

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven J. HATFILL, M.D.,)
)
Plaintiff,)
)
v.)
)
Attorney General Michael MUKASEY,)
et al.,)
)
Defendants.)
_____)

Civil No. 1:03-CV-01793 (RBW)

**PLAINTIFF STEVEN J. HATFILL’S REPLY MEMORANDUM IN SUPPORT OF HIS
MOTION TO FIND TONI LOCY IN CONTEMPT OF COURT**

Former reporter Toni Locy, having “respectfully refused” to obey the Court’s Order of August 13, 2007, now “respectfully requests” that the Court reverse itself and relieve her of any obligation to name the FBI and DOJ officials who provided her with confidential law enforcement information about the anthrax investigation and Dr. Hatfill’s role in it. But whether she has been *respectfully* contemptuous of the Court’s authority or merely contemptuous, the result is the same: The Court’s authority in this matter should be vindicated.

Ms. Locy does not dispute that she is in contempt of this Court’s Order of August 13, 2007. As pointed out in Dr. Hatfill’s brief, “[t]he party seeking a finding of contempt has the burden of demonstrating, by clear and convincing evidence, that: (1) the Court’s order was reasonably clear and specific; and (2) the alleged contemnor failed to comply with the Court’s order.” *Lee v. Dep’t. of Justice*, 401 F. Supp. 2d 123, 131 (D.D.C. 2005) (citations omitted). *See* Mem. in Supp. of Pl. Steven Hatfill’s Mot. that Toni Locy Be Held in Civil Contempt, Oct. 2, 2007 (Dkt. #205-2) at 2. Ms. Locy contests neither element required to establish contempt. She admits that, despite having had a full and complete hearing on her reporter’s privilege assertion,

she refused to reveal the names of the agency-defendant officials who made disclosures to her about the anthrax case. *See* Mem. of Points and Authorities of Toni Locy in Supp. of Mot. For Recons. and in Opp'n to Pl.'s Mot. For Civil Contempt, Dec. 19, 2007 (Dkt. # 212-2) (hereinafter "Locy Brief") at 2 (conceding her refusal). Nor does her opposition dispute that the order was reasonably clear and specific. Ms. Locy thus raises no merits defense for her persistent contempt of the Court's Order, because there is none. The remainder of this brief responds to Ms. Locy's arguments that, despite her uncontested contempt, the Court should effectively surrender to her intransigence and abandon any effort to enforce its Order. Dr. Hatfill urges the Court to reject this desperate attempt to relitigate issues already decided.

I. MS. LOCY OFFERS NO BASIS FOR NON-ENFORCEMENT OF THE COURT'S ORDER

A. Ms. Locy Simply Repeats Her Imperfect-Memory Argument

Ms. Locy's main argument against contempt now – her claim that she does not remember which sources made which disclosures, Locy Brief at 1-9, 16-17 – was also her main argument on the merits last summer. Mem. Of Points and Authorities of Toni Locy Opp. Pl.'s Mot. to Compel Further Testimony, May 23, 2007 (Dkt. #169). Dr. Hatfill responded to that argument during the briefing on the merits. As we pointed out then, Ms. Locy *can* name the nine or ten FBI and DOJ officials who gave her information on the anthrax case, and she *can* answer follow-up questions designed to narrow down their identity – she simply refuses to do these things. Dr. Hatfill's Reply Mem. In Supp. of Mot. To Compel Further Testimony From Toni Locy, June 4, 2007 (Dkt. #187). The Court considered both Ms. Locy's argument and Dr. Hatfill's, and then made its ruling, rejecting her privilege claim. The Court has warned that it "will not entertain. . . [reconsideration] motions that simply reassert arguments previously raised and rejected by the

court....” General Order and Guidelines for Civil Cases at 8.¹ Ms. Locy has admitted remembering the identities of her agency-defendant sources regarding the anthrax investigation. *See, e.g.*, Locy Dep. May 19, 2006, 133:7-15 (Ex. A) (admitting that she recalled the names of the six FBI sources about whom she testified but could not match particular disclosures to particular ones). She has been ordered to disclose them so that Dr. Hatfill may follow up to determine which among this small, identifiable set of agency defendant officials made which particular disclosures. Rather than accept Ms. Locy’s invitation to re-litigate this issue, Dr. Hatfill stands on his prior briefing of it and the Court’s resolution of that claim.²

