8 at. The tapes and the resumes are the two --

9 THE COURT: He's looking at the tapes or he's
10 looking at that issue?

11 MR. NICKLES: He's looking -- well, he's looking at
12 that issue and interviewing all the people that are involved.

13 THE COURT: Do you know whether the tapes have been
14 located?

15 MR. NICKLES: I have not received any early peek at
16 what Judge Sporkin has found except that I know he's been
17 working at it, he and his colleagues, and I have not sought to
18 influence in any way that report. But he's told me that he's
19 editing it now.

20 THE COURT: I'm somewhat puzzled. Wait a minute.
21 You can't get away that quick. I'm somewhat puzzled you
22 haven't had a chance to talk to Professor Turley. He's not a
23 difficult person to locate in the City. In fact, he's a
24 practicing lawyer.

25 MR. NICKLES: No, I appreciate that, Your Honor, but

1 I have tried to concentrate first on the *Bolger* case, and I
2 appreciate that's another judge's issue, and I then have
3 turned to the *Becker* case, all of which had earlier trial
4 dates, and I've now turned to the *Barham* case, but it's in the
5 aftermath of the elements of the *Becker* case.

6 So there is just -- these cases have been pending a
7 long time, as you know, Your Honor, and I will talk to
8 Mr. Turley. I hope that those discussions are productive, but
9 I can only do so much and make it meaningful and sensible.

10 THE COURT: You both are here today. Will you have
11 some time this morning to speak with him, assuming he's
12 available? It's puzzling that you two have not had a chance
13 to talk.

14 MR. NICKLES: It's very puzzling.

15 THE COURT: You're puzzled as well.

16 MR. NICKLES: I'm puzzled.

17 THE COURT: All right. You're here today, though.
18 You're here today, and you had --

19 MR. NICKLES: Your Honor, until I make some progress
20 to a point where I have essentially an agreement in principle
21 on *Barham*, I do not want to begin discussions with Mr. Turley.
22 Because I need to have a sense for where this is all going,
23 because ultimately, I'm talking about a fair amount of money
24 for the District of Columbia.

25 THE COURT: Absolutely.

1 MR. NICKLES: And there are a lot of elements of a
2 settlement that seem to be falling into place in the other
3 cases that, at least based on my review of prior history, had
4 not fallen into place. And so I settled a lot of cases in my
5 lifetime, Your Honor, and you need to move with honesty and
6 with the trust of the parties. And so I've done one. I think
7 I'm going to do two, and then I'm going to move into the cases
8 that are on your docket and hope to make you happy as well.

9 THE COURT: You have your optimism. You believe
10 that the -- at least one of the two class action cases will be
11 settled by next week.

12 MR. NICKLES: The *Becker* case?

13 THE COURT: No, the case now.

14 MR. NICKLES: I hope so, Your Honor. I'm quite
15 optimistic. My colleague is cautiously optimistic, but, you
16 know, we'll see. It's not over till the fat lady sings.

17 THE COURT: All right. I'm going to put discovery
18 issues aside for awhile. I just want to focus on settlement
19 right now. Let me hear from counsel first. Anything else you
20 wish to say?

21 Mr. Turley, I'll hear from you in just one second.

22 MS. VERHEYDEN-HILLIARD: The one issue that was
23 very surprising for me to hear was reference to the Federal
24 Defendants. At no point in any of our negotiations, in *Becker*
25 or in this case, has there ever even been mention of the

1 Federal Defendants. There have been no discussions with the
2 Federal Defendants. Our negotiations have not contemplated
3 the Federal Defendants. We, of course, are willing to
4 negotiate and resolve matters with the Federal Defendants but
5 that's not been in play at all at any stage. So that issue
6 remains as fully open as it's ever been.

7 THE COURT: That matter is a nonjury matter before
8 the Court, so I'm somewhat reluctant to get any -- to have any
9 extensive discussion about settlement, but I will ask counsel
10 for the Government, any interest in talking with the
11 Plaintiffs about settlement?

12 I don't need to get into any terms, though, because
13 that matter will be tried nonjury before the Court.

14 MS. BRASWELL: Actually, Your Honor, there's a jury
15 matter with respect to the Federal Defendants because there's
16 a *Bivens* claim against individual Defendant Richard Murphy who
17 was the Park police officer in charge of the scene.

