IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN J. HATFILL, M.D.,	)	
Plaintiff,	)	**Case No. 1:03-CV-01793 (RBW)**
v.	)	
MICHAEL MUKASEY ATTORNEY GENERAL, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY JAMES STEWART'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, OPPOSITION TO PLAINTIFF'S CONTEMPT MOTION

Non-party James Stewart, through his undersigned attorneys, respectfully submits this memorandum of law in support of his motion for reconsideration of the Court's Order dated August 13, 2007 (Dkt. 201) ("Order"), and in opposition to Plaintiff's Motion that James Stewart be Held in Civil Contempt (Dkt. 204) ("Motion").

SUMMARY OF ARGUMENT

In a discovery ruling dated August 13, 2007, the Court considered whether the qualified First Amendment privilege for confidential news sources held by various non-party journalists could be overcome on the record of this case. The Court concluded that plaintiff Steven J. Hatfill, like the plaintiff in *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 2351 (2006), had overcome the constitutional privileges of various non-party reporters – including the privilege held by former CBS News correspondent James Stewart – to protect the identities of their confidential sources because "the names of the sources are central to Dr. Hatfill's case" and because he had

"exhausted all reasonable alternative means of acquiring the sources who leaked the information that is the subject of this litigation." Memorandum Opinion dated August 13, 2007 (Dkt. 202) ("Decision") at 15-16.

As it applies to Mr. Stewart, the Court's decision was based on his declination to disclose the sources of information reflected in a May 8, 2003 news report broadcast on the CBS Evening News. In that broadcast, Mr. Stewart reported that Dr. Hatfill "remains the FBI's number-one suspect in the attacks, even though round-the-clock surveillance and extensive searches have failed to develop more than what is described as a highly circumstantial case." *See* Declaration of Lee Levine ("Levine Decl.") Exhibit 1 ("5/8/03 Broadcast"). The broadcast went on to report that FBI agents "[p]rivately" had confirmed that "they believe they already have their man, even if they never get his indictment," and that the government "could bring charges against Hatfill unrelated to the anthrax attacks at all if they become convinced that's the only way to stop future incidents." *Id.*

Since this Court granted Dr. Hatfill's motion to compel Mr. Stewart to disclose the identities of the sources of these broadcast statements, both the evidentiary record and the law governing this case have changed in a material way, fundamentally altering the assumptions on which the Court's decision was based. First, after the Court's decision, three different senior Department of Justice ("DOJ") and/or FBI officials have voluntarily waived promises of confidentiality they secured from non-party reporters in this case, including Mr. Stewart. Each has now been deposed under oath: One asserted a Fifth Amendment privilege against self-incrimination in response to all questions related to whether he disclosed the information at issue to reporters; one testified that he confirmed certain such information for reporters; and a third testified that he spoke with reporters (sometimes on background, and frequently with Mr.

Stewart) but could not recall what he told them about Dr. Hatfill specifically or about the anthrax investigation more generally. Taken together with (1) the previous testimony of five reporters, including Mr. Stewart, that *all of the disclosures cited by Dr. Hatfill as pivotal to his case* were made by at least one of these three sources, and (2) the previous testimony by three additional DOJ and/or FBI officials that they too made analogous disclosures about Dr. Hatfill to the press and public, the record in this case now contains substantial evidence that *all* the categories of disclosures at issue were in fact made by specifically identified employees of the defendant agencies. The issue of whether those disclosures constitute violations of the Privacy Act can now fairly be litigated without additional testimony from Mr. Stewart.

In this dispositive manner, the evidence in this case is now materially different from the record before the Court of Appeals in *Lee v. Department of Justice.* That record, which contained *no* evidence as to the identities of *any* sources who had provided information about Dr. Lee to the press or even as to the identities of the agencies in which they were employed, formed the predicate for the D.C. Circuit's determination that disclosure of the identities of confidential sources in that case was "clearly central" to Dr. Lee's ability to prosecute his claim. 413 F.3d at 57. In the circumstances that now govern this case, in contrast, the identities of Mr. Stewart's remaining confidential sources cannot reasonably be held to be central to Dr. Hatfill's case, not when he has now discovered the identities of, and has taken sworn testimony from, no less than six employees of the defendant agencies who collectively are alleged to be responsible for all of the categories of disclosures about which Dr. Hatfill complains.

Second, the D.C. Circuit has now ruled for the first time that a litigant such as Dr. Hatfill can maintain a claim under the Privacy Act only when the information on which that claim is based was "located in records *retrievable by [plaintiff's] name*." *Sussman v. U.S. Marshals*

Serv., 494 F.3d 1106, 1123 (D.C. Cir. 2007) (emphasis in original). In this case, Mr. Stewart is before the Court because Dr. Hatfill alleges that the FBI violated the Privacy Act when, in May 2003, its agents confirmed to Mr. Stewart that Dr. Hatfill was the principal suspect in the government's investigation of the 2001 anthrax mailings, that they believed he was the perpetrator, and that they might ultimately bring charges against him unrelated to the attacks themselves. Dr. Hatfill has, however, offered no evidence that such information has ever been maintained in a file "retrievable by [his] name," as now required by the Court of Appeals in order for him to state a claim under the Privacy Act. Indeed, although he has sought such information from the agency defendants in discovery, this Court has specifically denied his motion to compel them to provide it on the grounds that it is subject to a law enforcement privilege. *See* Dkts. 139, 144. In the absence of such evidence demonstrating that Dr. Hatfill can succeed in proving an essential element of his Privacy Act claim with respect to the information disclosed to Mr. Stewart, further testimony from him cannot fairly be viewed as "central" or "crucial" to proving that claim, a prerequisite to overcoming Mr. Stewart's constitutional privilege. *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); Decision at 3-4.

At the very least, therefore, the intervening decision in *Sussman* requires this Court to revisit its earlier discovery ruling and consider afresh Dr. Hatfill's contention that he is entitled to ascertain from the FBI whether the information at issue resides in an agency record retrievable by his name. If he is, we will know soon enough whether Dr. Hatfill has made the requisite showing to divest Mr. Stewart of his constitutional privilege. If he is not, we will know for certain that Dr. Hatfill cannot make that showing as a matter of law.

Given these material intervening events, this Court may properly reconsider its interlocutory discovery order as it applies to Mr. Stewart under the governing "flexible standard"

that contemplates such non-final decisions will be revisited "'as justice requires.'" *Radtke v. Caschetta*, No. 06-2031, 2007 WL 2071700, *2 (D.D.C. July 17, 2007) (citation omitted); *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004). Such reconsideration based on changed circumstances is particularly appropriate in the context of a contempt proceeding such as this. *E.g.*, *Mercer v. Mitchell*, 908 F.2d 763, 769 (11th Cir. 1990) ("a defendant should always be given an opportunity to show that changed circumstances would make holding him in contempt unjust"). And, even if the Court decides not to reconsider its Order, it retains ample discretion to decline to hold Mr. Stewart in contempt in light of a balancing of the equities including, as the record of discovery in this case now demonstrates, that Mr. Stewart's conceded failure to comply fully with the Court's order, itself necessary to preserve his assertion of privilege for appellate review, has and will cause Dr. Hatfill no material harm in the face of the other evidence now available to him. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827-28 (1994) (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)); *Pigford v. Veneman*, 307 F. Supp. 2d 51, 60 (D.D.C. 2004).

In this case, moreover, the equities weigh decisively against contempt for the additional reason, which we address further below, that the disclosures at issue with respect to Mr. Stewart were made to him in the first instance by Dr. Hatfill and his counsel and then merely confirmed by Mr. Stewart's FBI sources. *See* pp. 7-10, *infra*. Put simply, in the case of Mr. Stewart, Dr. Hatfill seeks contempt sanctions against a news reporter whose testimony he no longer needs, for a failure to testify that has done him no harm, arising from disclosures he himself instigated. Under such circumstances, the Court can and should properly exercise its discretion not to impose contempt sanctions.

Finally, should the Court nevertheless decide that Mr. Stewart must be held in contempt, the law of this Circuit, including the Court of Appeals' decision in *Lee*, establishes that the appropriate course is to impose a monetary sanction of $500 per day and to stay its imposition pending appeal. Because the willingness of a witness to risk civil contempt to preserve appellate review of a privilege claim is "a familiar procedure," *Maness v. Meyers*, 419 U.S. 449, 463 (1975), the courts of this Circuit have long recognized that it is premature to impose onerous sanctions prior to final adjudication of the merits of a journalist's invocation of the reporters' privilege in the appellate courts. *See, e.g.*, *Lee v. DOJ*, 401 F. Supp. 2d 123, 144 (D.D.C. 2005) (staying $500 daily sanction against journalist Walter Pincus for 30 days or until completion of appellate proceedings, and deferring consideration of request for compensatory sanctions) (Collyer, J.); *Lee v. DOJ*, 327 F. Supp. 2d 26, 33 (D.D.C. 2004) (same, with regard to five other journalists) (Jackson, J.).

