

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

**STEVEN J. HATFILL, M.D.,**

**Plaintiff,**

v.

**ATTORNEY GENERAL  
MICHAEL B. MUKASEY, et al.,**

**Defendants.**

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

**MEMORANDUM OF POINTS AND AUTHORITIES OF TONY LOCY  
IN SUPPORT OF MOTION FOR RECONSIDERATION AND  
IN OPPOSITION TO PLAINTIFF’S MOTION FOR CIVIL CONTEMPT**

Non-party Toni Locy (“Locy”), submits this memorandum in support of her motion for reconsideration of the Court’s Order dated August 13, 2007 (D.E. #201) and in opposition to plaintiff’s motion to hold Locy in contempt (D.E. #205).

**PRELIMINARY STATEMENT**

Locy moves for reconsideration of this Court’s Order compelling her to testify, and in that regard incorporates and adopts the arguments made by non-party reporter James Stewart in his Motion for Reconsideration, together with the Exhibits and Memorandum of Law in Support filed this date.

In the alternative, Locy respectfully urges the Court to deny plaintiff’s motion to hold her in contempt. Locy has testified twice in this case. She does not remember the names of the confidential sources who provided her with the information about plaintiff contained in her two articles that form part of the plaintiff’s Privacy Act claim.

Locy has also respectfully refused to reveal the names of confidential sources who gave her information about terrorism and anthrax issues in general. Disclosing those names would implicate other articles that do not mention the plaintiff and are not part of his case, and would violate Locy's promises of confidentiality to sources unrelated to this case. Locy has, however, reached out to those sources and tried to get them to release her from her promises of confidentiality. Two of those sources did so, and their names were promptly given to plaintiff's counsel. At their depositions, neither recalled what information he provided to Locy. And despite these recent conversations, Locy still does not remember who provided her with the specific information about plaintiff contained in the two articles.

Locy's actions throughout this case have been undertaken with the utmost respect for the Court. Unfortunately, she now has no choice but to decline to reveal the names of confidential sources in order to appeal this Court's discovery order. Her decision in that regard is certainly not intended to flout the Court's authority.

Locy respectfully requests that the Court decline to enter a contempt sanction. In the alternative, if the Court does enter a finding of contempt, Locy urges imposition of a modest fine that is stayed while she pursues her appeal.

### **FACTS**

Locy formerly worked as a reporter for USA TODAY. She authored two news articles – one published on May 29, 2003, and the other on June 10, 2003 – that plaintiff relies upon to support his Privacy Act claim. Locy has since left the journalism profession, and is now an assistant professor of journalism at West Virginia University. Locy Declaration ¶¶ 5-7. (Exh. A).

Locy began reporting on the anthrax attacks in October 2001, in what was to be the most intense period of her career. *Id.* at ¶¶ 8-11. The anthrax investigation, however, was only one of the many areas Locy covered in reporting on terrorism. Her other assignments during this time period included the entire panoply of terrorism subjects: the FBI's investigation of the 9/11 attacks, including the hunt for Osama Bin Laden; the capture of top al-Qaeda operatives; the Zacarias Moussaoui case; the Patriot Act; the overhaul of the FBI; detention and interrogation policies at Guantanamo Bay (which she visited several times); and military commissions. She also reported on legal developments, up to and including terrorism-related decisions in the Supreme Court. *Id.* at ¶¶ 12-13. In order to report on these matters, Locy relied on a large number of confidential sources. *Id.* at ¶¶ 11, 14.

Three years after their publication, plaintiff deposed Locy about two of her many terrorism-related articles. At the deposition, Locy produced all the documents in her possession relating to those articles; she withheld nothing. She told what she remembered about the articles, but unequivocally testified that she could not recall the identities of her confidential sources for the information contained in them. She has no notes to refresh her recollection as to the sources' identities, and she never told anyone else who they were. She was able to confirm where the articles' sources worked, but only because that is what the articles say. She has no independent recollection whatsoever. *Id.* at ¶ 15.

