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## INTRODUCTION

The United States' brief and supporting declarations confirm a well-documented tale of recklessness and gross mismanagement in the Government's discovery processes. The Department's submission to this Court re-affirms that, at its core, the case against Honeywell now is about what Honeywell told the United States and what the United States knew about Honeywell's Z Shield ballistic product and the testing performed on it. But the Government filed this lawsuit and levied serious accusations without even instructing and ensuring that documents containing the name of the defendant ("Honeywell") and name of the product at issue ("Z Shield") be properly preserved, collected, and produced. That the Government now asks this Court to hold that such conduct is appropriate and beyond sanction is staggering and, if accepted, would have destructive implications for the judicial process. Whatever the outer bounds of the duty to preserve and search documents, the deficiencies here are blatant and go to the heart of those obligations. Bad faith is not required for the relief Honeywell seeks, but even if it were, the Government's reckless disregard for its discovery obligations clearly meets that standard.

Attempting to defend its conduct, the Department provides eleven declarations purporting to demonstrate the soundness of its discovery practices. But that supporting material actually proves the Government's recklessness and confirms the fundamental unfairness of the Government making very serious and highly public allegations against Honeywell, while ignoring the rules designed to ensure pursuit of the truth:

- Improper Litigation Holds: The Government discloses for the first time that *none* of its litigation holds or alleged verbal instructions mentioned "Honeywell" at all or instructed witnesses to preserve all documents relating to "Z Shield."
- No Supplementation: The Department concedes through its silence that even after it launched an investigation of Honeywell and later filed suit against it in federal court, it never circulated supplemental hold memoranda advising of these new developments and instructing witnesses to preserve documents related to "Honeywell" or "Z Shield."

- Further Preservation Efforts Inadequate: After having issued inadequate hold instructions, the Department failed to take affirmative steps to ensure that all documents were actually preserved. As a result, hard drives that should have been retained and searched were instead lost or wiped of data, and in most instances the preservation of documents was only as good as the initial and flawed searches that were conducted.
- Improper Searches: The Government concedes that fact witnesses searched their own electronic and hard-copy files with either minimal or no assistance from lawyers or technology personnel, and that witnesses were not properly and timely instructed to search their documents for terms and subjects critical to this case, most importantly “Honeywell” or “Z Shield.” Because in most cases fact witnesses conducted their own searches, the Government cannot fully reconstruct what document searches were done.
- Flawed and Delayed Productions: The Department acknowledges a pattern of gross mismanagement of its production processes, which were so faulty that the Department apparently was unaware that it had not produced (or even reviewed) documents on two desktop computers, one laptop, one external drive, 96 CDs, two hard drives, and nine DVDs all belonging to its most important witness. The Government likewise confirms that, even after Honeywell filed the instant motion, it has produced tens of thousands of documents without even reviewing them, resulting in the production of coupons, inappropriate jokes, and retirement party announcements.
- Misrepresentations to Honeywell: The Government now admits that its earlier representations about its document production were wrong, but tries to deflect blame even though any reasonable investigation at the time would have shown how reckless those representations were. The Government also concedes that it withheld from Honeywell for years critical exculpatory documents while steadfastly maintaining that it had met its discovery obligations.

Despite all of this, the Department would have this Court believe that discovery in this case has proceeded much like any other, that the discovery issues were “insubstantial,” that “*any* problems have been remedied,” and that there has been “*no* prejudice.” These claims are remarkable and reflect the Department’s unwillingness to acknowledge its failures and take responsibility for its actions. So too does the Government’s unseemly attempt to blame this mess on its document discovery vendor, which is supposedly operating under the supervision and direction of the Department of Justice.

The documents that the United States failed to preserve and search are the ones most fundamental to Honeywell’s defense that it attempted to cooperate and share information with

government officials, only to be repeatedly ignored or rebuffed. After years of pressing by Honeywell, some of those documents have finally begun to seep out. It is no answer, however, that the Department has finally produced these long-withheld documents, as it had no intention of doing so on its own and there is no telling what still remains in witness files or what existed in those files years ago, when the duty to preserve attached. The “government’s conduct created a situation where we cannot assess exactly what or how much information was lost and what or how much information was important to the defendants’ case,” and “[i]t would defy logic at this point to give the government the benefit of the doubt on its word alone.” *Miller v. Holzmann*, 2007 WL 781941, at \*1 (D.D.C. Mar. 12, 2007).

But the prejudice, of course, runs much deeper than that. In recklessly disregarding its discovery obligations, the Department failed to investigate the strident allegations in its complaint and led its witnesses to testify and provide sworn interrogatory responses that are now contradicted by the evidence it was withholding. The Department’s strained efforts to explain away three particular exculpatory documents (which were offered only by way of example) highlight the degree to which the record has been tainted in this case, unfairly hampering Honeywell’s efforts to defend itself against serious allegations. Re-depositions of witnesses—although necessary, as the Department concedes—cannot fully rectify this situation. And while the United States points to the millions of pages it has produced, its statistics are not only misleading, but irrelevant: it is little solace to Honeywell to receive a large volume of material when there were not adequate instructions to preserve and search even documents containing the words “Honeywell” and “Z Shield,” the most important documents for Honeywell’s defense.

This case demands the Court's active supervision. For the reasons explained here and in Honeywell's opening brief, the Court should enter an order requiring the Government properly to preserve, search, and produce all responsive documents, and impose appropriate sanctions.

## ARGUMENT

### I. The United States Misconstrues The Governing Legal Standards

At the very outset, the Government seeks to avoid the consequences of its own behavior by asking the Court to apply an incorrect and heightened legal standard, claiming that Federal Rule of Civil Procedure 37 does not apply and that no relief is available unless the Government "purposefully" acted in "bad faith." 9/27/11 Opp. at 26-29 [Dkt. # 55]. Neither point is correct.

With respect to Rule 37, it is of course applicable. As an initial matter, Rule 37 clearly applies because Honeywell has filed a motion to compel and seeks the relief attendant to such a motion. *See* Fed. R. Civ. P. 37(a).<sup>1</sup> Rule 37 also allows for sanctions here. The Government wrongly argues that it cannot be sanctioned under Rule 37 because it "has not violated any Court-issued discovery order." Opp. at 26-27. While violation of a court order may generally be required for sanctions pursuant to Rule 37(b), an order is not required under Rule 37(c)(1), which allows for a range of sanctions (including fees and costs, preclusion of evidence, and other "appropriate" sanctions) for violation of Rule 26(e). Fed. R. Civ. P. 37(c)(1); *see also DL v. District of Columbia*, 274 F.R.D. 320, 325 (D.D.C. 2011) (noting that "unlike" Rule 37(b), "no court order needs to be in place for the imposition of Rule 37(c) sanctions"). Under Rule 26(e),

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<sup>1</sup> The Department in a separate filing argues that Honeywell's motion to compel should be "stricken" in light of Local Civil Rule 5.2, which provides that "any motion concerning discovery matters shall be accompanied by a copy of, or shall set forth verbatim, the relevant portion of any non-filed discovery materials to which the motion is addressed." *See* DOJ Mot. to Strike at 1-2 [Dkt. #56]. But Honeywell here is not seeking to compel particular categories of documents that the United States is withholding, but rather to compel proper search and preservation practices under Fed. R. Civ. P. 26 and the documents that would be yielded from such practices, which necessarily applies to all of Honeywell's discovery requests. The Department also does not allege any prejudice from Honeywell not attaching its document requests, of which the Government is well aware. Nevertheless, Honeywell has attached them here, thereby mooting the motion to strike. *See* Reply Ex. B-1 (Requests for Production).

“[a] party who has ... responded to .... [a] request for production ... must supplement or correct its disclosure or response ... in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect,” Fed. R. Civ. P. 26(e), which did not happen here. Under Rule 37, moreover, the “motive or reason for the failure is irrelevant,” and “[i]t therefore is unnecessary to decide whether the [Plaintiff] acted in bad faith.” *Norden v. Samper*, 544 F. Supp. 2d 43, 49-50 (D.D.C. 2008) (quotations omitted); *see also Walls v. Paulson*, 250 F.R.D. 48, 53-55 (D.D.C. 2008).