STATEMENT OF FACTS

A. The Alleged Disclosure of Privacy Act Information to Mr. Stewart

During the course of this litigation, Dr. Hatfill has identified three CBS News broadcasts reported by Mr. Stewart as potentially relevant and has obtained substantial testimony from him about their genesis. The news reports at issue were all broadcast in mid-2003, almost two years after the anthrax attacks themselves and long after Dr. Hatfill had become the focus of extensive media scrutiny. *See* 5/8/03 Broadcast; Levine Decl. Ex. 2 ("6/9/2003 Broadcast"); Levine Decl. Ex. 3 ("7/2/2003 Broadcast"). In his deposition in this case, Mr. Stewart explained that much of the information contained in these three reports either came from sources he was free to disclose – including an FBI press officer, the *New York Times*, and Dr. Hatfill's own counsel – or did not

concern Dr. Hatfill at all, but asserted a privilege with respect to the identities of the FBI sources for the first of these three reports, which was broadcast on May 8, 2003.[1]

The May 8, 2003 broadcast reported that FBI agents had confirmed "[p]rivately" that "they believe they already have their man, even if they never get his indictment." 5/8/03 Broadcast. It further explained that Dr. Hatfill "remains the FBI's number-one suspect in the attacks, even though round-the-clock surveillance and extensive searches have failed to develop more than what is described as a highly circumstantial case." *Id.* Finally, the broadcast reported that "sources suggest" the FBI could bring unrelated charges against Dr. Hatfill if they conclude he is guilty, not unlike the tax charges brought against Prohibition-era gangster Al Capone. *Id.*

This broadcast was the culmination of a series of events commencing the previous August when, in the wake of multiple public statements by then-Attorney General Ashcroft identifying Dr. Hatfill as a "person of interest" to the anthrax investigation, Dr. Hatfill held a press conference of his own, which Mr. Stewart attended. Stewart Decl. ¶ 3. At that press conference, Dr. Hatfill announced on national television that the FBI had wrongly made him its

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[1] Mr. Stewart's deposition testimony revealed that neither of the other broadcasts about which he was questioned contained information about Dr. Hatfill provided by confidential sources. Specifically, Mr. Stewart's June 9, 2003 broadcast reported that the FBI had recovered from a Maryland pond a "rectangular translucent plastic storage box with a snap-on lid and a hand-sized hole cut in one end." 6/9/2003 Broadcast. There is, however, no suggestion in the broadcast that the box or the pond had anything to do with Dr. Hatfill, and Mr. Stewart testified that he has no reason to believe that any of his confidential sources told him anything about Dr. Hatfill in connection with its preparation. *See* Levine Decl. Ex. 4 ("Stewart Dep.") at 74:9-85:5. By the same token, Mr. Stewart testified that the information about Dr. Hatfill contained in his July 2, 2003 broadcast all came either from an article in that day's *New York Times* or from an FBI press officer who talked to him *on the record*. *See generally* William J. Broad, David Johnston & Judith Miller, *Subject of Anthrax Inquiry Tied to Anti-Germ Training*, N.Y. TIMES, July 2, 2003, at A1; Stewart Dep. at 87:14-16; *id.* at 87:16-19, 88:15-89:14, 90:2-15, 91:11-14. In short, the record in this case is undisputed that Mr. Stewart received no information about Dr. Hatfill for either of these reports from confidential sources.

leading suspect, had subjected him to around-the-clock surveillance, and was likely going to prosecute him on trumped-up charges unrelated to the anthrax attacks themselves:

> I am openly followed by FBI agents in cars and on foot, 24 hours a day. . . . I am being tailed 24/7. My closest friend was told by the FBI that they have firm evidence that I mailed the anthrax letters.
>
> . . . .
>
> I believe I may actually get arrested when all is said and done. If this occurs, it will have nothing to do with anthrax. . . . If Steve Hatfill isn't the anthrax murderer, well, he spit on the sidewalk or littered or did something else he shouldn't have done.

Levine Decl. Ex. 5 at 9, 15.

In the months following Dr. Hatfill's press conference, Mr. Stewart spoke with his press spokesman, Pat Clawson, and his then-attorney, Victor Glasberg, on several occasions. Stewart Decl. ¶ 4. Both of them, purporting to speak on behalf of Dr. Hatfill, consistently reiterated that he "had become the FBI's leading suspect, that the government had focused most of its attention on Hatfill, and that, as a result, no effort was being made to identify and apprehend the actual perpetrator." *Id.* On October 6, 2002, Mr. Stewart prepared a report for the CBS Evening News in which he highlighted Mr. Glasberg's criticisms of the FBI's conduct vis-à-vis Dr. Hatfill. Levine Decl. Ex. 6 ("10/6/02 Broadcast"). At the same time, Mr. Stewart attempted unsuccessfully to convince Dr. Hatfill's representatives to make him available for an interview on 60 MINUTES II, a news program that allowed for such long-form interviews, during which he could tell this story to the program's national audience. Stewart Decl. at ¶ 5.

By early 2003, Tom Connolly had replaced Mr. Glasberg as Dr. Hatfill's counsel. Mr. Stewart spoke with Mr. Connolly several times by phone and had two lunch meetings with him, including a January 2003 lunch meeting attended by Dr. Hatfill. *Id.* at ¶¶ 6, 8. During their several conversations and meetings, Mr. Connolly – citing his own FBI sources – emphasized that Dr. Hatfill had wrongly been targeted by the agency as the leading suspect in the anthrax

attacks, had been forced to endure constant surveillance as a result, and faced the possibility of prosecution for an unrelated crime:

> In many of these conversations, and at both lunch meetings, Connolly told me that the FBI and DOJ had targeted Hatfill despite the fact that there was no evidence to support the proposition that Hatfill was the anthrax mailer. He stated as a fact that the government had made Hatfill its primary suspect and, as a result, had made his life miserable. In that regard, Connolly told me that he had his own FBI sources who had told him that the Bureau was now focusing its investigation virtually entirely on Hatfill to the exclusion of other potential suspects and that, if necessary, the government was prepared to indict Hatfill on charges unrelated to the mailings. Connolly detailed for me at great length the FBI's ongoing and constant surveillance of Hatfill, the toll it had taken on him, his friends, and his family, as well as the potentially disastrous consequences of the government's failure to pursue other leads and identify the actual perpetrator. *Virtually every time I talked with him, Connolly encouraged me to report on these subjects.*

Id. at 6 (emphasis added). *See also id.* at ¶ 8 (during January 2003 lunch, Mr. Connolly "again reiterated his fear, based on information he said he received from his own sources at the FBI, that the government would eventually indict Hatfill for some unrelated crime in order to save face").

Throughout this period, Mr. Stewart attempted to persuade Mr. Connolly that Dr. Hatfill should agree to be interviewed by Mr. Stewart for the purposes of a broadcast on 60 MINUTES II. Although Mr. Connolly expressed interest in this proposal, and purported to be considering it for several months, by the spring of 2003, he had stopped returning Mr. Stewart's calls. During that same period, Mr. Stewart contacted his own "sources within the FBI to ascertain whether the information that Connolly had provided . . . about Hatfill's status and situation was accurate." *Id.* at ¶ 9. As Mr. Stewart testified in this action, his sources confirmed that Dr. Hatfill had become the FBI's leading suspect because investigators believed he was in fact the perpetrator and made a "'grudging' admission" that unrelated charges were "a possibility" although "it did not seem to be a terribly viable one to them." Levine Decl. Ex. 4 ("Stewart Dep.") at 71:11-20. This confirmation of information initially provided by Dr. Hatfill

and his counsel represents the sole "disclosure" upon which he now seeks to have this Court hold Mr. Stewart in contempt.

B. The Court's Order

The Court's Order granting Dr. Hatfill's motion to compel Mr. Stewart and four other reporters to disclose the identities of their confidential sources noted generally that Dr. Hatfill's discovery efforts had "revealed numerous leaks from government officials to the press regarding personal information about Dr. Hatfill, his status in the anthrax investigation, and the techniques used to investigate his possible involvement in the events related to the anthrax mailings." Decision at 15. These discovery efforts included testimony from six reporters concerning "over 100 separate disclosures about Dr. Hatfill that they received directly from either FBI or DOJ sources, purportedly in violation of the Privacy Act." *Id.* Dr. Hatfill had characterized these disclosures to the Court as falling into three categories: (1) reports about the FBI's use of bloodhounds; (2) reports about searches of a pond near Frederick, Maryland; and (3) anonymous explanations "of why [Hatfill] should be understood as the likely Anthrax Killer." Plaintiff's Memorandum in Support of Plaintiff's Motion to Compel Discovery and Overrule Defendants' Assertion of Law Enforcement Privilege (Dk. 130) at 8-18 (incorporated by reference by Motion to Compel Further Testimony (Dk. 157-3) at 3). At the time this Court decided that the qualified reporters' privilege recognized in this Circuit had been overcome, and therefore ordered five journalists – including Mr. Stewart – to disclose the identities of their confidential sources, "all of [Dr. Hatfill's] efforts ha[d] failed to reveal the names of the sources who leaked this information." Decision at 15.