B. Dr. Hatfill Is Not “Estopped” From Seeking Enforcement of This Court’s Order

Ms. Locy argues that “Plaintiff is estopped from seeking an order of contempt” because he once cooperated with and commended some of her reporting. Locy Brief at 9-11. There is nothing persuasive about this argument, but it is noteworthy for several reasons.

First, in three pages of argument, Ms. Locy points to no legal authority of any kind supporting her estoppel claim.

¹ Ms. Locy also adopts Mr. Stewart’s Motion for Reconsideration but presents no independent argument for it. *See* Locy Brief at 1 (adopting and incorporating Mr. Stewart’s argument). In opposition to Ms. Locy’s request for reconsideration, Mr. Hatfill respectfully refers the Court to his brief, also filed this date, replying to Mr. Stewart and more fully addressing the reconsideration arguments.

² Ms. Locy also argues that “[i]t may also be that plaintiff has too broadly construed the Court’s August 13, 2007 Order. . . .” Locy Brief at 11, 11-13. But she makes no argument about the text of that Order and has no plausible claim that “to provide full and truthful responses to questions propounded to them by Dr. Hatfill’s attorneys” is ambiguous. Order, Aug. 13, 2007. Dr. Hatfill specifically argued in the merits briefing that, despite her professed lack of memory as to specifics, Ms. Locy could and should answer the questions she concedes she can about her anthrax reporting generally, because that is likely to lead to discovery of her sources on Dr. Hatfill. Her desperate search for vagueness in the Order is no more than a creative recycling of her unsuccessful lack-of-memory argument: she wishes the Order did not require her to answer questions about her anthrax reporting, because then her lack of memory as to the particulars would allow her to escape the Court’s Order.

Second, her factual arguments are *non sequiturs*. If Dr. Hatfill, his counsel, or someone else associated with him had been one of the confidential sources providing the disclosures at issue, *perhaps* there would be some unfairness in an effort by one source to compel disclosure of another source's identity. But that question is not before the Court because that is not Ms. Locy's allegation. While she describes in detail "issues" she discussed with Dr. Hatfill's counsel, Locy Decl. at ¶27, she admits that "[a]t no time, however, was Mr. Connolly a confidential source." *Id.* at ¶26. Nor is there any basis for hindering Dr. Hatfill's Privacy Act case against the government's smear campaign simply because he first tried to defend himself in the press. Moreover, Dr. Hatfill agrees that Ms. Locy's articles were more balanced than those of some of her peers in that she reported not just the agency defendants' campaign of leaks against Dr. Hatfill but his responses to and protestations of those leaks. But balance in her *articles* does not excuse the *leaks*. Regardless of the content of her reporting, the defendants' disclosures to Ms. Locy were just as illegal as their disclosures to other reporters (like Mr. Stewart) who more reliably carried water for them.

Third, the new assertions about Dr. Hatfill's counsel in Ms. Locy's recent declaration pertain to facts that long pre-dated the briefing on the merits, and there is no reason they could and should not have been made then. These assertions should not be entertained at all at this stage.³ Nonetheless, any weight the Court is inclined to give them at this point should reflect the contrast between her depiction of those discussions in her recent declaration and her previous testimony on the subject:

Q And how did you know Tom?

³ This Court does not entertain "arguments that should have been previously raised, but are being raised for the first time the 'Motion for Reconsideration.'" General Order and Guidelines for Civil Cases at 8.

