

Plaintiff/appellee Dr. Steven J. Hatfill hereby opposes the Emergency Motion to Stay filed yesterday by Toni Locy, a recalcitrant witness held in contempt of court by U.S. District Judge Walton on March 7, 2008. The motion for extraordinary relief should be denied, because Ms. Locy is unlikely to prevail on the merits, shows no risk of irreparable harm, and seeks relief that would irreparably harm Dr. Hatfill while manifestly disserving the public interest.

I. Background

Ms. Locy begins her summary of the proceedings below as if they began in 2006 with her inability to remember who leaked information about Dr. Hatfill. Indeed, she accuses Dr. Hatfill of conducting a “fishing expedition” and writes as if she cannot quite understand why she is even involved in the case. We know why, and so did Judge Walton.

Dr. Hatfill filed his complaint on August 26, 2003, alleging that the Justice Department¹ had violated the Privacy Act by making unauthorized disclosures about him to the news media – that is, by intentionally “leaking” investigative information. *See* Complaint (Ex. A). The vast majority of the leaks that made it into news reports were attributed to anonymous sources. *See* First Amended Complaint (Ex. B) ¶¶ 31-37, 56-57, 65-66, 96-97, 101-02. Toni Locy was one of

¹ We refer to the Department of Justice and its component Federal Bureau of Investigation collectively as “Justice Department” for the purposes of this brief.

the reporters who printed the leaked information while agreeing not to publish the names of the government officials who leaked it to her. *See* Ex. B ¶ 96(j) & (o).

The Justice Department initially sought and received a stay of almost all discovery. Order of February 10, 2004; Order of July 6, 2004 (Ex. C).

Depositions of reporters, however, were specifically authorized during the stay. Order of October 21, 2004 (Ex. D). After abortive subpoenas to and motions to quash from the media companies, Ms. Locy and other individual reporters were deposed.

At her deposition, Ms. Locy confirmed under oath that she did grant anonymity to several FBI and DOJ officials in return for leaks of investigative information about Dr. Hatfill. Locy Dep. May 19, 2006 (Ex. E) at 47:3-13, 52:7-10, 53:16-56:22, 133:7-11. However, she claimed that she could not remember which official was responsible for which leak. At the same time, however, she refused to name the sources she *could* remember so that plaintiff's counsel could follow up with depositions to fill the gaps in her memory. In addition, Ms. Locy refused to answer any questions designed to narrow the universe of sources who might have leaked in violation of the Privacy Act. For example, an unpublished draft of her May 29, 2003 article refers to one source as a "high-ranking FBI official" and another as a "top FBI source." Locy Dep. at 114:12-118:1. Ms. Locy acknowledged that these descriptions did not fit every one of her sources, but she

refused to define the terms or disclose the names of sources who fit that description. Locy Dep. at 134:11-135:21.²

Thus, when Dr. Hatfill moved to compel Ms. Locy to disclose the names of her sources, the record showed something quite different from the total failure of memory described in Ms. Locy's emergency motion to this Court. Instead, the record showed an evasive witness who remembered quite a lot of information but claimed a right to withhold it all because she could not remember a small part. Judge Walton rejected that argument, granted the motion to compel, and ordered Ms. Locy "to provide full and truthful responses to questions propounded . . . by Dr. Hatfill's attorneys." *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 51 (D.D.C. 2007).

² Ms. Locy refused to answer similar questions that might further narrow her anonymous source list. For example, she would not confirm whether any of her sources of information about Dr. Hatfill were both for-attribution sources and confidential sources. Locy Dep. at 79:6-80:3. She refused to answer whether any of her sources had first-hand knowledge of the investigation. *Id.* at 93:13-19. Nor would she state whether her sources carried a gun. *Id.* at 95:10-96:15. Further, she refused to reveal whether she ever spoke to the DOJ or FBI press offices off-the-record about Dr. Hatfill. *Id.* at 47:18-48:11, 109:3-14. Moreover, Ms. Locy refused to reveal whether she had spoken with particular officials within the FBI who had *already* testified under oath that they had communicated with her. *Id.* at 120:12-123:1, 125:17-126:6. She also refused to reveal whether any of her sources were included on a list of officials within the DOJ and FBI who had waived any promise of confidentiality they may have been granted. *Id.* at 119:11-120:10. She even invoked the privilege with respect to whether the four law enforcement sources identified in the May 29 article were still employed by the FBI today. *Id.* at 145:10-15. Ms. Locy did testify that some of these individuals had not previously been used as a source for her reporting, *id.* at 88:22-89:4, which suggests that she could provide their names if she chose.