The Department is further incorrect to claim that “purposeful” “bad faith” is always required for any and every type of litigation sanction pursuant to the Court’s inherent powers. *See Opp.* at 30-32 (claiming no “purposeful withholding of documents” and no “purposeful misrepresentations”); *id.* at 31 (claiming a lack of “intent to deceive”). A finding of “bad faith” is required for a “dispositive sanction,” *i.e.*, one that ends the lawsuit altogether, such as dismissal, a sanction Honeywell is not presently seeking. *See D’Onofrio v. SFX Sports Group, Inc.*, 2010 WL 3324964, at \*5 (D.D.C. Aug. 24, 2010) (citing *Shepherd v. American Broad. Cos., Inc.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995)). But contrary to the suggestion in the Department’s brief, *see Opp.* at 27, the D.C. Circuit in *Shepherd* (which was considering only “the ultimate sanction of default”) did not hold that proof of purposeful bad faith was required for every level of sanction. *Shepherd*, 62 F.3d at 1472. While the Court in *Shepherd* drew a distinction between so-called “punitive” sanctions and “issue-related” sanctions, this distinction affects only the burden of proof (punitive sanctions require proof by clear and convincing evidence, issue-related sanctions require proof by a preponderance), not the degree of culpability that must be proven in the first place. *Id.* at 1477-78; *see also id.* at 1478 (discussing the burden of proof for the “predicate misconduct”).

Courts have thus indicated that conduct short of that done in purposeful bad faith can give rise to sanctions under the Court's inherent power, and that bad faith can encompass a range of conduct. *See, e.g., Jones v. Hawley*, 255 F.R.D. 51, 53 (D.D.C. 2009) (“[A] court may employ an adverse inference due to a party’s failure to preserve evidence, even if deliberate or reckless conduct is not present.”) (quotations omitted); *More v. Snow*, 480 F. Supp. 2d 257, 274-75 (D.D.C. 2007) (“[C]ourts have found that ‘bad faith’ destruction or concealment of evidence encompasses both ‘deliberate’ destruction or concealment, and destruction or concealment with ‘reckless disregard’ for the relevance of the evidence.”) (citation omitted); *Miller*, 2007 WL 781941, at \*2 & n.2 (finding that the Government’s “negligent conduct certainly should be deemed sanctionable,” and allowing for the possibility of sanctions short of dismissal); *Miller v. Holzmann*, 2007 WL 172327, at \*7 (D.D.C. Jan. 17, 2007) (denying request for dismissal but allowing for the possibility of other sanctions); *Jefferson v. Reno*, 123 F. Supp. 2d 1, 7 (D.D.C. 2000) (“A party demonstrates bad faith by delaying or disrupting the litigation.”) (quotations omitted); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010) (“[W]illfulness involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur.”) (emphasis in original).

Moreover, if the Department were correct that proof of purposeful bad faith is required for the imposition of any discovery sanction at all, then parties could act with complete recklessness and yet avoid any consequences for their actions. That would mean litigation sanctions are either all or nothing, contrary to *Shepherd*'s admonitions that the inherent power gives “district court[s] the tools needed to protect the integrity of the judicial process,” and that courts must “calibrate the scales to ensure that the gravity of an inherent power sanction corresponds to the misconduct.” *Shepherd*, 62 F.3d at 1479, 1484 (quotations omitted). The

Department thus does not prove its immunity from sanctions by repeatedly insisting that it has not acted in intentional bad faith. *See, e.g.*, Opp. at 1-3, 18, 26-31, 39, 42, 46, 49-51.

## **II. The Department of Justice Made Misrepresentations And Failed To Preserve, Collect, and Produce Responsive Documents**

On the first page of its opposition brief, the United States contends that it “cast its discovery net widely to attempt to capture *all potentially relevant* custodians and materials.” Opp. at 1 (emphasis added). That statement is not remotely true, as demonstrated by the Department’s own declarations and the supplemental declaration of Professor Charles Wolfram. *See* Reply Ex. A (Wolfram Supp. Decl.). The Government’s brief now confirms that its central theory of this case is that Honeywell refused to cooperate with Government officials, to the point that precluding evidence on this score “would effectively end the case” and “be tantamount to precluding the United States from arguing that Honeywell violated” the False Claims Act. Opp. at 49. But this only demonstrates how deeply prejudicial it is that the Department filed this suit and turned the lives of Honeywell’s employees upside down, while failing to make even the most minimal efforts to ensure that documents in the Government’s possession relating to “Honeywell” and “Z Shield” were properly preserved, searched, and produced. The record in this case reveals a disturbing disregard for the Federal Rules, and the Department’s position—that its conduct here was proper as a matter of law and warrants no sanction or other relief *at all*—would, if accepted, allow parties to violate their discovery obligations with impunity.

### **A. The United States Incorrectly And Recklessly Represented That It Had Complied With Its Discovery Obligations Under The Federal Rules**

The Department does not deny that it repeatedly told Honeywell in 2009 that “the vast majority of documents responsive to [Honeywell’s] requests have already been produced to Honeywell in the August [2008] production.” 7/20/11 Hon. Motion, Ex. B-6 (1/13/09 DOJ Letter); *see also* Hon. Mot. at 9; Morris Decl. ¶ 22 [Dkt. # 56-2] (“Had I known” that

“substantial volumes of documents ... had not been collected, processed, and produced ... I would not have made these representations to Honeywell.”). Yet the Department now contends that “a relatively small percentage of responsive documents were produced after the Government’s initial production.” Opp. at 52. That is not true. As the declaration of the Department’s document vendor shows, as of January 13, 2009—when the Department first represented that it had already produced “the vast majority” of its documents to Honeywell—the Department had produced approximately 260,000 pages of Government documents. *See* Vetal Decl. ¶ 7 & Ex. 1 [Dkt. # 55-10]. Since that time, the Department has produced nearly **1.4 million additional pages** from its files, *see id.* at ¶ 6 & Ex. 1, and its production is not yet done. The Government now tries to blame its discovery vendor for its misrepresentations, claiming “DOJ counsel did not know about additional collections of electronic NIST documents that had not been produced.” Opp. at 8. Setting aside that any reasonable investigation would have revealed that a trove of documents belonging to its most important witness had neither been produced nor reviewed, *see id.* at 19-21, these NIST documents are only a portion of what had not been produced at the time of the representations, *see* Vetal Decl., Ex. 1.<sup>2</sup>

In its opposition brief, the Department continues to downplay what has happened in this case, claiming that “[t]he problems singled out by Honeywell were the result of inadvertent errors,” Opp. at 18, that DOJ’s efforts were “proactive,” *id.* at 46, that “many of Honeywell’s

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<sup>2</sup> Appendix A to Honeywell’s opening brief is a timeline showing the Government’s various representations, witness testimony, and document productions. *See* Hon. Mot., App. A. The Department boldly contends that this Appendix is “misleading as to what documents were produced and when.” Opp. at 8. But the Government’s “revised” Appendix does not take issue with the dates or production volumes in Honeywell’s Appendix, beyond providing page counts for each production, which only magnifies the problem. Moreover, what the Department has added to the Appendix only highlights what has gone wrong in this case. For example, the Government adds that on May 3, 2010, it chastised Honeywell for “not identify[ing] a single, specific document from Ms. Ward relating to ... Zylon that has not already been produced,” and on June 14, 2010 represented that Ms. Ward was a “tangential” witness. DOJ App. A. But several months later, the Government would produce Ms. Ward’s exculpatory handwritten notes detailing her discussions with Honeywell about Honeywell’s testing of Z Shield under high heat and humidity.

complaints concerned insubstantial discovery issues,” *id.* at 17, and that “any problems have been remedied,” *id.* at 49. There is no support in the record for representations such as this, as the issues Honeywell raises here are substantial, the Department began to address them only because of Honeywell’s dogged efforts (including meetings with DOJ leadership and the filing of this motion), and the problems are by no means remedied (or, in some cases, remediable). The Government’s representations about the completeness of its production, its derision of Honeywell’s concerns as “fly-specking” and requests for “make-work,” *see* Hon. Mot. at 25-27, and the many statements in its brief to the effect that nothing is amiss, all point to the need for this Court’s supervision of the Government’s discovery processes.