A Tom used to be a prosecutor, and I think I've met him on other cases, but I just -- I can't remember which ones.

Q And was he giving you information about Dr. Hatfill or the anthrax investigation?

MR. BERNIUS: I object. You can answer that insofar as it's nonconfidential information that was given to you -- or information given to you on a nonconfidential basis.

THE WITNESS: I would always call the counsel for anyone that I was writing about to ask for comment. I always did -- that was -- that is my practice. So I -- when I wrote stories, I would call Mr. Connolly to get reaction if he had any.

MR. O'DONNELL: Let me just say for the record to the extent there is any understanding of confidentiality regarding information received from Dr. Hatfill or any of his attorneys, he not only waives it, he urges you to disclose it to your heart's content.

Locy Dep. May 19, 2006 164:22-166:2. The Court might also contrast Ms. Locy's newly expansive memory of conversations with Dr. Hatfill's counsel with her professed lack of any memory whatsoever of anything any of her sources ever told her about Dr. Hatfill. *Compare* Locy Decl. at ¶ 19 (professing to have "no idea" who gave her the information she reported about Dr. Hatfill) *with id.* at ¶27 (detailing 11 "issues" she now recalls discussing with Dr. Hatfill's counsel). If, therefore, the Court considers relying on Mr. Locy's new assertions, it should first require that they be tested by cross examination in open court.

C. Ms. Locy Has Not Made Substantial Efforts To Comply, But She Has Invoked Privilege as a Sword and Shield To Prevent Testing of Her Professed Lack of Memory

Ms. Locy argues that she should not be held in contempt because she "has acted in good faith," and seeks credit from the Court for the disclosure of two of her sources. Locy Brief at 6-7. This argument is factually insupportable.

First, it bears repeating that Ms. Locy has the sole, complete, and absolute ability (indeed, obligation) to comply with the Court's Order – with or without the consent of the malfeasant employees of the agency defendants whom her defiance hides. This fact makes it difficult to make any sense at all out of an argument that her noncompliance is somehow “in good faith.”

Second, Ms. Locy's account of having “reached out” to her sources and obtained permission from two to obey this Court omits critically important facts. Counsel for *other* reporters, *not* Ms. Locy, were responsible for uncovering former U.S. Attorney Roscoe Howard and former FBI National Press Office Official Edward Cogswell as two of the previously anonymous leakers. When Ms. Locy was deposed after the Court overruled her reporter's privilege claim, she had only recently “begun the process” of attempting to get her sources within the defendant agencies to agree that they might be disclosed. Locy Dep. Sept. 10, 2007 192:16-18 (Ex. B). Furthermore, she waited *two weeks* after the entry of the Order, until the Thursday or Friday before her Monday deposition, to even begin the process, *id.* 198:22-199:3. As of that time, she had only “reached out” to four of them, *id.* 193:1-3, and she had only actually reached two of them. *Id.* 198:2-6. Only later, after counsel for a *different* reporter had identified Messrs. Howard and Cogswell as sources, did Ms. Locy follow along behind.

Finally, Ms. Locy has resorted to tactical invocations of privilege to make selective disclosures about her recent communications with these former sources. When questioned at her September 2007 deposition about what, exactly, she had said to these sources, she asserted a work-product objection and refused to answer. *Id.* 194:6-195:1. She refused on that basis to reveal whether she had even *asked* any of them to “waive” her promise to hide their identities from this court. *Id.* 195:14-196:8. She similarly asserted that the attorney work-product doctrine entitled her to withhold *what one of her FBI sources said to her when she called him to discuss*

