UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

GEOFFREY CALHOUN, et al. Plaintiffs, v. RICHARD PENNINGTON, Chief of Police for the City of Atlanta, in his official and individual capacities, et al. Defendants.	)	Civil Action File No.: 1:09-CV-3286-TCB

PLAINTIFFS' MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS

INTRODUCTION AND REQUEST FOR EXPEDITED RULING

This motion arises from Defendants' pervasive violations of their obligations under Rule 26 and Rule 37 of the Federal Rules of Civil Procedure, including the spoliation of evidence through both actual destruction and the failure to preserve evidence; the failure to search for and produce responsive items; and the failure to obey explicit orders of the Court.

Among Defendants' many specific discovery violations, this Motion will address:

- The deletion of mobile phone data by individual Defendants after the Court ordered them to produce their phones;
- The overwriting of back-up tapes by the City of Atlanta after the Court ordered the City to produce them;
- The failure to implement an effective litigation hold, and the consequent failure to preserve evidence;
- The pervasive failure to search for responsive items;
- The failure to produce responsive items and to supplement discovery as ordered by the Court, including the failure to serve any response at all Plaintiffs' Second Request for Production to the individual defendants;
- The failure to comply with specific instructions issued by the Court.

Defendants' collective failures to respond to individual requests are enumerated and discussed in Appendix A, and a verbatim recitation of the requests and responses at issue is attached as Appendix B.

Request for expedited ruling

Given the bad faith spoliation of electronic data, and the nature of electronic evidence, which can be lost or overwritten by the passage of time even in the best of circumstances, Plaintiffs respectfully request an expedited ruling on this Motion in the interest of preventing any further loss or spoliation of evidence.[1]

[1] Plaintiffs' mobile phone forensics expert has testified that additional mobile phone data is likely to be lost as Defendants continue to use their phones on a daily

The Court should:

- Order Defendants fully to comply with discovery.
- Order Defendants or their counsel to pay for the forensic examination of electronically stored information, including the restoration of deleted data.
- Order Defendants or their counsel to pay for the collection of electronically stored information and the creation of an e-discovery search facility available to all Parties and the Court.
- Order Defendants to provide their online user-ids and passwords, and their consent to third party internet providers to release online content.
- Award the reasonable attorneys' fees and costs incurred by Plaintiffs as a result of Defendants' continued and repeated failure to comply with discovery.
- Plaintiffs request the Court to enforce all orders granted under this motion by a finding of civil contempt.
- Impose such punitive sanctions, if any, as the Court finds appropriate.

FACTUAL BACKGROUND

I. The Complaint

On November 24, 2009, Plaintiffs filed the present action under 24 U.S.C. §1983 alleging that Defendants violated their rights under the United States Constitution under color of law, violated the Georgia Constitution, and committed tortious acts under the laws of the State of Georgia.

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basis, many of them heavily, and phone memory is recycled, thus obliterating deleted data." (Affidavit of John Carney, ¶ 31, Attachment 4 hereto.)

This action arises from a warrantless raid (the "Raid") conducted on the night of September 10, 2009 and early morning of September 11, 1009, by the Atlanta Police Department ("APD") on a bar called the Atlanta Eagle. Defendants have admitted that APD officers forced all 60-70 persons in the establishment to lay on the floor while they frisked them and entered all their names into a police database to search for warrants and/or criminal history.[2]

Plaintiffs contend, among other things, that Defendants unlawfully detained them without particularized reasonable articulable suspicion; unlawfully arrested them without probable cause; unlawfully frisked them for weapons without particularized reasonable articulable suspicion that they were armed and dangerous; unlawfully searched them without a warrant or probable cause; unlawfully searched the premises of the Atlanta Eagle, a retail store in the same building, and the home of Plaintiff Shepherd without a warrant or probable cause; and unlawfully arrested Plaintiff Shepherd in his home.

[2] (Defendants' Initial Disclosures, p. 5, Docket item No. 21.); Defendant City of Atlanta's September 13, 2010 Defendants' Supplemental Response to Plaintiffs' First Interrogatories lists 58 individuals whose names were entered into a police database during the Raid, but this list does not include all persons known to have been seized by police during the Raid, including Plaintiffs du-Wayne Ray, Christopher Schmaltz, and Saverio Montelone.

II. Discovery

Plaintiffs served discovery requests on the City of Atlanta and the individual Defendants beginning March 26, 2010. Defendants were consistently late in their responses and failed to comply with Plaintiffs' requests as discussed throughout the present Motion. Plaintiffs' counsel Daniel Grossman made numerous good faith attempts to encourage Defendants to comply with discovery, including letters, emails, phone calls, and in-person meetings with Defendants' counsel, but to no avail.[3]

III. The 30(b)(6) Deposition

By June, 2010, it had become obvious that Defendants were not going to comply with discovery and Plaintiffs noticed a 30(b)(6) deposition of Defendant City of Atlanta to inquire into the existence of responsive items and Defendants' efforts to preserve and search for those items. The City of Atlanta designated Defendant Debra Williams as its witness, but when Defendant Williams appeared for her deposition on August 5, 2010, she was not prepared to testify and the City terminated the deposition.[4] Defendant Williams appeared again on August 10, 2010, but was still not prepared to testify about all topics in the 30(b)(6) notice and

[3] (Affidavit of Daniel Grossman, ¶¶ 4-17, Attachment 3 hereto.)

[4] (Deposition of Debra Williams, August 5, 2010, p. 75, ll. 12-24.) Original deposition transcripts referred to in this Motion will be filed with the Court.

the City again terminated the deposition.[5] The deposition was eventually concluded with the testimony of Jeremy Johnson on August 19, 2010.[6]

IV. The August 20, 2010 Telephone Conference

On August 20, 2010, the parties had a telephone conference with the Court to discuss the problems with discovery. The Court found Defendants had been "woefully deficient in their responses to Plaintiffs' discovery requests," overruled Defendants' objections to discovery, and ordered Defendants to supplement their discovery responses and comply fully with Plaintiffs' requests on or before September 3, 2010.[7] The Court also issued a number of specific orders, e.g., ordering the individual Defendants to produce their mobile phones for inspection by Plaintiffs and to produce photographs of themselves; ordering the City of Atlanta to produce existing computer backups and email archives; and allowing Plaintiffs to inspect original documents at the offices of the Atlanta Police Department.

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[5] (Deposition of Debra Williams, August 10, 2010, p. 193, ll. 20-22; p. 198, ll. 7-23.)

[6] (Deposition of Jeremy Johnson, August 19, 2010.)

[7] (Transcript of August 20, 2010 Telephone Conference, Attachment 7 hereto.)

V. The August 27, 2010 Telephone Conference

On August 27, 2010, Defendants' counsel requested a telephone conference to ask the Court to issue a written order addressed to their clients. The Court denied Defendants' request but granted an additional week (to September 10, 2010) for Defendants to comply with the Court's August 20th orders, while shortening Defendants' time to produce computer back-ups and archives to September 1, 2010.[8]

VI. The Site Visits to APD

Plaintiffs' counsel Daniel Grossman visited APD's offices to view original documents as authorized by the Court on August 27, August 30, and September 1, 2010.[9] During these visits Plaintiffs discovered thousands of pages of responsive documents that had previously been withheld by Defendants.[10]

VII. The Mobile Phone Reports

None of the Defendants produced their phones to Plaintiffs as ordered by the Court,[11] but twenty-one of the thirty-five individual Defendants gave their phones

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[8] (Transcript of August 27, 2010, Telephone Conference, pp. 10, 15-16, Attachment 8 hereto.)

[9] (Affidavit of Daniel Grossman, ¶¶ 19, 24, 25, Attachment 3 hereto.)

[10] (Affidavit of Daniel Grossman, ¶¶ 19-22, 25-27, Attachment 3 hereto.)