Plaintiff thereafter moved to compel Locy to submit to a second deposition. In a lengthy decision dated August 13, 2007 (D.E. # 202), the Court discussed the fact that Locy and the other reporters had "identified more than 100 separate disclosures *about Dr. Hatfill* that they claimed were directly from FBI or DOJ sources." Opinion at 2 (emphasis added). As the Court explained "[t]he motion to compel currently before the Court is yet another attempt by Dr. Hatfill

to obtain the reporters' DOJ and FBI sources." *Id.* at 3. The Court granted the motion and ordered the reporters to answer questions from plaintiff's attorneys about their sources. *Id.*

Locy was deposed a second time on September 10, 2007. At that proceeding, plaintiff's counsel only asked her about her sources of general anthrax information; he did not ask her about her sources of information concerning plaintiff:

Q. Ms. Locy, tell me the source, the names of your sources at the Department of Justice regarding your anthrax investigation reporting?

MR. BERNIUS: This is – can I just interject. That's anthrax generally as opposed to Hatfill?

MR. O'DONNELL: That's what I just asked. That's right.

Locy September 10, 2007 Deposition at 188:6-188:15. (Exh. B). Locy's counsel suggested that the scope of the inquiry should more properly address confidential sources for information about Hatfill. *Id.* at 201:5-201:12. However, plaintiff's counsel explicitly confirmed that he was seeking Locy's sources for "anthrax" information generally, and not sources for information about the plaintiff. *Id.* at 188:12-188:15; 189:20-190:1.

Ms. Locy respectfully refused to answer those broader questions asking for "the names of [her] sources at the Department of Justice regarding [her] *anthrax investigation reporting*" (*id.* at 189:7-189:11 (emphasis added) and "the names of [her] sources at the Federal Bureau of Investigation regarding [her] *anthrax investigation reporting*." *Id.* at 189:16-189:19 (emphasis added)).<sup>1</sup> In so doing, she declared her respect for the Court's Order and her specific intent to obtain appellate review:

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<sup>1</sup> Ms. Locy also testified that she had tried to comply with this Court's order by reaching out to her confidential sources, to see if they would release her from her promises of confidentiality. *Id.* at 192:6-192:18; *see also* Locy Declaration ¶ 17. After the deposition, two of her sources did so (*id.* at ¶ 18), and plaintiff has since deposed them.

I fully respect the court's order. I do not remember the confidential sources who provided me with information about Steven Hatfill. Refusing 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 188:17-189:3. In fact, at the second deposition, plaintiff's counsel never asked Locy the identity of her sources of information about Dr. Hatfill. Exhibit B.

### **STANDARD OF REVIEW**

Civil contempt may be imposed only when a movant establishes his right to relief by clear and convincing evidence. *See Washington-Baltimore Newspaper Guild v. Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980). Because contempt is an "extraordinary remedy" courts impose it with caution. *Joshi v. Professional Health Services, Inc.*, 817 F.2d 877, 879 n.2 (D.C. Cir. 1987); *SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 11 (D.D.C. 1996).

The court order in question is to be read narrowly, *Armstrong v. EOP*, 1 F.3d 1274, 1289 (D.C. Cir. 1993), and any ambiguities must be resolved in favor of the party charged with contempt. *Common Cause v. NRC*, 674 F.2d 921, 927-28 (D.C. Cir. 1982).

A district court enjoys "broad discretion" in deciding whether to hold a party in contempt, *see In re General Motors Corp.*, 61 F.3d 256, 259 (4th Cir. 1995), and should not resort to such a severe sanction "if there are any grounds for doubt as to the wrongfulness of the defendant's conduct." *Life Partners, Inc.*, 912 F. Supp. at 11. Moreover, even if it finds a technical or insubstantial violation, it is within the discretion of a district court to excuse the conduct and decline to issue a contempt citation. *See Southern Railway Co. v. Brotherhood of Locomotive Fireman and Enginemen*, 337 F.2d 127, 135 (D.C. Cir. 1964); *see also Cobell v. Norton*, 231 F. Supp. 2d 315, 320 (D.D.C. 2002) ("a court is not required to impose a contempt

sanction every time a violation of a court order is proved”). Locy respectfully submits that the Court should decline to do so here.