this Court's Order. Id. 197:11-18. Now, she gives the Court a skeletal account of her recent communications with those sources designed to support her "good faith" argument. *See* Locy Brief at 2, 6-7; Locy Decl. at ¶17-18. This is a classic case of attempting to use privilege "as both a sword and shield by using the privileged [material] to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006) (citation omitted). As such, her selective disclosures about the conversations she had previously asserted as privileged may not be relied upon now and should be excluded from consideration. *See U.S. v. Nobles*, 422 U.S. 225, 241 (1975) (upholding exclusion of testimony where party attempted to use work-product assertion to present "a truncated portion" favorable to him); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 576-77 (1st Cir. 1989) (holding that a defendant who had invoked a privilege and refused to answer questions during a deposition could not later testify about the shooting.); *Engineered Prods. Co. v. Donaldson Co., Inc.*, 313 F. Supp. 2d 951, 1022-23 (N.D. Iowa 2004) (holding that the plaintiff could not introduce testimony on issues that the plaintiff had prevented the defendant from exploring during a deposition by invoking a privilege).

There is, however, other testimony in the record about Ms. Locy's conversations with her sources, and it is not at all helpful to Ms. Locy. While Ms. Locy has repeatedly (and under oath) asserted a lack of memory as to what her sources told her, Ms. Locy's memory was apparently much better in one of the recent conversations with a source which she attempted to cloak behind the work-product privilege. After being exposed, Mr. Cogswell testified that

Ms. Locy called me at sometime in the September [2007] time frame, I don't remember the exact date and told me that I may have provided some information for her in a particular anthrax story and she was under or could be under sanction by the judge in a civil action, and she had mentioned that I had provided some information to her and I mean, I was kind of surprised and she said it was in text of the FBI's transformation process and that it was in a story where I guess an FBI vehicle had hit Mr. Hatfill. She

told me that that was the information I had given her in that particular and that she wanted to know if she could have a waiver.

Cogswell Dep. Nov. 16, 2007 64:1-16 (Ex. C). Thus, Ms. Locy claims that her lack of memory is nearly absolute when she is called upon to tell the *Court* what her sources said (she has “no idea” who told her what she reported about the investigation of Dr. Hatfill), yet she is apparently capable of telling the *sources* what they said to her, and she claims to remember in detail the “issues” she discussed with Dr. Hatfill’s counsel. This sort of selectivity has the ring of tactics rather than truth, and her tactical invocation of privilege has been used to prevent fair discovery of the facts on this issue.

II. THE COURT’S SANCTION SHOULD INDUCE TIMELY COMPLIANCE

Lacking any real argument against a contempt finding (“respectful” or not), Ms. Locy argues that the Court should effectively decline to enforce its own Order. *See* Locy Brief, 13-20 (pleading that her contempt sanction be both nominal and stayed). The Court should reject this argument as well.

A. The Contempt Sanction Should Be Effective, Not Nominal

Ms. Locy presents no legal justification for her request that the contempt sanction be minimal. Neither *United States v. Cutler*, 6 F.3d 67, 70 (2d Cir. 1993), nor *United States v. Cuthbertson*, 630 F.2d 139, 143 (3d Cir. 1980), provides any authority for a nominal fine. Locy describes both as “upholding contempt fine of \$1.00 per day,” Locy Brief at 13, but in neither case was the propriety of the fine even challenged, let alone “upheld” by the Court. By contrast, *Pigford v. Veneman*, 307 F. Supp. 2d 51 (D.D.C. 2004) – precedent from this Court – *does* address the appropriateness of an escalating fine. Ms. Locy argues that 1) the *Pigford* fine was designed “to punish,” 2) the *Pigford* contemnor was not a reporter, and 3) the *Pigford* contempt

was not undertaken with the purpose of engaging in an appeal. Locy Brief at 14. But the Court in *Pigford* expressly rejected the argument that the escalating fines were punitive and clearly explained their compensatory and coercive nature. *Pigford*, 307 F. Supp. 2d at 56-57. Ms. Locy does not elaborate on her suggestion that, as a reporter, she has a greater right to flaunt a valid court order than the lawyer contemnors in *Pigford*, but suffice it to say that if there is any legal authority for that proposition the Court will not find it in Ms. Locy's brief.⁴ And the fact that she vows to continue her disobedience and appeal any contempt finding adds nothing.