[11] Plaintiffs did not insist on the production of mobile phones which are currently in use because Plaintiffs' forensic examiner could not guarantee

to an employee of the APD for examination on September 3, 2010.[12] The APD employee reviewed the "active" (i.e., non-deleted) data on the phones and prepared reports of his findings, which Defendants' counsel provided to Plaintiffs on September 14, 2010.[13]

ARGUMENT AND CITATION TO AUTHORITY

I. Defendants' spoilated evidence by destroying and failing to preserve evidence.

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Graff v. Baja Marine Corp.*, 310 Fed. Appx. 298, 300 (11th Cir. Ga. 2009), citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. N.Y. 1999); *Griffin v. GMAC Commercial Fin., L.L.C.*, 2007 U.S. Dist. LEXIS 10504, at *8-9 (N.D. Ga. Feb. 15, 2007). "Aside perhaps from

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examination of each phone in less than 24 hours as ordered by the Court, but Plaintiffs have repeatedly asked for the production of the Defendants' retired or replaced phones. (Affidavit of Daniel Grossman, ¶ 32, Attachment 3 hereto, Letter from Daniel Grossman to Robert Godfrey, September 17, 2010, Exhibit M.) Turning over these phones, which are not in use, would pose no hardship for Defendants. Yet, Defendants have not produced these phones.

[12] (Affidavit of John Carney, p. 10, Attachment 4 hereto.)

[13] (Affidavit of Daniel Grossman, ¶ 32, Attachment 3 hereto.) No mobile phone information was produced for the remaining fourteen defendant officers, and the APD examiner chose not to recover deleted data with any of the forensic tools which are available for that purpose. (Affidavit of John Carney, ¶ 30, Attachment 4 hereto.)

perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence." *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 258 (Fed. Cl. 2007). Defendants are guilty of both forms of spoliation—the actual destruction of evidence and the failure to preserve relevant evidence. Spoliation occurred even after this Court issued orders requiring certain evidence to be produced.

A. Defendants deliberately deleted mobile phone data they were ordered to produce to Plaintiffs.

After being ordered to produce their mobile phones for inspection, some of the Defendants destroyed the evidence on their phones instead.

Plaintiffs' forensic expert examined the APD mobile phone reports for a sample group comprised of six Defendants. The officers selected for this sample were the four most senior officers involved in the Raid (Red Dog commander Lt. Scott Pautsch, Raid commanders Sgt. John Brock and Sgt. Kelly Collier, and lead investigator Bennie Bridges); an officer whose phone was used to take a photograph during the Raid (Officer Jeremy Edwards); and one "rank-and-file" officer (Officer Brandon Jackson).

Plaintiffs' expert concluded that each of the six Defendants in the sample group deleted text messages from their mobile phones after the Court ordered them to produce their phones for inspection.[14]

Some of the missing messages specifically concern the Raid, and some were even sent during the Raid itself.[15]

The reports indicate that mobile phone photographs are missing as well, including photographs taken during the period of the Raid. Defendant Jeremy Edwards' phone, for example, contained a photograph taken during the Raid, but the two previous photographs are missing.[16]

The reports also suggest the possibility of "mobile phone hacking" (i.e., corrupt data being placed on the phones specifically to disrupt forensic extraction) on the phones of Defendants Darnell Perry, Jeremy Edwards, Timothy McClain, Dimitri Jacques, and Vincente Marcano.[17]

The data deleted from the officers' mobile phones likely includes items which are relevant to this action. Even the limited data Plaintiffs received from the examination reports shows that Defendants used their mobile phones to take

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14 (Affidavit of John Carney, ¶¶ 4-9, Attachment 4 hereto.)

15 (Affidavit of John Carney, ¶ 4, Attachment 4 hereto.)

16 (Affidavit of John Carney, ¶4, Attachment 4 hereto.)

17 (Affidavit of John Carney, ¶¶ 28-29, Attachment 4 hereto.)

photographs and exchange text message regarding the Raid. For example, the mobile phone of Defendant Dimitri Jacques contained the following exchange of text messages during the Raid between Defendant Jacques (who was waiting outside the bar as part of the Red Dog unit) and Defendant Jeremy Edwards (who was inside the bar as an undercover Vice officer)[18]:

> Edwards to Jacques: 11/09/09 02:53:20 (GMT) It's just now getting busy
>
> Edwards to Jacques: 11/09/09 02:53:33 (GMT) The actions just begining (sic)
>
> Edwards to Jacques: 11/09/09 02:53:59 (GMT) Our Sgt is wanting to make as many cases as possable (sic)
>
> Jacques to Edwards: 11/09/09 02:54:30 (GMT) What the eta
>
> Edwards to Jacques: 11/09/09 02:59:08 (GMT) Don't know..... Soon[19]

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[18] Defendants Jacques and Edwards both denied having any writings relating to the Raid in both their initial and supplemental responses to Plaintiffs' First Request for Production to the individual Defendants (Requests 1 and 2). Defendant Edwards was even more untruthful: Edwards denied having any mobile phone at all. "Defendant does not use portable communication devices." Response to Request 6 of Plaintiffs' First Request for Production to Defendant Jeremy Edwards. Even after being ordered to supplement his responses by the Court Edwards stuck to his original and untruthful response: "See previously produced responses."

[19] (Affidavit of John Carney, ¶ 4, Attachment 4 hereto.)

On September 15, 2009, four days after the Raid, when alleged use of anti-gay slurs by officers was being widely discussed in the Atlanta press, Defendant Jacques and Defendant Brandon Jackson had the following communication by text message[20]:

> Jacques to Jackson 22:18:33 (GMT): Bro no more fuckin gay jokes. For rear for real[21] (sic)

On August 26, 2010, the day the individual officer Defendants met with their counsel to discuss the Court's August 20 discovery orders, the following exchange took place between Defendant Jacques (a Red Dog officer), Defendant

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[20] Defendant Brandon Jackson also denied having any writings relating to this case. (Response to Requests 1 and 2 of Plaintiffs' First Request for Production to Defendant Brandon Jackson.)

It should be noted that Defendant Jackson was one of four APD Red Dog officers found by United States Magistrate Linda T. Walker to have been "less than candid" during testimony in her court. *United States v. Kelvin Bryant*, Criminal Case No. 1:09-CR-018-JEC (N.D. Ga., October 15, 2009), Attachment 9 hereto.

Two of the other officers cited by Magistrate Walker for untruthfulness were William Porter and James Menzoian, who are also Defendants in this action and who also denied having any responsive writings. (Response to Requests 1 and 2 of Plaintiffs' First Requests for Production to Defendant William Porter and James Menzoian.)

When asked by interrogatory if they had "ever been found to have been untruthful or to have misled any court, judge, [or] magistrate," Defendants Jackson and Menzoian each dishonestly answered "No." Response to Interrogatory No. 13, Plaintiffs' First Interrogatories to Defendant Brandon Jackson and James Menzoian.

[21] (Affidavit of John Carney, ¶ 6, Attachment 4 hereto.)

Scott Pautsch (the Red Dog commander), and Defendant Caldwell (a Red Dog officer):[22]

> Pautsch to Jacques: 19:23:29 (GMT): Tell everybody to stop making comments.
>
> Jacques to Pautsch: 19:25:22 (GMT): I already text everyone

Defendant Pautsch and officer Robert Godwin had the following communication on September 2, 2010:

> Godwin to Pautsch: 10:39:58 (GMT-5): Have you been advised of the eagle case information deadline Friday?
>
> Pautsch to Godwin 11:18:43 (GMT-5): No. All i know is that there supposed to come and take my phone.
>
> Godwin to Pautsch: 11:19:35 (GMT-5): Check your city email. Very important. [23]

Mobile phone billing records also show that Defendants exchanged text messages, voice calls, and photographs with one another during and shortly after the Raid. For example:

- Defendant Robert Godwin's billing records show two phone calls to Defendant Marlon Noble (mobile # 404-707-4588) made during the Raid (at 11:15 PM and again at 11:17 PM);
- Defendant Porter's billing records show a phone call to Defendant Brandon Jackson (mobile # 404-201-5691) made toward the end of the Raid (at 12:43 AM);

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22 (Affidavit of John Carney, ¶ 9, Attachment 4 hereto.)

23 (Affidavit of John Carney, ¶ 9, Attachment 4 hereto.)

