

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**MEMORANDUM IN SUPPORT OF PLAINTIFF STEVEN HATFILL’S MOTION THAT
TONI LOCY BE HELD IN CIVIL CONTEMPT**

On August 13, 2007, the Court ordered Ms. Locy (and four other reporters) “to comply with the subpoenas issued to them by Dr. Hatfill and to provide full and truthful responses to questions propounded to them by Dr. Hatfill’s attorneys.” Order, August 13, 2007. Ms. Locy, however, refused to obey the Order. Because Ms. Locy willfully disobeyed a clear and specific Order which was clearly known to and understood by her, civil contempt sanctions are warranted to compel obedience to the Court’s Order.

Federal courts have “have embraced an inherent contempt authority... as a power ‘necessary to the exercise of all others.’” *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994) (citations omitted). It is also expressly provided by 18 U.S.C. § 401(3), 28 U.S.C. § 1826, and the first sentence of Fed.R.Civ.P. 45: “(e) **Contempt.** Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.”

Civil contempt proceedings involve three stages:

(1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a

specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.

N.L.R.B. v. Blevins Popcorn Co., 659 F.2d 1173, 1184 (D.C. Cir. 1981). In this case, the Court issued the relevant Order on August 13, and Ms. Locy has brought matters to this second stage by disobeying the Order. The Court should now find her in contempt and specify a penalty to coerce Ms. Locy's compliance.

I. MS. LOCY IS IN CONTEMPT OF THE COURT'S AUGUST 13, 2007 ORDER

“The party seeking a finding of contempt has the burden of demonstrating, by clear and convincing evidence, that: (1) the Court's order was reasonably clear and specific; and (2) the alleged contemnor failed to comply with the Court's order.” *Lee v. Department of Justice*, 401 F. Supp. 2d 123, 131 (D.D.C. 2005) (citing *SEC v. Bankers Alliance Corp.*, 881 F.Supp. 673, 678 (D.D.C. 1995), and *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980)). *See also Food Lion v. United Food and Commercial Workers, et al.*, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (rejecting argument that movant must demonstrate bad faith by contemnor). There is no doubt that the standard is met here.

The Order was perfectly clear and specific: “to comply with the subpoenas issued to them by Dr. Hatfill and to provide full and truthful responses to questions propounded to them by Dr. Hatfill's attorneys.” Order, August 13, 2007. Ms. Locy testified that she had reviewed the Order in question before the deposition. Ex. A (Locy Dep. Excerpts), 184:2-5. She was even provided a copy of the Order at the deposition. *Id.* at 186:1-20. Ms. Locy testified that she understood the Order's requirements:

Q Do you recognize that document?

A Yes.

- Q What is it?
A It's the court order.
Q You understand that that's the order in which Judge Walton ruled on your assertion of reporter's privilege?
A Yes.
Q You understand that he's overruled your objections and ordered you to answer my questions.
A Yes.
Q You understand that he's held that neither the Constitution nor the common law allow you to withhold the names of your FBI or DOJ sources?
A Yes.

Id. at 186:13-187:7. There is, therefore, no ambiguity that the first half of the test for contempt is satisfied by clear and convincing evidence here.

The evidence of the second requirement – that the alleged contemnor failed to comply with the Court's order -- is equally clear and convincing. Ms. Locy was asked the following question: “Q: Ms. Locy, tell me the source, the names of your sources at the Department of Justice regarding your anthrax investigation reporting.” *Id.* at 188:6-9. After an interjection by her counsel, she read a prepared statement in which she made clear that her position that “[r]efusing to answer is the only way for me to have an appeals court decide whether I must reveal confidential sources who may not have provided the information at issue in this case.” *Id.* at 188:21-189:3. The record of her failure to comply is exceptionally clear:

- Q To be clear for the record, the question you're refusing to answer is: What are the names of your sources at the Department of Justice regarding your anthrax investigation reporting.
A That's correct.
Q And you refuse to answer that question?
A That's correct.