**B. The Department’s Failure Properly To Preserve Documents**

At the outset, “a party has an obligation to preserve evidence it knew or reasonably should have known was relevant to the litigation and the destruction of which would prejudice the other party to that litigation.” *Miller v. Holzmann*, 2007 WL 172327, at \*3 (D.D.C. Jan. 17, 2007). The Department did not remotely meet this obligation because (1) its litigation holds were clearly inadequate for preserving materials critical to this case; and (2) it failed to take steps to ensure that documents would in fact be preserved, resulting in the apparent loss of evidence.

**1. The Department’s Litigation Holds Failed To Instruct Witnesses To Preserve All Documents Relating To Honeywell And Z Shield**

The Department spends much of its brief attempting to demonstrate that witnesses were instructed orally and in writing to preserve documents. Setting aside that “it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information,” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*) (emphasis in original), a closer inspection of the Government’s supporting materials reveals a critical shortcoming that it has never disclosed before: at no time did the

Department *even mention* “Honeywell” in a hold instruction or advise witnesses to preserve all documents relating to “Z Shield,” the product at issue in this case.<sup>3</sup>

The Department claims that its “extensive preservation efforts” “began years before” it filed suit against Honeywell in June 2008. Opp. at 6. But those efforts did not pertain to this case and could not have captured all materials relevant to it, much less the key ones. The Government’s initial hold notices, sent in 2004, were for a different lawsuit altogether involving the defendants Second Chance and Toyobo; these notices did not mention Z Shield or Honeywell at all. See Opp. at 8-9 (citing Morris Decl., Ex. 1 (3/19/04 hold notice); *id.* Ex. 2 (9/14/04 hold notice)). The same is true of all the written and oral communications that the Department cites on pages 9 to 12 of its opposition brief (including the declarations cited therein), spanning the three-year time period between April 2004 and Spring of 2007. Opp. at 9-12. Along with other deficiencies (*e.g.*, the oral and written instructions did not indicate *how* agencies should preserve documents), these communications did not even identify the product at issue or the name of the defendant *in this case*.

The Department provides this information on the apparent assumption that because some of these notices instructed agencies to preserve documents relating to “Zylon” or “body armor,” they necessarily instructed agencies to preserve documents relating to “Z Shield” and “Honeywell,” since Z Shield contains Zylon fiber. Opp. at 17. That is wrong. Honeywell did not make “Zylon” or “body armor.” And the context makes clear that the holds pertained to

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<sup>3</sup> Honeywell’s ability to examine the Government’s preservation instructions is limited to those communications that the Government elected to disclose as part of its opposition to this motion. While the Department purports to “not waive the attorney client privilege as to other internal government communications,” Opp. at 6 n.7, it has plainly done so with respect to communications about document preservation and searches: it is unfair for the Government to rely on a selective set of communications while at the same time withholding the complete record of those communications from Honeywell and the Court. See, *e.g.*, *Bowles v. National Ass’n of Home Builders*, 224 F.R.D. 246, 257 (D.D.C. 2004). But for present purposes, even the materials the Department has disclosed reveal serious problems with its preservation and searches of documents.

other companies and products, not Honeywell and Z Shield. The two multi-agency memos from this period have the *Second Chance* case caption in the “re:” line; relate to other companies (none of whom made or used Z Shield); reference only non-Honeywell brand names; and generically asked agencies, without any more specificity, to “insure the retention of all relevant documentation.” Morris Decl., Exs. 1, 2. While the Government quotes a Natick hold email, *see* Opp. at 11-12, it leaves out that this email “address[ed] Preservation of Material relating to *U.S. ex rel. Westrick v. Second Chance et al.*,” Stone Decl. ¶ 10 [Dkt. # 55-6], not this case.

Anticipating the problem, the Department’s brief stretches to claim that DOJ instructed agencies “in writing, to preserve all documents relating to Zylon body armor *in any form.*” Opp. at 6 (emphasis added); *see also id.* (same); *id.* at 17 (same). But none of the hold memoranda from this time period (or later) actually say “in any form.”<sup>4</sup> There is simply no reason to believe that instructions relating to another case, other companies, and other products would have led witnesses to preserve documents relating to Honeywell and Z Shield, especially documents critical to this case: offers of cooperation from Honeywell and documents showing the Government’s knowledge of Honeywell’s Z Shield testing. *See, e.g., The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 2010 Sedona Conf. J. 265, 280 (2010) (“Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter ... [and] the probative value of the information.”). In fact, though the Government issued a subpoena for documents to Honeywell

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<sup>4</sup> Because the Government’s hold notices did not mention “Z Shield,” the Government must try to claim that “Mr. Rice understood the preservation instruction to apply to all materials using PBO (the scientific name for Zylon) in any form, including woven Zylon fabric and Z Shield.” Opp. at 10. But even if this post-hoc assurance is true, the Department does not make this representation for all of the other persons who apparently would have received its preservation instructions and had less scientific knowledge than Mr. Rice, who “over[saw] research concerning body armor for domestic law enforcement purposes.” Morris Decl. ¶ 19(c). For example, while the Government touts its instructions to Mr. Miller at NLECTC and Ms. Ward at Natick, *see* Opp. at 11, both witnesses have testified they did not even know when they searched for documents that Honeywell was going to be a defendant in this litigation, *see* Hon. Mot., Ex. B-14 (Miller Dep. at 576:12 - :16); B-15 (Ward Dep. at 243:22 - :24).

in May 2006, Opp. at 11, it does not represent that at that time or any other before it filed suit, it notified agencies that Honeywell was now a target of investigation and that communications with Honeywell and documents relating to Z Shield should be preserved.

Instead, the Government's correspondence to agencies following its issuance of the Honeywell subpoena actually confirmed that documents pertaining to Honeywell or Z Shield were mostly *not* of interest. Opp. at 12-15. On April 10, 2007, the Department issued a memorandum to agencies instructing that it would have to produce "all documents relating to Zylon," but clarified that "[s]pecifically, we will need to produce any documents that fall into the following categories." Morris Decl., Ex. 3. Of the succeeding nine categories listed, *none mentioned Honeywell at all*, even though they requested "communications between your office" and *seventeen other* companies involved in the supply chain for Zylon-containing body armors. *Id.* The only request that even comes close to Z Shield was for "[a]ny and all documents referring to the failure of a Zylon Shield vest in Germany in or about June or July 2001." *Id.* But Honeywell did not make vests and thus did not make the one at issue in Germany; its product is far more commonly known as "Z Shield" not "Zylon Shield;" and the specificity of this request—limited to one incident overseas—implies that documents concerning "Zylon Shield" more generally were not pertinent. A later memo sent on April 17, 2007, *see* Opp. at 13, is to the same effect, only with ten categories that still leave out Honeywell and Z Shield. *See* Morris Decl., Ex. 4. Confirming that it was not interpreted to cover this case, when this memo was sent to the military, the cover letter referenced the need for documents "relating to specified manufacturers of [Z]ylon body armor" (of which Honeywell was not), and referenced "Zylon fiber or fabric," not Z Shield. Koltuniak Decl., Ex. 1 [Dkt. # 55-7].

Finally, the Government cannot claim that it issued proper holds by relying on its September 5, 2007 memorandum to over 40 agencies. *See* Opp. at 15-16. This memorandum by its terms relates only to the “two pending civil actions” involving Toyobo and Second Chance, asks agencies “to retain documents and materials potentially relevant to these two pieces of litigation,” and attaches the complaints in those cases, requesting that “you thoroughly review the claims alleged in the two attached complaints to determine the precise scope of the information to be preserved.” Morris Decl., Ex. 5. The September 2007 notice nowhere mentions Honeywell or Z Shield. The Government’s brief nonetheless implies that recipients would have preserved all documents relevant to this case because one of the attached complaints contained three paragraphs relating to Honeywell. *See* Opp. at 15 (citing *Toyobo* Complaint at ¶¶ 50, 52, and 59); *id.* at 43 (claiming the *Toyobo* Complaint “includ[ed] details ... about Honeywell’s production of Z Shield”). But it is inconceivable that witnesses would have known to preserve *all* documents relating to Honeywell and Z Shield based on three paragraphs in a lengthy complaint against a different company, even assuming the complaint was passed on to them and they read it.<sup>5</sup> To that point, several weeks later, an NIJ lawyer instructed NIJ employees to preserve documents “in connection with Second Chance Body Armor and its employees and officers,” again not mentioning Honeywell or Z Shield. Pensinger Decl., Ex. 5.