- Defendant Stephanie Upton's billing records show that she received a multimedia text message (a photograph or video) from Defendant Brandon Jackson (mobile #404-201-5691) at 1:55 PM on the day after the Raid.[24]

These messages and the billing records show that Defendants' mobile phones were used in connection with the Raid and contain discoverable and highly relevant items; and it is reasonable to conclude that some of the deleted items are also relevant to this case.

B. The City destroyed computer back-up tapes in direct violation of this Court's order to produce them.

During the August 19, 2010, deposition of the City's 30(b)(6) witness, Plaintiffs learned that the City of Atlanta Department of Information Technology ("DIT") recycles network back-up tapes every 90 days (a process which overwrites and thus deletes all data on the previous tapes), and that Defendants never altered this policy due to this litigation.[25] Plaintiffs informed the Court of the 90-day deletion and the Court ordered Defendants to produce any tapes still in existence no later than September 1, 2010.[26]

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[24] Defendants Upton and Porter are among the Defendants for whom no mobile phone examination report was given to Plaintiffs.

[25] (Deposition of Jeremy Johnson, p. 44, l. 17 to p. 45, l. 14; p. 49, ll. 1-12.)

[26] (Transcript from August 20, 2010 telephone conference, pp. 10-11, Attachment 7 hereto; Transcript from August 27, 2010 telephone conference, p. 16, Attachment 8 hereto.)

On September 1, 2010, when it became apparent that Defendants were not going to produce the back-up tapes before the deadline set by the Court, counsel for the parties held a 4.5 hour conference call which included three representatives of the City's DIT and Plaintiffs' e-discovery consultants. During this conference Plaintiffs learned that the City never disabled its tape recycling policy and continued to destroy backup tapes in direct violation of the Court's order to produce them.[27] In fact, even as counsel conducted the conference call old back-up tapes were being overwritten with new data; the September 1 back-up process which started at 4:00 PM that afternoon used 90-day old tapes according to the City's standard practice.[28] The City did not agree to stop recycling tapes until Plaintiffs' sent the Court an email requesting an emergency order.[29]

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[27] (Affidavit of Constance R. Martin, ¶¶ 7-9, Attachment 5 hereto.)

[28] (Affidavit of Constance R. Martin, ¶ 8, Attachment 5 hereto.)

[29] It should be noted that Defendants' counsel Tamara Baines was dishonest to the Court in response to Plaintiffs' request for an emergency order when she wrote, in an email to the Court dated September 2, 2010, "We were not aware that the tapes containing the data were being recycled every ninety days." Baines defended the 30(b)(6) deposition of Jeremy Johnson and was present when he testified about the 90-day deletion policy on August 19, 2010; her statement to the Court two weeks later denying knowledge of this practice was in violation of her duty of candor to the Court.

C. Defendants failed to preserve evidence as require by law.

Defendants' spoliation of evidence also includes their conspicuous failure to preserve evidence after notice of anticipated and actual litigation.

1. Defendants had an obligation to preserve evidence beginning as early as September, 2009.

"It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec*., 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). "Notice does not have to be of actual litigation, but can concern 'potential' litigation. Otherwise, any person could shred documents to their heart's content before suit is brought without fear of sanction." *Griffin v. GMAC Commercial Fin., L.L.C.*, 2007 U.S. Dist. LEXIS 10504, at *8 (N.D. Ga. Feb. 15, 2007). *See Silvestri v. Gen. Motors Corp*., 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."); *United States ex rel. Koch v. Koch Indus*., 197 F.R.D. 463, 482 (N.D. Okla. 1998) ("A litigant has a duty to preserve evidence that it knows or should know is relevant to imminent or ongoing litigation.")

Within less than 48 hours after the Raid the conduct of police officers at the Atlanta Eagle became the subject of media attention and the APD issued a public statement acknowledging "allegations of improper behavior by police officers

conducting the investigation."[30] During the next few days the City Council discussed allegations of improper police conduct and two separate public demonstrations were held to protest the Raid. [31]

On September 14, 2010, fourteen individuals who had been present at the Raid filed complaints with the Internal Affairs unit of the APD's Office of Professional Standards ("OPS") alleging illegal conduct by officers at the Raid.[32] On September 16, 2010, an attorney representing eight individuals at the Raid wrote a letter to OPS asking for "a complete and thorough investigation into the illegal actions of the officers present at The Atlanta Eagle" and stating, "It is our belief that you will find that the actions of these officers violated not only the law, but the standards of your profession."[33]

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30 (http://www.ajc.com/news/atlanta/atlanta-police-raid-gay-136646.html)

31 (http://www.myfoxatlanta.com/dpp/news/Supporters_of_Gay_Bar_to_Voice_Anger_091509
http://clatl.com/atlanta/demonstrators-protest-eagle-raid/Content?oid=1283424
http://www.towleroad.com/2009/09/hundreds-turn-out-to-protest-raid-on-atlanta-eagle-gay-bar.html

These articles are presented merely to show that Defendants had reason to anticipate litigation within days of the Raid by virtue of media coverage if nothing else.)

32 (Affidavit of Daniel Grossman, ¶ 26, Attachment 3 hereto.)

33 (Affidavit of Daniel Grossman, ¶ 27, Attachment 3 hereto, Letter from Alan Begner to OPS, dated September 16, 2009, Exhibit L.)

These facts triggered an obligation on the part of Defendants to preserve evidence in connection with anticipated litigation.

2. Defendants failed to issue a litigation hold letter upon anticipation of litigation, and no effective litigation hold was ever implemented.

Despite ample reason to anticipate litigation as early as September 14, 2009, and the filing of this action on November 24, 2009, Defendants' counsel did not issue a litigation hold letter until December 21, 2010. [34]

When the litigation hold letter was finally issued it was not distributed to the necessary people. An effective litigation hold requires communicating with "the 'key players' in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these 'key players' are the 'employees likely to have relevant information,' it is particularly important that the preservation duty be communicated clearly to them." *Zubulake v. UBS Warburg LLC* ("*Zubulake V*"), 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004). The key players in this case include (at the very least) the police officers who participated in the Raid, but Defendants' counsel did not distribute the December

[34] Defendants issued the letter only after receiving a "Preservation Letter" from Plaintiffs which specifically described items the Defendants were required to preserve for use as evidence. (Affidavit of Daniel Grossman, ¶ 33, Attachment 3 hereto, Letter dated December 17, 2009, Exhibit N.)

21, 2010 litigation hold letter to all those officers or even to the police supervisors in command of the Raid (Defendants Brock, Collier, and Adams).[35]

Equally incomprehensible, even though Plaintiffs' Preservation Letter specifically called for the preservation of electronic information, Defendants' counsel did not send their litigation hold letters to the City of Atlanta's Department of Information Technology ("DIT"), which has exclusive responsibility for the computer system of the APD, including its email and other electronically stored information.[36] As soon as Defendants' counsel became aware of the need for a litigation hold they were obligated to communicate "with information technology personnel, who can explain system-wide back-up procedures and the … implementation of the firm's recycling policy." *Zubulake V*, 229 F.R.D. at 432. Once a preservation duty is triggered, a party "must suspend its routine document retention/destruction policy and . . . ensure the preservation of relevant documents.'" *Pension Comm.*, 685 F. Supp. 2d at 466; *see also Zubulake v. UBS Warburg LLC* ("*Zubulake IV*"), 220 F.R.D. 212, 18 (S.D.N.Y. 2003), *Thompson v. U.S. Dep't of Hous. & Urban Dev*., 219 F.R.D. 93, 100 (D. Md. 2003); *Goodman v. Praxair Servs., LLC*, 632 F. Supp. 2d 494, 511(D. Md. 2009). This was never

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35 (Affidavit of Daniel Grossman, ¶ 33, Attachment 3 hereto, Letter from Jerry De Loach dated December 21, 2009, Exhibit O.)