18 THE COURT: Are there any nonjury claims?

19 MS. BRASWELL: Yeah. There are in *Chang*. *Chang* has
20 FTCA claims.

21 THE COURT: Right.

22 MS. BRASWELL: So there will be a jury issue, but I
23 can just -- I can speak very quickly about the issue.

24 THE COURT: Sure.

25 MS. BRASWELL: We have said in prior mediations and

1 we have said to the District before, "If you get close to
2 settlement, come talk to us," because as the Court and the
3 Plaintiffs well know, it has always been our view that the
4 Federal Defendants were a very, very small piece of what
5 occurred here, and therefore, it is the District that bears
6 the burden of any kind of real settlement in this case.

7 That said, obviously it would make sense to have a
8 global settlement. It would make no sense to afford the
9 District and the District Defendants, both official and
10 individual, to settle out and have the Federal Defendants sort
11 of on the sidelines.

12 So, that's what we've said, "Get close, come talk to
13 us." So that's why there have been no conversations. If the
14 *Barham* Plaintiffs have a different view of how it should
15 proceed, they certainly can inform us.

16 THE COURT: Right.

17 MS. VERHEYDEN-HILLIARD: Well, while the Federal
18 Defendants have apparently had these discussions with the
19 District, they never said that to the Plaintiffs, so this is
20 news to us. We have negotiated in good faith with the
21 District in both these cases, understanding we were
22 negotiating only the District issues. We would take serious
23 objection and I think it would derail matters if suddenly
24 we're on the verge of an agreement with the District,
25 negotiating on the terms we felt we're negotiating and

1 suddenly we're told we're throwing the Federal Defendants in
2 at the last minute. That's unfair negotiations. That's never
3 been raised with us at any point. We are happy and intend to
4 continue to proceed with the District to try and resolve these
5 cases, and as we said, we are certainly cautiously optimistic
6 in this case that something can be achieved, but that's
7 extraordinary to suddenly be told that at the last minute the
8 Federal Defendants are going to walk in and be told, "Oh,
9 we're doing a global settlement," and you know, that's not
10 been on the table with us.

11 MR. NICKLES: I don't want there to be any confusion
12 here, Your Honor. The Federal -- I haven't had any
13 discussions with the Federal Defendants except exactly what
14 the young lady has said, and that is, "When you get close,
15 come and tell us."

16 When we get close next week, I'm going to come and
17 tell them. I obviously am not negotiating on behalf of the
18 Federal Defendants, and as the attorneys have said, I haven't
19 said, "This is on behalf of the Federal Defendants." There's
20 no --

21 THE COURT: Well, I mean, it sounds like you may be
22 at the point where it might be helpful if you enlist the aid
23 of one of the magistrate judges, Judge Kay or Judge --

24 MR. NICKLES: No, I don't --

25 THE COURT: You don't think so?

1 MR. NICKLES: No.

2 MR. MESSINEO: We're not interested.

3 THE COURT: You're having productive talks. You may
4 be having productive talks with the City but there's still
5 some other principal players here.

6 MR. MESSINEO: We are having productive talks with
7 the City. That is a very substantial change in circumstances
8 over seven years of litigation.

9 THE COURT: All right.

10 MR. MESSINEO: And we are representing to the Court
11 that that is in fact a qualitatively different circumstance
12 that has heretofore not been present. And with respect to the
13 Federal Defendants, I mean, I at first thought that
14 Mr. Nickles may have actually inadvertently spoke when he
15 referenced the Federal Defendants because it just has not been
16 a part of any of our drafting or our terms or our discussions,
17 and I think we've always approached the Federal Defendants
18 discreetly as they have with us in earlier mediations, and I
19 mean, I think that's where we're at.

20 We -- our response is that it sounded like they were
21 trying to fold themselves in, and that's just not been on the
22 table or contemplated, but I think that we will be glad to
23 speak, of course, with the Federal Defendants, discreetly, to
24 resolve issues, if that's at all possible.