## **I. LOCY SHOULD NOT BE HELD IN CONTEMPT OF COURT**

### **A. Locy has acted in good faith**

Plaintiff’s Motion misapprehends Locy’s actions in this case. Although plaintiff accuses Locy of “willful” and “entrenched” defiance (Plaintiff’s Mem. at 4, 6), Locy has – at every turn and opportunity – acted in good faith and out of respect for the Court.

This is not a case where a reporter had repeated contacts with the same principal source for a major story, like Watergate.<sup>2</sup> Nor is this a case where one source provided a reporter with unforgettable information on one occasion. And, this is most assuredly not a case where a reporter knows the name of a confidential source but refuses to disclose it.

Rather, Locy’s reporting did not concentrate on plaintiff; she covered virtually the entire range of terrorism issues, of which plaintiff’s role was a minor part. Locy Declaration at ¶¶ 11-14. Her sources were similarly undifferentiated, providing her with information along the entire spectrum of terrorism issues. *Id.* at ¶ 15. All of the events at issue occurred years before her deposition took place, and she has no notes to refresh her recollection. *Id.* at ¶ 15. It is therefore impossible for her to say who, among her universe of confidential sources, were the sources for statements about plaintiff: she simply does not remember, and her failure of recollection is genuine.

Indeed, if this were a case of “willful” or “entrenched” defiance as plaintiff claims, Locy would have done nothing to comply with the Order. However, in good faith she reached out to

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<sup>2</sup> The only person who could arguably qualify as a principal source for information about plaintiff is his counsel, as discussed at pages 9-11, *infra*. Locy Declaration at ¶¶ 25-31.

see if her sources would release her from her promises of confidentiality. In part, she succeeded, but in part she did not. *Id.* at ¶¶ 17-18.

With due respect, plaintiff's claims of malevolence by Locy are unfounded.

**B. A contempt sanction will not advance this case**

To hold Locy in contempt and force her to reveal the sources of general anthrax information, as plaintiff requests, will not lead to discovery of any evidence relevant to this case. Contempt would be an exercise in futility, and plaintiff's sanction request should be denied.

First, of course, although Locy could testify about the identity of her sources for terrorism related articles generally, that testimony would not be probative of any issue in this case, because she is unable to link any of those sources to specific information, much less information about plaintiff.

Second, although forcing Locy to disclose all of her sources could theoretically narrow the universe of *possible* sources of Hatfill-related information, that exercise would inexorably disclose the identity of confidential sources completely *unrelated* to this case. Compelling Locy to reveal *all* her confidential sources so that plaintiff can ask which of them *might* have been the source for the two articles in question is a quintessential fishing expedition foreclosed by the First Amendment. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (the First Amendment affords a privilege "if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation") (Powell, J. concurring).<sup>3</sup>

Third, as a practical matter the record now shows that this exercise regarding compelled disclosure of Locy's sources is futile, and will sidetrack any real progress toward disposition of

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<sup>3</sup> Locy respectfully believes her First Amendment privilege protects her against such an inquiry, and intends to raise this issue on appeal.

this case; certainly plaintiff has not shown the contrary. Thus, one of Locy's sources, Edwin Cogswell (formerly the public affairs specialist with the FBI's National Press Office) could not remember anything he and Locy discussed about the anthrax investigation generally, or about the plaintiff in particular:

Q. Did you provide any information to Ms. Locy from USA Today about the Amerithrax investigation?

A. I mean, my contact with Ms. Locy has been some time ago, and I don't really remember what we talked about.

\* \* \*

Q. Did you provide Ms. Locy any information about Dr. Hatfill?

A. I mean, I don't have any recollection of what Ms. Locy and I may have talked about over the time I was in the press office.

