

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven J. HATFILL, M.D.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil No. 1:03-CV-01793 (RBW)
)	
Attorney General Michael MUKASEY,)	
<i>et al.,</i>)	
)	
<i>Defendants.</i>)	
_____)	

**PLAINTIFF’S STATEMENT OF MATERIAL UNDISPUTED FACTS
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Local Civil Rules 7(h) and 56.1, Plaintiff Dr. Steven Hatfill hereby submits the following Statement of Material Undisputed Facts in support of his Motion for Partial Summary Judgment.

I. PARTIES AND BACKGROUND

1. Plaintiff Dr. Steven Hatfill is a medical doctor and a researcher. Hatfill Dep. at 8:2-14 (Ex. 18).¹

2. The United States Department of Justice and the Federal Bureau of Investigation (hereinafter “the Agency Defendants”) are executive agencies within the executive branch of the United States government and thus regulated under the Privacy Act, 5 U.S.C. § 552a(a), (b), (c)(1)(A) & (B), and (g)(1)(A) & (B). Def.’s Answer to Pl.’s First Am. Compl. ¶¶ 16-17 (hereinafter “Answer”) (Ex. 125); Def.’s Resp. to Pl.’s First Set of Req. for Admis. Nos. 1-2 (Ex. 120).

¹ True and correct copies of all exhibits cited herein are attached to the Declaration of Steven Fredley filed concurrently herewith.

3. The Agency Defendants maintain a “system of records” subject to the protections of the Privacy Act. Their “system of records” includes the Automated Case Support system (“ACS”) and a paper system searchable through ACS. The Agency Defendants’ “system of records” includes investigative techniques, internal Agency Defendant electronic communications about investigations, follow up on leads, tasking to other field offices, and all reports (*e.g.*, 302s) of investigative activities. Roth Dep. at 99:5-101:11 (Ex. 39); Lambert Dep. at 114:13-120:22, 129:7-131:18 (Ex. 29); Kohl Dep. at 217:17-218:9 (Ex. 26); Garrett Dep. at 145:1-146:8 (Ex. 15). All investigative techniques used and information gathered by the Agency Defendants about Dr. Hatfill in the course of their anthrax investigation is contained within the Agency Defendants’ “system of records.” Harp Dep. at 309:5-310:5 (Ex. 17); Roth Dep. at 104:12-105:13 (Ex. 39); Lambert Dep. at 136:15-20 (Ex. 29).

4. The Agency Defendants’ “system of records” for the anthrax investigation was “an open book,” accessible by literally thousands of individuals. Roth Dep. at 267:12-268:11, 275:13-280:11, 284:8-15 (Ex. 39). The number of individuals accessing these records was so numerous that one FBI agent testified that it would have taken an investigation the size of the anthrax investigation to determine who was accessing the anthrax files. Roth Dep. at 284:8-288:10 (Ex. 39).

5. The Agency Defendants’ investigation of Dr. Hatfill was beset by leaks. *See infra* ¶¶ 26-48. The lead prosecutor in the anthrax case testified that he would “be denying reality” if he did not admit as much. Kohl Dep. at 281:7-17 (Ex. 26). Because of these leaks, Dr. Hatfill filed suit against the Agency Defendants for violations of the Privacy Act. Dr. Hatfill alleges, *inter alia*, that the Agency Defendants failed or refused to safeguard the anthrax records

pertaining to Dr. Hatfill despite their obligations under the law and despite knowing the investigative information about Dr. Hatfill was being leaked. First Am. Compl. ¶ 120 (Ex. 116).

II. THE ANTHRAX ATTACKS AND THE AMERITHRAX INVESTIGATION

6. In October 2001, the nation learned that someone had mailed letters containing the deadly pathogen anthrax to members of the press and to two United States senators. These letters were apparently dropped in a postal box in Princeton, New Jersey, with the letters to the media mailed on or about September 18, 2001, and those to Senators Thomas A. Daschle and Patrick J. Leahy mailed on or about October 9, 2001. Five people died, many others took ill, and panic seized the nation. Answer ¶ 19 (Ex. 117).

