

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

STEVEN J. HATFILL, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE NEW YORK TIMES COMPANY, )  
 )  
 Defendant. )

CIVIL ACTION NO. 1:04cv807 (CMH/LO)

**ORDER**

For the reasons stated from the bench and in accord with specific rulings thereto,  
it is

ORDERED that Plaintiff's Motion for Supplemental Enforcement of Discovery Orders Pursuant to Rule 37 is GRANTED. Plaintiff has brought this defamation action against Defendant, after Defendant published a series of columns written by Nicholas Kristof, alleging that Plaintiff was involved in the anthrax attacks which killed five people in 2001. On October 20, 2006, this Court ordered Defendant to reveal the identity of Confidential Sources #2, #3 and #4.<sup>1</sup> On October 31, 2006, the District Judge Claude M. Hilton affirmed this Court's order. On November 2, 2006, this Court re-set the deadline for Defendant to reveal its confidential sources no later than November 8, 2006. Defendant did not reveal the three sources by November 8, 2006. Plaintiff now requests that this Court impose sanctions against Defendant pursuant to Fed. R. Civ. P. 37.

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<sup>1</sup>Only Confidential Sources #2 and #3 remain at issue in this case. On November 7, 2006, Defendant's counsel identified Dr. Peter Lowry as Confidential Source #4, because Dr. Lowry decided to release Mr. Kristof from his promise of confidentiality.

In its motion, Plaintiff requests that this Court preclude Defendant from filing any dispositive motions for summary judgment, preclude Defendant from continuing to pursue discovery, and declare the Defendant to be in civil contempt and assess a \$25,000 per day fine, until such time as Defendant complies with the November 2 order.

Rule 37 gives the district court "wide discretion to impose sanctions for a party's failure to comply with its discovery orders." *Mut. Fed. Sav. & Loan Ass'n v. Richards & Assoc.*, 872 F.2d 88, 92 (4th Cir. 1989). Nonetheless, "it is the normal rule that the proper sanction must be no more severe than is necessary to prevent prejudice to the movant." *Wilson v. Volkswagen of Am.*, 561 F.2d 494, 504 (4th Cir.1977) (internal citations omitted). Accordingly, the U.S. Court of Appeals for the Fourth Circuit has adopted a four-part test for a district court to use when determining what sanctions to impose under Rule 37: (1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective. *Anderson v. Found. For Advancement, Educ. & Employment of Am. Indians*, 155 F.3d 500, 504 (4th Cir. 1998) (citing *Wilson*). As such, the Court finds that the sanctions proposed by Plaintiff are more drastic than necessary to prevent prejudice to Plaintiff under the circumstances.

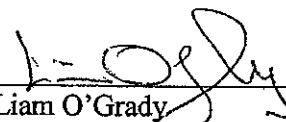
In this case, the Court finds that Defendant has failed to obey an order to provide discovery and thus the appropriate sanction is found in Rule 37(b)(2)(B). Under this rule, the disobedient party is not allowed to support or oppose designated claims or defenses and is prohibited from introducing designated matters in evidence. *See Fed. R. Civ. P. 37(b)(2)(B)*. Therefore, it is

ORDERED that Defendant shall not be allowed to refer to, rely on, or enter into evidence to <sup>the</sup> existence of Confidential Source #2 or #3. Considering the first factor outlined in *Anderson*, the Court finds that although Defendant has attempted to get waivers from Confidential Sources #2 and #3 in order to comply with the Court's order, Defendant is, nonetheless, in violation of the Court's order, as the Court has previously found that Defendant is not privileged from revealing these sources. Further, as to the second factor, this violation has created some prejudice for Plaintiff as he will not be afforded an opportunity to question the confidential sources to determine if Mr. Kristof accurately reported information the sources provided. However, this sanction is narrowly tailored as to ameliorate that prejudice without resorting to overly drastic measures given the nature of this case. Further, this sanction shall serve as a sufficient deterrent to this particular sort of non-compliance, since without reference to Confidential Source #2 or #3, Defendant is left with little to no explanation for some of the allegedly defamatory statements which Defendant published. Further, pursuant to Rule 37(b)(2), it is

ORDERED that Defendant shall pay the reasonable expenses including attorneys' fees and costs incurred by Plaintiff in filing and arguing this motion for sanctions. Plaintiff shall identify its fees and costs by letter to the Court by 5:00 p.m. on Monday, November 27, 2006.

Defendant may file by letter any objection to the identified fees and costs by 5:00 p.m. on  
December 4, 2006.

Entered this 20<sup>th</sup> day of November, 2006.

  
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Liam O'Grady  
United States Magistrate Judge

Alexandria, Virginia