The Government thus has no basis for the exaggerated representations it makes about its preservation efforts. For example, the Department’s brief claims *without citation* that:

[P]rior to filing the Honeywell Complaint, on June 5, 2008, DOJ had: ... Sent multiple *written litigation hold instructions* to these Affected Agencies, including instructions to preserve and collect *all materials relating to* “Zylon or Zylon-containing vests,” “*Z Shield*,” and “Armor Holdings.” Opp. at 42 (emphasis added).

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<sup>5</sup> For example, the Government suggests that TSWG was “affiliated with” the Navy, who it claims received hold notices. *See, e.g.*, Opp. at 9, 13, 15. But no representation is made that TSWG actually received a hold notice.

No written hold memo included with the Government's brief actually uses the term "Z Shield," much less instructs that "all materials relating to" it be preserved. Equally disturbing, having failed to instruct witnesses to preserve all documents relating to Honeywell and Z Shield *before* filing its complaint, the Department concedes through its silence that it never sent such a written instruction *after* it filed this lawsuit in June 2008. *But see Pension Committee*, 685 F. Supp. 2d at 465 ("[T]he failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.") (emphasis in original); *see also* Reply Ex. A (Wolfram Supp. Decl. ¶ 2). And while the Department circulated to agencies the complaints filed in the *Second Chance* and *Toyobo* litigations, *see* Morris Decl., Ex. 5, it apparently never circulated the *Honeywell* complaint.

## **2. The Department Failed To Take Reasonable Steps To Ensure The Preservation Of Potentially Relevant Documents**

"A party's discovery obligations do not end with the implementation of a 'litigation hold'—to the contrary, that's only the beginning. ... Counsel must take affirmative steps to monitor compliance" with hold instructions. *Zubulake*, 229 F.R.D. at 432. After issuing inadequate holds, the Department compounded the problem by failing to take affirmative steps to ensure that potentially relevant materials would in fact be preserved. Its brief identifies only one witness whose electronic files were preserved near the time of the preservation instructions and then later searched, *see* Opp. at 16, although even this preservation was not done until April 2007, *see* Sigler Decl. ¶ 5(b) [Dkt. # 55-2], nearly a year after the Department issued a subpoena to Honeywell. *See also* Hon. Mot. Ex. B-13 (6/14/10 DOJ Letter, at 4) ("[T]he United States has no obligation to image the hard drive of any particular witness."). In the meantime, Ms. Ward's hard drive crashed while this litigation was pending, *see* Hon. Mot. at 14-15, Mr. LaPlume's computer was "mistakenly reimaged," Opp. at 12 n.11, and no indication is given that routine

deletion policies were suspended at the key agencies. *But see Peskoff v. Farber*, 244 F.R.D. 54, 60 (D.D.C. 2007). The Government's failure to take affirmative preservation steps means that, in large part, it only preserved what its witnesses turned over in their deficient searches.<sup>6</sup>

To make matters worse, the Department was clearly aware that it needed to do more than simply issue litigation holds. In its September 5, 2007 preservation memorandum concerning the *Toyobo* and *Second Chance* cases, it instructed as follows:

- “Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of potentially relevant documents. ***Electronic discovery has created new opportunities for costly mistakes, as courts have exacted judgments against parties for failing to preserve ESI or have instructed juries to assume that a party’s failure to produce ESI implies that the ESI would have been damaging to that party’s legal position.***” Morris Decl., Ex. 5 (9/5/07 Letter) (emphasis added).
- “When implementing this ‘litigation hold,’ ***it is not sufficient to simply notify all employees of a ‘litigation hold’ and expect that they will then retain and produce all information related to the suit.***” *Id.* (emphasis added).
- “[I]nitial preservation steps must be taken because failure to meet document preservation obligations ***may result in monetary or other sanctions.***” *Id.* (emphasis added).

It is clear from the Department's submission that it never conducted this follow-up work. And though its brief highlights some of the instructions in this letter, *see Opp.* at 15-16, no suggestion is made that they were heeded. Indeed, it is apparent from the record that these instructions were

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<sup>6</sup> The Government's opposition brief discloses for the first time that it has “[r]ecently” attempted to restore Ms. Ward's hard drive, an “effort [that] appears to have been successful.” *Opp.* at 24. It bears note that it took the filing of this motion to spark this “recent effort,” and while Honeywell hopes it will be successful, its success is yet unknown, belying the Government's claim that “DOJ remedied the problems cited in [Honeywell's] Motion months before the Motion was filed.” *Id.* at 17. The Government evidently has not undertaken similar efforts with respect to Mr. LaPlume's computer, on the apparent rationale that Mr. LaPlume's files are not “exculpatory.” *Id.* at 12 n.11, 46 n.24. That is not correct. Mr. LaPlume was involved in testing Zylon-containing vests that showed “zero degradation ... [after] four years worth of deployment,” outfitted American soldiers in Zylon-containing vests and believed them to be safe long after purported concerns about Zylon had become known, and had written that the Government's testing of Zylon was a “complete load of shit.” Hon. Mot., Ex. B-12 (LaPlume Dep. 219-20, 243, 250-51). It is inconceivable that these documents are not “exculpatory.” Nor did Mr. LaPlume testify that his “primary documents” were all contained in a binder. *Opp.* at 12 n.11. To the contrary, he said that his computer contained “test results, reports, [and] email ... [g]enerated by Janet[] [Ward's] group.” Hon. Mot., Ex. B-12 (LaPlume Dep. 336:10 - :13). These materials were evidently lost when his hard drive was re-imaged.

not followed, as hard drives were lost and potentially relevant documents at key agencies were not “locked down” at appropriate times. Here, the “government’s conduct created a situation where we cannot assess exactly what or how much information was lost and what or how much information was important to the defendants’ case,” and “[i]t would defy logic at this point to give the government the benefit of the doubt on its word alone.” *Miller*, 2007 WL 781941, at \*1.

**C. The Department’s Failure To Conduct Proper Searches**

**1. Fact Witnesses Conducted Their Own Searches Without Properly Searching For Key Terms Central To This Case**

The Department does not respond at all to the case law making clear that discovery obligations are not met by delegating search responsibilities to unsupervised and unassisted fact witnesses who have no experience conducting such searches. *See* Hon. Mot. at 19 (citing cases). And the Department’s brief makes clear that this is exactly what was done here. In fact, the Government allowed witnesses to conduct largely unsupervised searches while not even timely asking them to search for documents most critical to its legal theory and Honeywell’s defense: those containing the words “Honeywell” and “Z Shield.” To that point, witnesses have already testified that they did not even know Honeywell was going to be involved in litigation when they searched their files. It is the height of recklessness to bring a case premised on Honeywell’s failure to cooperate without even bothering to check whether contrary documents existed. *See Jones*, 255 F.R.D. at 52 (“[A] fundamental purpose of discovery is to secure information that will impeach or contradict an opponent’s case.”).

Even now the Government misrepresents its own declarations to paper over what happened, which only confirms the inadequacies that plagued the searches at every key agency:

**NIJ/OJP:** The Department asserts in its brief that “information technology personnel and OJP attorneys, in consultation with DOJ attorneys, *conducted searches* at NIJ and OJP.”

Opp. at 44 (citing Pensinger Decl. ¶¶ 9-10) (emphasis added). But this is contradicted by the very declaration cited in support. Neither the cited paragraphs of the Pensinger declaration nor any other part of that declaration say that IT personnel or lawyers conducted the searches. To the contrary, the Pensinger declaration makes clear that NIJ fact witnesses searched their own files. *See* Pensinger Decl. ¶ 10 (“NIJ staff conducted searches of their files and then[] returned copies of the results of these electronic searches.”); *id.* ¶ 9 (“NIJ employees ... searched their files”).