7. The FBI launched a massive investigation—code named Amerithrax. Answer ¶ 1 (Ex. 117); Lambert Dep. at 32:8-33:1 (Ex. 29). The investigation was a high priority within the DOJ and FBI, second only to the 9/11 investigation. Harp Dep. at 25:2-12 (Ex. 17); Ashcroft Dep. at 21:3-8 (Ex. 2); Lambert Dep. at 25:2-14 (Ex. 29); Garrett Dep. at 147:3-5 (Ex. 15); Kohl Dep. at 16:6-12 (Ex. 26). The FBI was the lead agency in charge of the investigation and investigators from other agencies worked along with FBI investigators. Roth Dep. at 241:5-13 (Ex. 39); Mueller 8:20-21 (Ex. 32). Accordingly, the FBI had a “high responsibility” for protecting investigative information. Roth Dep. at 241:5-13 (Ex. 39). It is one of the largest and most complex criminal investigations in law enforcement history. Mem. of Points and Auth. In Supp. of Agency Defs.’ Mot. For Stay of Proceedings, Nov. 21, 2003, (Dckt. # 14) at 1

8. Within months of the Amerithrax investigation’s start, information concerning investigative techniques that had or would be employed, investigative results, and evaluations of those results, began to appear in the media, attributed to anonymous sources identified as “senior law enforcement official,” “senior FBI agent,” and “FBI official.” For example, information

about the Amerithrax investigation attributed to Agency Defendant officials and law enforcement sources appeared in the following articles:

a. “Linda Vizi, a spokeswoman for the FBI in Philadelphia, said she could not disclose what prompted the raid. ‘Nobody is charged, nobody is under arrest,’ she said, adding, ‘I cannot say anything. It’s a sealed warrant, it’s an ongoing investigation.’ *Two law enforcement officials*, speaking on the condition of anonymity, said the raid was prompted by specific information that was solid enough for the FBI to obtain search warrants but that did not appear to have been borne out. ‘It looked promising, but I don’t think anything is going to come of it,’ one *official* said.” Susan Schmidt & Debbie Goldberg, *Pa.’s Officials’ Homes Raided in Anthrax Case*, Wash. Post, Nov. 15, 2001 (emphasis added) (Ex. 46).

b. “Two weeks ago, FBI agents visited scientific laboratories and offices at Rutgers University in New Brunswick, N.J., for an exhaustive look at photocopy machines in use there. The agency has been looking for tiny marks or imperfections that could match the particular photocopy machine with one of the anthrax letters sent to U.S. Senate offices and news companies. A similar investigation has been conducted at other universities, *FBI officials* said. . . . A *law enforcement official* said Assaad was cleared by the FBI investigators shortly after the bureau received the anonymous letter. The FBI believes the letter’s timing was a coincidence, and that incident is probably not connected to the anthrax mailings, the *official* said.” Dan Eggen & Jody Warrick, *FBI Says Central N.J. May Hold Key to Solving Anthrax Mystery*, Wash. Post, Jan. 23, 2002 (emphasis added) (Ex. 47);

c. “This [*senior law enforcement official involved in the investigation*], who spoke on condition of anonymity, said the FBI likely will deploy lie detectors and subpoena employee records to compare the handwriting on them with the letters and envelopes that

contained the anthrax. . . . The FBI also has commissioned tests that look at other biological properties of the bacterium and analyze the chemicals in the powder sent in the mailings. As many as 10 laboratories are conducting these analyses, said a *senior FBI agent*. . . . To make the match, the FBI has obtained or requested anthrax from every lab in the United States that it knows worked with the Ames strain, according to the *senior law-enforcement official*.” Gary Fields, *FBI Refocuses Anthrax Probe on Scientific Analysis*, The Wall Street Journal , Feb. 10, 2002 (emphasis added) (Ex. 48);

d. “Another *FBI official*, speaking on the condition of anonymity because the anthrax case is ongoing, confirmed that one of the hijackers had been treated at a South Florida hospital for a ‘leg lesion’ and that the suspected lead hijacker, Mohammed Atta, had sought treatment for skin irritation on at least one of his hands.” Elizabeth Shogren & Josh Meyer, *Lead on Terrorist With Anthrax Didn’t Pan Out*, L.A. Times, Mar. 24, 2002 (emphasis added) (Ex. 49);