Cogswell Deposition at 54:12-17; 55:3-8 (copy attached to declaration of Lee Levine at Exhibit 7). Cogswell's recollection was dimmed by the passage of time, *id.* at 81:17-82:2; 130:7-130:12, and by the number of conversations he had with Locy – more than 50 and possibly more than 100. *Id.* at 81:3-16.<sup>4</sup>

Another of Locy's sources, Roscoe Howard (formerly United States Attorney for the District of Columbia), similarly testified that he did not recall being the source of any

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<sup>4</sup> Mr. Cogswell testified that, when Locy contacted him to request a waiver, Locy mentioned that he had talked to her about the FBI's "transformation process." Cogswell Deposition at 64:1-16. Of course, Cogswell said that "to a lot of reporters." *Id.* at 65:5-8. He "would frequently tell reporters that we have a new mission to leave no stone unturned," *id.* at 154:15-22, because "that was one of our main themes" to convey to the press." *Id.* at 236:14-16. That Locy recalled Cogswell's mantra is not inconsistent with her failure to recall conversations about particular news articles.

information for Locy's articles. Howard Deposition at 178:13-179:9; 180:14-20 (copy attached to declaration of Lee Levine at Exhibit 8).

The record testimony of Locy and her sources shows that there is nothing to be gained from holding Locy in contempt, because it is unreasonable at best to believe that, if deposed, any other source would recall providing particular information for two discrete newspaper articles, written by one reporter (Locy), more than four years ago, in May and June 2003. The contempt sanction, followed by certain appeals and the prospect of untold numbers of additional unproductive depositions, is no longer reasonably calculated to lead to the discovery of admissible evidence.

**C. Plaintiff is estopped from seeking an order of contempt**

Plaintiff's request to sanction Locy should also be denied because he now wants to punish Locy for activity he once commended: Locy published news articles that, at the time, plaintiff's representatives encouraged, facilitated and complimented. The Court should not permit plaintiff in effect to have it both ways.

While she was covering the anthrax investigation, plaintiff's representatives consistently provided information to Locy about Dr. Hatfill. Locy Declaration ¶¶ 23-28. Hatfill's first attorney gave her a copy of his written complaint to the Office of Professional Responsibility about Attorney General Ashcroft's initial public identification of plaintiff as a "person of interest." *Id.* at ¶ 23. The interaction between plaintiff's team and Locy continued thereafter.

Thus, plaintiff's *de facto* press agent promised to arrange an interview for Locy with Dr. Hatfill's girlfriend, and with Dr. Hatfill himself, although no interview ever took place. *Id.* at ¶ 24.

Later, after Mr. Connolly began to represent plaintiff, the flow of information from plaintiff to Locy increased. Locy knew Mr. Connolly from writing about the Moussaoui case. *Id.* at ¶ 25. Mr. Connolly had numerous and routine conversations with Locy about the investigation, including discussions about the topics that are the subject of Dr. Hatfill's Privacy Act claim. *Id.* at ¶ 26. Indeed, Locy always called Mr. Connolly before one of her Hatfill-related stories appeared in USA TODAY because she knew that he was representing Dr. Hatfill and because she wanted to be fair to Dr. Hatfill. *Id.* at ¶ 27. Locy also called Mr. Connolly periodically to check in to see what he might be hearing about the investigation and, on a number of occasions, Mr. Connolly contacted Locy to tell her about developments. *Id.* Among other things, Mr. Connolly and Locy discussed:

- the reaction of police dogs to a scent at Dr. Hatfill's apartment or his girlfriend's home;
- whether Dr. Hatfill "passed" the polygraph and what a finding of "evasive" really meant;
- Dr. Hatfill's alleged exaggerations on his resume;
- whether Dr. Hatfill had been to Trenton or Princeton (two locations where the anthrax letters were believed to have been mailed from);
- the "book" Dr. Hatfill supposedly wrote that used a fictitious attack with supposed similarities to the October 2001 anthrax attack;
- what the FBI had found during various searches of the pond in Frederick (the rope, the box, etc.);
- Dr. Hatfill's inability to find a job and his issues with Louisiana State University; and
- that Dr. Hatfill was having a really hard time since Attorney General Ashcroft labeled him a "person of interest" – both financially and personally – and was without a job and was hurting financially;

*Id.* In fact, Locy’s “hook” for her May 29, 2003 “24/7 Surveillance” story – one her two stories at issue in this case – came from Mr. Connolly, Mr. Clawson or both. *Id.* at ¶ 27(i). Mr. Connolly went so far as to introduce Locy to Dr. Hatfill at D.C. Traffic Court and spoke to her at length about the proceeding. Indeed, Mr. Connolly’s office provided Locy with an advance copy of the complaint in this case. *Id.* at ¶ 27(j,k).