Making matters worse, the Department provided these NIJ fact witnesses with 40 key terms to search, *but the list included neither “Honeywell” nor “Z Shield.”* *See* Pensinger Decl., Ex. 3 (4/18/07 Email). While the Department did request that “Zylon Shield” be searched, Honeywell’s Z Shield product is usually referred to by its trade name “Z Shield,” and not “Zylon Shield.” To that point, the Government’s Complaint in this case uses the term “Zylon Shield” *once*, and “Z Shield” *over 225 times*. *See* Compl. [Dkt. # 1]. Moreover, when the Department the next day circulated a “revised list” to “cover certain variations and abbreviations of the terms in the original list,” Pensinger Decl. ¶ 9, the list still failed to include “Honeywell” or “Z Shield,” and it inexplicably abbreviated “Zylon Shield” to “Zylon,” *id.*, Ex. 4 (4/19/07 Email), confirming the lack of focus or complete ignorance of Honeywell’s product. There is much to criticize in these search-term lists, but the most fundamental problem is that employees at NIJ—which according to the Complaint conducted the “Ballistic Testing Confirm[ing] the Defective Nature of Z Shield,” Compl. ¶ 84—were not instructed to search for the name of the defendant in this case or the common trade name of the product at issue. Pensinger Decl., Exs. 3, 4.

The search-term list aside, the Government does not represent (nor is it clear how it could) that fact witnesses actually followed through and conducted searches using all the terms provided for all places where electronic documents were stored. It is hard to imagine busy

employees sitting down to run searches of 40 terms on multiple electronic repositories. *See* Opp. at 14. But it is even harder to imagine that this inevitably rudimentary and unassisted searching—using Windows search tools or other desktop computer search functions that are inadequate for litigation purposes—would have captured all potentially responsive documents.

**NIST**: The Department states in its brief that at NIST the “collection efforts were conducted by agency principals with subject matter expertise, [and] were assisted by information technology professionals and/or supervised by agency counsel.” Opp. at 14. But “agency principals with subject matter expertise” means fact witnesses. And the declaration from NIST’s Mr. Rice confirms that “principal researchers at NIST ... lead the data collection efforts within their areas” and that his own “data collection efforts involved my physical search and examination of paper-based records in my office and electronic records on my computers.” Rice Decl. ¶¶ 10, 12 [Dkt. #55-9]. The only apparent involvement of lawyers here, according to Mr. Rice’s declaration, was NIST counsel’s largely unelaborated “verbal instructions” (which did not specify anything about Honeywell or Z Shield). *Id.* ¶ 10. Neither attorneys nor technology personnel were involved in the actual searches discussed here.

Nor is it clear what NIST fact witnesses did to search for documents. Unlike NIJ, the Government claims that the NIST searches were not “limited to key word searching.” Opp. at 14. But it does not indicate what search terms were used, whether “Honeywell” and “Z Shield” were among them, or what, if anything, was done beyond key-word searching. The 40-term list discussed above (which, in any event, did not include “Honeywell” or “Z Shield”) was evidently sent only to NIJ fact witnesses, not other agencies.

**NLECTC**: The Department contends in its brief that “information technology personnel assisted with searches at NLECTC, and NLECTC employees consulted with both OJP and DOJ

attorneys during these searches.” Opp. at 44 (citing Miller Decl. ¶¶ 4-5). Yet again, this contention is contradicted by the declaration the Department cites, as well as other record evidence. In his declaration, NLECTC’s Mr. Miller states that “[t]hese searches were performed by myself and NLECTC staff,” Miller Decl. ¶ 4 [Dkt. #55-8], and says nothing about consultation with attorneys “during” the searches. Indeed, Mr. Miller has previously testified this did not happen. *See* Hon. Mot., Ex. B-14 (Miller Dep. at 578:1 - 579:16) (“Q. Did anybody come from the [DOJ] or OJP to assist you and direct you in what you were doing? A. No.”); *see also id.* at 583:9 - :14 (confirming that other NLECTC employees “went on their own computers and did their own personal searches”). The only reference to technology personnel in Mr. Miller’s declaration is in relation to the searching of certain “databases,” not the searching of any other NLECTC documents. *See* Miller Decl. ¶ 4.

As with NIST, the Department does not disclose what terms NLECTC employees searched for. But Mr. Miller has already testified that he could not remember the search terms he used or whether he searched for “Honeywell” or “Z Shield,” and that he did not even know at the time he did the search that Honeywell was involved in litigation. Hon. Mot., Ex. B-14 (Miller Dep. at 581-82); *see also id.* (Miller Dep. at 576:12 - :16). Mr. Miller’s declaration says he provided documents in reference to an April 2007 request, but the request referred to is the memorandum that lists nine categories of documents “relating to Zylon,” does not mention Honeywell, and lists “Zylon Shield” only in relation to the one incident in Germany involving another company’s vest. Miller Decl. ¶ 11 & Ex. 3.

In fact, Mr. Miller’s declaration confirms that it was not until **August 2010**—months after Honeywell deposed him and years after this case was filed—that NLECTC was finally asked to search for some terms relevant to this case (“Honeywell, Z Shield, Z-Shield, Wagner, Murray,

Hurst, exposure, environmental, accelerated”). *Id.* ¶ 15. There would have been no reason to conduct these searches if they had been done earlier, and by 2010 these searches were run against whatever files still remained at NLECTC, not what existed years earlier when the duty to preserve attached.

Compounding all of this, it is not even clear that when witnesses at NLECTC (and the other agencies) searched their files using search tools that are inappropriate for litigation, that they provided everything that came up when key terms were hit. Mr. Miller states only that “the resulting documentation that was produced was complete and accurate to the spirit of the request.” Miller Decl. ¶ 5. It is inexcusable for the Department to entrust untrained witnesses, lacking minimal if any supervision from the responsible lawyers, with deciphering the “spirit” of a request and thus with determining what is legally relevant to litigation.

**U.S. Army Natick:** The Government’s declarations here again confirm that witnesses conducted initial searches without the involvement of lawyers or technology personnel, *see* Koltuniak Decl. ¶ 19 (noting that Mr. Cunniff searched his own computer); Ward Decl. ¶ 12 [Dkt. #55-11] (“I conducted searches of my computer and associated files for relevant documents.”); *id.* ¶ 13 (“I ... conducted additional searches of my computer to the best of my ability to check for additional documents, such as within my email box.”). Ms. Ward has already testified to the same. *See* Hon. Mot. at 17 (quoting Ward testimony).

Nor, once again, is it clear which terms Natick witnesses used when they initially searched their own files, as the Department provides no further insight. Ms. Ward has already testified, however, that she searched only for “Zylon,” “Toyobo,” and “PBO,” and did not search for “Honeywell” or “Z Shield” (and did not even know at the time that Honeywell was a defendant). Hon. Mot., Ex. B-15 (Ward Dep. 241:19 - :22, 243:11 - :24, 244:4 - :5). Though it

had previously assured Honeywell that Ms. Ward's search was "reasonable," Hon. Mot., Ex. B-33 (3/1/10 DOJ Letter at 2), the Department now concedes that Ms. Ward's "search for responsive information may not have captured all [responsive] materials, such as documents that only contained the word 'Honeywell' instead of just those about 'Zylon' or 'PBO.'" Opp. at 22.

Yet even after Ms. Ward's February 2010 deposition exposed the flaws in her searching, the Department waited *six months* to ask Natick employees to conduct follow-up searches specific to this case, such as for "Honeywell," "Z Shield," and "Lori Wagner." See Stone Decl. ¶ 24. These searches were themselves seriously inadequate: they were under-inclusive of the terms at issue in this case; internally under-inclusive (a search for "Lori Wagner" likely would not yield documents containing only "Wagner"); a Honeywell witness name is misspelled; the searches were again done by fact witnesses with no apparent involvement of lawyers and technology personnel; and they were done on whatever files happened to still exist in August 2010 (including Janet Ward's new hard drive, not the one that had already crashed). That Ms. Ward located her hard-copy exculpatory notes during this search only raises additional questions about how DOJ can say it "incurred substantial resources working with Natick on document preservation, collection, and production," Opp. at 22, and yet missed documents showing Ms. Ward and Honeywell discussing Honeywell's testing on Z Shield. Moreover, when DOJ finally decided to image Ms. Ward's (new) computer in January 2011, see Stone Decl. ¶ 30, it ran 70 search terms, see Opp. at 23, making it unclear why fewer terms were run at NIJ.