36 (Deposition of Jeremy Johnson, pp. 11-12.)

done, and the City made virtually no effort to preserve electronically stored information:

- The City made no effort to preserve evidence on the computer workstations of City employees.[37]
- The City made no specific effort to preserve emails relating to the Raid.[38]
- The City made no effort to preserve voicemail recordings relating to the Raid.[39]
- The City made no effort to preserve the electronic files of retired employees Defendant Richard Pennington or Carlos Banda (who retired as police chief and deputy police chief, respectively, after the filing of this action); the City routinely deletes the computer files of retired employees 90 days after they leave their employment, an no exception to this policy was made with regard to Defendant Pennington or Deputy Chief Banda.[40]
- The City made no effort to alter its policy of using old computer back-up tapes to create new back-ups every 90 days; as a result, back-up tapes from September, October, November, and December, 2009, which existed when this action was filed and when the litigation hold letters were issued, no longer exist.[41]

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[37] (Deposition of Jeremy Johnson, p. 56, l. 25 – p. 57, l. 5; p. 66, ll. 11-15; Affidavit of Constance R. Martin, ¶ 16, Attachment 5 hereto.)

[38] (Deposition of Debra Williams, August 10, 2010, pp. 182-183; Deposition of Jeremy Johnson, p. 52, ll. 21-25.)

[39] (Deposition of Jeremy Johnson, p. 79, l. 24 – p. 80, l. 3; p. 81, ll. 15-22.)

[40] (Deposition of Jeremy Johnson, p. 99, ll. 7-11; p. 101, ll. 7-14.)

[41] (Deposition of Jeremy Johnson, p. 50, ll. 1-25.)

In addition, voice recordings (including telephone calls) from 2009 have also been lost or deleted. Major Debra Williams testified that police supervisors participating in the raid would have communicated with the APD Communications Supervisor by telephone (for example, raid supervisors would likely have alerted APD that officers were entering the establishment), and that all such calls are recorded.[42] In its supplemental response to Plaintiffs Second Request for Production, the City admits that "it does not have" these recordings. Defendants' counsel Robert Godfrey informed Plaintiffs that while these recordings existed when Plaintiffs' Preservation Letter was served in December, 2009, the recordings were subsequently deleted and no longer exist.[43]

3. Defendants were specifically aware of their duty to preserve mobile phone data.

Defendants and their counsel were also under a specific obligation to preserve the mobile phone data which has now been lost. Mobile phone data was specifically mentioned in the "Preservation Letter" that Plaintiffs sent to Defendants on December 17, 2009, and at the Rule 26(f) conference held on February 24, 2010, Plaintiffs' counsel Daniel Grossman stated that he had reason to believe discoverable evidence existed on the mobile phones of police officers

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42 (Deposition of Debra Williams, August 10, 2010, pp. 36-38, 40-41.)

43 (Affidavit of Daniel Grossman, ¶ 30, Attachment 3 hereto.)

involved in the Raid and reminded Defendants' counsel of their duty to preserve this evidence; Grossman specifically warned that deletion or destruction of this evidence could result in severe sanctions.[44] At numerous times over the following months Grossman spoke with Defendants' attorneys Dennis Young, Stephen Power, Robert Godfrey, and Christopher Walker to inquire about the preservation and production of mobile phone data and to request that this information be preserved and searched. Defendants' counsel were aware of the need to preserve mobile phone data and even issued an additional Litigation Hold letter on this very point, but never took effective steps to implement such a hold.[45]

On June 30, 2010, frustrated that mobile phone data was apparently not being preserved, Grossman wrote to Dennis Young and Christopher Walker to again "remind defendants of their duty to preserve electronic data relevant to this case, in particular data located on the mobile phones, PDAs, laptop computers, and other electronic devices used by officers involved in the Eagle Raid." Grossman recommended that Defendants hire an electronic discovery consultant to help Defendants preserve and produce responsive items contained on these devices, and

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[44] (Affidavit of Daniel Grossman, ¶ 3, Attachment 3 hereto.)

[45] This Litigation Hold letter is undated, but may have been issued after the February 24, 2010, Conference at which the subject was discussed. (Affidavit of Daniel Grossman, ¶ 33, Letter from Dennis M. Young, undated, Exhibit P. Attachment 3 hereto.)

he cited numerous federal court decisions regarding sanctions for the spoliation of evidence. Finally, Grossman asked the Defendants to "confirm what actions you have taken or intend to take to preserve and produce this data."[46] Defendants never responded to this letter[47], and the City made no effort to preserve evidence on mobile phones, Blackberries, and other electronic devices in the possession of Atlanta police officers during the Raid.[48]

"Nothing other than bad faith can be inferred" where a requesting party's preservation letters are clear and concise but the responding party's counsel fails to ensure that the evidence is preserved. *See, Swofford v. Eslinger,* 671 F.Supp. 2d 1274, 1280-1281 (M.D. Fla. 2009).

II. The City failed to search for and produce responsive items.

A. Defendants have admitted they failed to search for responsive items

Defendants and their counsel had a "responsibility . . . to take affirmative steps to monitor compliance so that all sources of discoverable information [we]re identified and searched." *In Re Seroquel Prod. Liability Litig.,* 244 F.R.D. 650,

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46 (Affidavit of Daniel Grossman, ¶ 9, Attachment 3 hereto, Letter from Dan Grossman to Christopher Walker, June 30, 2010, Exhibit B.)

47 (Affidavit of Daniel Grossman, ¶ 10, Attachment 3 hereto.)

48 (Deposition of Debra Williams, August 10, 2010, pp. 137-138.)

663 (M.D. Fla. 2007); *Zubulake V,* 229 F.R.D at 432. Instead, there was an almost complete failure by Defendants and their counsel to search for responsive items:

- The City never searched the paper files of numerous individuals likely to have responsive documents (including Defendant Richard Pennington, police chief George Turner, Zone 5 commander Major Khirus Williams, assistant chief Peter Andresen, deputy chief Carlos Banda, deputy chief Ernest Finley, Deputy Chief Calvin Moss, Major Darryl Tolleson, Major Moses Perdue, or Mayor Shirley Franklin).[49]

- The City never searched the computer workstations of City employees involved with the Raid.[50]

- The City never searched the personal computer of any Atlanta police officer for information about the Raid.[51]

- The City never searched the mobile phones, Blackberries, or PDAs of police officers involved in the Raid.[52]

- The City never searched either of its two voicemail systems.[53]

- The City never searched the electronic calendars of police officers involved in the Raid who use an electronic calendar to store information.[54]

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[49] (Deposition of Debra Williams, August 10, 2010, pp. 120-123.)

[50] (Deposition of Jeremy Johnson, p. 55, ll. 12-17; Deposition of Debra Williams, August 10, 2010, pp. 124-125.)

[51] (Deposition of Jeremy Johnson, p. 76, ll. 11-17.)

[52] (Deposition of Jeremy Johnson, p. 58, ll. 3-6; p. 59, ll. 1-4; Deposition of Debra Williams, August 10, 2010, pp. 124-125.)

[53] (Deposition of Jeremy Johnson, pp. 79-81, p. 79, ll. 19-23; p. 80, ll. 15-20.)

[54] (Deposition of Debra Williams, August 10, 2010, p. 197, ll. 19-23.)

- The City never searched for the telephone, 911, and radio recordings requested by the Plaintiffs.[55]

- The City never searched the APD's "Horizon" message board system for messages about the Raid.[56]

- The City never searched its Omnix database for information about the Raid.[57]

- The City never even asked numerous police officers who were involved with this case whether or not they had any responsive documents.[58]

When Defendants did finally make an attempt to search for responsive items their efforts were late and wholly inadequate. For example, the City made no timely or meaningful attempt to locate one of the most important sources of evidence, the emails written and received by police officers and other City employees:

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[55] (Deposition of Debra Williams, August 10, 2010, p. 63, ll. 9-25; p. 64, ll. 1-2.)

[56] (Deposition of Debra Williams, August 10, 2010, p. 232, ll. 14-22; Deposition of Jeremy Johnson, p. 77, ll. 4-18; p. 104, ll. 11-15.)

[57] (Deposition of Jeremy Johnson, p. 77, ll. 19-23.)

[58] (Deposition of Debra Williams, August 10, 2010, pp. 112-114.)

- The City did not conduct any email search at all until sometime after July 14, 2010 (several months after Defendants' discovery responses were due).[59]

- The July, 2010 search was based on a narrow list of keywords.[60]

- The City searched the emails of only 13 City employees.