Dr. Hatfill then deposed Ms. Locy a second time. She again refused to answer questions that would identify her anthrax sources at the Justice Department. Locy Dep. Sept. 10, 2007 (Ex. F) at 188:21-190:12. Moreover, she committed herself to this course of action despite the admission that *she did not even know whether any of her former DOJ or FBI sources still objected* to her disclosing their identity, because she had “just begun the process of reaching out to people.” *Id.* at 200:22-201:19. Even after reading FBI official Debra Weierman’s sworn testimony waiving any promise of confidentiality from a reporter, Ms. Locy still refused to answer the question “whether Ms. Weierman was a source you used in your reporting on the anthrax investigation?” *Id.* at 205:21-207:21.

Ms. Locy’s determination to hide the identities of these malfeasant public officials was so strong that she also refused to answer questions about her contacts with four of her former sources in the days preceding the deposition. Ms. Locy revealed that she had “begun the process of reaching out to people” (the Friday before her Monday deposition) who were “sources” on “various stories.” *Id.* at 192:16-194:5. She testified that “[t]hree of the four are FBI,” *id.* at 193:2-3, yet refused to reveal whether they were current or former FBI officials. *Id.* at 199:4-19. She refused to disclose anything about where the fourth person worked, and in particular, whether that person was affiliated with DOJ. *Id.* at 193:4-194:5. She testified that she “ha[d] no waivers,” *id.* at 192:9-10, but invoked the attorney

work-product doctrine and refused to disclose whether she had even *asked* for such waivers – or anything else about her communications with these four people. *Id.* at 195:14-196:8. Thus, despite the tone of utter bewilderment that permeates Ms. Locy’s factual statement, the trial court record shows why she is here.

In her emergency motion, Ms. Locy tells this Court that Judge Walton “credited Ms. Locy’s lack of memory” and “found her failure of recollection credible.” Emergency Motion at 3, 6. It would be more accurate to say that Judge Walton expressly recognized that it would quickly become impossible for trial courts to obtain the testimony they need if witnesses could simply evade court orders by feigning lack of memory:

The Court: I mean I am not suggesting that Ms. Locy would not be truthful but it would be very convenient for reporters in this situation to just say, “I don’t recall,” and as a result of saying that, they are off the hook.

I am not suggesting anything sinister, but I mean that would be an easy way to avoid the consequences of the state of the law at the time.

Transcript of Proceedings, Feb. 19, 2008 (Ex. G) at 11:1-10. The Court then took care to describe Ms. Locy’s memory failure as “purported” in the contempt memorandum opinion and to assume rather than find her to be truthful. Mem. Opinion, March 7, 2008 (hereinafter Contempt Op.) at 5, 8 (attached as Ex. F to Emergency Motion).

II. The Virginia Petroleum Jobbers Standard Governing a Request for the Extraordinary Relief of a Stay

The circumstances of this case do not justify Ms. Locy's request for a stay. Ms. Locy suggests that a journalist asserting the reporter's privilege against a discovery order is entitled to a stay. *See* Emergency Motion at 10 (asserting that "[s]tays of contempt sanctions pending appeal are the norm when journalists challenge discovery orders requiring them to reveal confidential sources."³ This is not the law.

³ Locy also argues that the district court's decision regarding Walter Pincus in *Lee v. Dep't of Justice*, 401 F. Supp.2d 123 (D.D.C. 2005), is somehow instructive on the issue of whether to stay contempt sanctions pending appeal. Emergency Motion at 10-11. But that district court opinion did not even mention the standard governing a stay, and for a straightforward reason: Lee did not appear to have contested Pincus's request for a stay of sanctions in the event he was held in contempt. *See Lee v. Department of Justice*, U.S. Dist. Court for Dist. of Columbia, No Civ.A. 99-3380 (RMC), docket entries 155 (Lee's motion to show cause), 160 (Pincus's Opp'n), and 164 (Lee's Reply). Moreover, Ms. Locy has no basis for her assertion that the contempt Order was stayed because 1) the Pincus's facts "were, by definition, distinct from those of other reporters" and 2) the Lee court had not decided the claim of a separate common-law privilege. Emergency Motion at 10-11, citing *Lee v. Dep't of Justice*, 401 F. Supp.2d 123, 144 (D.D.C. 2005). The cited opinion noted that the Court of Appeals had not resolved the common-law privilege assertion, *id.* at 135, but it drew no link at all between the disputed common-law privilege claim (which it overruled with lengthy analysis) and the uncontested stay (which it granted without comment). The opinion actually *rejected* the claim that Pincus's facts were, by definition unique: "The point is that Mr. Pincus did not proceed along the same procedural track as the other five reporters because of a supposed agreement and *not because his particular situation is factually distinguishable.*" *Lee*, 401 F. Supp. 2d at 129 fn. 9 (emphasis added). The court further noted "it is disingenuous for Mr. Pincus to try now to distance himself from the other journalists and argue that his situation is markedly different." *Id.* at 143.