Relying on the Court of Appeals' decision in *Lee v. Department of Justice* as "unequivocal guidance and instruction" on the privilege's application in such a situation, the Court determined that establishing "the actual identity" of confidential news sources who

disclosed information about Dr. Hatfill "will be important, and quite possibly essential, in proving his Privacy Act claims." *Id.* at 15-16. The Court concluded that Dr. Hatfill, like the plaintiff in *Lee*, had overcame the privileges asserted by the various non-party reporters – including the privilege held by Mr. Stewart – because "the names of the sources are central to [his] case" and because Dr. Hatfill had "exhausted all reasonable alternative means of acquiring the sources who leaked the information that is the subject of this litigation." *Id.* at 15-17. Accordingly, the Court granted Dr. Hatfill's motion to compel further testimony from journalists Michael Isikoff, Daniel Klaidman, Allan Lengel, Toni Locy, and Mr. Stewart, ordering each of them "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 at 1.

C. Three Confidential Sources Have Now Been Identified and Have Been Deposed in this Action

Following this Court's Order, the identities of three confidential sources who had provided information to one or more of these journalists were revealed to Dr. Hatfill – former United States Attorney for the District of Columbia Roscoe Howard; Dan Seikaly, the former chief of the Criminal Division of that office; and Ed Cogswell, the former unit chief of the FBI's national Press Office. These sources, all of whom were at all relevant times public officials employed by the DOJ and/or the FBI, waived the benefits of the promises of confidentiality they had received and voluntarily appeared for deposition in this case. One of them, Mr. Cogswell, had received a promise of confidentiality from Mr. Stewart. Stewart Decl. ¶ 16; *see also* Levine Decl. Ex. 7 ("Cogswell Dep.") at 86:9-87:2 (waiving promises of confidentiality made to him by Mr. Ross, Ms. Locy, and Mr. Stewart with regard to anthrax reporting). As we describe in some detail in the pages that follow, the state of the record with respect to the categories of disclosures upon which Dr. Hatfill has based his claims – the FBI's use of bloodhounds that allegedly

reacted to him, the FBI's search of a pond that allegedly was connected to him, and the FBI's characterization of him as its principal suspect – has, as a result of the recent depositions of these three former employees of the defendant agencies, been altered dramatically since the Court's ruling on the motions to compel these reporters to provide additional testimony.[2]

1. Evidence of Disclosures about the FBI's Use of Bloodhounds to Investigate Dr. Hatfill

Dr. Hatfill has now amassed substantial evidence that identified employees of the Department of Justice disclosed to journalists that the FBI had used specially trained bloodhounds to investigate him, that the bloodhounds visited specific locations where Dr. Hatfill had been present and picked up his scent, and that the bloodhounds subsequently reacted in a material way to Dr. Hatfill himself. This information was originally reported to the public by *Newsweek* magazine, in an article co-authored by Messrs. Klaidman and Isikoff, who have testified that their information came from confidential sources now identified as Messrs. Seikaly and Howard. Both of these former DOJ officials have now been deposed. Mr. Howard confirmed that he talked with Mr. Isikoff about the use of bloodhounds, *see* Levine Decl. Ex. 8 ("Howard Dep.") at 83:6-18, 84:4-8, 144:10-14,[3] and Mr. Seikaly invoked his Fifth Amendment

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[2] For reasons unknown to Mr. Stewart, Dr. Hatfill has sought to hold only two of the six reporters that have been ordered to provide further testimony in contempt, him and Ms. Locy. Both of them, like several of their colleagues, have secured waivers of their pledges of confidentiality from and have therefore disclosed to Dr. Hatfill some, but not all of their sources. Despite Dr. Hatfill's misleading suggestion to the contrary, *see* Motion at 4 & 5 n.1, it is undisputed that Mr. Stewart has made a good faith effort to secure waivers from his sources and has succeeded in obtaining a waiver from one of them. *See* Stewart Decl. ¶¶ 15-16.

[3] Mr. Howard testified in some detail concerning how he came to speak to reporters generally, and to Mr. Isikoff specifically, about Dr. Hatfill and his role in the anthrax investigation:

> [U]sually what would happen is you'd get a call. They'd say we're going to run a story on this, and I'd say don't do that, that's wrong. But when you're asking me what they were, no, I don't – I can't remember, you know, specifically anything now. I mean, it's not like I took notes or wrote them down. Usually somebody was about to run a

privilege against self-incrimination in response to every question put to him on the subject of his communications with Mr. Klaidman and other reporters, *see* Levine Decl. Ex. 9 ("Seikaly Dep.") at 91:16-20 ("I'm going to exercise my Fifth Amendment privilege on any questions arising out of this [news report] and my involvement or not in any information contained in it."); *id.* at 75:3-7, 79:2-90:6, 92:7-96:1, 97:15-98:14 (asserting privilege as to whether he acted as a source with respect to the anthrax investigation or Dr. Hatfill's role in it for other reporters); 74:5-16 (asserting privilege as to whether he knows of other DOJ or FBI employees who served as sources to the press about the investigation).[4]

In the wake of these depositions, Mr. Klaidman's testimony about the disclosures made to him by employees of the Department of Justice stands unrebutted. At the very least, therefore,

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> story. They were trying to get confirmation of something, they would want to see if it was right and I'd go don't do that. I mean, that's about as good as I can give you.
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> . . . .
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> Q: And in order to get, for example, Mr. Isikoff not to run a story that was wrong, did you have to tell him what was right?
>
> A: Well, sometimes, yeah.
>
> . . . .
>
> And so yes, in a general sense – I mean, did I sit there and talk about Steven Hatfill? Did I talk about the dogs? Yes. Did I talk about the investigation and where we were going? Yes.

Howard Dep. at 83:6-18, 84:4-8, 144:10-14; *see generally id.* at 8:1-9:19, 170:15-22, 243:2-244:3, 244:14-245:5 (identifying himself as a confidential source for several reporters and waiving promises of confidentiality).

[4] Mr. Seikaly similarly asserted his Fifth Amendment privilege in response to questions about his own intent in making these disclosures, *see* Seikaly Dep. at 124:12-126:9, 127:2-16, 129:17-131:14, 181:2-183:6, whether the disclosures came from DOJ or FBI records, *see id.* at 183:7-12, whether he ever informed the FBI Office of Professional Responsibility about the disclosures he had made, *see id.* at 140:2-13, whether he provided *Washington Post* reporter Alan Lengel with information contained in a sealed affidavit submitted to the Court in this action, *see id.* at 120:4-121:15, and whether an interrogatory answer he verified in this case was false, *see id.* at 169:13-172:13, 176:15-177:20, 183:13-186:1.

the record in this case is now undisputed that DOJ disclosed to the press significant details about its use of bloodhounds to investigate Dr. Hatfill. *See* Levine Decl. Ex. 10 ("Klaidman Dep.") at 45:11-21. These disclosures included:

- How "scent packs" were used by the FBI, *see id.* at 59:13-17, 60:22-61:4, and how the dogs were brought to Dr. Hatfill's apartment, his girlfriend's apartment, and to restaurants he had visited, *id.* at 62:5-20.
- How, in place after place, the dogs did not react – until they got to places where Dr. Hatfill had visited, when the dogs started "barking," "howling," and "straining," *id.* at 52:18-53:2.
- How the dogs "jumped and barked, indicating they'd picked up the scent" at Dr. Hatfill's girlfriend's apartment and at a Denny's restaurant that Dr. Hatfill had visited, *id.* at 69:9-17, and how they "bounded right up to Hatfill," *id.* at 80:7-81:1, 81:6-10.
- How the bloodhound results constituted a potential "breakthrough" in the case, *id.* at 71:21-72:10.

Beyond this undisputed testimony, the record now contains substantial additional evidence that DOJ officials disclosed to the press significant details about the FBI's use of bloodhounds in its investigation of Dr. Hatfill. Mr. Howard, then the senior law enforcement official in the District of Columbia and the person charged with leading the federal criminal investigation into the anthrax attacks, has now conceded under oath that he talked with reporters "about Steven Hatfill . . . about the dogs . . . [and] about the investigation and where we were going." Howard Dep. at 144:10-14. Mr. Isikoff, one of the reporters to whom he made such disclosures, has testified that Mr. Howard:

- Confirmed to him that bloodhounds reacted to Dr. Hatfill, *see* Levine Decl. Ex. 11 ("Isikoff Dep.") at 65:19-66:2, 68:15-70:15, 74:2-14, 77:21-78:9, 78:18-20).
- Described to him the reactions of these dogs as putting the FBI on the "verge of a breakthrough," *id.* at 98:2-12.
- Told him that "[w]hen you see how the dogs go to everything connected to him, you say 'Damn!'", a quotation that is republished in the *Newsweek* article verbatim and is reflected in Mr. Isikoff's contemporaneous handwritten notes of his discussion with Mr. Howard. *Id.* at 116:5-117:3, 291:17-292:17.