At no time, in any of their frequent conversations, did Mr. Connolly or Mr. Clawson tell Locy that the subject matter of her articles should not be published or violated the Privacy Act. *Id.* at ¶¶ 20, 29. They never complained to her about any unfairness or impropriety in any story she ever wrote about Dr. Hatfill, despite ample opportunities to do so. *Id.* They never raised any concern about Locy’s stories, and never suggested that they would seek to force Locy to disclose her confidential sources (*id.* at ¶ 30). Indeed, they complimented Locy’s work, and lamented how she managed to find sources in the FBI and elsewhere who provided accurate, fair information about Dr. Hatfill, but that other reporters had sources who were spreading inaccurate information about him. *Id.* at ¶ 31.

Locy is not suggesting that Mr. Connolly or plaintiff’s other representatives acted inappropriately when they encouraged her reporting about him. Apparently, they felt that at the time that the news articles she authored and published were in plaintiff’s best interests. Locy does urge, however, that it is inappropriate for plaintiff effectively to punish Locy for engaging in that same conduct.

**D. To the extent plaintiff reads this Court’s Order overbroadly, contempt is inappropriate.**

It may also be that plaintiff has too broadly construed the Court’s August 13, 2007 Order to compel further testimony from the reporters. That Order was based on the premise that plaintiff should learn the identity of the confidential sources for articles about Dr. Hatfill that are

at issue in the plaintiff's Privacy Act case. Given this factual underpinning, the Court required the non-party journalists to answer questions posed to them by the plaintiff.

Plaintiff, however, interpreted the Court's Order as allowing a far-reaching inquiry into all of Locy's confidential sources for her general anthrax reporting. Locy September 10, 2007 Deposition at 188:12-188:15; 189:20-190:1. (Exh. B). Locy's reporting on the anthrax investigation generally included numerous stories that relied on confidential sources, but did not mention plaintiff in any way and are consequently not at issue in this case. Despite suggestions that plaintiff focus his questions on Locy's sources about Hatfill (*id.* at 201:5-201:12), his counsel refused to do so. *Id.* at 189:7-189:11; 189:16-189:19. *At no time* in her second deposition did plaintiff ask Locy the names of her sources of information about Dr. Hatfill. Exhibit B.

To the extent plaintiff has too broadly construed the Court's discovery order, there can be no finding of contempt. The D.C. Circuit reached a similar conclusion on similar facts in *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005). There, the appellate court reversed a finding of contempt because the questions the reporter refused to answer were broader than those ordered by the district court:

Gerth argues, and we agree, that this definition of "the Wen Ho Lee case" [used by the plaintiff's counsel in his deposition] was so broad that it encompassed information not included in the Discovery Order, including material from confidential sources in articles that referenced Wen Ho Lee but that was not personally related to Wen Ho Lee himself.

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The Discovery Order only compelled the disclosure of sources who provided information "directly about Wen Ho Lee," not about the background of the case or related cases, even if they were tangentially related to Wen Ho Lee.

*Id.* at 64. Because the questions posed by the plaintiff's attorneys implicated articles beyond those at issue in the case, the D.C. Circuit held that the reporter properly refused to answer the questions, and was incorrectly held in contempt by the district court. *Id.* To the extent that plaintiff has misconstrued this Court's order, contempt is similarly inappropriate.

## **II. ANY FINE SHOULD BE NOMINAL AND SHOULD BE STAYED TO ALLOW LOCY TO SEEK APPELLATE REVIEW**

In light of the constitutional privilege at issue in this case, if the Court finds Locy in contempt, it should impose a nominal fine, and should stay its imposition pending appeal.