A stay pending appeal is “extraordinary relief.” *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). *Virginia Petroleum Jobbers* long ago established a four-factor test that is “familiar to both the bench and bar in this Circuit.” *Washington Metro. Area Trans. Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977) (hereinafter “*WMATC*”). The first factor is whether the petitioner for a stay has “made a strong showing that it is likely to prevail on the merits of its appeal.” *Id.* at 925. This Court requires Ms. Locy to make this showing because “[w]ithout such a substantial indication of probable success, there would be no justification for the court’s intrusion into the ordinary processes of administration and judicial review.” *Id.* The second factor is whether the petitioner has “shown that without such relief, [she] will be irreparably injured.” *Id.* The third is whether “issuance of a stay” would “substantially harm other parties,” such as Dr. Hatfill. *Id.* And the final one is the public interest. *Id.*

A petitioner’s weakness in one factor may not be fatal if all the other factors are particularly strong. As the Court explained in *WMATC*, “under *Virginia Petroleum Jobbers* a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits.” 559 F.2d at 843. But Ms. Locy can carry her burden on none of the four *Virginia Petroleum Jobbers* factors and is clearly not entitled to the extraordinary relief of a stay.

III. Ms. Locy Cannot Make a Strong Showing That She is Likely to Prevail on the Merits of Her Constitutional Privilege Claim

A. The District Court's Application of *Lee* Is Plainly Correct, and Plainly Not an Abuse of Discretion

In order to prevail on the merits of her appeal, Ms. Locy would have to establish that the district court committed an abuse of discretion in overruling her assertion of privilege. *Lee v. Dep't of Justice*, 413 F.3d 53, 59, *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005). *See also Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1972), *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981) (applying abuse-of-discretion standard of review). The district court's application of the clearly controlling *Lee* case was not merely a reasonable exercise of discretion but a compelling one.

In *Lee*, a Privacy Act case, the court determined that “*Zerilli* provides for a non-party journalist’s qualified privilege in a civil action such as this one, where testimony of journalists is sought because government officials have been accused of illegally providing the journalists with private information.” *Lee*, 413 F.3d at 59. Citing *Zerilli* and *Carey*, the Court noted “the two guidelines determining when a court can compel a non-party journalist to testify about a confidential source. First, the information sought must go to ‘the heart of the matter.’ Second, the litigant must exhaust ‘every reasonable alternative source of information.’” *Id.* (internal citations omitted). The Court also expressly warned:

When applying this analysis, however, the court must keep in mind that this privilege is not absolute. The Supreme Court has noted in the context of privilege in grand jury cases that it “cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.” The same principle applies here; the protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is.

Id. at 59-60 (internal citations omitted).

Centrality⁴ is established here for the same reason it was in *Lee*. “First, it is clear that the information . . . goes to the heart of [Dr. Hatfill’s] case. As in *Zerilli*, the relevant information is the identity of the individuals who may have leaked information in violation of the Privacy Act. If he cannot show the identities of the leakers, [Dr. Hatfill’s] ability to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised.” *Id.* at 60. “Insofar as the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority of leaks will likely be unprovable without evidence from either leaker or leakee.” *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 997 (D.C. Cir. 2005) (Tatel, J., concurring in judgment).

Despite the obvious parallel to *Lee* and the careful application of that clearly governing authority by the district court which is hearing the underlying claim

⁴ Ms. Locy does not dispute in her emergency motion that Dr. Hatfill has satisfied the second *Lee* element, exhaustion of reasonable alternatives. See Memorandum Opinion August 13, 2007 (hereinafter Privilege Op.) (Ex. I) at 10 (finding exhaustion prong satisfied).