The basic point here is that as to this case, the Government's searches were largely haphazard, woefully deficient, and unlikely to collect many of the documents most critical here. It was reckless for the Department to charge Honeywell with misleading government officials

when it did not even ask those officials timely to search for and provide evidence of their communications with Honeywell.

**2. The Professed Magnitude Of The Government's Document Production Does Not Justify Its Incomplete Searches**

In an apparent attempt to excuse its conduct here, the Department repeatedly touts the supposed size of its document production. But the Government's calculations require closer examination. The United States throughout its brief takes credit for "preserving, collecting, and producing over 2.9 million pages of responsive documents" to Honeywell. Opp. at 6 (section title); *see also id.* at 4 ("DOJ has produced to Honeywell more than 2.9 million pages from 77 document repositories"); *id.* at 30-31 (touting "DOJ's production to Honeywell of nearly 3 million pages of documents from 77 document repositories"). But nearly half the total pages DOJ produced to Honeywell came from documents that had been produced by third parties to the United States, and more than 60% of the 77 referenced document repositories were third parties. *See* Vetal Decl. ¶ 4. Surely the Department cannot claim credit for simply turning around and re-producing what a third-party had preserved, searched, and produced to it.

Moreover, the material from the Government's own files has been messy and extraneous, as its production contains substantial amounts of irrelevant material, documents each more than a thousand pages in length consisting of unintelligible computer code, and many duplicates of the same documents. For example, the Government has produced the NIJ .04 Body Armor Standard—a publicly available 57-page document—over 50 times. And the Department's calculations appear to include some boxes that Honeywell returned to the Government as containing unintelligible code and the private information of government employees.

The larger point, however, is that the number of pages the Department has produced does not somehow prove it properly preserved and searched for the documents that are actually

relevant to this case. It hardly befits the adversarial process for Honeywell to receive computer code and over 50 copies of the Body Amor Standard, but to know that witnesses searching their own files did not timely search for “Honeywell” or “Z Shield” and in some cases apparently still have not done so. Nor can the Department be heard to complain about the number of documents it must produce when it is the Government that chose to file this lawsuit, and when one reason for the volume of documents is the federal government’s substantial knowledge of the supposed issues with Zylon.

**D. The Department’s Failure Properly To Produce Documents**

The Department does not deny that “documents were often produced in highly disorganized fashion; emails were produced without attachments in succeeding order; and the productions often included irrelevant and privileged materials, to the point that Honeywell had to return some productions altogether.” Hon. Mot. at 22. To the contrary, the Department acknowledges that its productions have been both flawed and delayed. *See, e.g.*, Opp. at 1 (“there have been production delays and late discoveries”); *id.* at 3 (“late document discoveries”); *id.* at 7 (“problems arose with various productions”). But what has happened in this case is far beyond the typical problems that arise in discovery, for even the Government’s own declarations reveal production processes that have fundamentally broken down. While the Department now seeks to turn its discovery vendor into the scapegoat, it is the United States that is ultimately responsible for its own productions, *see* Reply Ex. A (Wolfram Supp. Decl. ¶ 9), and there is no basis for making Honeywell absorb the costs of the Government’s mismanagement.

The production problems in this case are legion, but two examples serve to demonstrate the extent and seriousness of the problem. *First*, the Department concedes that it withheld from Honeywell for years materials on two desktop computers, one laptop, one external drive, 96

CDs, two hard drives, and nine DVDs all belonging Kirk Rice, a critical witness in this case who was deposed before most of these materials were produced. *See* Opp. at 18-21; *see also* Morris Decl. ¶ 19(c) (citing “Mr. Rice’s important role overseeing research concerning body armor”). This withholding was the product of not only one, but apparently two independent alleged oversights involving DOJ, its document vendor Labat, and the Department of Commerce. *See* Opp. at 20 (explaining that “[d]ue to mis-communication among DOJ and Labat, the 96 CDs, the two hard drives, and the nine DVDs (all at Labat) did not get produced to Honeywell” because “the production logs kept at Labat mistakenly indicated that these materials had already been produced”); *id.* (explaining that “[s]imilarly, due to mis-communication among DOJ, Labat, and Commerce ... DOJ mistakenly believed the computers had initially been produced to Labat”). It is inconceivable that a properly managed production process could have somehow overlooked (twice) the files of the most important Government witness in this case, a glaring oversight that raises serious questions about what other documents remain unproduced due to similar mistakes.

*Second*, the Department still refuses to provide an adequate production of the newly discovered materials that led it to call for a unilateral and self-imposed discovery stay in October 2010. The Department initially produced this material to Honeywell in April 2011, but Honeywell returned it after determining it contained substantial amounts of irrelevant material, such as inappropriate jokes, coupons, and computer code. *See* Hon. Mot. at 23-24; *see also* Vetal Decl. ¶ 45 (conceding that the production contained “many privileged documents” and “irrelevant documents with obscenities”). Remarkably, the Department admitted that no lawyer had reviewed these documents before producing them, *see* Hon. Mot., Ex. B-22 (7/8/11 DOJ Letter, at 2), which is apparently how it can now claim that “DOJ did not know of these irrelevant materials at the time they were produced to Honeywell,” Morris Decl. ¶ 19(j).

On August 8, 2011, and after Honeywell had filed the instant motion, the Department re-produced these documents but warned that “given the nature of electronic searching, we expect some irrelevant material will remain on the hard drive.” Reply Ex. B-2 (8/5/11 DOJ Letter, at 2). That proved to be correct, as the production again contained much irrelevant material, such as documents concerning retirement parties, a lost cell phone, flu shots, coupons for yogurt and Doritos chips, and a “joke” email entitled “Who is Jack Schitt?” See Reply Ex. B-3 (collecting several irrelevant documents from August 2011 production). Yet after Honeywell flagged this issue again for the Department, the United States still refused to provide a proper production.

The Department’s apparent position is that Honeywell has the obligation to sift through its undifferentiated production to find what is relevant and responsive. See Opp. at 24; Morris Decl., Ex. 11 (9/1/11 DOJ email) (demanding that Honeywell “explain how those irrelevant materials prevent [it] from conducting [its] review”). But under Rules 26 and 34, it is the producing party’s obligation to review its documents and provide what is responsive; it cannot shift the cost of that review by flooding the other side with irrelevant documents. See, e.g., *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* 38 (2d ed. 2007) (“It is the responsibility of the producing party to determine what is responsive to discovery demands and to make adequate arrangements to preserve and produce relevant information.”). Here, moreover, there are substantial questions about the Government’s processes themselves, as there is again no indication that lawyers reviewed the documents before they were produced. The Department’s production letter referenced only “extensive sampling by legal personnel,” Ex. B-2 (8/5/11 DOJ Letter, at 1), and its document vendor indicates only that the vendor’s paralegals reviewed certain search results (including for relevance) and that “DOJ attorneys spot checked the work of Labat paralegals,”

Vetal Decl. ¶¶ 58, 63. It simply cannot be the law of this Circuit that the United States meets its discovery obligations by “spot checking” the work of non-lawyers at a third-party document vendor. In fact, rather than review the documents for responsiveness, it appears the Department instead had its vendor run targeted searches to weed out some of the clearly irrelevant documents, which turns the entire process upside down. *See id.* ¶ 58 (noting that Labat “performed a search of common obscenities” and the “results were reviewed by a team of paralegals”); *id.* ¶ 62 (“Labat conducted ... searches for coupons, menus, and jokes.”).