2. Evidence of Disclosures about the Pond Search

Similarly, the record now contains substantial evidence that specifically identified DOJ officials disclosed to the press detailed accounts of the FBI's search of a pond near Dr. Hatfill's home and the implications of that search for its investigation of Dr. Hatfill. Two reporters, Messrs. Klaidman and Lengel, working for two separate publications, *Newsweek* and the *Washington Post*, have testified without contradiction that Mr. Seikaly disclosed to them significant details about the pond search, including:

- That the FBI searched the pond on the basis of a tip from an acquaintance of Dr. Hatfill's, *see* Klaidman Dep. at 102:15-103:7, 108:5-16.
- That the pond search was related to Dr. Hatfill and had been triggered by a hypothetical statement Dr. Hatfill allegedly made to an acquaintance about disposing of materials in a pond, *see* Levine Decl. Ex. 12 ("Lengel Dep.") at 50:15-51:21, 56:5-14, 58:19-59:4, 92:6-10, 97:17-98:1, 410:7-15.[5]

[5] In contrast, Mr. Stewart's only news report that referenced the pond search, on June 9, 2003, was not about Dr. Hatfill and did contain any disclosures involving him. *See* note 1 *supra.*

- That the FBI planned to drain the pond, *see id.* at 70:18-71:7, 72:1-8, and that when it did so it found vials and a plastic box with glove holes, *see id.* at 72:14-73:7.
- That, in June 2003, forensic tests on materials retrieved from the pond were ongoing, with conflicting results, *see id.* at 94:6-95:19.

This undisputed evidence bolsters additional testimony, already in the record, that the FBI itself had disclosed significant information about the pond search, and other aspects of its investigation of Dr. Hatfill, to the press. Debra Weierman, a press officer in the FBI's Washington Field Office, has testified not only that she likely confirmed the pond searches to the press on a confidential basis, *see* Dkt. 174-12 ("Weierman Dep.") at 303:15-305:5, but that she also disclosed to reporters that a search of Dr. Hatfill's apartment was undertaken pursuant to a warrant and in connection with the anthrax investigation, *id*. at 93:16-94:19, 181:16-20, 329:22-331:22; 374:8-376:10.

3. Evidence of Disclosures about Dr. Hatfill's Status

Finally, the record now contains considerable evidence that multiple, specifically identified employees of the defendant agencies – including all three of the recently deposed sources – repeatedly disclosed Dr. Hatfill's status in the investigation to the press, including specifically the fact that, by mid-2002 and continuing thereafter, he had become the FBI's leading suspect and the primary focus of its investigation, although there remained substantial questions concerning whether he would ever be prosecuted for perpetrating the anthrax attacks. The record evidence in this regard includes the following:

- Testimony that former Attorney General Ashcroft disclosed to reporters in August 2002 that Dr. Hatfill was a "person of interest" to the investigation, a

statement apparently contained in his prepared "talking points," *see* Dkt. 174-24 ("Ayres Dep.") at 76:20-77:13.

- Testimony by Mr. Lengel that Mr. Seikaly told him in early 2004 that Dr. Hatfill remained a key focus of the investigation, *see* Lengel Dep. at 143:9-22; *see also id.* at 165:16-166:8.
- Testimony by Arthur Eberhart, a former FBI official, that he disclosed to reporters that that the agency had amassed a circumstantial case against Dr. Hatfill, *see* Dkt. 174-21 ("Eberhart Dep.") at 90:10-22.
- Testimony by ABC News correspondent Brian Ross that Mr. Eberhart disclosed to him that the FBI was "one spore short from indicting Steve Hatfill, but they couldn't find any actual anthrax," Levine Decl. Ex. 13 ("Ross Dep.") at 164:4-7, and confirmed to Mr. Ross that the case against Dr. Hatfill was "circumstantial, but potentially significant," *id.* at 185:2-16.
- Testimony by Mr. Ross that Ed Cogswell, then unit chief of the FBI's national Press Office, disclosed to him at various times that (1) the FBI was building a growing circumstantial case against Dr. Hatfill and that he was the main focus of its investigation, *see id.* at 140:20-141:14, 148:2-12, 155:7-157:9; *see also* Levine Decl. Ex. 14 (Oct. 22, 2002 report); (2) that there were too many questions about Dr. Hatfill to back off and that he remained the FBI's leading suspect, *see* Ross Dep. at 170:2-15, 172:1-174:9; *see also* Levine Decl. Ex. 15 (June 9, 2003 report); and (3) that, by mid-2004, the FBI had set itself an internal deadline to make a case against Dr. Hatfill that would stand up in

court, Ross Dep. at 187:12-188:3, 191:1-18; *see also* Levine Decl. Ex. 16 (July 20, 2004 report).

- Testimony by Mr. Stewart that, before his May 2003 broadcast, he confirmed with more than one of the FBI sources he regularly consulted about the anthrax investigation – which included Mr. Cogswell – information he had been provided by Dr. Hatfill's counsel, including that Dr. Hatfill remained the FBI's leading suspect, that the agency believed he was the perpetrator but that the case against him was based on only circumstantial evidence, and that it was conceivable, but not likely, that he might ultimately be prosecuted on unrelated charges. Stewart Dep. at 47:17-48:17, 52:12-54:2, 55:14-22, 56:12-57:10, 65:6-71:20.[6]
- Testimony by Mr. Cogswell that he indeed served as a confidential source for Mr. Stewart on multiple occasions, *see* Cogswell Dep. at 79:9-80:20, and that he did talk to Mr. Ross and his producer about the anthrax investigation, *see id.* at 86:9-87:2, although he does not recall the substance of any of those conversations, *see, e.g.*, *id.* at 39:6-11 ("Q: Did you speak with any member of the press about the anthrax investigation? A: I don't have a specific recollection at this time, but it was an issue during the tenure I was in the press office."), 41:3-8 ("Q: Do you recall whether you personally received any inquiries from any member of the press about the Amerithrax investigation or about Dr. Hatfill? A: I really don't remember at this time.").

[6] Mr. Stewart has testified that he cannot recall which of his sources confirmed for him the accuracy of this information. *See* Stewart Decl. ¶ 14; *see also* Stewart Dep. at 20:21-21:6, 46:14-21, 48:3-17, 52:16-20, 53:12-16, 55:18-22, 56:7-11, 56:22-57:10, 61:3-5, 62:2-7, 66:2-6, 67:2-6, 68:10-15.

ARGUMENT

I. INTERVENING DEVELOPMENTS WARRANT RECONSIDERATION OF WHETHER MR. STEWART'S REPORTERS' PRIVILEGE SHOULD PROPERLY YIELD IN THIS CASE

As the foregoing demonstrates, the record in this case has changed in a material way since this Court granted Dr. Hatfill's motion to compel further testimony from Mr. Stewart. In addition, the Court of Appeals has issued an important pronouncement with respect to the substantive law governing the Privacy Act claims that Dr. Hatfill seeks to pursue. *See Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1123 (D.C. Cir. 2007). These developments separately warrant reconsideration of the Court's Order granting Dr. Hatfill's motion to compel.

First, the evidence that comprises the record in this case, including the deposition testimony of three former DOJ/FBI officials taken *after* the Court granted Dr. Hatfill's motion to compel, reveals that this case is now fundamentally different from *Lee v. Department of Justice*, in a manner that properly should alter the outcome of that motion as it pertains to Mr. Stewart. When it granted Dr. Hatfill's motion to compel, this Court relied on *Lee* because that case also involved a Privacy Act plaintiff seeking to compel the disclosure of confidential news sources from non-party reporters. *See* Decision at 10. In *Lee*, however, the plaintiff had been unable, despite substantial efforts, to discover the identities of *any* of the confidential sources that had allegedly leaked information about him from agency records to the press. Indeed, Dr. Lee had not been able to secure any testimony demonstrating that those confidential sources were even employed by the defendant agencies. *See, e.g.*, 413 F.3d at 56 (Dr. Lee had "learned nothing identifying the source of the leaks").

Following the discovery that has taken place since the Court adjudicated Dr. Hatfill's motion to compel, in contrast, the evidentiary record in this case is fundamentally different. In short, Dr. Hatfill has now amassed substantial evidence that *all* of the categories of disclosures

on which he bases his claim were made by identified persons employed by the defendant agencies, all of whom have now been deposed in this action. Under these circumstances, Dr. Hatfill cannot reasonably be deemed to have carried his burden of demonstrating that the additional testimony he seeks to compel from Mr. Stewart "goes to 'the heart of the matter'" such that it is "crucial" to Dr. Hatfill's case. *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981) (citation omitted); *see also Lee*, 413 F.3d at 59. To the contrary, any additional testimony by Mr. Stewart would at best be cumulative of more probative evidence already in the record.

Second, the Court of Appeals' decision in *Sussman* requires the conclusion that, on the present state of the record, Dr. Hatfill has not demonstrated that the testimony he seeks to compel from Mr. Stewart is central to his case, as required to overcome Mr. Stewart's assertion of the reporters' privilege, because Dr. Hatfill has not been permitted to secure any evidence that the disclosures made to Mr. Stewart reside in agency records "*retrievable by [plaintiff's] name*." *Sussman*, 494 F.3d at 1123 (emphasis in original). At the very least, therefore, before holding Mr. Stewart in contempt, the Court should revisit its decision to absolve the agency defendants of *any* obligation to provide that threshold information to Dr. Hatfill.