- The City did not search the emails of all 35 individual Defendants let alone other "key players."[61]

- The City did not even search the email of Investigator Bennie Bridges, who was the lead investigator for the Eagle case and one of the supervisors present at the Raid itself.[62]

The City's search for radio recordings was similarly late and inadequate. Although the deadline to produce these recordings was May 5, 2010 (in response to Request 7 of Plaintiffs' Second Request for Production to Defendant City of Atlanta), the Law Department did not even request any recordings from APD until May 20, 2010, and then requested radio traffic related to the wrong incident

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59 (Deposition of Jeremy Johnson, p. 245.)

60 (Deposition of Jeremy Johnson, pp. 70-73; Exhibit 23 to Deposition of Jeremy Johnson.)

61 (Deposition of Jeremy Johnson, pp. 70-73 and Exhibit 23 to Deposition of Jeremy Johnson.)

62 (*Id*. p. 73; Bennie Bridges' Response to Plaintiffs' First Interrogatories.)

number.[63] As a result, Defendants failed to produce the radio recordings which were due on May 5 until more than four months later, on September 14 (four days after the compliance deadline established by the Court).

B. The City failed to produce responsive documents.

As a result of Defendants' pervasive failure to search, and perhaps a willful attempt to conceal evidence, Defendants withheld a massive quantity of discoverable and in some cases highly relevant and even dispositive items.

1. The City withheld responsive paper documents.

The site visits to APD revealed the existence of 12,046 pages of responsive documents, many of which had previously been withheld. [64] The visit to the Red Dog unit alone, for example, uncovered thousands of previously unproduced documents including personnel files, Use of Force Reports, tactical plans of other police raids, Red Dog training materials, and Command Memoranda concerning arrest, search and seizure, and other responsive topics. [65]

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63 (Deposition of Debra Williams, August 10, 2010, p. 57.)

64 (Affidavit of Daniel Grossman, ¶ 19, Attachment 3 hereto.)

65 (Affidavit of Daniel Grossman, ¶ 20, Attachment 3 hereto.) Given the large quantity of responsive documents uncovered during these site visits Defendants may claim the visits satisfy their obligations under discovery. These site visits were not intended to relieve Defendants of their obligation to search for and produce responsive items; not only do Defendants have a much better understanding of their own filing system than Plaintiffs, but some key responsive items were missing from their normal locations as discussed below.

The documents discovered by Plaintiffs included "smoking gun" items such sworn statements by police officers admitting key factual issues which are in dispute in this action. For example, one of the disputed issues is whether police officers searched the premises of the Atlanta Eagle, including the manager's office on the second floor and a locked liquor storage room. Raid commander Defendant John Brock stated in his interrogatory response that "The Club was not searched," but in a sworn statement he made to Internal Affairs, which was never produced to Plaintiffs and was only discovered during the site visit, Defendant Brock admitted that he himself instructed officers to "clear" the upstairs office and that officers kicked in the door to the liquor storage area (which he called a "kitchen").[66] In another Internal Affairs statement Defendants also withheld, but which was found during the site visit, Investigator Bennie Bridges similarly admitted that officers kicked down the door and searched the liquor storage area.[67]

In addition to discovering documents which had previously been withheld, the site visits also disclosed documents which are missing and may have been spoliated. For example, Plaintiffs discovered detailed minutes of "Special

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[66] (John Brock Response to Interrog # 3, Affidavit of Daniel Grossman, ¶ 25, John Brock OPS Statement, June 29, 2010, P. 21A-2-3, Exhibit I, Attachment 3 hereto.)

[67] (Affidavit of Daniel Grossman, ¶ 25, Bennie Bridges' Statement, June 29, 2010, P. 22A-2-2, Exhibit J, Attachment 3 hereto.)

Enforcement Section (SES) Supervisor Meetings" for 2007, 2008, 2009, and 2010, in which commanders of SES units (including the two units involved in the Raid, Vice and Red Dog) presented detailed descriptions of their activities during that week. Minutes of each weekly meeting were located except for one period of time—the period that included the Raid. These key minutes were missing not only from the file cabinets of the Special Enforcement Section itself, but also from the file cabinets of the Criminal Investigation Division of which SES is a department.[68] These minutes may well go to the very heart of who ordered the Raid and what happened. It is Defendants' obligation to locate and produce these minutes, or to admit that they have been spoliated and no longer exist, but so far Defendants have done neither.[69]

2. The City failed to produce its Microsoft Exchange Archives as ordered by the Court.

At the two August conferences the Court ordered Defendants to produce all existing computer backups including "archives" of Microsoft Exchange files (which include emails, email attachments, and calendar information)[70] and all other

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68 (Affidavit of Daniel Grossman, ¶ 22, Attachment 3 hereto.)

69 (Affidavit of Daniel Grossman, ¶ 23, Attachment 3 hereto.)

70 DIT creates an "archive" the City's Microsoft Exchange servers every 30th day. This archive is a "snapshot" of all data on the Exchange server on that date, and these 30-day archives are retained for seven years. (Deposition of Jeremy Johnson, p. 42, ll. 17-25; pp. 43-44, ll. 1-5; Affidavit of Constance R. Martin, ¶ 11,

backups to be produced to Plaintiffs no later than September 1, 2010.[71] On September 14, 2010, the City of Atlanta finally produced a USB external hard drive which Defendants' counsel described as containing the archives of Microsoft Exchange data for 63 employees of the City of Atlanta.[72] Plaintiffs' e-discovery consultant examined that data and determined that it does not, in fact, contain the complete back-up archives ordered by the Court:

> Even a cursory review of these PST files indicated that the Defendants failed to produce all existing backup files even for these 63 employees. Complete Microsoft Exchange data (such as emails) from the 2009-2010 timeframe were not contained on the drive received by the Plaintiff on September 14, 2010. As just one example of many, the PST files relating to Defendant Debra Williams contained no data later than November, 2008, and contained no "Sent Items" later than June 6, 2008.[73]

Since the City's 30(b)(6) witness testified that these Microsoft Exchange archives are created every 30th day and are retained for seven years, the City clearly has not produced all Microsoft Exchange back-up archives currently in existence as

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Attachment 5 hereto.) While the City's witness referred to these archives as "back-ups," they are in fact "accessible data" which the DIT uses on a daily basis to access emails sent or received by City employees. (Deposition of Jeremy Johnson, p. 89, ll. 3-20.)

71 (August 20, 2010 Telephone Conference Transcript p. 10, Attachment 7 hereto; August 27, 2010 Telephone Conference Transcript p. 16, Attachment 8 hereto.)

72 (Affidavit of Daniel Grossman, ¶ 31, Attachment 3 hereto.)

73 (Affidavit of Constance R. Martin, ¶ 13, Attachment 5 hereto.)

ordered by the Court.

3. Defendants have failed to produce photographs of themselves as ordered by the Court.

During the August 20, 2010, telephone conference the Court explicitly ordered Defendants to produce at least five photographs of themselves as requested by Plaintiffs, but not a single individual defendant has complied with the Court's order. Twenty of the 35 individual defendants have still produced nothing but a single ID photo in the form of a small, fuzzy 2" x 3" inkjet printout, and of the remaining 15 defendants, the majority produced only 2-3 photos and many of these are so fuzzy or dark as to be unrecognizable.[74] It would have been quite easy for Defendants to comply with this simple request and their failure to do so shows an especially arrogant contempt for the authority of this Court.

III. Responsibility for these violations falls on both defendants and their counsel.

A. The responsibility of Defendants.

Defendants are responsible for the general failure to preserve and produce responsive items: "At the end of the day… the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by

[74] The few photographs produced by Defendants were low-quality inkjet printouts of digital photographs, where the original digital files are likely of high quality and could easily have been produced on disc or by email.

court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril." *Zubulake V*, 229 F.R.D. at 436.