Id. at 189:7-15. *See also id.* at 189:16-190:12 (refusing to disclose the identities of her FBI sources).

It is beyond dispute that this Court's Order was clear and specific and that she has failed to obey it. The only question is what sanction is required to compel respect for the Court's Order and to compensate for the harm occasioned by her recalcitrance.

II. THE COURT SHOULD ORDER COERCIVE AND COMPENSATORY SANCTIONS

“Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.” *United States v. Mine Workers*, 330 U.S. 258, 303-304 (1947) (citation omitted). “[T]he award of costs and attorney's fees” has been found “[a]n appropriate amount” to accomplish the compensatory purpose of such sanctions. *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F. Supp. 2d 70, 86 (D.D.C. 2003).

A. Coercive Sanction

A “per diem, coercive fine... is the epitome of a civil sanction” for contempt. *Pigford v. Veneman*, 307 F. Supp. 2d 51, 57 (D.D.C. 2004). The Supreme Court has described a “per diem fine imposed for each day a contemnor fails to comply with an affirmative court order” as “[a] close analogy to coercive imprisonment...” *Bagwell*, 512 U.S. at 829. “Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged.” *Id.*

Ms. Locy's willful defiance will not end until she is compelled to end it:

Q You understand that if you refuse to tell me the names of your FBI and DOJ sources, you'll be disobeying the judge's order.

A I understand.

Q You understand that you might suffer the consequence of being found in contempt of court.

A I understand.

Ex. A., 187:12-20. Moreover, she committed herself to this course of action despite the admission that *she did not even know whether any of her former DOJ or FBI sources still object* to her testifying truthfully as to their identity, because she has “just begun the process of reaching out to people.” *Id.* at 200:22-201:19. But it is not clear that Ms. Locy defers to the desires of the disclosing officials themselves any more than to the ruling of this court. Even after reading FBI official Debra Weierman’s sworn testimony waiving any promise of confidentiality from a reporter, Ms. Locy still refused to answer the question “whether Ms. Weierman was a source you used in your reporting on the anthrax investigation?” *Id.* at 205:21-207:21.

Ms. Locy’s determination to hide the identities of these malfeasant public officials is so strong that she also refused to answer questions about her contacts with four of her former sources in the days preceding the deposition. As noted above, Ms. Locy revealed that she had “begun the process of reaching out to people” (the Friday before her Monday deposition) who were “sources” on “various stories.” *Id.* at 192:16-194:5. She testified that “[t]hree of the four are FBI,” *id.* at 193:2-3, yet refused to reveal whether they were current or former FBI officials. *Id.* at 199:4-19.¹ She refused to disclose anything about where the fourth person worked, and in particular, whether that person was affiliated with DOJ. *Id.* at 193:4-194:5. She testified that she “ha[d] no waivers,” *id.* at 192:9-10, but invoked the attorney work-product doctrine and refused

¹ Ms. Locy’s counsel subsequently informed Dr. Hatfill’s counsel that one of Ms. Locy’s sources consented to her obeying the Court order as to him and that he is a former DOJ official who had also recently identified himself to Dr. Hatfill’s counsel as one of the sources for another of the reporters subject to the August 10, 2007 Order. (*See* Plaintiff’s Motion to Extend Discovery Deadline ¶2, (Dckt # 203) Sept., 17, 2007). Counsel later provided the identity of one of Ms. Locy’s FBI sources, too. Ms. Locy refuses, however, to reveal the identity of her remaining FBI or DOJ sources.

to disclose whether she had even *asked* for such waivers – or anything else about her communications with these four people. *Id.* at 195:14-196:8.²

This entrenched defiance calls for coercion at this stage, but not punishment. *See Bagwell*, 512 U.S. 821 (1994) (analyzing punitive criminal contempt and coercive civil contempt). In order to maximize the likelihood of obtaining Ms. Locy’s rapid compliance with this Court’s decision, and in keeping with past precedent, Dr. Hatfill asks that the Court first impose an escalating *per diem* fine. *See Pigford*, 307 F. Supp. 2d at 54 (adopting fine of \$1,000 per day for first month of contempt, increasing by \$1,000 for each subsequent month the contempt continued unpurged). In particular, Dr. Hatfill asks for a fine of \$1,000 per day for the first week of continued contempt, \$2,000 per day for the second week, escalating in \$1,000 increments for each subsequent week. There are several reasons to adopt an escalating *per diem* fine but with a more rapid escalation than in *Pigford*.