25 THE COURT: All right.

1 MS. BRASWELL: Your Honor, it certainly appeared to
2 me that the Court believed, when it was asking about
3 settlement, that it was talking about settlement of the whole
4 case and not just settlement of certain parties. And we
5 actually have never had conversations with the *Barham*
6 Plaintiffs or *Chang* Plaintiffs substantively about settlement,
7 because as I said, in past mediations, because they have been
8 so far apart with the District, we have never engaged in the
9 process, and we have always said, "If you get closer, then
10 come talk to us."

11 So, that's what we said again this time. We assumed
12 that this court has an interest in the entire case being
13 settled.

14 THE COURT: Right.

15 MS. BRASWELL: And we would hope that both the
16 *Barham* Plaintiffs and the *Chang* Plaintiffs, should they be
17 near settlement with the District, would have an interest in
18 having a global settlement of the case.

19 THE COURT: Likewise. All right. I knew you didn't
20 mean any disrespect, Mr. Nickles, but I think it was
21 inappropriate to refer to counsel for the Government as "young
22 lady."

23 MR. NICKLES: I'm sorry, Your Honor.

24 THE COURT: Counsel.

25 MR. TURLEY: Thank you, Your Honor. On behalf of

1 the *Chang* Plaintiffs, the one thing I would agree to start off
2 on the right foot with Mr. Nickles is that I agree there's --
3 we're both puzzled. The -- I am puzzled by the position of
4 the District of Columbia with regard to the settlement
5 discussions.

6 I think that this court made clear in the last
7 hearing that given the last -- the series of representations
8 made in this case by the District, we would proceed to our
9 October trial and I'm more than willing to sit down in terms
10 of settlement discussions. However, there is a disconnect
11 between what Mr. Nickles has said before this court and what
12 it is doing in the filings and in the depositions of this
13 case.

14 The District has now canceled more depositions than
15 have been held. It has opposed questions on the most
16 frivolous basis, including claiming privilege over questions
17 like whether evidence has been destroyed. Somehow that's a
18 privilege question.

19 It has filed a series of protective orders that we
20 respectfully submit are facially meritless. And what seems to
21 be, from the filing that the District seems to have gone past
22 denial under Kubler-Ross and seems to be stuck at anger and
23 transference, and there's a very sharp disconnect. But what
24 we have in discovery is very disturbing.

25 The *Hustler* deposition is a good example of that. I

1 have no choice but to proceed towards trial, and we are in the
2 pretrial mode.

3 THE COURT: No. I will tell everyone, I'm not
4 moving the trial date. Those are firm trial dates, and I said
5 that last month.

6 MR. TURLEY: Thank you, Your Honor.

7 THE COURT: Do you have sessions scheduled with the
8 magistrate judge with regard to any discovery disputes?

9 MR. TURLEY: There is not currently a schedule, but
10 I believe that may be coming, but the problem with the --

11 THE COURT: It will be coming.

12 MR. TURLEY: Yes. But the Hustler matter, I think,
13 is very important. It was just filed a few days ago.

14 We have an officer who is obviously material, who
15 was close in proximity to Former Chief Ramsey and other high
16 ranking officials like Jordan. The District interviewed
17 Detective Hustler for a relatively small time and then
18 immediately called to see if they could cancel his deposition.

19 When he appeared for deposition, we once again found
20 that the deposition would not be held. On this occasion we
21 were told that in fact the District doesn't represent
22 Detective Hustler, that he has private counsel. When we
23 talked to private --

24 THE COURT: Keep track of your time and your billing
25 records.

1 MR. TURLEY: Thank you, Your Honor. I appreciate
2 that. But I think that if you look at the filing that the
3 District has made in the Hustler matter, you will see what is
4 occurring on the boots on the ground here. They have -- they
5 have done everything they could to avoid discovery, and in
6 fact, with Hustler you have a detective who was in the
7 proximity of high ranking officials and suddenly the District
8 is arguing that we shouldn't be able to take his deposition
9 and we have yet to have that deposition.

10 What we would put forward to the Court is that as we
11 move towards trial, regardless of what might happen,
12 Mr. Nickles is continuing the same dilatory tactics that
13 preexisted in this case. He has in the past said that that
14 was due to incompetence or other lawyers, but since his
15 arrival in this case we have had an increase in these
16 meritless motions to prevent questions, prevent depositions,
17 and we are making very little progress during this period of
18 discovery.