### **A. Any fine should be nominal**

Any fine imposed by the Court should be nominal when, as here, the issue before the Court has not been addressed by any appellate court. *See, e.g., United States v. Cutler*, 6 F.3d 67, 70 (2d Cir. 1993) (upholding contempt fine of \$1.00 per day imposed on reporters and television stations for refusing, on reporter's privilege grounds, to provide unpublished notes, outtakes and testimony in criminal contempt proceeding); *United States v. Cuthbertson*, 630 F.2d 139, 143 (3d Cir. 1980) (upholding contempt fine of \$1.00 per day imposed on CBS for refusing, on reporter's privilege grounds, to produce for in camera review by the court, statements of potential government witnesses in a criminal trial), *cert. denied*, 449 U.S. 1126 (1981).<sup>5</sup>

In *Cutler* and *Cuthbertson*, the courts entered *de minimis* fines pending appeal in light of the seriousness of the constitutional questions involved. Here, Locy respectfully submits that a nominal fine is also appropriate in light of the serious constitutional questions at the center of

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<sup>5</sup> *See also* Edward Gregory Mascolo, *Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor*, 16 N.E. Journal on Criminal and Civil Confinement 171, 203 (Summer 1990) ("Because of the drastic nature of sanctions for contempt, a court should avoid, where feasible, imposition of 'Draconian punishment' upon the civil contemnor").

this case and her good faith throughout these proceedings, including her efforts to contact her sources *before* and *after* her second deposition. Subjecting Locy to heavy penalties for asserting and defending, in good faith, her First Amendment rights makes little sense, especially since a contempt citation is the only procedural means for Locy to appeal this Court's ruling and obtain a final judicial resolution of her constitutional argument.

Dr. Hatfill argues that the Court should impose an escalating per diem fine. Not only is this request at odds with the many cases imposing only a nominal fine on reporters, but the lone case relied upon by plaintiff, *Pigford v. Veneman*, 307 F. Supp. 2d 51 (D.D.C. 2004), is completely inapposite. In *Pigford*, plaintiff's counsel agreed to a deadline to present the claims of its class members in exchange for the government allowing late-filed claims, costing an estimated \$33 million. Despite being granted an extension of its agreed-upon deadline, the class counsel did not meet the extended deadline. In addition, the class counsel willfully and knowingly violating a Protective Order. Because the counsel's actions cost the government an estimated \$33 million, the court imposed escalating fines to punish the counsel for their delay in meeting their part of the bargain.

*Pigford* has no relevance here. It does not concern a reporter who is undertaking the only route available to her to obtain appellate review of her unresolved situation. Plaintiff's reliance upon this case only underscores the weakness of his argument for increasing fines here. Under the well reasoned and sound cases cited above, any fine should be nominal.<sup>6</sup>

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<sup>6</sup> Plaintiff also asks the Court to take the unprecedented step of requiring Locy to pay any fine herself, and not seek reimbursement from any source. Plaintiff's Mem. at 7. Neither of the cases cited support this sweeping proposition. Instead, both involve attorneys who were solely responsible for sanctionable conduct and, as a result, the court ordered that the fine should be borne solely by the attorneys, and not their clients. *See, e.g., In re HCMA (Carolina) Inc.*, 301 B.R. 764, 767 (P.R. Bankr. Ct. 2003) (holding that attorneys, and not clients, must pay sanction for attorney's misconduct); *Mass. School of Law at Andover, Inc.* (Footnote continued on next page)

**B. The Court should stay any sanction pending appeal**

The Court should also stay any contempt fine pending appeal.

The grounds for granting a stay pending appeal are well-established. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). In deciding whether to issue a stay, a court considers: (1) whether the petitioner is likely to prevail on the merits of her appeal; (2) whether the petitioner will be irreparably injured without such relief; (3) whether the issuance of a stay would substantially harm other parties interested in the proceeding; and (4) wherein lies the public interest. *Id.* Where the last three factors weigh in favor of granting a stay, the petitioner need only show a “substantial case on the merits.” *Holiday Tours, Inc.*, 558 F.2d at 843. To grant a stay, the Court is “not required to find that ultimate success by the movant is a mathematical probability.” *Id.* Similarly, a stay may be appropriate where a “serious legal question” is raised, even if the movant has not shown that it is likely to prevail on the merits. *See McGregor Printing Corp. v. KEMP*, 811 F. Supp. 10, 12 (D.D.C. 1993).