(Privilege Op. at 10), Ms. Locy argues that her evidence is not central because (1) it includes all of the Justice Department officials whose anthrax disclosures she promised to cloak, including some who may not have given her specific disclosures about Dr. Hatfill (Emergency Motion at 12); (2) she asserts that the prospect of identifying the individuals who gave her the Hatfill disclosures is “speculation” and “a remote possibility at best” (*id.* at 13); and, (3) Dr. Hatfill has indicated his determination to try the case this year (*id.*), despite the continued disobedience of the Court’s Order by herself and fellow recalcitrant reporter James Stewart. None of her arguments cast doubt on the district court’s centrality determination.

First, as the district court noted, the overbreadth predicament Ms. Locy asserts is of her own making. Contempt Op. at 6. She is the one who disposed of her notes and therefore claims now to have “no idea” which of her anonymous Justice Department sources on the anthrax investigation gave Hatfill disclosures and which gave her disclosures on other aspects of the case. She is the one who obstinately refused to answer any questions designed to narrow down her list of sources. Applying the centrality prong of *Lee* in a way that allows the media immunize themselves from discovery under such circumstances would give them a unilateral way to avoid compliance with the law.

Second, Ms. Locy seriously mischaracterizes the usefulness of her withheld testimony about the Justice Department officials who made disclosures to her about the anthrax investigation. Notwithstanding her inability to make the final linkage between individual source and individual leak, it is clear from Ms. Locy's deposition testimony that she can name the individual sources who leaked investigative information in return for her promise of anonymity:

Q Just so we're clear, you do remember the names of the dozen or so sources that you had for your reporting on the anthrax investigation in general?

A Yes, I do.

Q But you do not recall the names of those sources that provided information about Dr. Hatfill specifically?

A Correct.

Locy Dep. at 210:20-211:6. As noted *supra* at 2-5 and n.2, Ms. Locy used her since-overruled privilege assertion to resist a number of specific questions designed to narrow down the identities of those who disclosed information specific to Dr. Hatfill. It is hardly "speculative" to find that the answers to questions such as these could enable Dr. Hatfill to identify specific disclosing officials.

Her final argument on centrality – that Dr. Hatfill's determination to get this 2003 case to trial in 2008 shows that her testimony is not central – is equally unavailing. Dr. Hatfill has not declared his willingness to try this case without all

of the central evidence to which the Court has found to be central to his case.⁵ Ms. Locy notes that Hatfill has stated his belief in the strength of his case, and she cites some of the evidence of leaking that has been uncovered. Emergency Motion at 4-5, 13-14, 19. But the district court, which will be the trier of fact in this matter, has expressly concluded that the evidence Ms. Locy withholds is central to this case. *Hatfill*, 505 F.Supp. 2d at 42-43; Contempt Op. at 7. Immediate and realistic enforcement of the Court's well-reasoned Order is the only way Dr. Hatfill has any reasonable prospect of achieving the justice to which he is entitled, both trying the case before further loss of evidence through claims of memory loss like Ms. Locy's, and doing so with all of the evidence which the trier of fact has found central to his case.⁶

⁵ What Dr. Hatfill has done is to refuse to consent to yet further delay and yet further prejudice while Ms. Locy and the remaining recalcitrant reporter pursue a stay, an appeal to a panel of this Court, an *en banc* appeal, and a petition for certiorari. See Hearing Trans., Jan. 11, 2008 (Ex. H), at 6:11-10:3; Hearing Trans., Feb. 19, 2008 (Ex. G) at 19:16-20:15. Even after Ms. Locy's contempt is eventually brought to an end, Dr. Hatfill will have to go through the same process of follow-up depositions with the sources that he followed for the three Justice Department sources disclosed through the decisions of other reporters to obey the District Court's August Order.

⁶ Ms. Locy also argues that, aside from the merits of the reporter's privilege claim, the District Court's Contempt Order "conflicts with settled contempt precedent" by punishing her failure of memory. Emergency Motion at 14-16. But she does not dispute that she can remember what the Court ordered her to reveal – the identities of the Justice Department officials with whom she brokered anonymous-disclosure deals about the anthrax investigation. The caselaw she cites on impossibility of compliance (*id.* at 14-15) is, therefore, clearly inapplicable.

B. There Is No Federal Common Law “Reporters’ Privilege” and It Would Not Apply Here if There Were.

Ms. Locy also makes the strained argument that she is likely to succeed on the merits because her “appeal raises a privilege issue as yet unresolved in this Circuit.” Emergency Motion at 16. But Ms. Locy’s hopeful suggestion that this Court *might* adopt a federal reporter’s privilege of the sort that Congress has repeatedly *declined* to enact does not demonstrate a likelihood of success on the merits. In fact, not only is this Court unlikely to recognize a “reporters’ privilege” at all, but “even assuming *arguendo* that” it were to do so, the district court has already rejected the application of a qualified common law privilege on the facts of this case. *Hatfill*, 505 F. Supp.2d at 45.