There is no excuse for conducting discovery in this manner. Not only do the document management practices at DOJ and its vendor raise concerns about what still remains unproduced, they have resulted in needless costs and delays. Honeywell is hardly seeking “perfection,” Opp. at 28, but rather asks for basic compliance with the Federal Rules.<sup>7</sup>

**E. The United States Sponsored Inaccurate And Misleading Testimony And Sworn Interrogatory Responses That Depended On The Non-Existence Of Exculpatory Documents Withheld From Honeywell**

That unsearched government files contained relevant, and indeed exculpatory documents, was by no means only a theoretical possibility. For as a direct result of its disregard of basic discovery obligations, the United States filed a misleading complaint and sponsored inaccurate and misleading testimony and sworn interrogatory responses that are contradicted by critical exculpatory documents withheld from Honeywell. The Department protests that it would not “strategically withh[o]ld this evidence” only to “then release[] it after sponsoring false testimony at key depositions of Government witnesses.” Opp. at 30. But even if the United States is to be

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<sup>7</sup> The cases that the Government primarily relies upon are inapposite, as they do not involve discovery violations of remotely the scope, severity, or degree of prejudice as this case. *See* Opp. at 5 n.2, 28, 43 (citing *United States v. Halliburton Co.*, 272 F.R.D. 235 (D.D.C. 2011); *Davis v. Grant Park Nursing Home, L.P.*, 2010 WL 4642531 (D.D.C. Nov. 9, 2010); *D’Onofrio*, 2010 WL 3324964, at \*7; *Alexander v. FBI*, 541 F. Supp. 2d 274 (D.D.C. 2008); *United States v. O’Keefe*, 537 F. Supp. 2d 13 (D.D.C. 2008)).

believed that it would not purposefully do so, the key point is that, through its inadequate preservation and collection measures, the Government recklessly made itself unaware of these exculpatory documents when it filed this lawsuit and, through sworn testimony, attempted to develop the theory that Honeywell failed to cooperate with government officials.

The United States' strained efforts to explain away the three belatedly produced documents that Honeywell cited in its motion (offered only by way of example) underscore the incompatibility between these long-withheld documents and the record as developed by DOJ over the last three years:

**Janet Ward Handwritten Notes:** The Department does not (and cannot) deny that Ms. Ward's handwritten notes reflect a March 2002 conversation, during which Honeywell told Ms. Ward that "Z Shield - [f]rom testing at Honeywell" was exhibiting "some environmental effects" from "accelerated aging" testing. Hon. Mot., Ex. B-24 (Ward Handwritten Notes). Yet as a result of the Department's inadequate document search processes, these notes remained undiscovered and unproduced while the Government was drafting and submitting a sworn interrogatory response stating that Ms. Ward "did not recall Honeywell ever discussing the results of [its] [heat/humidity testing] data with her." *Id.* Ex. B-5 (DOJ Interrogatory Responses, at 12).

The Department also does not seriously defend its elicited testimony of Ms. Ward—again given when her notes sat uncollected in her office—that she did not remember Honeywell sharing with her "any exposure conditioning or heat and humidity" testing on Honeywell's Z Shield. *Id.* Ex. B-15 (Ward Dep. at 447). While the Department now tries to narrow its interrogatory response and Ms. Ward's testimony as referring only to the sharing of "specific" hard data, *see Opp.* at 33, neither the interrogatory response nor Ms. Ward's testimony was that

narrow. To the contrary, in response to a follow-up deposition question from a Department attorney, Ms. Ward specifically clarified that when she testified “I don’t remember that any of that type of information was shared,” she meant “[t]he environmental-type aging *or* the environmental exposure-type data.” Hon. Mot., Ex. B-15 (Ward Dep. at 447-48) (emphasis added).

The distortion of the record caused by the Government’s discovery lapses cannot be swept aside on the basis of the Department’s assurance that Ms. Ward’s “recollection remains the same after seeing the purportedly exculpatory notes.” Opp. at 33. It will be forever unknown what more Ms. Ward may have remembered had she seen her notes when Honeywell deposed her nearly two years ago, or even years prior, when the notes should have been collected for this case. And it is surprising that the Department would sponsor yet more testimony from Ms. Ward (*i.e.*, the declaration submitted with its opposition brief) without knowing what documents may exist on her old hard drive that it is attempting to restore.

**Kirk Rice Phone Log:** Kirk Rice’s belatedly produced phone log recorded the following message from Lance Miller at NLECTC: “rec’d call from Lori Wagner at Honeywell, she is asking about where we stand with various studies and again offered to provide assistance re: samples, tes[t]ing, data[.] [T]hey are willing to help us.” Hon. Mot., Ex. B-26 (Rice Phone Log). As Honeywell explained in its motion, this phone log entry is fundamentally at odds with the Department’s sworn interrogatory response charging Honeywell with a “[l]ack of cooperation” and “lack of openness,” *id.* Hon. Mot., Ex. B-5 (DOJ Interrogatory Responses, at 10), and with Mr. Rice’s sworn testimony that there was “a reluctance” on Honeywell’s part to share information, and that he did not “recall a whole lot being offered up,” *id.* Ex. B-29 (Rice Dep. at 618-620).

The Government attempts to minimize the damage done to the integrity of the record through a fanciful and post-hoc interpretation of the phone log, which had remained unsearched and unproduced when the Government provided its interrogatory responses and Mr. Rice was deposed. Thus, the Department claims that the phone log “is in no way exculpatory,” because it “is entirely consistent with Honeywell’s pattern of ignoring requests for its own data,” and because “Honeywell’s ‘offers of assistance’ referred to Honeywell’s attempts to obtain data, not to offer its own.” Opp. at 37-38. But only in the bizarre world that the Department has backed itself into can an overture “*offer[ing]* to provide assistance re: samples, tes[t]ing, [and] data” and expressing a “*willing[ness]* to help” somehow be construed as a *refusal* to provide data and an *unwillingness* to help.

The Department also goes far out on a limb in claiming, in the absence of any testimony on this phone log, that it was “not an offer to provide Honeywell’s Z Shield technical data.” *Id.* at 35. The attached declaration from Mr. Rice makes clear that he “do[es] not recall returning this call.” *See* Rice Decl. ¶ 18. And the record is replete with evidence that Honeywell’s many other offers of assistance included providing its test data on Z Shield, evidence the Government cannot rebut because its scientists never bothered to respond to Honeywell’s offers. Ex. B-4 (deposition testimony). For example, several weeks after the call referenced in Mr. Rice’s phone log, a Honeywell executive—in a letter the Government has not yet been able to produce from its files—wrote to the Department of Justice that “Honeywell has accumulated additional technical data on the performance of its Z Shield® product” and “would be happy to meet with the NIJ investigators to provide these data and discuss their significance.” Hon. Mot., Ex. B-27 (12/3/03 Letter). This offer, like so many others extended by Honeywell, was never taken up.

The basic point is that any common-sense reading of Mr. Rice's phone log makes clear that it is directly contrary to the Government's interrogatory responses and deposition testimony. This case has been tainted by the Government's creation of a record premised on the non-existence of documents such as this.

**Government's Agreement That Honeywell's Data Did Not Matter:** A belatedly produced March 2002 email—withheld until after key depositions and interrogatory responses relating to its subject matter—references the “agree[ment]” of the government researchers working on their own high heat and humidity study that Honeywell's “participation would not necessarily be in the best interests of the program, *and that their information, or lack of it, would not hinder the progress in any way.*” Hon. Mot., Ex. B-32 (3/21/02 Lightsey e-mail) (emphasis added). The United States provides no explanation whatsoever as to how this document can be squared with the Government's sworn interrogatory response—based on deposition testimony that the Department itself elicited—that “the Honeywell Heat/Humidity Testing data would have materially assisted the [federal government's] research in a variety of ways.” Hon. Mot., Ex. B-5 (DOJ Interrogatory Response, at 11). It is impossible to understand how Honeywell's information could have “materially assisted” the government when government researchers at the time all “agreed” that not having Honeywell's information “would not hinder the[ir] progress in any way.” The Department's only apparent response—that “the ‘information’ Honeywell offered was to participate in the committee running the study,” Opp. at 38—is linguistically nonsensical and not what the document actually says. Nor is there any indication that other like documents would have been picked up in witnesses' initial searches, as this document contains the word “Honeywell” but not “Zylon” (or even Z Shield).

The foregoing examples demonstrate that the United States' discovery failings have fueled its creation of a misleading record, including sworn statements, built on the presumed non-existence of exculpatory materials. It is no answer to say that the Government eventually did produce these three documents. *See* Opp. at 32. The Department did so only due to Honeywell's dogged inquiries, made in the face of assertions that substantially all documents had been produced and that Honeywell should "resume focusing on the merits of this case instead of 'fly-specking' the discovery process." Hon. Mot., Ex. B-13 (6/14/10 DOJ Letter, at 6). Moreover, there is no way at this late date to fully cure the distortion of the record when it can never be known how witnesses would have testified had these three important documents been available when they were initially deposited. There is also no telling what other similar documents are forever lost or will remain unproduced since "Honeywell" and "Z Shield" were not part of the Government's preservation and search efforts.