19 And I wish to put in front of the Court, so that
20 you're aware of that, we do not want to engage in this types
21 of motions practice. We've had more cancellations and motions
22 than depositions because of these efforts. And so we would
23 submit to the Court that we are eager to proceed to talk about
24 settlement, but we are even more eager to get some discovery
25 in this case.

1 The biggest problem that we have with Mr. Nickles'
2 representations and the position that he has taken with this
3 court is that this is not a case where we're not getting much
4 information.

5 To the contrary, the small amount of information we
6 have gotten has been extremely probative, has been extremely
7 important, and we believe that there is even more important
8 evidence that has yet to be discovered. And so we would
9 encourage the Court to address those questions so that we can
10 get all the evidence of this case out.

11 THE COURT: It seems to be -- there seems to be some
12 disagreement with respect to whether discovery is limited to
13 information and evidence that would otherwise be discoverable
14 pursuant to our rules, or does it also pertain to the issue of
15 sanctions?

16 MR. TURLEY: Yes.

17 THE COURT: The simple answer is -- and if anyone
18 doesn't understand this, tell me. It pertains to both,
19 sanctions as well as discoverable evidence, because I'm
20 interested in what happened to evidence that no longer exists
21 because that's going to inform this court's decision with
22 respect to the significant sanctions that this court is going
23 to impose.

24 So it pertains to sanctions as well as to any and
25 all other evidence that's otherwise discoverable pursuant to

1 the rules of civil procedure, period. Does anyone not
2 understand what I've just said?

3 MR. TURLEY: Thank you, Your Honor. That is very,
4 very helpful, and I'm hoping that the District will withdraw
5 its motion on the Hustler matter as well as some of these
6 other motions. In Hustler, they've actually argued that a
7 witness has to be named in these 22,000 documents that they
8 withheld for us to call them.

9 Hustler actually was named 26 times, but they're
10 still maintaining the motion, and I have to say that the
11 purpose of these motions does not appear to be one on the
12 merits, but your clarification, Your Honor, is very, very
13 useful. We made it clear to the District when they objected
14 to the Hustler deposition that he would be asked about --

15 THE COURT: Has that been rescheduled?

16 MR. TURLEY: It has yet to be rescheduled because
17 the District has filed a protective order to try to prevent us
18 from asking him questions of what he might have heard at that
19 critical moment of the mass arrests.

20 THE COURT: I'm going to order it be rescheduled.
21 It will take place in this courthouse. It'll be supervised by
22 marshals. So, pick a date and time that's convenient. If any
23 depositions are canceled, I'm going to start imposing fines of
24 \$1,000 per day for any depositions that the City sua sponte
25 cancels, and I will impose additional sanctions as well.

1 But that Hustler deposition will take place in this
2 courthouse and be under the supervision of a magistrate judge
3 and there will be marshals present as well. I'm not going to
4 play games. Until the City -- Mr. Nickles, you're playing
5 games with the wrong judge. Hint to the wise should be
6 sufficient, but I'm telling you, you're playing games with the
7 wrong judge.

8 MR. TURLEY: Thank you, Your Honor.

9 THE COURT: Anyone else?

10 MR. NICKLES: Your Honor, I'd like Ms. Pressley to
11 address the discovery issue, but with all due respect, the
12 personalization of this -- I have a group of lawyers that's
13 working on this matter and they have filed motions that seem
14 to them to be justifiable.

15 The manner in which Mr. Turley continues both to
16 play in the press and before the judge the personalization of
17 this matter -- I have brought in a team of very good lawyers
18 who are seeking appropriately to present reasonable arguments.

19 THE COURT: There shouldn't been any dispute that
20 the scope of discovery also include sanctions. That was clear
21 from day one. I didn't put any limitations on discovery, and
22 I'm very concerned about what's taken place over the last
23 several years. I'm very concerned that arguably there's been
24 noncompliance with court orders. Has it been willful? I
25 don't know, but we're going to find out.

1 I'm concerned about allegations that evidence has
2 been destroyed. And if it -- if there is evidence that there
3 has been destruction of indeed evidence, I'm going to refer
4 that matter to the U.S. attorney's office or the Department of
5 Justice, I can tell you that now, for criminal investigation.
6 I'm not playing games with this.

