

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

Steven J. HATFILL, M.D.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil No. 1:03-CV-01793 (RBW)
)	
Attorney General)	
Alberto GONZALES, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
)	

**PLAINTIFF’S MOTION TO
EXTEND DISCOVERY DEADLINE**

On August 13, 2007, the Court issued an Order and Memorandum Opinion compelling testimony from reporters Toni Locy, Daniel Klaidman, Michael Isikoff, Allan Lengel, and James Stewart. Specifically the Court ordered the reporters to “comply with the subpoenas issued to them by Dr. Hatfill and ... provide full and truthful responses to questions propounded to them by Dr. Hatfill’s attorneys.” Mem. Op. at 31 (Aug. 13, 2007). In its Opinion, the Court overruled each assertion of privilege that those reporters had invoked in refusing to identify their anonymous sources who leaked information regarding Dr. Hatfill in violation of the Privacy Act. As part of its ruling, the Court extended discovery for forty-five days from the date of its Order, *i.e.* until September 27, 2007. For the reasons stated below, Dr. Steven Hatfill hereby requests an extension of that discovery deadline.

1. In considering whether to grant a motion for a discovery extension, the Court primarily considers the diligence of the requesting party. *See Nat’l R.R. Passenger Corp. v. Expresstrak, L.L.C.*, No. 02-1773, 2006 WL 2711533, at *2 (D.D.C. Sept. 21, 2006). Where the discovery deadline “cannot reasonably be met despite the diligence of the party seeking the

extension,” the Court in its discretion may modify the deadline. *Id.* Here, despite Dr. Hatfill’s diligence, he is unable to complete the requested discovery within the existing deadline.

2. After the Court issued its August 13 Order, Dr. Hatfill promptly re-noticed the depositions of the five reporters and sought compliance with the document subpoenas that the reporters were ordered to obey. During the scheduling negotiations that ensued, two DOJ sources whose identities were subject to disclosure in the August 13 Order identified themselves to Dr. Hatfill’s counsel. Both sources have retained counsel, and Dr. Hatfill’s counsel is working with counsel for those two newly identified sources to schedule their depositions. However, in light of the scheduling conflicts with the sources and their counsel (and due to discovery-related issues discussed below) it may be impracticable to depose the sources during the existing discovery period. Because these sources may identify others who leaked information about Dr. Hatfill, or other reporters to whom they themselves leaked information, their testimony may result in the need to take additional depositions.

3. On September 12, 2007, after the identities of the two sources were confirmed under oath for the first time, Dr. Hatfill made a written request to counsel for agency defendants that they supplement certain discovery responses insofar as the two recently identified DOJ sources are concerned.¹ On September 14, 2007, agency counsel informed Dr. Hatfill’s counsel that agency defendants “intend to update their interrogatory responses,” but that their “information ... is limited by the fact that they have no current access to [the sources] who are separately represented by counsel.” Because the two sources are former DOJ employees, Dr.

¹ In response to certain discovery requests made by Dr. Hatfill, Agency counsel had previously objected on the grounds that that the requests were not “limited to calls to or from any particular official, employee, or agent of DOJ” and that, because “DOJ is a massive organization composed of dozens of components with offices across the country,” Plaintiff’s requests would require them to search for documents and records for “any of one of thousands of employees.” Such objections now are without merit as they relate to the two identified DOJ sources.

Hatfill's position is that the agency defendants are obliged to search records within their possession, custody, and control from the time those sources were employed by DOJ for requested documents relating to those sources, and that agency defendants must update any written responses to Dr. Hatfill's discovery to reflect information defendants possess relating to those sources. Defendants have stated that they "intend to inquire into whether the U.S. Attorney's Office may have additional responsive documents," but have offered no timetable for producing such documents or otherwise supplementing their prior discovery responses. Dr. Hatfill is entitled to obtain relevant documents relating to the now-identified sources prior to taking those sources' depositions and he awaits agency defendants' supplemental responses so that he can depose those now-identified sources thoroughly. And though he hopes such action will not be necessary, Dr. Hatfill also may be forced to move to compel supplemental responses from agency defendants should they fail or refuse to produce all relevant and responsive information and/or fail or refuse to provide other discovery updates pertaining to those now-identified, former-DOJ sources.

4. In addition, Dr. Hatfill is hopeful that additional sources may yet be identified, particularly by reporters Toni Locy, James Stewart, and Allan Lengel, all of whom have now refused to identify their confidential sources in violation of the Court's August 13 Order, but whose counsel has represented that confidentiality waivers from the sources are now being sought. Additional source identifications may also result from the September 7, 2007 Order of the U.S. District Court for the Southern District of New York (Hellerstein, J.), which ordered

Brian Ross of ABC News to disclose his sources, for substantially the same reasons as this Court ordered the other five reporters to do so.²

5. If the reporters cannot be induced to reveal the sources whose names are still unknown, Dr. Hatfill may be forced to file motions for orders to show cause why those witnesses should not be held in contempt and for sanctions pursuant to Federal Rule of Civil Procedure 37 in a further attempt to obtain this “important, and quite possibly essential” information. Mem. Op. at 15-16. Dr. Hatfill may also ask the Court to reconsider its prior decision that it was “premature to authorize the taking of depositions of corporate representatives of media companies when their specific reporters are already being compelled by this Court to provide testimony on the same subject.” Mem. Op. at 27. The Court recognized that, “depending upon the outcome of the reporters’ depositions, it may be necessary for the Court to revisit in the future whether corporate representatives of the media companies who employed the reporters when they disclosed the information concerning Dr. Hatfill to the public should be compelled to provide deposition testimony.” *Id.* at 28. Accordingly, Dr. Hatfill, in a further effort to obtain the sources’ identities, may move the Court to reconsider its decision quashing the subpoenas for documents and testimony from The Washington Post, CBS, Newsweek, and ABC News.

6. Extending the discovery deadline for Dr. Hatfill to pursue the identities of the remaining anonymous DOJ and FBI officials who leaked information about Dr. Hatfill will not affect any deadline set in this case. No schedule has been set for dispositive motions, pretrial conference, or trial. Dr. Hatfill has previously requested and been granted two discovery extensions, both arising from the refusal of media witnesses to identify their sources by name.

² Dr. Hatfill has proposed dates for Mr. Ross’s deposition to Mr. Ross’s counsel, but the deposition has not yet been scheduled.

7. Dr. Hatfill has conferred with agency defendants pursuant to Local Civil Rule 7(m), and agency defendants' counsel have informed Dr. Hatfill that they "take no position" on Dr. Hatfill's request for additional time.

8. Dr. Hatfill accordingly requests that the Court vacate the current discovery deadline of September 27, 2007, and set a status conference to take place November 12, 2007. The parties shall continue discovery during that 45-day period and can apprise the court of the status of the on-going discovery at the status conference. The Court then can determine whether discovery has been completed or whether additional time for discovery is necessary.

Dated: September 17, 2007

Respectfully submitted,

/s/ Charles T. Kimmett
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