She also claims that her situation is like reporter Jeff Gerth’s situation, not reporter Bob Drogin’s situation in the *Lee* case. Emergency Motion at 15-16. But the asserted analogy to Mr. Gerth in *Lee* is equally off. Like Locy, Drogin wrote articles that provided information specifically about the Privacy Act Plaintiff. *Lee*, 413 F.3d at 55-56. Drogin asserted that he did not recall the names of most of his anonymous sources, but he claimed the privilege as to one source and refused to answer a question in his deposition regarding that source in order to protect his identity. *Id.* at 62-63. The Court found that Drogin’s refusal to answer squarely violated the Court’s discovery order and held him in contempt. *Id.* In sharp contrast, Gerth never refused to answer any questions covered by the Court’s discovery order. *Lee*, 413 F.3d at 63-63. Instead, Gerth claimed that he only had done confidential reporting regarding Peter Lee, not the Plaintiff Wen Ho Lee, and he consistently testified that he did not know the identity of any of the confidential sources who provided information about Wen Ho Lee. *Id.* While Ms. Locy seeks to distinguish herself from Drogin on centrality, Emergency Motion at 16, the cases of both Drogin and Locy are equally central, because (unlike Mr. Gerth), both reporters used (and continued to withhold) anonymous government sources for reporting specifically about the Privacy Act plaintiff in their respective cases.

The district court properly recognized that “[e]xceptions to the demand for every man’s evidence are not lightly created or expansively construed, for they are in derogation of the search for the truth.” *Hatfill*, 505 F. Supp. at 47 (quoting *United States v. Nixon*, 418, U.S. 683, 710 (1974)). The court carefully applied the four-factor analysis recognizing new privileges set forth by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 10-15 (1996) and summarized by this Court in *In re Duces Tecum Issued to Commodity Futures Trading Comm’n*, 439 F.3d 740, 750 (D.C. Cir. 2006), but was “unpersuaded that the reporters have satisfied these prerequisites.” The court particularly emphasized that the “evidentiary benefit,” 518 U.S. at 11, of rejecting a broad “reporter’s privilege” is very great here “because affording supremacy to a reporter’s privilege” in the “context of an actionable Privacy Act violation claim” would “erect a potentially insurmountable hurdle for a Privacy Act litigant seeking to hold the government accountable for leaks condemned by the Act.” *Hatfill*, 505 F. Supp. at 45.

The district court also correctly pointed out that while the three panel members of *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D. C. Cir. 2005), were “not of one mind on the existence of a common law privilege,” the approaches of all three judges’ support rejecting any common law privilege in this case. Judge Sentelle found that “creation of a reporter’s privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision” and that it

should be “address[ed] . . . to the Article I legislative branch.” *Id.* at 981 (Sentelle, J., concurring). Judge Henderson found it unnecessary to rule on the issue of privilege, but expressed grave doubts about a “test that requires more than an evaluation of the essentiality of the information to the prosecution and the exhaustion of available alternative sources thereof,” *id.* at 984-85 (Henderson, J., concurring) -- both factors that are plainly satisfied here. And while Judge Tatel would have recognized a common law privilege, “it is not absolute and may be overcome by an appropriate showing” that the public interest required disclosure, *id.* at 973, as Judge Tatel found to be the case in *Miller* itself. *Id.* at 1003 (Tatel, J., concurring).

Here, Judge Walton similarly found that “to the extent a federal common law privilege existed, it would not be absolute, and should not be recognized” in the context of a viable Privacy Act case. Memorandum Opinion, March 7, 2006 (Ex. J). Indeed, the district court emphasized that to rule otherwise would undermine the public interest by “frustrat[ing] the fundamental purpose for the Privacy Act’s adoption.” *Hatfill*, 505 F. Supp.2d at 45. As a result, even if Ms. Locy were to convince this Court to adopt a common law privilege similar to that advocated by Judge Tatel – but criticized by Judges Sentelle and Henderson – in *Miller*, the district court has *already performed* the balancing that would be required under that approach and *rejected* the application of such a qualified

privilege in this case. Such balancing is, of course, within the sound discretion of the district court judge. *See Lee*, 413 F.3d at 59 (announcing that this Court would “defer to the sound discretion of the trial court where the balancing of the relevant factors is involved”). Accordingly, even if Ms. Locy were to convince this Court to recognize new protections for reporters, she still would not prevail on the merits.