7 MR. NICKLES: I understand that, Judge.

8 THE COURT: If you want --

9 MR. NICKLES: I understand that, Your Honor, but we
10 have submitted my declaration and my supplemental declaration
11 indicating exactly what we have done. And it's all right for
12 counsel to come in and make an argument, but to personalize
13 this as somehow contrary to representations I've made when I
14 don't even know the particulars of this discovery. And I'd
15 like, with all due respect, to have Ms. Pressley address it.
16 Is that permissible, Your Honor?

17 THE COURT: Sure.

18 MR. NICKLES: All right. Thank you.

19 THE COURT: Good morning.

20 MS. PRESSLEY: Good morning, Your Honor. Monique
21 Pressley on behalf of the District and the individual
22 Defendants. First with respect to what appears to be the most
23 concern to *Chang* counsel. The deposition of Detective Hustler
24 was noted by *Barham* Plaintiffs seven days prior to last
25 Friday.

1 This deposition, Your Honor, is not relating to
2 sanctions-related discovery nor is it related to late-produced
3 documents by the District. Now, as Mr. Turley has stated,
4 there are issues with respect to settlement; however --

5 THE COURT: Let the record reflect that my
6 colleague, Judge Facciola, has joined us.

7 Good morning, Judge.

8 JUDGE FACCIOLA: Good morning. Your Honor, are you
9 sure you have enough lawyers?

10 (LAUGHTER.)

11 MS. PRESSLEY: There are issues with respect to
12 settlement, Judge Sullivan, but I frankly have been brought on
13 to be trial counsel to the extent that the *Chang* matter, or
14 the *Barham* and *Chang* matters do not settle. So the motions
15 that are being filed now on behalf of the District, on behalf
16 of individual Defendants are motions which this counsel and
17 the other counsel who are working for the District believe
18 have merit and believe are justified and necessary in order
19 for us to prepare for trial and defend against the evidence at
20 trial.

21 Now, there have been times from the filings of both
22 *Barham* and *Chang* Plaintiffs, but especially counsel for *Chang*
23 Plaintiffs, we've sort of been accused of being lawyers, and
24 that's my job to defend the cases. Now, with Detective
25 Hustler's deposition, this is a deposition of a detective who

1 has been gainfully employed since September 27, 2002 and
2 before as a member of the Metropolitan Police Department. He
3 was on the ESU, the Emergency Service Unit, on the day that
4 the mass demonstrations took place. We didn't hide him.

5 They received notice that he was employed. They had
6 every opportunity to talk to him when they talked to the other
7 30 lawyers.

8 THE COURT: They can talk to him in the federal
9 courthouse, Judge Facciola, on your supervision and on a date
10 and time that's convenient for you, and that deposition is
11 going to go forward.

12 MS. PRESSLEY: And Your Honor, we have no problem
13 with the deposition going forward. The issue we --

14 THE COURT: I'm glad the City has no problem with
15 that.

16 MS. PRESSLEY: Your Honor, the issue is with the
17 Court's ruling with respect to who should be responsible for
18 the deposition and whether the deposition can be attributed to
19 the District's late production of evidence. This is just a
20 new witness about --

21 THE COURT: We are talking about going forward.

22 MS. PRESSLEY: Well, Your Honor, if I may beg the
23 question, it was my understanding, coming into the case late,
24 that the reason why the District was going to be responsible
25 for this discovery, responsible in terms of payment for the

1 discovery --

2 THE COURT: I've ruled discovery is going to go
3 forward for that person. So it will be scheduled in the
4 federal courthouse, it will be under the supervision of Judge
5 Facciola on a date and a time that's convenient for him and
6 for others. So what's the next point you want to address?
7 That's been addressed.

8 MS. PRESSLEY: Will the District be responsible for
9 paying, and in the future, Your Honor, for imposition of
10 sanctions of costs with respect to this deposition since this
11 deposition is not pursuant to the Court's ruling in terms of
12 later found evidence?

13 THE COURT: I'll address the issue of sanctions at a
14 later date. His deposition is going to go forward.
15 Now, what's your next point?

16 MS. PRESSLEY: Your Honor, that was the point. With
17 respect to the other motions, the other motions are pending
18 before Judge Facciola.