Nor does Ms. Locy present any factual justification for her request. The Supreme Court has explained that the purpose of a per diem contempt fine is to "exert a constant coercive pressure." *Int'l Union v. Bagwell*, 512 U.S. 821, 829 (1994). The lengths to which Ms. Locy goes – adopting Mr. Stewart's tactics of re-arguing the merits, coat-tailing on the partial compliance of others, and coming up with new and doubtful factual assertions – illustrates that a very significant degree of coercion will be required to vindicate the Court's Order. While she asks in passing for an unspecified but "nominal" fine, Locy Brief at 13, she does not in fact contend that such a fine would ever prove effective. Her course of conduct demonstrates that it

⁴ In a footnote argument, Ms. Locy also attempts to distinguish the cases authorizing a court to ensure the effectiveness of fines by prohibiting their reimbursement. As Locy herself points out, the cases at issue "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." Locy Brief at 14 n.6 (emphasis added). Ms. Locy stands in precisely the analogous position. While her "reporting was conducted within the scope of her employment for USA Today," *id.*, her contempt was not. It began long after she left the employment of USA Today. In fact, she has emphasized to this Court that she herself, and no one at USA Today, is the only person who can answer the questions she has been ordered to answer. Mem. Of Points and Authorities of Toni Locy Opposing Pl.'s Mot. to Compel Further Testimony, May 23, 2007 (Dkt. #169) at 7. Given the doggedness of her defiance, it is clear that allowing reimbursement of any contempt sanction would ensure its ineffectiveness.

will never be, and it confirms that high and escalating per diem fines are a reasonably calculated initial effort⁵ to compel compliance.⁶

B. There is No Basis To Delay This Case By Staying Enforcement of the Order

The circumstances of this case do not justify Ms. Locy's request for a stay. Locy Brief, 15-20. A stay pending appeal is an "extraordinary remedy. . . ." *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004). "The first, and most important, hurdle which the petitioner[] must overcome is the requirement that [she] present a strong likelihood of prevailing on the merits of [her] appeal." *Am. Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1411, 1414 (D.D.C. 1985). *See also Shays*, 340 F. Supp. 2d at 45. "Without such a substantial indication of probable success, there would be no justification for the [C]ourt's intrusion in the ordinary processes of administrative and judicial review." *Va. Petroleum Jobbers v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

In the wake of the *Lee* case, the correctness of the Court's ruling on reporter's privilege is not subject to serious dispute, and Ms. Locy has no reasonable prospect of prevailing on appeal. As this Court has already found, "*Lee* provides *direct and unequivocal* guidance and instruction." Mem. Op., Aug. 13, 2007 at 10 (emphasis added). This Court has already analyzed *Lee* closely, *id.* at 10-14, noted that this case "is strikingly similar," *id.* at 14, and, accordingly,

⁵ While the nature of the sanction is at the court's discretion, Dr. Hatfill has not suggested incarceration as an initial step. That sanction can, however, be revisited if escalating fines prove ineffective.

⁶ Ms. Locy does not contest Dr. Hatfill's entitlement to compensatory attorneys' fees for the expense attendant to compelling her compliance, nor his right to seek compensatory sanctions should ongoing contempt by Ms. Locy cause Dr. Hatfill further damages in this case. *See* Mem. in Support of Plaintiff Steven Hatfill's Mot. that Toni Locy be Held in Civil Contempt, Oct. 2, 2007 (Dckt. #205-2) at 7. Should the Court grant Dr. Hatfill's contempt motion, he requests permission to submit an appropriate Bill of Costs to the respondents who are held in contempt and an order that they pay such reasonable costs. *Id.*

followed *Lee. Id.* at 15. The Court of Appeals has spoken clearly and recently on this very issue, on the same underlying claim, and under almost the same facts. There is nothing remotely unfair about compelling Ms. Locy's obedience to the lawful order of this Court rather than giving her the "free pass" she seeks.