### **III. The Department's Conduct In Discovery Has Severely Prejudiced Honeywell**

Notwithstanding the overwhelming record of admitted discovery failures in this case, the Government still tries to argue that "Honeywell has suffered *no prejudice*." Opp. at 49 (emphasis added); *see also id.* at 5 ("failure to establish any prejudice"); *id.* at 46 ("inability to prove any prejudice"). But if there is no prejudice where, as here, a party fails to instruct that documents relating to the defendant and the product at issue be properly preserved, searched, and collected—and then recklessly advances theories that depend upon the non-existence of contradictory documents that were not produced—then no discovery violation would ever be prejudicial. The Department's conduct here provides a case study for why the Federal Rules are so important, as the Government's failure to comply with those Rules has distorted the adversary process, substantially delayed the proceedings, and needlessly increased litigation costs.

Tainted Record and Impeded Defense Against Serious Accusations: The Government is using its discovery abuses for litigation advantage: its now primary theory of the case concerns what Honeywell allegedly did not tell the United States about Z Shield, Honeywell's interactions with the United States regarding Z Shield, and what the United States allegedly did not know about Z Shield. Yet the Government failed timely to preserve, collect, and produce from its files the very documents that Honeywell would have needed to rebut this theory, most fundamentally documents containing the words "Honeywell" and "Z Shield." And the failures were real: in recent months, and after years of Honeywell's persistence, the Department finally released critical exculpatory documents that contradict its central allegations and the sworn testimony it had elicited. Honeywell has been prejudiced by being forced to plan its defense based on an incomplete and ever-changing record, and to take and defend depositions without access to key documents that the Government represented did not exist. *See DL*, 274 F.R.D. at 328-29. Even more prejudicial, however, is that the Government has prosecuted a case, and permitted discovery to proceed for years, without doing even the most basic due diligence regarding the existence of contrary evidence to which Honeywell is entitled for its defense. Given the Government's conduct, there are serious questions remaining about what documents are forever lost and what documents remain unproduced. *See Jones*, 255 F.R.D. at 54 ("Plaintiffs' failing to preserve these documents has deprived the defendants of fundamental information that could have been used to investigate the bona fides of plaintiffs' claims.").

There is accordingly no merit to the Department's contention that whether documents have been lost or remain unproduced is speculative. *See, e.g., Opp*. at 48. Honeywell's motion is hardly based on "vague notions that there are more [documents] than what was produced," *id.* (quoting *United States v. O'Keefe*, 537 F. Supp. 2d 14, 22 (D.D.C. 2008), but rather is

founded on record evidence, testimony, and now declarations concerning the Government's conduct in preserving, searching, and producing documents. It does not take guesswork to conclude (taking one example) that when NIJ employees electronically searched their own documents for "Zylon Shield" using rudimentary search functions that they may not have turned up documents with the words "Z Shield" or "Honeywell."

The Department's other efforts at damage control are similarly unavailing. The Government cannot simply claim that documents not produced from one witness were likely produced by others. *See, e.g.,* Opp. at 46-47. Janet Ward's notes or Kirk Rice's phone log would not exist in anyone else's files and would never have even been produced had Honeywell not pushed hard for follow-up document searches and productions. *See Miller*, 2007 WL 172327, at \*6 ("The government once again argues that its loss was insignificant because its entire contents have most probably been disclosed in other documents that were disclosed.... But, once again, without the file itself, it is impossible to say with the certainty that I consider to be required that its loss is insignificant."). Nor can the Government challenge Honeywell to identify particular documents that have yet to be produced. *See, e.g.,* Opp. at 47. Honeywell had no idea about Janet Ward's notes and Kirk Rice's phone log, and it would "defy logic at this point to give the government the benefit of the doubt" that everything has been provided. *Miller*, 2007 WL 781941, at \*1; *see also Miller*, 2007 WL 172327, at \*5 ("Those documents could have been useless or the classic 'smoking gun.' At this point, all we can do is guess.").

In fact, the Government now says that communications between Honeywell and the United States are so critical that a preclusion instruction on this issue "would effectively end the case" and "be tantamount to precluding the United States from arguing that Honeywell violated" the False Claims Act. Opp. at 49. But that only underscores the seriousness of the

Government's failure to preserve and search for these communications: the Government cannot rely on the importance of this issue to avoid a sanction while claiming lack of prejudice to Honeywell from its wholly inadequate preservation, search, and production of such documents.<sup>8</sup>

Substantial Expense and Delay: The Government's conduct has substantially delayed this case and resulted in large and unnecessary costs. Honeywell must now re-depose numerous government witnesses due to newly produced documents and because it is now obvious that key portions of their testimony are inaccurate. Honeywell has already prepared for and taken these depositions once; it now has no choice but to do it all over again, in some cases two years after the original depositions. This is clearly prejudicial, not only because of the cost, but also because witness recollections inevitably will be worse than they were when Honeywell first deposed them. *See, e.g., Zubalake V*, 229 F.R.D. at 436-37 (explaining that "the effect of late production cannot be underestimated," and ordering the "pay[ment] [of] the costs of any depositions or re-depositions required by the late production"). The Department in fact concedes that re-depositions are necessary, *see* Opp. at 3, belying its claim that there is "no prejudice" here.<sup>9</sup> And Honeywell has incurred substantial additional costs as well, such as expenses

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<sup>8</sup> As a result, Honeywell's requested preclusion instruction and an adverse inference are clearly warranted here. Moreover, the Court can also craft other appropriate instructions based on its consideration of the record. *Cf. Pension Committee*, 685 F. Supp. 2d at 470 ("Like many other sanctions, an adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction should be determined based on the nature of the spoliating party's conduct—the more egregious the conduct, the more harsh the instruction."); *D'Onofrio*, 2010 WL 3324964, at \*7 ("[T]here is a deterrent value to preclusion.").

<sup>9</sup> While agreeing that its witnesses must be re-deposed, the Department objects to paying Honeywell's reasonable expenses for these depositions, as well as other fees and costs associated with its discovery failures, on grounds of sovereign immunity. *See* Opp. at 51. That objection is misplaced and would allow the Government to abuse the discovery rules and imposes costs on others without consequence. The Department does not cite any case disallowing such fees when issued pursuant to Rule 37, and the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(b), specifically provides that the United States is liable for "fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute." The Supreme Court has held that the Federal Rules of Civil Procedure have "the force of a federal statute," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941), and accordingly, courts have held that the Federal Rules of Civil Procedure, which are promulgated pursuant to statute, fall within the EAJA, *see, e.g., M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1182 (Fed. Cir. 1993) (explaining that "the United States should be liable for fees the same as other parties when it abuses

associated with ferreting out the Government's discovery failures and dealing with its improper productions. All of this has resulted in extensive delays—the original fact discovery deadline was in *October 2009*—attributable in substantial part to issues with the Government's document production. In fact, since the Department unilaterally halted discovery in October 2010, virtually nothing has been done to move this case forward.

### CONCLUSION

This is not how discovery is supposed to work. For the reasons set forth here and in Honeywell's opening motion, this Court should actively supervise this matter and enter the relief requested in Honeywell's motion, including an order compelling the United States to preserve, search, and produce documents in accordance with the Federal Rules and appropriate sanctions.

Date: October 26, 2011

Respectfully submitted,

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discovery”) (quotations omitted); *see also Alexander v. FBI*, 186 F.R.D. 78, 87-89 (D.D.C. 1998) (awarding fees against the Government under Rule 37). Unsurprisingly, the Government's own hold notice in the *Second Chance* case warned that its “failure to meet document preservation obligations may result in *monetary* or other sanctions.” Morris Decl., Ex. 4 (9/5/07 Letter) (emphasis added). In any event, if the Government maintains it cannot be held liable for fees and costs, that would only underscore the prejudice of its discovery misconduct and the need for other sanctions.

**CERTIFICATE OF SERVICE**

This is to certify that on this 26th day of October, 2011, I electronically filed a true and correct copy of the foregoing by using the CM/ECF system, which will send a notice of electronic filing to attorneys for the United States that have appeared in this case.

/s Daniel A. Bress

Daniel A. Bress