A. This Court Is Free to Reconsider Its Interlocutory Rulings and Properly Does So Where, as Here, Material Circumstances Have Changed

An interlocutory ruling such as the Order at issue here is properly reconsidered pursuant to Fed. R. Civ. P. 54(b) under a "flexible standard" permitting revision "as justice requires," rather than under the stricter standard applicable to reconsideration of final judgments under Rules 59(e) or 60(b). *Radtke v. Caschetta*, No. 06-2031, 2007 WL 2071700, *2 (D.D.C. July 17, 2007); *see also Reed v. Islamic Republic of Iran*, 242 F.R.D. 125, 128 (D.D.C. 2007) ("A district court may revise its own interlocutory decisions 'at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.'") (quoting Fed. R. Civ.

P. 54(b)); *Moore v. Hartman*, 332 F. Supp. 2d 252, 256 (D.D.C. 2004) ("although courts only reconsider under Rule 60(b)(6) in 'exceptional circumstances,' courts have more flexibility in applying Rule 54(b)") (citation omitted).

As Judge Lamberth concluded after surveying the relevant authority in *Cobell v. Norton*, "asking 'what justice requires' amounts to determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances." 224 F.R.D. 266, 272 (D.D.C. 2004); *see also id.* at 273 ("This Court has previously noted that a District Court retains 'broad discretion to grant or deny a motion for reconsideration.'") (citation omitted). Here, the "relevant circumstances" include new record evidence – the testimony of three high-ranking employees of the defendant agencies alleged to be responsible for the key disclosures about Dr. Hatfill – that bears directly on the Court's analysis of whether the compulsion of additional testimony from Mr. Stewart remains "crucial" to Dr. Hatfill's case, and therefore whether Mr. Stewart's constitutional privilege has been properly overcome. *See generally Florida v. Cohen*, 887 F.2d 1451, 1455 (11th Cir. 1989) (remanding for trial court reconsideration of ruling on efficacy of assertion of law enforcement privilege because "new facts have emerged which could change the balancing calculus conducted by that court").

The Court has a particular obligation to consider relevant intervening developments in the context of a contempt proceeding such as this one. Where an accused contemnor argues that changes in the operative facts affect the continued validity of a court order as applied to those facts, a trial court must consider the merits of such a defense before issuing a finding of contempt. *See, e.g.*, *Maggio v. Zeitz*, 333 U.S. 56, 76-77 (1948) (in context of contempt application, district court must consider any "intervening events" between the time underlying order was issued and disobeyed); *Mercer v. Mitchell*, 908 F.2d 763, 769 (11th Cir. 1990) ("a

defendant should *always* be given an opportunity to show that changed circumstances would make holding him in contempt unjust") (emphasis in original); *In re Fula*, 672 F.2d 279, 284 (2d Cir. 1982) (alleged contemnor "may proffer any defenses [at a contempt proceeding] which . . . could not have been raised in her motion to quash").

B. Compelled Disclosure of Additional Sources by Mr. Stewart Can No Longer Reasonably Be Deemed "Essential" to Dr. Hatfill's Claim

When the Court adjudicated Dr. Hatfill's motion to compel, it concluded that this case was analogous to *Lee v. Department of Justice* in what the Court deemed to be a dispositive respect – *i.e.*, despite engaging in substantial discovery, Dr. Hatfill, like Dr. Lee, had been unable to ascertain the identities of any of the confidential sources who provided information to the press about him. The analogy to *Lee* is, however, no longer apt. To the contrary, following the Court's order granting the motion to compel, three confidential sources for disclosures to the press about Dr. Hatfill (including one source relied upon by Mr. Stewart) have now been identified, and all three of those sources have now been deposed. As a result, the record now contains voluminous evidence supporting Dr. Hatfill's contention that a total of six known persons employed by the Department of Justice and/or the FBI disclosed to the press and public information about him which he claims is protected by the Privacy Act, specifically information about how bloodhounds used in the investigation reacted to him, how results of the search of a pond near his home may have incriminated him, and his status as the FBI's primary suspect throughout much of the investigation.

It is not for Mr. Stewart to advise the Court concerning whether Dr. Hatfill can or should ultimately prevail in his case against the agency defendants. Nevertheless, it is now beyond dispute that any further testimony from Mr. Stewart identifying additional sources for a single category of disclosures about which there is already considerable record evidence, including by

multiple agency officials who made such disclosures, is not "crucial" to Dr. Hatfill's case as required in this Circuit to overcome Mr. Stewart's constitutional privilege. *Zerilli*, 625 F.2d at 713; *see also Lee*, 413 F.3d at 57. Specifically as it applies to Mr. Stewart, the record now contains substantial evidence from which Dr. Hatfill may argue that identified government officials – including the former United States Attorney for the District of Columbia, the former chief of the Criminal Division of that United States Attorney's Office, the then-Attorney General of the United States, and an FBI press officer who served as a confidential source for Mr. Stewart – confirmed for the press, *inter alia*, that Dr. Hatfill was "a person of interest" to the anthrax investigation, was the FBI's primary suspect, that FBI officials believed he perpetrated the attacks but lacked direct evidence to prosecute him, and that they would consider charging him with unrelated crimes if necessary. *See* Ross Dep. at 107:18-108:12, 137:19-138:13; 140:20-141:14, 148:2-12, 155:7-157:9; 170:2-15, 172:1-174:9; 185:2-11; 187:12-188:3, 191:1-18 (describing statements by Mr. Cogswell); *id*. at 164:4-7, 185:12-16 (Mr. Eberhart); Lengel Dep. at 143:9-22 (Mr. Seikaly); Isikoff Dep. at 311:6-20, 312:2-14, 312:17-22 (Mr. Howard).

Indeed, much of this evidence is undisputed, either because (1) it has been testified to by reporters and specifically confirmed by their sources, *e.g.*, Eberhart Dep. at 90:10-12; Ross Dep. at 185:2-16, (2) it has been admitted under oath by an agency employee, *e.g.*, Weierman Dep. at 303:15-305:5, or (3) it has been testified to by reporters and left unrebutted in testimony by their sources either (a) because of a failure of memory, *e.g.*, Ross Dep. at 140:20-141:14, 148:2-12, 155:7-157:9, or (b) because the source has invoked the Fifth Amendment privilege against self-incrimination. In the latter case, because Mr. Seikaly – the former DOJ official who has invoked the privilege – has done so in response to questions about conduct within the scope of his official

duties while employed there, Dr. Hatfill is likely also entitled to an adverse inference in this civil action.[7]

By contrast, Mr. Stewart has already testified that he cannot recall what, if any, disclosures about Dr. Hatfill his remaining confidential sources made to him. *See* note 6 *supra.* As a result, the probative value of the identities of those sources is far less than the multiple specific confirmations of specific disclosures now reflected in the record of this case. Indeed, with respect to the only disclosures at issue allegedly made to Mr. Stewart – those relating to Dr. Hatfill's status in the investigation – Dr. Hatfill now has in his possession considerable admissible evidence that those disclosures were made to both Mr. Ross and Mr. Stewart by Mr. Cogswell, by Mr. Eberhardt to multiple reporters, by Mr. Seikaly to Mr. Lengel, and by Attorney General Ashcroft to multiple reporters. Especially in this case, in which the Court itself – not a

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[7] *See Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987) ("[T]he fact that Richards may not be presently involved with Cerro Gordo in an official capacity presents no bar to requiring him to assert the privilege before the jury. . . . Richards, as a former member of Cerro Gordo, stands in a position similar to the non-party ex-employees" whose invocations of the privilege have been held admissible by other Circuits.); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275-77 (3d Cir. 1986) (affirming district court's admission of and permission for adverse inference against plaintiff-employer where employees, whether past or present, invoked the Fifth Amendment); *Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983) (affirming admission of and permission for adverse inference where ex-employees invoked Fifth Amendment); *Limone v. United States*, 497 F. Supp. 2d 143, 176 n.77 (D. Mass. 2007) ("Adverse inferences may also be drawn against the government in its role as Rico's former employer. . . . There is also precedent for imputing silence of an employee to his employer under Rule 801(d)(2)(D), even that of a former employee."); *Lentz v. Metro. Prop. & Cas. Ins. Co.*, 768 N.E.2d 538, 542 (Mass. 2002) ("The rationale for admitting a nonparty employee's invocation of the privilege against self-incrimination as to a matter within the scope of employment is that it fairly may be characterized as a vicarious admission of the employer. The evidence may be admitted through former as well as current employees."); *cf. Kontos v. Kontos*, 968 F. Supp. 400, 407 (S.D. Ind. 1997) (distinguishing cases involving "a claim of privilege by a current or former employee" from case of defendant's sister invoking privilege and declining to draw adverse inference).

jury – will be the trier of fact,[8] it can no longer credibly be asserted that Dr. Hatfill's claims rise or fall with his ability to compel disclosure of the identities of Mr. Stewart's remaining confidential sources.