IV. The Remaining *Virginia Petroleum Jobbers* Factors Also Weigh Against Ms. Locy

The risks of irreparable harm to either party and the public interest also weigh against extraordinary relief.

Ms. Locy has only a token argument of irreparable harm under the facts of this case. She left her last position as a reporter a year and a half ago to pursue a masters degree in law and now works as a professor of journalism at West Virginia University. Locy Decl. (Ex. E to Emergency Motion) ¶¶ 6-7. She cannot and does not argue that obedience to the Court Order will destroy her ability to serve as a vehicle for publicizing future anonymous disclosures the Justice Department dares not make openly.⁷

⁷ Moreover, to the extent she claims special harm in the compelled disclosure of federal officials eventually shown to have made anthrax-case disclosures without making disclosures specifically about Dr. Hatfill, the district court addressed the issue by offering to issue and enforce a protective order limiting the identities of such individuals to Dr. Hatfill and his counsel. Contempt Op. at 9.

Ms. Locy's only argument for irreparable harm to her in failing to grant the stay is that "she will be forced either to reveal her confidential sources or incur substantial fines and likely imprisonment, all without the opportunity to be heard on appeal. That will irreparably harm her...." Emergency Motion at 18.⁸

But her desire to pursue her appeal free of the consequences of her contempt is no irreparable harm at all. As the district court noted, the very purpose of a contempt sanction is to exert a coercive influence over the contemnor, a purpose that would be defeated by the acceptance of the circular argument that imposition of the contempt sanction is itself irreparable harm. *See* Contempt Op. at 12.

Moreover, there is ample precedent for the proposition that mere financial injury, which is the only sanction Ms. Locy faces at the moment, does not constitute irreparable injury. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Virginia Petroleum Jobbers*, 259 F.2d at 925.

But 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. The district court explained that the lapse of time jeopardizes a party's ability to advance his claims, as illustrated by Ms. Locy's own purported failure of recollection in this very case. Contempt Op. at 13-14.

⁸ Ms. Locy goes on to assert that "the district court recognized as much," Emergency Motion at 18 (citing Contempt Op. at 13). The Court did no such thing. Rather, it "presume[d] for the sake of argument" that the injury Ms. Locy articulated was irreparable. Contempt Op. at 13.

More fundamentally however, Ms. Locy's history of dug-in recalcitrance, *see supra* at 2-5 and n.2, clearly suggests that she is determined to defy the Court regardless of the outcome of her appeal, so that granting a stay will almost certainly allow her to "run out the clock" and deprive Dr. Hatfill of her evidence entirely. In other words, it is uncertain whether it will take one day, one week, or one year of sanctions to induce respect for the Court's Order, but it is certain that staying even the onset of sanctions until her appeal runs its course will reward her defiance and deprive Dr. Hatfill of her evidence no matter how this Court rules on the merits.

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. Emergency Motion 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*. 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).

Moreover, the public interest must be judged in the context of the actual case at issue. There was no whistle-blowing here, no use of an anonymity agreement by a reporter to allow a courageous federal official to expose wrongdoing without fear of retaliation. The “leaks” at issue here are disclosures from investigative files about one innocent and uncharged man, designed to convey through cooperative members of the media the false story that the government had made progress in the anthrax investigation by identifying the “person of interest” most likely responsible for these infamous murders. As the district court found, there is no public interest in fostering such violations of the Privacy Act and possibly F.R.Crim.P. 6(e). Contempt Op. at 15-16. *See also Lee*, 413 F.3d at 59-60 (rejecting argument that reporter’s privilege should be construed to protect federal officials who violate the Privacy Act because they feel it newsworthy).

It is possible that if the stay is denied and Ms. Locy is actually compelled to reveal her sources, the example will chill future Justice Department officials from making a disclosure like this to reporters:

The sources, who requested anonymity because the anthrax probe is active, say the focus on Hatfill stems from the belief by many investigators – but not all of them – that he was behind the mail attacks that killed five people, sickened 17 others and forced thousands to take antibiotics.

USA Today, May 29, 2003 (Ex. B to Emergency Motion). It is difficult to conceive of a chilling effect more clearly in the interest of the American public.

Dated: March 11, 2008

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Christopher Wright", written over a horizontal line.

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