The secondary factors in the test governing a stay request are 1) the threat of irreparable harm to that party without a stay, 2) the threat of irreparable harm to others with a stay, and 3) the public interest. *See, e.g., Am. Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1411, 1414 (D.D.C. 1985); *Shays v. FEC*, 340 F. Supp. 2d 39, 45 (D.D.C. 2004). These also militate against the extraordinary relief Ms. Locy seeks.

Given the extraordinary government delay that has already hampered Dr. Hatfill, yet more delay under another stay risks obvious prejudice to him through further loss of evidence. Ms. Locy's own memory appears to be rapidly worsening (except perhaps with respect to her conversations with Mr. Connolly). *Compare* Locy Dep., May 19, 2006, 133:7-15 (admitting that she recalled the names of the six FBI sources about whom she testified but could not match particular disclosures to particular ones) with Locy Decl. at ¶19 (now claiming to have "no idea" who gave her the disclosures she reported about Dr. Hatfill). The more time is allowed to pass before this evidence is obtained, the greater the genuine loss of evidence will be (and the more plausible insincere claims of memory loss will appear). The risk is particularly clear here given the government-requested stays that originally delayed depositions in this case and delayed the contempt briefing this fall, and the need to conduct follow-up depositions based on the disclosures eventually compelled from recalcitrant reporters.

By contrast, there is no risk of professional or other harm to Ms. Locy in denying a stay. She left her last position as a reporter a year and a half ago to pursue a masters degree in law.

Locy Decl. at ¶6. Now she works as a professor of journalism at West Virginia University. *Id.* at ¶7.

Nor is the public interest served by further delay. Ms. Locy argues that enforcing the Court's Order could have a general chilling effect by calling into question the enforceability of reporters' secrecy agreements with leaking public officials. Locy Brief at 19-20. But any such "chill" arises from and is accounted for in the underlying legal principles, as set out authoritatively for this Circuit in *Lee*. Moreover, that precise argument was made in the argument on the merits and considered at length in the Court's resultant opinion. August 13 Opinion, slip op. at 20-25. And while privilege rulings subject to serious legal dispute are sometimes stayed, Courts will not hesitate to deny a stay where, as here, the privilege issue has recently and clearly been resolved in the controlling court. *See, e.g., In re Sealed Case*, 148 F.3d 1079 (D.C. Cir. 1998) (denying request for stay pending appeal *en banc* of decision overruling privilege claim by Secret Service agents protecting the President).

Privilege claims are important, and so is a litigant's right to vindicate his claims. Last August, the Court resolved the conflict between those interests in this case. The Court did so through heavily briefed and thoroughly argued ancillary litigation between Dr. Hatfill and the press. Imperfect and costly though it may be, that is how the legal system functions. But it would not function if the losing side in such ancillary disputes were routinely allowed to ignore the outcome with impunity until every possible means of re-litigation had been exhausted. As a practical matter, Ms. Locy (and Mr. Stewart) may well decide to continue defying the Court's authority despite whatever sanctions the Court may impose during the pendency of an appeal, but completing this long litigation in a timely and orderly manner requires that the Order be enforced now and the case proceed, whether or not she eventually appeals.

Dated: January 4, 2008

Respectfully submitted,

/s/ Patrick O'Donnell

Thomas G. Connolly, D.C. Bar # 420416

Mark A. Grannis, D.C. Bar # 429268

Patrick O'Donnell, D.C. Bar # 459360

Charles T. Kimmett, D.C. Bar #463920

Amy Richardson, D.C. Bar #472284

HARRIS, WILTSHIRE & GRANNIS LLP

1200 Eighteenth Street, N.W., Suite 1200

Washington, D.C. 20036

Telephone: (202) 730-1300

Facsimile: (202) 730-1301