Even under normal rules of evidence and separate and apart from the rigorous showing demanded by the constitutional privilege, the additional testimony that Dr. Hatfill seeks from Mr. Stewart would, at most, lead to cumulative evidence of dubious admissibility. "Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of a judge's power." *Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981).[9] It is in any event well-settled in this Court (and in every other circuit that has addressed the issue) that a litigant's desire to discover cumulative or unnecessary evidence simply does not justify abrogating the constitutional privilege. *See, e.g.*, *CFTC v. McGraw Hill Cos.*, 390 F. Supp. 2d 27, 34 (D.D.C. 2005) (evaluating need by looking to whether "the information is crucial to the plaintiff's proof," and whether the requesting party "needs [the] evidence" sought); *Mgmt. Info. Techs., Inc. v. Alyeska Pipeline Serv. Co*., 151 F.R.D. 471, 477 (D.D.C. 1993) (insufficient showing of need where "[t]he information requested is of only marginal value considering the issues and the substantial amount of discovery that has already gone on in this case"); *United States v. Hubbard*, 493 F. Supp. 202, 205 (D.D.C. 1979) (quashing

[8] Because the Privacy Act does not "'unequivocally express[]'" a right to jury trial against the government, such claims are tried to the court. *Lehman v. Nakshian*, 453 U.S. 156,160-61 (1981) (citation omitted); *e.g.*, *Payne v. EEOC*, No. 00-2021, 2000 WL 1862659, at *2 (10th Cir. Dec. 20, 2000) (unpublished); *Harris v. USDA*, No. 96-5783, 1997 WL 528498, at *3 (6th Cir. Aug. 26, 1997) (unpublished).

[9] *Accord United States v. Bishop*, 291 F.3d 1100, 1110 (9th Cir. 2002) ("In a jury trial, [witness's] seconding the defendants' statements . . . might have been helpful to the defense. In a bench trial, however, such testimony would have been cumulative and virtually irrelevant."); *Shiloh-Bryant v. Pack*, No. 92-4019, 1993 WL 58778, at *1-2 (5th Cir. Feb. 17, 1993) (unpublished) (affirming order closing the evidence in bench trial where plaintiff "proposed to introduce only cumulative testimony from additional witnesses").

subpoena where "[a]ny testimony the reporter could offer would be merely cumulative and less than the best evidence available"); *see also Shoen v. Shoen*, 48 F.3d 412, 416-17 (9th Cir. 1995) (journalist's evidence must be "noncumulative"); *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979) (plaintiff cannot show need for information that would be cumulative of other admitted disclosures); *United States v. Nat'l Talent Assocs.*, No. 962617, 1997 WL 829176, at *5-6 (D.N.J. Sept. 4, 1997) (where government already had amassed evidence of significant violations of FTC order, discovery of journalist's work product merely to prove more violations was not justified).

This is especially so where, as here, Dr. Hatfill not only already has ample evidence that the generic disclosures made to Mr. Stewart were also made by multiple identified employees of the defendant agencies to multiple reporters, but that a host of other disclosures of far more specific investigative information about Dr. Hatfill was in fact disclosed by identified agency officials to several reporters. Thus, if Dr. Hatfill cannot prevail in this case based on the evidence now reflected in the record, he surely will not prevail because of any additional information that Mr. Stewart's additional sources might provide. And, if the record evidence is now sufficient to entitle Dr. Hatfill to the relief he seeks, he does not need further testimony from Mr. Stewart as a matter of law.

C. There Is No Record Evidence, as Required by *Sussman*, that the Information Disclosed to Mr. Stewart Is Protected by the Privacy Act

On July 31, 2007, the Court of Appeals decided *Sussman v. United States Marshals Service*, in which it announced an important "change in the law" in this Circuit governing civil actions, like this one, brought under the Privacy Act. 494 F.3d at 1123-24. In *Sussman*, the plaintiff alleged that federal investigators had improperly listed his name as an alias for another person who was at that time a fugitive, and then made improper disclosures about him in

violation of the Privacy Act when, during the course of an investigation, federal marshals "contacted a number of individuals and institutions who the agency believed had involvement with [the fugitive]." *Sussman v. United States Marshals Serv.*, No. 03-610 (HHK), slip op. at 7 (D.D.C. Aug. 3, 2004). The Court of Appeals concluded that, although the disclosed information was admittedly contained within a system of agency records, no evidence before the district court established that it was "located in records *retrievable by Sussman's name.*" 494 F.3d at 1123 (emphasis in original). The Court held that the Privacy Act authorizes civil actions based on unlawful disclosures "*only* by a person whose records are actually disclosed." *Id*. (emphasis in original). Accordingly, the Court of Appeals announced for the first time that, in order to state a viable Privacy Act claim, a plaintiff "must present evidence that materials from records *about him*, which the [agency] retrieved by *his name*, were improperly disclosed." *Id.* (emphasis in original). Recognizing that this holding represents a "change in the law" imposing a new requirement of which the plaintiff was necessarily "unaware" when he conducted discovery, the Court remanded so that he could attempt to make the showing now deemed necessary for his claim to survive. *Id.* at 1123-24.

In the course of discovery in this case, Dr. Hatfill sought, through requests for admissions to the defendant agencies, to establish that certain categories of information were "contained within a record or records within a system of records maintained by defendant United States Department of Justice from which information can be retrieved by the name of Dr. Hatfill, or by some identifying number, symbol, or other identifying particular assigned to Dr. Hatfill."[10] In

[10] *See, e.g.*, Defendant Department of Justice's Responses to Plaintiff's First Set of Requests for Admission (Dkt. 130-8), Nos. 3-4, 5-6, 18-19, 33-34, 46-47, 59-60, 72-73, 85-86, 98-99, 111-12, 126-27, 139-40, 152-53, 165-66, 178-79, 191-92, 204-05, 219-20, 232-33, 246-47; Defendant Department of Justice's Responses to Plaintiff's Second Set of Requests for Admission

response, the agency defendants denied that "information regarding whether Law enforcement officials decided to 'focus entirely on [Dr.] Hatfill' with respect to the Anthrax Murders (as was reported by ABCNEWS.com on January 9, 2003) is contained within a record or series of records within a system of records maintained by defendant United States Department of Justice from which information can be retrieved by the name of Dr. Hatfill, or by some identifying number, symbol, or other identifying particular assigned to Dr. Hatfill." Dkt. 130-8, No. 152. In addition, the agency defendants asserted a law enforcement privilege and declined to answer whether such records contain information indicating that "the FBI believed that Dr. Hatfill is the number one suspect in the Anthrax Murders," Dkt. 130-7, No. 330, or that "Dr. Hatfill remains the key focus of the FBI's anthrax investigation," *id.*, No. 342.

Dr. Hatfill thereafter sought to compel responses to various requests for admission, including Request Nos. 330 and 342. *See* Memorandum of Points and Authorities in Support of Plaintiff's Motion to Compel Discovery and Overrule Defendant's Assertion of Law Enforcement Privilege over Information Disclosed to the Press (Dkt. 130-1) at 7 n.3. On March 20, 2007, the Court denied the motion as it pertained to these two requests without explanation. 3/20/2007 Order (Dkt. 139) at 2 (denying motion to compel answers to Requests for Admissions 330 and 342, among others); *see also* 3/30/2007 Order (Dkt. 144) at 1-2 (same).

As a result, Dr. Hatfill has no evidence to support what the D.C. Circuit has now authoritatively held is an essential element of his claim as it applies to the only disclosures made to Mr. Stewart that are alleged by Dr. Hatfill to violate the Privacy Act. To be sure, Dr. Hatfill has assembled a "circumstantial case" that certain information about him resides in relevant agency files. Dkt. 130-2 at 19. Specifically, FBI officials have testified that there is a case file

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(Dkt. 130-7), Nos. 300, 306, 312, 318, 324, 330, 336, 342, 348, 354, 360, 366, 372, 378, 384, 390, 396, 402, 408, 414, 420, 426, 432, 438, 444, 450, 456, 462, 468, 475, 482, 488.

for the anthrax investigation, with a sub-file for Dr. Hatfill that contains investigative information such as the results of polygraph examinations and searches of his property. *See* Levine Decl. Ex. 17 ("Garrett Dep.") at 86:22-88:3, 143:20-146:8; *see also* Levine Decl. Ex. 18 ("Lambert Dep.") at 128:16-130:14 (results of searches and other investigative techniques stored in sub-files), Ex. 19 ("Roth Dep.") at 101:12-105:13 (results of searches and other investigative techniques stored in sub-files). But Dr. Hatfill is unable to establish, because the Court has held that the information is protected by the law enforcement privilege, that the only disclosure at issue with respect to Mr. Stewart – *i.e.*, that Dr. Hatfill was the "the FBI's number-one suspect in the attacks" and that the agency believed he was the perpetrator of the anthrax attacks – was in fact contained in a record *about him*, and retrievable *by his name*, as now required to state a claim under the Privacy Act following *Sussman*.