First, it is important that the recalcitrant witnesses’ defiance comes to a very rapid end. This case is now more than four years old, and the risk of further prejudicial loss of evidence is significant.

Second, purging the contempt is markedly easier here than was the case in *Pigford*. In *Pigford*, the contemnors were class counsel required to prepare and file certain petitions and notices of withdrawal. *Id.* at 54. Here, Ms. Locy has merely to name the DOJ and FBI officials who provided her information about their anthrax investigation.

Third, the law in this Court and this Circuit is clear. *See Lee v. DOJ*, 413 F.3d 53 (D.C. Cir. 2005). Thus there is no legal justification for Ms. Locy to arrogate to herself a right to disobey the Court’s order to obtain an appeal.

² Dr. Hatfill asks that this attorney-work-product objection be overruled summarily.

Finally, the risk of industry support for Ms. Locy's contempt calls for one additional measure: the Court should prohibit Ms. Locy's solicitation or acceptance of any reimbursement for any contempt fines it should levy. *Cf. Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 914 F. Supp. 1172, 1179-80 (E.D.Pa. 1996) (prohibiting party assessed discovery sanctions from accepting any reimbursement from any other source), *In re HCMA (Carolina), Inc.*, 301 B.R. 764, 767 (Bankr. D. P.R. 2003) (prohibiting contemnor from seeking or accepting reimbursement for civil contempt sanctions). If the media industry is allowed to underwrite her defiance, fines in the range suggested here will have no coercive effect at all. (Alternatively, if the Court is disinclined to prohibit third-party reimbursement of the penalties, then the fines should begin at \$10,000 per day and the *per diem* amount should increase by \$5,000 for each week of continued defiance.)

Finally, in the event that coercive fines do not prove sufficient to enforce the Court's August 13 Order, Dr. Hatfill proposes that the Court set a status conference no later than 60 days after the imposition of the contempt Order. The Court can, at that time, assess whether additional sanctions are required to accomplish compliance.

B. Compensatory Sanction

At this stage, Dr. Hatfill seeks attorneys' fees and costs to compensate him for the harm suffered to date. "It is well-established that courts may award attorneys' fees and expenses in conjunction with a civil contempt proceeding." *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 70, 86 (D.D.C. 2003). If Ms. Locy's contempt continues, then the resultant harm to Dr. Hatfill will obviously grow, possibly to the point of frustrating Dr. Hatfill's ability to complete the prosecution of his underlying claim. Dr. Hatfill therefore seeks an award of his costs and

fees associated with Ms. Locy's second deposition and this motion, without prejudice to his right to seek further compensatory contempt sanctions from Ms. Locy later in this matter should her continued disobedience to this Court's Order cause him further damages. Dr. Hatfill's counsel will prepare a Bill of Costs for the contempt-related attorneys' fees and costs at the Court's instruction.

III. CONCLUSION

For the reasons state above, this Court should vindicate its authority by ordering Ms. Locy to show cause why she should not be held in contempt. Should she not obey the Order before the hearing on the motion, she should be held in contempt on the hearing date, and she should be subject to contempt sanctions as described above and provided for in the attached proposed Contempt Order.

Dated: September 25, 2007

Respectfully submitted,

/s/ Patrick O'Donnell

Thomas G. Connolly, D.C. Bar # 420416
Mark A. Grannis, D.C. Bar # 429268
Patrick O'Donnell, D.C. Bar #459360
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036
Telephone: (202) 730-1300
Facsimile: (202) 730-1301

Counsel for Steven J. Hatfill, M.D.