Here, all four factors weigh in favor staying the imposition of contempt sanctions against Locy pending the outcome of her appeal, including the constitutional significance of the legal issues at stake and the public interest in the free flow of information.

**1. Locy has serious and substantial legal issues for appeal**

Contrary to plaintiff’s assertion that “the law in this Court and this Circuit is clear” that Locy must reveal her confidential sources for articles not related to plaintiff, Locy is unaware of

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*(Footnote continued from previous page)*

*v. ABA*, 914 F. Supp. 1172, 1179-80 (E.D. Pa. 1996) (holding that attorney alone must pay sanctions for his willful misconduct). Here, of course, Locy’s reporting was conducted within the scope of her employment for USA TODAY. If USA TODAY, or any other person or entity, chooses to pay Locy’s fine, they should be allowed to do so.

any court compelling reporters to reveal their confidential sources in circumstances like those here. For this reason, and because this case raises questions left unanswered by the D.C. Circuit's opinion in *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), any finding of contempt should be stayed pending appeal.

First, and foremost, Locy cannot recall the names of her the confidential sources who provided the information at issue in this case. Plaintiff would thus have Locy reveal her sources for all of her anthrax-related, non-Hatfill related reporting, despite the fact that this would result in the disclosure of numerous individuals who provided information under a promise of confidentiality about articles *not* at issue in this case. We are aware of no other authority forcing such a broad disclosure.

Compelling Locy to identify all of her sources would trounce the constitutional interest in protecting of the identities of *all* of them, based solely upon plaintiff's hope that, at a future deposition, *some* subset might acknowledge being a source for the May 29 or June 10 articles. Even if that scenario were to occur, others of Locy's sources would have been sacrificed for no purpose whatever. Compelling disclosure of *multiple* confidential sources in the hope that *one* will recall events of years ago and confess is contrary to established authority. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 710, 92 S. Ct. 2646, 2671 (1972) (the First Amendment affords a privilege "if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation") (Powell, J. concurring); *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (affirming order quashing subpoenas issued to reporters in criminal case because "the reporters' testimony was not 'essential and crucial' to [defendant's] case and was not relevant to determining [defendant's] guilt or innocence"); *Lee v. Dep't of Justice*, 413 F.3d 53, 61-64 (D.C. Cir. 2005) (reversing contempt order against reporter who

refused to answer questions about sources on non-relevant stories); *Blumenthal v. Drudge*, 186 F.R.D. 236, 244 n.12 (D.D.C. 1999) (“In addition, plaintiffs’ document request number 25 asks for information regarding defendant’s sources for stories beyond the scope of this litigation. Defendant’s interactions with his sources for other stories do not go to the heart of plaintiffs’ claims”).

Moreover, in *Lee*, the Court of Appeals never directly addressed whether identifying the employer of confidential sources “would have been sufficient to support at least a portion of [the plaintiff’s] claim.” *Lee*, 413 F.3d at 60. During her depositions, Locy confirmed the employer of some of her confidential sources, based on the published reports. Said another way, because her articles reported that her sources were FBI or DOJ individuals, she confirmed that this was accurate information when reported. Her appeal would directly raise the issue of whether this is sufficient to allow the plaintiff to proceed on his Privacy Act claim.<sup>7</sup>

Finally, in certain respects, Locy’s situation is akin to that of reporter Jeff Gerth in *Lee*. The Court of Appeals in *Lee* reversed the finding of contempt as to Gerth because he could not remember the identifies of “sources who gave information specifically about Lee.” *Id.* at 64. Similarly, Locy has consistently stated that she does not remember which confidential sources provided her with information about Hatfill. When she refused to answer the questions of Hatfill’s attorney, she stated:

I do not remember the confidential sources who provided me with information about Steven Hatfill. Refusing 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.

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<sup>7</sup> Plaintiff previously indicated that he believed the disclosure of the particular government agency employer was sufficient to allow him to prove his Privacy Act case.

Locy Deposition at 188:17-189:3.