As the record now stands, therefore, regardless of whether Dr. Hatfill learns the names of Mr. Stewart's remaining confidential sources, he will be unable to state a viable claim under the Privacy Act with respect to the only disclosures he seeks to attribute to them. If, as the Court's March 23 order denying Dr. Hatfill's motion to compel the agency defendants to provide the very evidence now required by *Sussman* indicates, such predicate evidence is properly protected by the law enforcement privilege, then Dr. Hatfill cannot go forward with his claim as to these disclosures regardless of any testimony he might secure from Mr. Stewart's remaining confidential sources. Put differently, if the information is privileged, Dr. Hatfill is precluded from compelling its disclosure, whether in response to a request for admission directed to the agency defendants or in response to a deposition question posed to FBI officials who served as sources for Mr. Stewart.

If, on the other hand, information about whether the disclosures at issue reside in an agency file retrievable by Dr. Hatfill's name is not properly privileged, then Dr. Hatfill should be able to discover the answer to that inquiry from the defendant agencies directly. If the answer is "no," then Dr. Hatfill has no basis to compel further testimony from Mr. Stewart precisely because, as mandated by *Sussman*, there will in that event be no basis to contend that any disclosure by a confidential source to Mr. Stewart violated the Privacy Act. In the wake of *Sussman,* therefore, the Court should at the very least reconsider its ruling with respect to the law enforcement privilege as applied to Requests for Admission Nos. 330 and 342 before determining whether further testimony may be compelled from Mr. Stewart and whether he should be held in contempt for failing to provide it.

Not only does this approach comport with *Sussman* itself, in which the Court of Appeals remanded for further discovery in light of the "change in the law" it announced because the plaintiff there – like Dr. Hatfill here – was consequently "unaware of this requirement or the need to rebut it," 494 F.3d at 1123, it is entirely consistent with the obligation that courts have long recognized fall upon litigants who, like Dr. Hatfill, seek to compel journalists to reveal the identities of their confidential sources. To cite just one illustrative example also arising from allegedly harmful disclosures by the FBI in the course of a criminal investigation, in *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 180-81 (Ga. Ct. App. 2001), Richard Jewell, the man wrongly accused by anonymous FBI leakers of the 1996 Olympic Park bombing, sought to compel the disclosure of a newspaper's confidential FBI source in a defamation case.[11]

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[11] Dr. Hatfill has often compared himself to Mr. Jewell. *E.g.*, Memorandum of Points and Authorities in Opposition to the Media Companies' Motions to Quash (Dkt. 61) at 19 (arguing that the "folly of the Jewell case" failed to deter the FBI or the media from "resorting to the same shameful playbook" against Dr. Hatfill); *see also* Marilyn W. Thompson, *The Pursuit of Steven*

Rejecting Mr. Jewell's motion to compel as premature, the court recognized that, in assessing "the requesting party's specific need" for the identities of reporters' confidential sources, trial courts must first conduct a "legal analysis similar to, perhaps even identical to, that required in ruling upon a motion for summary judgment" by "look[ing] to the entire record to determine if each particular claim is legally viable," even though such an approach may "thwart the trial court's . . . desire to avoid piecemeal adjudication." *Id.*[12]

In this case, the same result should apply. Following *Sussman*, until and unless Dr. Hatfill is able to demonstrate an essential element of his *prima facie* case – *i.e.*, that the information that forms the basis of his claim Dr. Hatfill's name – any effort by him to hold Mr. Stewart in contempt for the purpose of coercing him disclose the identities of his remaining confidential sources is decidedly premature.

II. ALTERNATELY, THE COURT SHOULD EXERCISE ITS DISCRETION NOT TO HOLD MR. STEWART IN CONTEMPT UNDER THESE CIRCUMSTANCES

Even if the Court decides not to reconsider its Order, this is an appropriate case for it to exercise its discretion to refrain from holding Mr. Stewart in contempt. *See Peppers v. Barry*, 873 F.2d 967, 968 (6th Cir. 1989) ("In general, a finding of civil contempt is within the discretion of the district court"); *Marshall v. Local Union No. 639, Int'l Bhd. of Teamsters*, 593

Hatfill, WASH. POST MAGAZINE, at W6 (Sept. 14, 2003) ("His supporters compare him to Richard Jewell, the man falsely accused in the 1996 Atlanta Olympics bombing case.").

[12] *See also*, *e.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F2d 583, 597 (1st Cir. 1980) ("plaintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery" before disclosure of confidential sources may be compelled); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972) ("to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a [an] allegation would utterly emasculate the fundamental principles" undergirding the constitutional privilege); *Blumenthal v. Drudge*, 186 F.R.D. 236, 245 (D.D.C. 1999) (source information allegedly relevant to actual malice element of a public-figure defamation claim need not be disclosed absent proof that plaintiffs were public figures).

F.2d 1297, 1303 (D.C. Cir. 1979) ("courts need not impose the contempt sanction for every violation"); *Brotherton v. Lehman*, Civ. A. No. 81-1477, 1984 WL 66, *4 (D.D.C. Feb. 29, 1984) (same); 7-37 Wayne D. Brazil, MOORE'S FEDERAL PRACTICE-CIVIL § 37.50[1][b] (3d ed.) (decision whether to impose contempt sanctions is entrusted to court's "broad discretion"). In exercising its discretion, the Court may properly take into consideration the fact that Dr. Hatfill seeks an equitable remedy. *E.g.*, *McGregor v. Chierico*, 206 F.3d 1378, 1385 n.5 (11th Cir. 2000) ("District courts are afforded wide discretion in fashioning an equitable remedy for civil contempt.").

Mr. Stewart respectfully submits that four equitable factors ought to weigh heavily in the Court's calculus. First, following the Court's Order granting Dr. Hatfill's motion to compel, Mr. Stewart contacted three of his confidential sources for purposes of seeking a waiver of his obligation to protect their confidentiality, in fact received such a waiver from one of them (Mr. Cogswell), and promptly notified Dr. Hatfill's counsel of that fact. *See* Stewart Decl. ¶ 15. As a result of those efforts, Dr. Hatfill has now secured deposition testimony from Mr. Cogswell about his interactions with Mr. Stewart.

Second, it would be manifestly inequitable to hold Mr. Stewart in contempt for failing to disclose all of the confidential sources who may have confirmed for him the accuracy of the disclosures contained in his May 2003 broadcast when those disclosures were openly discussed with him by Dr. Hatfill's counsel before Mr. Stewart ever consulted his confidential sources and, in key respects – such as Mr. Connolly's assertion that the FBI was considering indicting Dr Hatfill on unrelated charges – were made to him in the first instance by Mr. Connolly, who encouraged Mr. Stewart to investigate and report about them. The Court is urged to consider the Declaration contemporaneously submitted by Mr. Stewart. In it, he details the circumstances

that led him to report the information that Dr. Hatfill now claims was disclosed in violation of the Privacy Act. Specifically, Mr. Stewart recounts how Dr. Hatfill's counsel not only advised him that the FBI had focused its investigation on Dr. Hatfill (unfairly in counsel's view), and complained to Mr. Stewart that – based on information Mr. Connolly asserted he had secured from his own FBI sources – investigators were so convinced that Dr. Hatfill had perpetrated the anthrax attacks that they were prepared to indict him on unrelated charges in the absence of direct evidence of his guilt, but also how Mr. Connolly urged Mr. Stewart to investigate and report on these subjects and had several extensive discussions with him – including two lunch meetings, one with Dr. Hatfill present – in which they hashed out the details of an appearance by Dr. Hatfill on 60 MINUTES II for the precise purpose of discussing these very "disclosures" in front of a national television audience. *See, e.g.*, Stewart Decl. ¶¶ 5-9. Finally, Mr. Stewart describes how he consulted his own FBI sources for the sole purpose of confirming the accuracy of the information he had received from Dr. Hatfill and his counsel. *Id.* ¶¶ 10-12.

A court can and should deny a petition for contempt where, as here, the moving party contributed in some meaningful way to the alleged contemptuous conduct. *See, e.g.*, *Trustees of the Buffalo Laborers' Pension Fund v. Accent Stripe, Inc.*, No. 01-CV-76C, 2007 WL 1540267, at *5 (W.D.N.Y. May 24, 2007) (citing *Brennan v. Nassau County*, 352 F.3d 60, 63 (2d Cir. 2003), and *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). Indeed, courts have held that a plaintiff such as Dr. Hatfill cannot properly maintain a claim under the Privacy Act at all where, as here, the information at issue was publicized by the plaintiff himself prior to its alleged disclosure by a government agency. *See Wiley v. Dep't of Veterans Affairs*, 176 F. Supp. 2d 747, 753 (E.D. Mich. 2001) ("The case law on this subject, though extremely limited, indicates that an individual can waive the privacy interest that the

federal statute is meant to safeguard by himself disclosing otherwise confidential information.”); *Schwartz v. U.S. DOJ*, No. 94 CIV. 7476, 1995 WL 675462, *8 (S.D.N.Y. Nov. 14, 1995) (plaintiff waived any privacy interest when he put the records at issue in a court proceeding), *aff’d*, No. 95-6423, 1996 WL 335757 (2d Cir. June 6, 1996); *Mangino v. Dep’t of Army*, Civ. A. No. 94-2067, 1994 WL 477260, *5 (D. Kan. Aug. 24, 1994) (“To the extent the Privacy Act created a privilege, plaintiff waived any such privilege when he placed his records at issue.”).