e. “Whoever concocted the wispy white powder used in last fall’s anthrax attacks followed a recipe markedly different from the ones commonly used by scientists in the United States or any other country known to have biological weapons, *law enforcement sources* said yesterday. . . . *Some details of the new findings were reported by Newsweek in its April 8 edition*. . . . The agency continues to believe, based on the balance of evidence, that the culprit is a U.S. scientist with highly specialized training and skills, the *sources* said.” Jody Warrick, *Powder Used in Anthrax Attacks “Was Not Routine,”* Wash. Post, Apr. 9, 2002 (emphasis added) (Ex. 50);

f. “Still seeking a suspect in the anthrax-by-mail attacks, the Justice Department is preparing to give lie detector tests to hundreds of federal workers at two facilities

where anthrax is kept, a *law enforcement official* says. The government will administer the tests to workers at Fort Detrick, Md. and Dugway Proving Ground, Utah. The tests will begin in June. Investigators will focus on workers who had expertise in preparing anthrax for use as a weapon and those who may have had access to it, the *official* said Monday, speaking on condition of anonymity.” Christopher Newton, *Justice Planning Polygraphs for Hundreds of Federal Workers About Anthrax Attacks*, Associated Press, May 21, 2002 (emphasis added) (Ex. 51).

9. To prioritize the various leads that needed to be investigated, the Agency Defendants created a formal list of “persons of interest.” Answer ¶ 21 (Ex. 117). This term—which was invented specifically for this investigation by Special Agent John Kerr and Supervisory Special Agent Bob Roth—was a way of classifying persons who met one or more specific criteria that justified further investigative scrutiny. Answer ¶ 21 (Ex. 117); Roth Dep. at 57:8-59:10 (Ex. 39); Lambert Dep. at 63:20-65:16, 70:21-71:20 (Ex. 29); Harp. Dep. at 164:19-165:4 (Ex. 17); Mueller Dep. at 53:10-55:6 (Ex. 32). Generally speaking, the more criteria a person met, the higher that person would be on the constantly changing list. Answer ¶ 21 (Ex. 117); Roth Dep. at 57:8-59:10 (Ex. 39). The reason a new term was invented was that the “persons of interest” list was intended by the FBI to include people who were definitely *not* viewed as “suspects” or “subjects” within the investigation. Answer ¶ 21 (Ex. 117); Roth Dep. at 60:10-61:1 (Ex. 39). Indeed, most of the individuals, if not all, considered “persons of interest” were innocent of any wrongdoing. Roth Dep. at 57:8-61:1 (Ex. 39).

10. Despite that, many Agency Defendant officials—including those intimately involved in the Amerithrax investigation—equated “person of interest” with suspect or subject.

Garrett Dep. at 25:16-26:15 (Ex. 15); Murray Dep. at 114:8-116:16 (Ex. 33); Eberhart Dep. at 34:4-35:4) (Ex. 13); Ayres Dep. at 50:19-53:6 (Ex. 3).

11. The “person of interest” list was supposed to be strictly limited to internal FBI use only. Answer ¶ 21 (Ex. 117); Roth Dep. at 59:3-10 (Ex. 39). The “person of interest” list contained not only names of innocent individuals, but also their biographical background information, how these individuals developed as a “person of interest,” ongoing investigative information, and daily investigative results. Mem. from J. Smallwood to All Field Offices, at 2 (Nov. 9, 2001) (Ex. 128).

12. Defendants were on notice, and anticipated from the very beginning, that the “person of interest” list was particularly threatened by the risk of leaks or other disclosure to the national media. The guidelines for classifying and prioritizing “persons of interest” were issued in a memorandum dated December 3, 2001. Answer ¶ 22 (Ex. 117); Mem. from B. Roth, WFO to Counterterrorism (Dec. 3, 2001) (Ex. 130). On December 7, 2001, a follow-up memorandum prepared by Special Agent Jennifer Gant (and approved by Agent Kerr) was circulated within the FBI’s Washington, D.C. Field Office. Agent Gant, who had worked on other high profile cases and was therefore sensitive to and concerned about the possibility of leaks, wrote:

The divisions are reluctant to add names to the “Persons of Interest” list for many reasons. . . . [T]he list is widely disseminated in the FBI and DOJ, and based on part experience, there is a *probability that it will be leaked* or accidentally fall into the hands of the national media. This would end any covert investigation into the potential people involved. This list has the potential to be a major detriment to the case, yet has no apparent investigative value.