19 THE COURT: Judge Facciola will get to them in the
20 due course.

21 MS. PRESSLEY: And if I'm understanding the Court's
22 ruling, if there is an issue with respect to who should be
23 responsible for costs for the different depositions as it
24 relates to the discovery going forward, then we should reserve
25 those issues in terms of Plaintiffs' billing and in terms of

1 our cost.

2 THE COURT: I want to get to -- I want to get
3 discovery over with respect to discoverable evidence, what may
4 have happened evidence that no longer exists and discovery
5 with respect to my consideration of the issue of sanctions. I
6 want to know what happened and what didn't happen because
7 that's going to inform the Court's decision, and I'll focus on
8 Judge Sporkin's report.

9 And by the way, Mr. Nickles, will that report be
10 filed on the public docket and shared with counsel for
11 Plaintiffs?

12 MR. NICKLES: Absolutely, Your Honor.

13 THE COURT: All right.

14 MR. NICKLES: Judge Sporkin has talked to anyone he
15 wanted, including the Plaintiffs. I just want to emphasize,
16 Your Honor, because we have taken to heart the Court's
17 comments.

18 THE COURT: As well you should, Counsel.

19 MR. NICKLES: And it's in my declaration.

20 THE COURT: As well you should, and you recognize --
21 Just a minute. You recognize, appropriately so, two months
22 ago that what's taken place in this case should have never
23 taken place.

24 MR. NICKLES: Absolutely. But what concerns me --

25 THE COURT: But there's a price to pay for that,

1 too.

2 MR. NICKLES: I don't disagree with that, but I
3 think what concerns me is the personalization of what are now
4 appropriate lawyer's work as accusations that somehow I am not
5 being true to my declaration. Counsel and particularly in the
6 *Chang* case have waged a war in the press about the District's
7 conduct. That is not appropriate.

8 THE COURT: It's not that they waged a war in the
9 papers. They filed pleadings. They filed pleadings, and the
10 press is going to pick up on the pleadings, and the press is
11 going to pick up on your own statements.

12 MR. NICKLES: It's more than pleadings, Your Honor.

13 THE COURT: On your own statements.

14 MR. NICKLES: It's more than pleadings. Indeed, you
15 could hear counsel for *Chang* talk from this very rostrum,
16 Mr. Nickles didn't do this; Mr. Nickles didn't do that; Mr.
17 Nickles is deceiving the Court; Mr. Nickles is not complying
18 with his declaration. That is not appropriate conduct by
19 counsel. Before -- and if the Court wants to take out after
20 me, that's fine, but I think the Court should also --

21 THE COURT: I'm not singling you out.

22 MS. PRESSLEY: Your Honor, just two more points, if
23 I may be heard. One, with respect to the releases to the
24 press, actually counsel's e-mails -- my e-mails have been
25 released to the City paper and were part of a blog, and so

1 that was information that I only e-mailed to Plaintiffs'
2 counsel that's also being released.

3 And then, secondly, Your Honor, with respect to the
4 depositions of Detective Hustler, and if there are more
5 depositions that should follow, which I anticipate there would
6 be --

7 THE COURT: And that's the reason why -- Look, I
8 was -- we were receiving a motion today from everyone, and
9 there are a few other matters on my calendar, and I enlisted
10 the aid of my colleague Judge Facciola to assist the Court,
11 and I'm going to leave it in his very capable hands to do
12 whatever he believes is appropriate to ensure that whatever
13 discovery the Plaintiffs are entitled to -- because the City
14 is not entitled to anymore discovery.

15 And that's another thing. Anyone has any problems
16 understanding that, let me know. You get no more discovery.
17 The City gets zero discovery. Your discovery is over.

18 MS. PRESSLEY: For these depositions where new
19 information comes forward from outside sources, is it the
20 Court's position that the City will not have --

21 THE COURT: If somehow or another down the line
22 these cases don't settle and someone in your office believes
23 there is some good faith basis for a deposition, you can file
24 a motion, but for the time being, discovery has been long
25 closed.

