

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STEVEN J. HATFILL, M.D.,

Plaintiff,

v.

**ATTORNEY GENERAL
ALBERTO GONZALEZ, et al.,**

Defendants.

**Case No. 1:03-CV-01793
(RBW)**

TONI LOCY’S MOTION TO STRIKE UNTIMELY SUPPLEMENTAL SUBMISSION

Non-party reporter Toni Locy, in confirmation of her motion to strike made in open court on July 9, 2007, moves the Court as follows:

1. To strike plaintiff’s untimely supplemental submission (Docket No. 194, Exhibit B), pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Local Rule 7(d); and
2. For such other and further relief which to the Court may seem just and proper, all of which more clearly appears in the Memorandum submitted herewith.

Dated: July 9, 2007

Respectfully submitted,
NIXON PEABODY LLP

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**MEMORANDUM OF POINTS AND AUTHORITIES OF TONI LOCY
IN SUPPORT OF MOTION TO STRIKE UNTIMELY SUPPLEMENTAL SUBMISSION**

Toni Locy (“Locy”), by counsel, submits this memorandum in support of her motion, made in open court on July 9, 2007, to strike plaintiff’s untimely supplemental submission (Docket No. 194, Exhibit B).

BACKGROUND

As the Court is aware, on May 9, 2007, plaintiff moved to compel Locy to submit to a second deposition despite the fact she had already testified, at length, that she could not recall the names of the source(s) who provided her with the information contained in the two articles at issue. Docket No. 157. Plaintiff’s supporting papers included deposition excerpts, in his attempt to demonstrate that he had exhausted all reasonable alternatives of information, as required by *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

In her response, Locy showed that plaintiff had failed to exhaust all reasonable alternative sources for the information he sought from Locy. Docket No. 169.

On June 4, 2007, plaintiff endeavored again to demonstrate exhaustion of alternative sources of information, and filed the deposition excerpts of 27 additional witnesses. Docket No. 187.

At the oral argument of the motion on July 3, Locy again demonstrated that plaintiff had failed to exhaust all reasonable alternative sources for the information he sought from Locy.

Now, well *after* oral argument on his motion (and almost two months after the motion to compel and more than one month after plaintiff filed his reply papers), plaintiff has attempted to supplement his motion with an additional 16 deposition transcript excerpts. Docket No. 194, Exh B.

ARGUMENT

The Federal Rules of Civil Procedure and this Court's Local Rules do not allow a party to file a supplemental production of evidence after filing its reply memorandum and after oral argument. Because the information contained in plaintiff's supplemental production could have – and should have – been provided earlier, and because allowing this late production would unduly prejudice Locy, it should be stricken.

This Court has routinely stricken supplemental filings made after the time for filing replies has expired. For example, in *DL v. District of Columbia*, 450 F. Supp. 2d 11 (D.D.C. 2006), three weeks after filing their reply, the defendants filed a supplemental memorandum. The Court granted a motion to strike, holding that the untimely submission violated the Federal Rules of Civil Procedure and this Court's Local Rules:

Under Local Civil Rule 7(d), defendants have “five days after service of the memorandum in opposition” to file their reply. This deadline means that the entire brief, including affidavits and attachments, must be filed within five days. Parties may seek an extension of time if they cannot comply with the deadline in the Rules but cannot delay filing the supporting documents for their

brief until whatever date they choose. See Federal Rule of Civil Procedure 6(b). In this case, defendants' Supplemental Reply was filed three weeks later, on January 17, 2006. Defendants did not request leave to file their Supplemental Reply nor did they request an extension of time within which to file this Supplemental Reply. Therefore, defendants' Supplemental Reply will be struck as untimely and filed without leave of the Court.

Id. at 20.

Similarly, in *Tax Analysts v. United States Dep't of Justice*, 759 F. Supp. 28 (D.D.C. 1991), the Court struck a supplemental memorandum that provided information that could have been included in prior submissions:

Plaintiff provides no reason why the case was not included in its application, nor did plaintiff seek leave of Court to file this supplemental memorandum. Plaintiff simply posits that because the Local Rules do not expressly forbid the filing of supplemental memoranda, and because the court and the clerk's office generally accept supplemental filings, the filing was proper. Plaintiff's argument, however, is overstated. It is true that this Court often accepts supplemental filings provided to apprise the Court of new developments that arguably could affect the Court's decision. However, plaintiff cannot seriously argue that parties have free rein to file whatever they may fancy, long after the issues are fully briefed under Local Rule 108. Such a practice would thwart the purpose of the rule.

Id. at 32.

The plaintiff's delay here is longer than that in *DL v. District of Columbia*, and much more prejudicial than the submissions in either *DL v. District of Columbia* or *Tax Analysts* because plaintiff seeks to offer additional evidence, and does so well after oral argument on his motion. Plaintiff well knew that he had the burden of showing exhaustion of alternatives before he filed his original motion, and before he filed his reply papers he well knew that Locy challenged his proofs in that regard. Indeed he attempted to overcome Locy's challenge by filing

voluminous evidence with his reply, when Locy's only opportunity to respond was at oral argument.

At oral argument, it became clear that plaintiff did not show that he exhausted his alternative sources of information as to Locy. He should not be permitted once again to supplement the record now, when Locy has no meaningful opportunity to respond to his belated offering.

CONCLUSION

For the foregoing reasons, Ms. Locy requests that this Court strike plaintiff's untimely supplemental submission.

Dated: July 9, 2007

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