The duty to preserve was made clear to the Defendant City of Atlanta by Plaintiffs' December 17, 2009 Preservation Letter (which was mailed to Atlanta's Mayor, City Council President, Police Chief, Deputy Police Chief, and Deputy City Attorney, among others), but even parties who may not have been informed of the Preservation Letter are liable for their failure to preserve evidence. *Swofford v. Eslinger*, 671 F.Supp. 2d 1274, 1282 (M.D. Fla. 2009). Defendants "cannot absolve themselves of liability from their failure to preserve the evidence by having their counsel withhold the demand for preservation from them. If the law were otherwise, no party would be responsible for the willful violation of a preservation demand or the destruction of evidence known to be relevant to ongoing or impending litigation if they simply counseled their attorney not to communicate the demand to them." *Id.* at 1283.

And, of course, it is always appropriate to hold parties accountable for their own personal conduct, and any individual Defendants who personally spoliated evidence (such as those who deleted mobile phone data) are naturally responsible for those acts. *See*, *Flury v. Daimler Chrysler Corp*. 427 F.3d 939, 944 (11th Cir. 2005); *Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360, 1377 (N.D. Ga. 2008).

B. The responsibility of counsel.

Defendants' counsel are also liable for their violations of Rules 26 and 37 of the Federal Rules of Civil Procedures in connection with their conduct in this action. Attorneys have many obligations in responding to discovery and the counsel for these Defendants failed virtually each and every one of them:

> counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced. In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client's information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be reiterated regularly and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (e.g., backup tapes) that the party has a duty to preserve.

Zubulake V, 229 F.R.D. at 439.

Fed. R. Civ. P. 26(e) imposes a continuing duty to supplement discovery and while "the Rule 26 duty to supplement is nominally the party's, it really falls on counsel." *Zubulake V*, 229 F.R.D. at 433 ("a party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel.") This duty to supplement applies equally to all the individual attorneys who have represented Defendants because the duty has applied at all times throughout this litigation.

Fed. R. Civ. P. 26(g) also contains a certification requirement that imposes upon counsel "an affirmative duty under Rule to make a reasonable inquiry into the basis of their discovery responses and to "stop and think about the legitimacy of [those responses]." *Metro. Opera Ass'n v. Local 100, Hotel Employees,* 212 F.R.D. 178, 221 (S.D.N.Y. 2003); *see also Apex Oil Co. v. Belcher Co. of N.Y.*, 855 F.2d 1009, 1017 (2d Cir. 1988). The attorney's "signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand." *Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292, 1305 (11th Cir. 2003) (quoting Fed. R. Civ. P. 26(G) advisory committee's notes.) The attorneys who signed the original discovery responses (Peter Andrews and Dennis Young) clearly did not take that responsibility seriously. Among many other incomprehensible responses, these attorneys falsely denied the existence of any "training materials used by or prepared specifically for the Red Dog unit of the APD," even though it defies common sense to think that APD would employ a SWAT-type narcotics unit to provide an "aggressive police presence" without providing them with any specialized training[75], and they signed responses for dozens of individual Defendants who each denied having even a single personal

[75]Atlanta Police Website, http://www.atlantapd.org/Index.asp?nav=RD&menu=42; (Response 32 to Plaintiffs Second Request for Production to Defendant City of Atlanta.)

email or text message about a major police raid which involved more than 35 police officers and 60 civilians and which has been the focus of widespread attention. Did these attorneys really "stop and think" about the legitimacy of these answers?

After the Court ordered Defendants to supplement discovery the attorneys who signed the new responses (Jerry De Loach, Robert Godfrey, and Tamara Baines) sometimes just incorporated the same untruthful and unbelievable answers as the original responses: "See previously produced responses." Did these attorneys themselves "stop and think?" And it was these attorneys who, after the Court's orders on August 20 and August 27, failed to prevent the recycling of backup tapes; failed to take effective measures to discourage Defendants from deleting mobile phone data; failed to supplement discovery; and failed to produce the email archives, photographs, and other items specifically compelled by the Court.

It should be noted that the attorneys who are responsible for these violations include those who participated in discovery on behalf of Defendants but never entered a notice of appearance, despite being ordered to do so by the Court. These include Jerry de Loach, who signed discovery responses and participated in the August 27 telephone conference. In addition, Mr. De Loach, as the Law Department's head of litigation and Robert Godfrey's superior, participated in the

August 26, 2010 meeting between Defendants' counsel and the individual Defendants[76]; Mr. De Loach is at least partly responsible for counsel's failure to impress upon the Defendants the importance of preserving evidence such as the mobile phone data which was subsequently deleted. Further, Assistant City Attorney Amber Robinson, who coordinated discovery with APD's Internal Affairs unit, may be responsible for the failure to produce the sworn Internal Affairs statements that were withheld from Plaintiffs.[77] These attorneys should not be able to evade sanctions by pointing to their failure to enter an appearance.

V. Sanctions

The Court has broad discretion to impose sanctions for discovery violations, deriving "from the court's inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases." *Flury*, 427 F.3d at 944, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).[78] Defendants and their counsel

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76 (Affidavit of Daniel Grossman, ¶ 18, Attachment 3 hereto.)

77 (Affidavit of Daniel Grossman, ¶ 28, Attachment 3 hereto.)

78 "'The key to unlocking the court's inherent power is a finding of bad faith,' and a party may demonstrate bad faith by delaying or disrupting litigation or hampering the enforcement of a court order." *Kipperman v. Onex Corp.*, 260 F.R.D. 682, 699 (N.D. Ga. 2009), citing *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1304 (11th Cir. 2006).

are also subject to specific sanctions under Rules 26 and 37 of the Federal Rules of Civil Procedure.[79]

The relief specifically requested at this time by Plaintiffs is remedial and compensatory; it is intended to put Plaintiffs in the same place they would be without Defendants' abuses by giving Plaintiffs the discovery they should have received months ago, and compensating them for the unnecessary time and expenses they have incurred as a result of these violations.

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[79] Under Rule 26(g)(3), "If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation. Fed. R. Civ. P. 26(g)(3).

Rule 37 authorizes the Court to impose sanctions for the failure to obey a discovery order, including "(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part;(vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination." Fed. R. Civ. P. 37(b)(2)(A).

"Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

The Court may also, in its discretion, wish to impose punitive sanctions arising from Defendants' deliberate spoliation of evidence and refusal to obey the Court's clearly expressed orders.

Plaintiffs respectfully ask the Court to enter the following orders in this action:

A. Order Defendants fully to comply with discovery.

The Court has already ordered full compliance with discovery but these orders have been ignored. Plaintiffs ask the Court again to order full compliance with discovery and, as discussed below, to use its civil contempt authority to compel actual compliance with these orders.

B. Order Defendants or their counsel to pay for the forensic examination of electronically stored information, including the restoration of deleted data.

Defendants' bad faith authorizes the Court, in its discretion, to impose the severest of sanctions, including the striking of pleadings or entry of default judgment. Fed. R. Civ. P. 37(b)(2)(A).

However, since it is feasible to restore deleted electronic information on both computer hard drives and mobile phones,[80] Plaintiffs request that the Court order Defendants and/or their counsel to pay Plaintiffs' forensic expert to restore this data to as great an extent as possible, and to prepare a report to the Court

[80] (Affidavit of John Carney, ¶¶ 33, 35, Attachment 4 hereto.)

describing the specific items deleted by Defendants. This should provide Plaintiffs with at least some of the responsive items Defendants should have preserved in the first place and thus fulfill one of the goals of a spoliation sanction, which is to "restore the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010), citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). The restoration of deleted data will also assist the Court in determining what additional sanctions may be appropriate in light of the spoliation that actually occurred, since the factors considered in making this determination can much better be addressed after the deleted data is restored in whole or in part.[81]

Restoration of deleted data can be an expensive process, but if Defendants had fulfilled their obligation to preserve electronic data in the first place no such restoration would be required. It is therefore appropriate to order Defendants to pay for the restoration of deleted data as other courts have done. *See, e.g., Canon*

[81] These factors include "(1) whether the [party] was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [party] acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded." *Flury v. Daimler Chrysler Corp*. 427 F.3d 939, 945 (11th Cir. 2005).