Locy thus presents a “substantial case” on the merits that raises significant legal issues and addresses the boundaries of the reporters’ privilege under the First Amendment. Indeed, in many cases that present a less substantial case, courts have routinely stayed the imposition of contempt sanctions pending appeal. *See, e.g., Tinsley v. Mitchell*, 804 F.2d 1254 (D.C. Cir. 1986) (trial court stayed civil contempt fine of \$50 per day after attorney refused to pay his share of attorneys’ fees); *Common Cause v. Nuclear Regulatory Comm’n*, 674 F.2d 921 (D.C. Cir. 1982). This is particularly true with respect to reporter’s privilege cases raising First Amendment issues. *See, e.g., United States v. Cutler*, 6 F.3d 67, 70 (2d Cir. 1993) (\$1/day fine stayed pending appeal); *United States v. Cuthbertson*, 630 F.2d 139, 143 (3d Cir. 1980) (same); *In re Special Proceedings*, Nos. 03-2052, 04-1383 (1st Cir. Mar. 25, 2004) (granting stay of contempt sanction against reporter pending expedited appeal); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1177 (1st Cir. 1988) (civil contempt fine against NBC stayed pending appeal).

In fact, in the two most recent occasions in which this Court has had occasion to confront this question, in cases where a reporter was held in contempt for refusing to disclose confidential information, it stayed the imposition of sanctions pending appellate review. *See In re: Special Counsel Investigation*, 332 F. Supp. 2d 33, 34 (D.D.C. 2004); *Lee v. Dept. of Justice*, 327 F. Supp. 2d 26, 33 (D.D.C. 2004), *aff’d in part and rev’d in part*, 413 F.3d 53 (D.C. Cir. 2005). This case is no different.

**2. Locy will suffer irreparable harm absent a stay**

If the Court denies Locy’s motion to stay the imposition of contempt sanctions, Locy will be forced to either reveal her confidential sources, thereby mooting her claim of right to protect

their identities, or incur fines which are substantial to her. Locy should not be forced to suffer such a Hobson's choice to have her appeal heard. *See, e.g., 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 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").

**3. Dr. Hatfill has not shown that he will suffer substantial harm if a stay is granted**

Any injury to Dr. Hatfill that results from a stay would be minimal. Two of Locy's sources have waived confidentiality and been deposed. As Locy cannot remember the particular confidential sources who provided information about Dr. Hatfill and contends that she is not required to disclose her entire universe of confidential sources on anthrax generally, staying the imposition of contempt sanctions would not materially affect Dr. Hatfill or cause any additional harm.

**4. Granting a stay serves the public interest**

Finally, because of the unresolved constitutional issues at stake and the circumstances surrounding Locy's reporting, the public interest weighs in favor of granting Locy's request for a stay. The two news stories by Locy at issue in Dr. Hatfill's Complaint reflect Locy's efforts to present a balanced and accurate account of one of the most notorious crimes in recent history. The public had a strong interest in timely reports about the investigation of the crime involving anthrax. Requiring Locy to disclose her entire universe of confidential anthrax sources in the hope that one of them will confess to providing information about Dr. Hatfill, would inevitably have a chilling effect on the free flow of information and could significantly impair the media's ability to report the news. This is exactly the type of fishing expedition that is foreclosed by the

First Amendment. *See, e.g., Blumenthal v. Drudge*, 186 F.R.D. 236, 244 n.12 (D.D.C. 1999) (“In addition, plaintiffs’ document request number 25 asks for information regarding defendant’s sources for stories beyond the scope of this litigation. Defendant’s interactions with his sources for other stories do not go to the heart of plaintiffs’ claims”). The public interest weighs heavily in favor of staying the imposition of contempt sanctions pending the outcome of Locy’s appeal to the Court of Appeals.

### **CONCLUSION**

For the foregoing reasons, non-party reporter Toni Locy respectfully requests that the Court deny Dr. Hatfill’s motion to hold her in civil contempt. In the alternative, should the Court enter an order finding her in contempt, Ms. Locy requests the imposition of a nominal fine that is stayed pending an appeal of the merits of her assertion of a reporters’ privilege under both the First Amendment and federal common law.

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Respectfully submitted,

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