Thus, for example, in *Hoffman v. Rubin*, the Eighth Circuit affirmed the dismissal of a Privacy Act claim because the plaintiff, who had appeared on 60 MINUTES to discuss alleged sexual harassment at the Treasury Department, subsequently asserted a Privacy Act claim against the Department for, among other things, providing the same information to 60 MINUTES in a letter rebutting his allegations. 193 F.3d 959, 961, 966 (8th Cir. 1999) (“As to [the] letter to the ‘60 Minutes’ journalist, [plaintiff] himself had previously provided the same information to the journalist, waiving, in effect, his protection under the Privacy Act.”). Like the journalist in *Hoffman*, Mr. Stewart received information from his government sources only after Dr. Hatfill’s counsel had “previously provided the same information” to him. *Id.* Whether the Court grounds its decision in principles of waiver, as the Eighth Circuit did in *Hoffman*, or in considerations of simple equity, the fact that Dr. Hatfill now seeks to hold Mr. Stewart in contempt because he did exactly what Dr. Hatfill’s counsel urged him to do should lead the Court to deny Dr. Hatfill’s application to have Mr. Stewart held in contempt.

Third, it is hornbook law that civil contempt exists to assist a party’s prosecution of its case, not to punish the alleged contemnor or to vindicate the authority of the Court. *See, e.g.*, *Int’l Union, United Mine Workers of Am.*, 512 U.S. at 827-28. As such, where something less than full compliance with a court order does not undermine a litigant’s case, or otherwise do him

harm, contempt is inappropriate. *See Mercer*, 908 F.2d at 768 n.8 ("When circumstances have changed so that (1) noncompliance does not injure the complainant, or (2) there is no harm resulting from continued contumacious conduct, then, in most cases, it would be unjust to hold the defendant in contempt."). Thus, in *Pigford v. Veneman*, a case on which Dr. Hatfill relies, *see* Motion at 4-6**,** the court agreed that, despite violation of its order, "civil contempt sanctions are not appropriate because no actual harm resulted." 307 F. Supp. 2d 51, 60 (D.D.C. 2004).

For all of the reason addressed in Part I of this Memorandum (at pp. 22-31), Dr. Hatfill has suffered no discernible harm as a result of Mr. Stewart's failure to identify all of his confidential sources, both because (1) Dr. Hatfill has now amassed substantial evidence that the categories of disclosures about which he complains were made by identified employees of the defendant agencies and (2) following *Sussman*, he is unable to prove that any disclosures made to Mr. Stewart violated the Privacy Act since the Court has precluded Dr. Hatfill from establishing an essential element of his case – *i.e.*, that the disclosures reflect information maintained in agency records retrievable by his name. Under such circumstances, the equity powers of a court should not properly be invoked.

Finally, it is not without relevance that Dr. Hatfill has himself determined, for no reason discernible to Mr. Stewart, to seek to have him held in contempt, but not to pursue such a sanction against several other journalists who have, like Mr. Stewart, secured waivers from some but not all of their confidential sources. The Court should properly pause before holding in contempt a third-party witness based on a party's arbitrary determination to single him out from among a host of similarly situated witnesses for punitive treatment. Moreover, the fact that Dr. Hatfill has implicitly acknowledged that pursuing additional sources from other similarly

situated journalists is no longer necessary to his case strongly supports the proposition that there is similarly no need for him to continue to pursue Mr. Stewart.

III. SHOULD THE COURT NEVERTHELESS HOLD MR. STEWART IN CONTEMPT, ANY SANCTION SHOULD BE REASONABLE AND SHOULD BE STAYED PENDING APPEAL

If the Court nevertheless holds Mr. Stewart in contempt, the Court should impose a reasonable sanction, which should be stayed pending an appeal. This result has obtained in virtually all analogous cases in this Circuit and elsewhere because, "[w]ithout such a stay, [the reporter] must either surrender his secrets (and moot his claim of right to protect them) or face" harsh sanctions, an "unpalatable choice" that the law will seek to avoid. *In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J.) (granting stay of state court's finding of reporter in civil contempt pending petition for writ of certiorari and disposition thereof). A stay is particularly appropriate in this case because Mr. Stewart would of necessity seek appellate review of important, unresolved issues raised in this case, including the application of the constitutional privilege to the facts of *this case*, and the existence *vel non* of a common law reporters' privilege, a subject on which the Court of Appeals has yet to speak authoritatively.

Under prevailing case law, Mr. Stewart has no choice but to decline to comply with the Order in order to obtain appellate review. *See In re Ryan*, 538 F.2d 435, 437 (D.C. Cir. 1976) (non-party compelled to give testimony not entitled to immediate review unless it first disobeys and is held in contempt). This is "a familiar procedure." *Maness*, 419 U.S. at 463. Dr. Hatfill nevertheless asserts that "there is no legal justification for Mr. Stewart to arrogate to himself a right to disobey the Court's Order" because "the law in this Court and this Circuit is clear." Motion at 6. With all due respect, this assertion is demonstrably false. For one thing, the Court of Appeals in *Lee* left unresolved whether federal common law provides a broader privilege to

journalists than that afforded by the First Amendment. *See Lee*, 413 F.3d at 57 n.2; *see also In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir.) (similarly declining to decide issue in the context of a grand jury subpoena), *cert. denied*, 545 U.S. 1150 (2005). For another, the Court of Appeals in *Lee* emphasized that, under the governing test articulated in *Zerilli*, determination of whether the privilege has been overcome in a given case is decidedly fact specific. *See* 413 F.3d at 60-61. If nothing else, the recent developments in this case (in which three confidential sources have been identified and have given testimony) sufficiently distinguish this case from *Lee* (in which *no* confidential sources were ever identified) to provide a legitimate basis for Mr. Stewart to seek an appellate ruling that this case should yield a different result than that which obtained in *Lee.* It would be manifestly unfair to sanction Mr. Stewart prior to an appeal for taking the very course that the law says he must pursue in order secure appellate review at all.[13]

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[13] The imposition of a contempt sanction at this time would also raise significant constitutional issues where, as here, an act of contempt is a prerequisite to appellate review. *See In re Ryan*, 538 F.2d at 437. As the Court of Appeals has explained, the *Noerr-Pennington* doctrine provides that, "in certain contexts[,] otherwise illegal conduct … is protected by the First Amendment when it is part of a direct petition to government" pursued in good faith. *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 611 (D.C. Cir. 2007) (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961) and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-70 (1965)); *see also BE & K Construction Co. v. NLRB*, 536 U.S. 516, 525 (2002) (*Noerr-Pennington* immunity shields conduct outside the antitrust realm). It therefore follows that a witness's refusal to comply with a court order cannot give rise to sanctions if that contemptuous conduct is in furtherance of the witness's good-faith exercise of his First Amendment right to petition the government for a redress of grievances – *i.e.*, the right to pursue an appeal that itself raises important constitutional issues. Because Mr. Stewart's invocation of the constitutional privilege is neither frivolous nor objectively unreasonable in light of the present state of the record and the questions left unresolved by *Lee*, the immunity provided by the *Noerr-Pennington* doctrine fully applies in this context. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) ("'sham' litigation" exception to *Noerr-Pennington* doctrine applies only where "no reasonable litigant could realistically expect success on the merits" and there is evidence of a subjective intent to abuse the judicial process).

Under such circumstances, the proper course – consistently followed by judges in this Circuit and elsewhere and by both judges of this Court who held reporters in contempt in *Lee* – is for the Court to impose a reasonable daily fine, to stay its application pending appeal, and to defer consideration of other sanctions until the appellate process has run its course. *See* 401 F. Supp. 2d at 144 (Collyer, J.); 327 F. Supp. 2d at 33 (Jackson, J.) (both imposing sanction of $500 per day and staying enforcement of order pending appeal); *see also Tinsley v. Mitchell*, 804 F.2d 1254 (D.C. Cir. 1986) (trial court stayed civil contempt fine of $50 per day pending appeal); *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921 (D.C. Cir. 1982).[14]

CONCLUSION

For the foregoing reasons, non-party James Stewart respectfully requests that the Court reconsider its Order dated August 13, 2007, or deny Dr. Hatfill's application to hold him in civil contempt. In the alternative, should the Court enter an order finding him in contempt, Mr. Stewart requests the imposition of a sanction of $500 per day, stayed pending an appeal of the merits of his assertion of a reporters' privilege under both the First Amendment and federal common law.

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[14] *Accord, e.g.*, *United States* v. *Cutler*, 6 F.3d 67, 70 (2d Cir. 1993) (noting contempt fine of $1 per day on reporters and television stations asserting privilege stayed pending appeal); *United States* v. *Cuthbertson*, 630 F.2d 139, 143 (3d Cir. 1980) (noting contempt fine of $1 per day imposed on CBS for asserting privilege stayed pending appeal); *United States* v. *LaRouche*, 841 F.2d 1176, 1177 (1st Cir. 1989) (civil contempt fine against NBC stayed pending appeal).

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