U.S.A., INC. v. S.A.M., Inc. 2008 LEXIS 47712 (U.S.D.C., E.D. La. 2008).[82]

1. The forensic examination and collection of data should include the personal computers of the individual defendants.

Given the individual Defendants' failure to produce even a single personal writing (such as a personal email, Facebook message, or online postings), the forensic examination and data collection discussed above should include the individual defendants' personal computers, since this is where personal emails and other writings are most likely to be found. Each of the individual Defendants has denied being in possession of responsive writings such as personal emails but these assertions are not credible, and in the case of at least several defendants they are clearly untruthful. Plaintiffs have little reason to trust these claims since the failure to produce certain relevant items raises doubt about a party's assertion that no other items exist. *Connor v. Sun Trust Bank,* 546 F. Supp. 2d 1360, 1376 (N.D. Ga. 2008).

[82] Defendants' preferred method of having forensic examination performed by employees of the APD rather than a third-party expert is completely inappropriate, not only for the obvious conflict of interest, but because the mobile phone examination performed by the APD examiner was grossly inadequate and unprofessional, as described by Plaintiffs' forensic expert. (Affidavit of John Carney, ¶¶ 11-30, Attachment 4 hereto.) "… the mobile phone forensic examination performed by the Defendants was substantially and materially inadequate with a flawed process design that lacked conformance in every meaningful way with best practices in the mobile phone forensics field." (Affidavit of John Carney, ¶ 32, Attachment 4 hereto.)

2. The forensic examination and collection of data should include the City of Atlanta computer workstations of "key players" and others likely to have responsive information.

The forensic restoration and collection of data should include the City of Atlanta computers workstations of "key players" and others likely to have responsive information, such as the administrative assistants and primary subordinates assigned to key players and to the police department units directly involved in this action (Vice, Red Dog, Special Enforcement Section, and Criminal Investigation Division).

Under the user permissions established by the DIT, individual City employees are free to save files exclusively to their own assigned computer hard drives and the City did not take any steps in response to this litigation to prevent such files from being deleted.[83] These hard drives should therefore be examined for responsive files which may have been deleted.

C. Order Defendants or their counsel to pay for the collection of electronically stored information and the creation of an e-discovery search facility available to all Parties and the Court.

Plaintiffs ask the Court to order Defendants or their counsel to pay Plaintiffs' e-discovery consultants to collect electronically stored information in the possession of Defendants (including emails, database entries, mobile phone data, text documents, and photographs,) and load the information into a search

[83] (Deposition of Jeremy Johnson, p. 66, ll. 1-15.)

facility, which will then be made available to all parties and the Court. The City of Atlanta agreed to this procedure with regard to its own electronic data during the August 20, 2010, conference ("That's fine with the City. The City has no objection to that")[84], but Plaintiffs were reluctant to begin the project out of concern Defendants would not honor their agreement; Defendants' counsel Tamara Baines had already agreed, on the record, that the City would pay the cost of the 30(b)(6) deposition it terminated but the City later refused to make any such payment.[85]

The procedure proposed by Plaintiffs is no different than what Defendants should have already done on their own to comply with discovery. Without an e-discovery search facility there is no practical way to search tens-of-thousands of emails, text messages, and database entries from a large number of employees for items responsive to such a wide variety of discovery topics (including the Raid itself, the investigation which preceded the raid, the discussions which followed the Raid, APD training on topics such as search and seizure, and other police raids which may show evidence of a custom and practice relevant to Plaintiffs' claims regarding municipal liability). Defendants' "failure to establish any systematic

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84 (Transcript of August 20, 2010, pp. 10-11, Attachment 7 hereto.)

85 (Deposition of Debra Williams, August 5, 2010, p. 77, ll. 6-8.) (Ms. Baines stated: "The City will pay for her to be deposed again as a 30(b)(6) witness because we are stopping it.") *See also, Id.* p. 75, ll. 21-24.)

process to comply with plaintiffs' discovery requests" on their own represents "culpable intent" in failing to comply with discovery. *Nat'l Ass'n of Radiation Survivors v. Turnage,* 115 F.R.D. 543, 551 (N.D. Cal. 1987).

Under the Federal Rules of Civil Procedure "the presumption is that the responding party . . . must bear the expense of complying with discovery requests." *Peskoff v. Faber*, 251 F.R.D. 59, 61 (D.D.C. 2008), quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), and this presumption applies to the discovery of electronically stored information. *Peskoff* at 61; *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003).

Defendants should already have borne the expense of an e-discovery search facility to fulfill their burden to search for and produce responsive materials, and Plaintiffs are merely asking the Court to assure that Defendants do now what they should have done months ago.

D. Order Defendants to provide their online user-ids and passwords, and their consent to third party internet providers to release online content.

No individual Defendant has produced even a single online writing (such as a personal email, online comment, social media posting, or instant message) in response to Requests 1 and 2 of Plaintiffs' First Request for Production to the individual Defendants. Moreover, no individual Defendant has served any response at all to Plaintiffs' Second Request for Production, which specifically

requested the production of "comments or writings of any kind made by the defendant concerning or relating in any way to the Atlanta Eagle, the Atlanta Eagle Raid, the above-styled action, or any of the plaintiffs in this action" posted on "Facebook.com, MySpace.com, Officer.com, Twitter.com, Yahoo.com, AOL.com, and any other website, forum, and internet social media outlet of any kind." Defendants' responses to this request were due on September 7, 2010 (over two weeks after Defendants were ordered to comply with discovery), yet not one Defendant has responded to the request.

Given Defendants' complete failure to produce this information voluntarily, Plaintiffs ask the Court to order each individual Defendant to identify all online accounts (including email, social networking, instant messaging, and message boards and forums, but excluding financial or medical accounts) that he or she has used from May, 2009 (when the Eagle investigation began) to the present; to provide their user-ids and passwords to all such accounts; to provide their consent to third parties (e.g. internet providers) for the release of online content[86]; and to pay for Plaintiffs' e-discovery consultants to collect this data and load it into a search facility available to all parties and the Court.

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[86] Defendants' consent is required to satisfy the requirements of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2702(b)(3). Plaintiffs may also ask this Court for an order addressed to these internet providers requiring production of this data.

E. Award the reasonable attorneys' fees and costs incurred by Plaintiffs as a result of Defendants' continued and repeated failure to comply with discovery.

Plaintiffs are entitled to reasonable attorneys' fees and costs as a result of Defendants' conduct both before and after the Court's August discovery orders. Plaintiffs' counsel should not have had to spend time and expenses on multiple phone calls, emails, letters, good faith conferences, a three-part deposition, consultation with forensic experts, and now this extensive motion to compel as a result of Defendants' continuing and bad faith refusal to comply with discovery.[87]

Throughout this litigation Defendants have attempted to wear Plaintiffs down by dragging out discovery disputes as much as possible. For example, by late June, when, it had become obvious that Defendants had no intention of complying with discovery, Plaintiffs served a notice for a 30(b)(6) deposition to inquire into the existence of responsive items. On July 13, 2010, Plaintiffs' counsel Daniel Grossman sent an email to Defendants' counsel Dennis Young stating: "Please let me know if the defendants will fully comply with all our outstanding discovery requests within the next few days, or please schedule a date early next week for the 30(b)(6) deposition."[88]

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87 (This effort is described in the Affidavit of Daniel Grossman, ¶¶ 4-17, Attachment 3 hereto.)

88 (Affidavit of Daniel Grossman, ¶ 11, Attachment 3 hereto.)

In an effort to prompt voluntary compliance with discovery, Grossman explicitly told Defendants' counsel Christopher Walker that the 30(b)(6) testimony would be used in connection with a motion to compel and Grossman encouraged Defendants to avoid the deposition (and thus a motion to compel) simply by agreeing to comply with discovery.[89] Grossman explained Plaintiffs' position to Christopher Walker again by email and offered to take the deposition off the calendar, and even give Defendants additional time to comply with discovery, if they would simply agree to a date certain for compliance.[90] How did Defendants respond to this offer? Christopher Walker replied: "I believe the best option is for us to schedule the 30(b)(6) witness for the City of Atlanta."[91]

In other words, Defendants were so determined to avoid compliance with discovery that rather than take advantage of the additional time offered by the Plaintiffs, Defendants chose, instead, to make Plaintiffs begin the tedious,

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89 (Affidavit of Daniel Grossman, ¶ 12, Attachment 3 hereto.)