1 MS. PRESSLEY: And does that relate to the
2 individual Defendants as well?

3 THE COURT: Counsel, I just made it clear. I'm
4 not --

5 MS. PRESSLEY: These are Chief Ramsey and Chief
6 Newsham, Your Honor. I'm saying this evidence relates
7 directly to them, and they have separate counsel other than
8 the District so would they --

9 THE COURT: They will speak for themselves.

10 MS. PRESSLEY: Okay. Very well, Your Honor. Thank
11 you.

12 MR. TURLEY: Your Honor, very briefly, I just want
13 to clarify one thing. First of all, the statements --

14 THE COURT: Let me just say one thing. If there's a
15 need to schedule all of these depositions in the courthouse
16 under Judge Facciola's supervision or someone else's or the
17 marshal's supervision, I'll do it, because we're going to get
18 to the end of discovery, I can tell you that, whether these
19 cases settle or not.

20 MR. TURLEY: We are very, very grateful to that --
21 for that, Your Honor, and I just want to make -- just clarify
22 the record. You could put all the statements I've made
23 publicly in this case on the back of a single business card.
24 We let our filings speak for themselves.

25 In fact, what we have filed with the Court is that

1 often information has been denied to us. For example,
2 Mr. Nickles' past involvement in the case or Ms. Efros' past
3 involvement, what information we've gotten is because -- has
4 been from Mr. Nickles' interviews, and he's done extensive
5 interviews. We have not. So, I don't understand what that
6 comment was about.

7 As to the e-mails that was referenced by opposing
8 counsel, those are attached to the filings in this court. The
9 media picked up on those e-mails.

10 THE COURT: I've seen a number of e-mails. That's
11 understandable.

12 MR. TURLEY: And so we just wanted to clarify that,
13 Your Honor.

14 Finally, in terms of Detective Hustler, it has
15 already been addressed, but we are deeply appreciative of this
16 court forcing discovery to go forward. When Mr. Nickles says
17 that I personalized this case, I am perplexed. Mr. Nickles
18 came to this court in his first appearance and said, "I am
19 personally taking responsibility. I am going to be the
20 trial judge -- sorry -- the trial lawyer. I am going to
21 supervise this. You have my declaration." And he has
22 personalized this as saying that it is his -- these are his
23 actions and his guarantees.

24 When we contest those, we're not personalizing it,
25 we're responding, and I'd be more than happy to sit down with

1 Mr. Nickles. I've never met Mr. Nickles in my life. I have
2 nothing against him in this world, but I must represent my
3 client.

4 THE COURT: You two don't even know one another?

5 MR. TURLEY: We actually don't know each other.

6 This would not exactly be the best start of a long
7 relationship, but who knows, hope springs eternal, Your Honor.

8 THE COURT: I have no doubt that everyone can put
9 aside their personal differences and settle these cases fairly
10 on the merits. I have no doubt about that. The personalities
11 are left at the door every day.

12 MR. TURLEY: And I will certainly leave mine at the
13 door, Your Honor. Thank you very much.

14 THE COURT: Anyone else want to say anything?

15 Mr. Nickles, he's here, you want to talk to him?
16 I'm going to leave. Judge Facciola, you can have my chair,
17 sir. I finished saying everything that I need to say.

18 JUDGE FACCIOLA: Maybe I'll just make one point.

19 THE COURT: Sure.

20 JUDGE FACCIOLA: I've had the pleasure of working
21 with you on many occasions, Your Honor.

22 THE COURT: And with all these attorneys as well.

23 JUDGE FACCIOLA: And with these attorneys. But I
24 think you know my own professional and personal commitment to
25 the principles articulated in the Sedona Conference on

1 cooperation which has now been endorsed by 100 judges, and
2 just yesterday I published an article, the central theme of
3 which is that questions of -- in discovery, particularly
4 involving privilege logs, can and should be resolved in a
5 cooperative fashion, so I stand ready to live up to those
6 principles once again to help counsel in any way I can.

7 THE COURT: Judge Facciola, you are welcome to have
8 my --

9 JUDGE FACCIOLA: Well, I am not as familiar with
10 this case as I want to be, to be blunt, and I want to review
11 the pleadings again. I'll call counsel in and we'll work some
12 things out. That won't be a problem. That probably will be
13 within the next two weeks.

