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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 DARRYL CHERNEY,  
13 Plaintiff,  
14 v.

Case No. C-91-1057 CW (JL)

DECLARATION OF JAMES WHEATON  
IN SUPPORT OF PLAINTIFF'S  
OBJECTION TO DESTRUCTION OF  
EVIDENCE.

15 THE FEDERAL BUREAU OF  
16 INVESTIGATION, *et al.*,  
17 Defendants.

Date: September 8, 2010  
Time: 9:00 a.m.  
Dept: The Honorable James Larson

18 I, James R. Wheaton, declare under penalty of perjury of the laws of the state of California:

- 19 1. If called as a witness in this matter, I would competently testify as follows.
- 20 2. I am an attorney licensed to practice law in California and before this Court.
- 21 3. The First Amendment Project, for which I am Senior Counsel, was hired as Fee Counsel for  
22 Plaintiffs in this case. That is, FAP was hired on the day the verdict was handed down by the jury,  
23 to represent the Plaintiffs and all of their counsel in preparing and presenting a claim for fees and  
24 costs. That representation also came to include settlement negotiations directly with the defendants  
25 City of Oakland and the Federal Bureau of Investigation. In that latter role I was principally  
26 responsible for drafting the settlement documents and communicating directly with counsel for the  
27 Defendants. Mr. Joseph Sher was the sole contact for Plaintiffs on behalf of the FBI with respect  
28 to the settlement discussions.
4. Mr. Sher in his declaration provides a true and correct copy of the eventual final settlement  
agreement as it was reduced to writing and submitted to the Court as part of a Stipulated settlement.

1 The issue of distribution of the evidence was addressed in Paragraph 2.a., which reads:

2 2. Non-monetary relief

3 a. The City defendants have stated their intention to release all evidence  
4 gathered in the underlying criminal investigation to plaintiffs (save and except  
5 contraband items which plaintiffs would have no lawful authority to possess). This  
6 will be reduced to a writing between the plaintiffs and the City defendants. The City  
7 will itemize any items withheld and the parties will refer any disputes regarding  
8 withheld items for resolution to Magistrate Judge Larson.

9 5. That paragraph does not directly reference the FBI or any federal defendant for the following  
10 reasons.

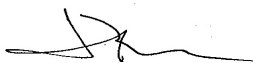
11 6. First, Mr. Sher stated that the underlying criminal investigation was being conducted by the  
12 City of Oakland Police Department. Furthermore that the FBI did not have its own investigation,  
13 but was serving solely to assist local law enforcement on such matters as evidence analysis.

14 7. Second, Mr. Sher stated that the evidence it had did not belong to the FBI, but rather to the  
15 local law enforcement agencies that had sent it to the FBI for analysis. Furthermore that the FBI  
16 could dispose of the evidence only by returning it to the local law enforcement agencies, and could  
17 neither destroy it nor enter into any agreement with a private party regarding its disposition.

18 8. In short, he stated, without equivocation, that all evidence would be returned to the local law  
19 enforcement agencies from whence it came. He did state that the FBI would resist releasing any  
20 evidence to private parties that consisted of unlawful contraband no private party could lawfully  
21 possess. What that evidence might be and whether its possession was or was not lawful was left to  
22 be decided in the future.

23 9. Therefore, the Settlement Agreement in paragraph 2.a. does not reference the federal  
24 defendants directly but places the specific obligations on the City of Oakland, where the parties  
25 contemplated all the evidence would be returned and which had ownership of the evidence..

26 I swear under penalty of perjury of the laws of the State of California that the foregoing is true and  
27 correct to the best of my knowledge, and was executed in Oakland California on August 23, 2010.

28 

JAMES R. WHEATON