90 (Affidavit of Daniel Grossman, ¶ 13, Attachment 3 hereto; Daniel Grossman July 14, 2010, email to Christopher Walker, Exhibit D.)

91 (Affidavit of Daniel Grossman, ¶ 14, Attachment 3 hereto; Christopher Walker email to Daniel Grossman, Exhibit E.)

painstaking, and expensive process of documenting Defendants' discovery violations though a 30(b)(6) deposition.[92]

Even after being twice ordered by the Court to comply with discovery, Defendants failed to do so, necessitating the present motion to compel, taking the time not only of Plaintiffs' counsel but of the Court and its staff as well.

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[92] Even that process, however, did not go smoothly. When the City's designated 30(b)(6) witness, Major Debra Williams, finally sat for her deposition on August 5, 2010, she was not only one hour late but was so unprepared that Defendants' counsel Tamara Baines terminated the deposition, stating, "there's obviously a few things that should have taken place before we can truly present her as a 30(b)(6)… I understand, too, that we'll end up having to pay for the deposition when she's deposed again, but I cannot present her as a 30(b)(6) today." (Deposition of Debra Williams, August 5, 2010, p. 6; p. 75, ll. 15-23.)

Not only did the City never pay for the deposition as promised, but when Major Williams appeared again on August 10 she was still not prepared to testify about some of the matters in the deposition notice. (Deposition of Debra Williams, August 10, 2010, p. 193.) The City therefore scheduled yet a third deposition, with another witness, which took place on August 19, 2010, two weeks after the first deposition. (Deposition of Jeremy Johnson.)

The production of an unprepared 30(b)(6) witness is considered a failure to appear, which is sanctionable under Rule 37(d)(1). *Continental Cas. Co. v. Compass Bank*, 2006 U.S. Dist. LEXIS 12288, at *56-70 (S.D. Ala., March 3, 2006), citing *Black Horse Lane Assoc.* v. *Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("We hold that when a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), 'producing an unprepared witness is tantamount to a failure to appear' that is sanctionable under Rule 37(d)."); *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D.Kan. 1999) ("'Producing an unprepared witness is tantamount to a failure to appear at a deposition.' . . . The court may find lack of preparation at a deposition to be a failure to appear."); and *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("Producing an unprepared witness is tantamount to a failure to appear."), *order aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996).

F. Plaintiffs request the Court to enforce all orders issued under this motion by a finding of civil contempt.

The Court has already ordered Defendants to comply with discovery on two occasions. Indeed, to emphasize the gravity of disobedience with these orders the Court even warned that the "Sword of Damocles" was hanging over the City's head.[93] Despite these warnings Defendants ignored the Court's clear orders, and so Plaintiffs are concerned that additional orders may be similarly ignored.

In fact, it appears that Defendants may have deliberately chosen to defy the Court. On August 26, 2010, Defendants' counsel Robert Godfrey stated in an email: "I have just completed my meeting with the officers and as I anticipated, there was a good deal of discomfort with what we have to do to comply with the Court's order. First of all, I am going to have to have an order from the judge that I can show the officers and APD brass."[94] The next day Defendants, through counsel, asked the Court for such a written order, and when the request was denied it seems they simply chose to ignore the Court's verbal orders. Instead of producing their mobile phones as ordered, several Defendants deleted the data they were told to produce, and all 35 Defendants refused to do something as simple as producing five photographs of themselves, suggesting an intentional and coordinated defiance of the Court's authority.

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93 (Transcript of August 27, 2010, p. 17, Attachment 8 hereto.)

94 (Affidavit of Daniel Grossman, ¶ 18, Attachment 3 hereto.)

"Courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Smith v. Pefanis*, 652 F. Supp. 2d 1308, 1339 (N.D. Ga. 2009). The Federal Rules of Civil Procedure authorize the Court to "[treat] as contempt of court the failure to obey any order except an order to submit to a physical or mental examination," and other courts have exercised this authority to with regard to discovery violations. Fed. R. Civ. P. 37(B)(2)(A)(VII); *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510 (11th Cir. 1986).

A finding of civil contempt requires clear and convincing evidence that: "(1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator had the ability to comply with the order." *Riccard v. Prudential Ins. Co. of Am.*, 307 F.3d 1277, 1296 (11th Cir. 2002). The Court's orders to produce mobile phones, backup tapes, email archives, and photographs were clear and unambiguous and transcripts of the hearings were available to Defendants; there can be little doubt that Defendants had the ability to comply with these orders.

A federal court recently used its civil contempt authority to enforce an order (in that case, the payment of attorneys' fees) arising from discovery violations similar to the violations in this action (including the failure to implement a litigation hold, the deletion of electronically stored information, the failure to preserve electronic evidence, and the failure to stop the recycling of computer

backup tapes). *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010). The court in *Victor Stanley* found the use of its contempt authority appropriate because it believed that "without the threat of jail time, [the responding party's] future conduct would be predicted by his past." *Id*., at 157.

Given Defendants' refusal to obey the clear orders issued by this Court, Plaintiffs ask the Court to hold Defendants and their counsel in civil contempt and order them imprisoned, but give them the opportunity to purge the contempt and avoid ever being jailed simply by complying with the Court's orders within a reasonable period of time.

Plaintiffs wish to make it clear that they do not seek the actual incarceration of Defendants or their counsel; Plaintiffs merely suggest that the Court use its civil contempt authority as a mechanism to assure compliance with the Court's orders, which have already been blatantly and deliberately violated by these Defendants. As the court noted in *Victor Stanley*, "to avoid jail time, all that is required" of Defendants is to obey the orders of the Court. *Id.* at 158.

G. Impose such punitive sanctions, if any, as the Court finds appropriate.

Defendants' abuse of discovery hurt not only Plaintiffs but also the Court and the adversary system itself, which "relies in large part on the good faith and diligence of counsel and the parties in abiding by these rules and conducting

themselves and their judicial business honestly." *Metro. Opera Ass'n v. Local 100, Hotel Employees*, 212 F.R.D. 178, 181 (S.D.N.Y. 2003); *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644 at *98 ("the duty to preserve evidence … is a duty owed to the court, not to a party's adversary.")

Discovery sanctions are intended not only to prevent unfair prejudice to litigators but also "to insure the integrity of the discovery process." *Flury v. Daimler Chrysler Corp.* 427 F.3d 939, 944 (11th Cir. 2005); *Gratton v. Great Am. Commc'ns.*, 178 F.3d 1373, 1374 (11th Cir. 1999). Severe sanctions are available to the district court "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976). As discussed above, these sanctions can include entry of default judgment and the striking of pleadings or defenses.

The sanctions requested by Plaintiffs for their own sake, at this time, are remedial and compensatory, and it is for the Court to determine in its own discretion if additional sanctions are appropriate to protect the integrity of the judicial process or to deter misconduct in the future.

CONCLUSION

Throughout this litigation the Defendants and their counsel have acted as if the rules, the law, and even the orders of this Court simply do not apply to them: They have responded late to most discovery requests; failed to respond at all to others; failed to follow the Court's "Instructions to Parties and Counsel;" failed to use good faith in making or certifying their discovery responses; failed to preserve, search for, or produce responsive items as required by law; failed to obey clear and unambiguous orders of this Court; and rather than produce evidence pursuant to this Court's Order, they destroyed it. These violations involved all thirty-five Defendants and at least eight individual attorneys. The judicial process cannot function when parties and their counsel so flagrantly, pervasively, and deliberately ignore their obligations.

This 6th day of October, 2010.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEOFFREY CALHOUN, et al.	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	File No.:
	)	1:09-CV-3286-TCB
	)	
RICHARD PENNINGTON, Chief of Police for the City of Atlanta, in his official and individual capacities, et al.	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2010 I electronically filed **Plaintiffs' Motion to Compel Discovery and for Sanctions** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:[95]

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[95] Counsel hereby certifies that this document has been prepared in Times New Roman font (14 point), in accordance with Local Rule 5.1C.

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