14 THE COURT: All right.

15 JUDGE FACCIOLA: But I rather do that than just take
16 this cold. I just wanted to express my own commitment.

17 THE COURT: It was represented this morning that
18 there is some optimism -- may be guarded on one side, not as
19 guarded on the other side -- with respect to one of the cases,
20 the *Chang* case, and apparently the part -- the attorneys have
21 not had a chance to meet, for whatever reasons, in the *Barham*
22 cases, so -- I'm sorry, *Barham* and *Chang*, although apparently
23 every other judge in this courthouse is happy with the
24 settlements. *Becker* and what's the other case?

25 MR. MESSINEO: *Bolger*.

1 THE COURT: And *Bolger*.

2 JUDGE FACCIOLA: Of which I am intimately familiar.
3 I'll be glad to -- I'll get to work on it, Judge.

4 THE COURT: Thank you. Thank you so much.

5 JUDGE FACCIOLA: But I don't need them now -- right
6 now. I'll be in touch with them shortly. I imagine within
7 the next week or two.

8 THE COURT: All right. That's fine.

9 JUDGE FACCIOLA: Thank you, Judge.

10 THE COURT: Thank you, Judge.

11 JUDGE FACCIOLA: I have to go to another --

12 THE COURT: Anything else? I should schedule
13 another status hearing. Judge, what do you recommend? Maybe
14 towards the end of the -- maybe mid December.

15 JUDGE FACCIOLA: Towards the end of December is
16 always miserable for everybody.

17 THE COURT: Good. It will be mid December then.

18 (LAUGHTER.)

19 THE COURT: I mean, you know, I mean, seriously --

20 JUDGE FACCIOLA: I'm in criminal, Judge, so my time
21 is a little more constrained but not that badly constrained.
22 A Tuesday and a Thursday morning is best for me.

23 THE COURT: Let's talk. Maybe we can schedule a
24 date that's convenient for both of us. There probably will be
25 a session that week of the 14th, though. I can't let the

1 year --

2 JUDGE FACCIOLA: I don't know if the Chief Judge has
3 announced when we go on recess, Your Honor, yet.

4 THE COURT: I think it's -- I'm not sure. I think
5 it's the week of the 21st, I believe. I'm not sure. But
6 we'll pick a date probably that Tuesday or Thursday. Letting
7 everyone know now, we'll either have a status hearing on the
8 15th or 17th of December. Yes.

9 MS. VERHEYDEN-HILLIARD: Your Honor, we haven't --
10 the one outstanding case that hasn't been discussed or settled
11 is the *Frucht* case. We have a status hearing on that on the
12 15th, but perhaps that will get resolved.

13 THE COURT: What time is that? Is that Judge
14 Friedman's case?

15 MS. VERHEYDEN-HILLIARD: No, that one is before
16 Judge Leon.

17 THE COURT: All right.

18 MR. NICKLES: I don't know anything about that case,
19 and I'm trying -- I'm trying to make you happy and make Judge
20 Leon happy.

21 JUDGE FACCIOLA: Are you shooting for the 15th
22 then?

23 THE COURT: I'm open to any suggestions.

24 JUDGE FACCIOLA: Is that a Tuesday and a Thursday,
25 Your Honor?

1 THE COURT: The 15th is a Tuesday, right.

2 JUDGE FACCIOLA: Subject to demands of criminal,
3 which I can't anticipate, let's -- either of those dates is
4 fine with me, Your Honor.

5 THE COURT: All right. Maybe the 17th is a better
6 date. I don't know. You have the 15th before Judge Leon; is
7 that correct?

8 MS. VERHEYDEN-HILLIARD: Correct, Your Honor.
9 That's at 11:00 a.m., Your Honor.

10 THE COURT: All right. I'll do this. I'll
11 tentatively schedule both cases for a status hearing on the
12 17th at 10:00 o'clock. I'm aware I have other matters
13 scheduled that day. 10:00 o'clock is fine, though. All
14 right.

15 JUDGE FACCIOLA: Thank you.

16 THE COURT: Anyone else? Mr. Turley? Anyone else?

17 MR. TUOHEY: No, Your Honor. Thank you.

18 THE COURT: All right. Everyone have a wonderful
19 day. Thank you.

20 (PROCEEDINGS END AT 10:45 A.M.)

21 *-*-*-*

22 **CERTIFICATE OF REPORTER**

23 I, Catalina Kerr, certify that the foregoing is a
24 correct transcript from the record of proceedings in the
25 above-entitled matter.

Catalina Kerr

Date