Mem. from J. Gant to Washington Field, at 4 (Dec. 7, 2001) (*emphasis added*) (Ex. 129); Kohl Dep. at 153:12-154:8 (Ex. 26).

13. Despite this FBI agent’s prescient warning—for which Agent Roth, a 9 ½ year veteran of the FBI, in retrospect had “high regard”—the “person of interest” list was compiled,

regularly updated with a summary of investigative activity conducted vis-à-vis each individual, and maintained in the FBI's Automated Case Support ("ACS") system. Ex. 128; Kohl Dep. at 148:11-149:21 (Ex. 26); Answer ¶ 23 (Ex. 117); Lambert Dep. at 345:18-346:20 (Ex. 29); Roth Dep. at 13:22-14:6, 82:5-9 (Ex. 39).

14. Dr. Hatfill was one of the FBI's "persons of interest," and the FBI investigated whether he had any connection with the 2001 anthrax attacks. Answer ¶ 24 (Ex. 117). Dr. Hatfill testified, however, that he has never worked with anthrax nor "had, knowingly, access to anthrax." Hatfill Dep. at 207:13-208:1, 240:19-20, 251:17-18 (Ex. 18). Nevertheless, he willingly cooperated with the FBI's investigation of the anthrax attacks. Answer ¶ 24 (Ex. 117); Roth Dep. at 66:18-68:5 (Ex. 39); Garrett Dep. at 36:2-37:11 (Ex. 15); Harp Dep. at 189:9-190:15 (Ex. 17); Lambert Dep. at 75:2-77:1 (Ex. 29). Dr. Hatfill agreed to several interviews with the FBI, waived his physician-patient privilege, consented to the search of his apartment, and volunteered to take a polygraph examination. Answer ¶ 24 (Ex. 117); Roth Dep. at 66:18-67:7 (Ex. 39); Garrett Dep. at 35:2-13 (Ex. 15).

15. Barbara Hatch Rosenberg is a professor at the State University of New York at Purchase. Answer ¶ 25 (Ex. 117). Professor Rosenberg published on the Internet a "profile" of the anthrax killer in which she speculated that the perpetrator not only "fit[] the FBI profile" but also was a "[m]iddle-aged American" who "[w]orks for a CIA contractor in [the] Washington, DC area," "[w]orked in USAMRIID laboratory in the past," and "[k]nows Bill Patrick and has probably learned a thing or two about weaponization from him, informally." Analysis of the Anthrax Attacks at 12 (Ex. 135).

16. The FBI could respond publicly to mistaken assertions and speculation by outsiders as to whether it had identified an individual as a particular suspect, and it did so when

public response served the FBI's interests. In addition to providing a "profile" of the anthrax mailer, Professor Rosenberg asserted that the FBI had focused in on one particular suspect. This assertion received a swift rebuke by the FBI. The FBI issued a media statement designed to refute Professor Rosenberg's allegations that the FBI had a prime suspect in the anthrax investigation. FBI Media Advisory (Feb. 25, 2002) (Ex. 134); Draft FBI Media Advisory (Feb. 21, 2002) (Ex. 133) (Response to Barbara Hatch Rosenberg allegation); Weierman Dep. at 271:19-274:20 (Ex. 45); Harp Dep. at 133:10-136:7 (Ex. 17); Kohl Dep. at 208:1-210:18 (Ex. 26). The FBI stated it had "interviewed hundreds of persons, in some instances, more than once. It is not accurate, however, that the FBI has identified a prime suspect in this case." FBI Media Advisory (Feb. 25, 2002) (Ex. 134).

17. *The New York Times*, in particular, criticized the FBI for not making sufficient progress in its investigation. On May 24, 2002, Nicholas Kristof wrote a column in *The New York Times* in which he criticized the FBI for its failure to solve the case. Nicholas Kristof, *Connecting Deadly Dots*, N.Y. Times, May 24, 2002 (Ex. 52). In particular, Mr. Kristof criticized the FBI's failure to investigate:

[O]ne middle-aged American who has worked for the United States military bio-defense program and had access to the labs at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the anthrax attack.

Id. Kristof later admitted in print that the person he was describing was Dr. Hatfill. *See* Nicholas Kristof, *The Anthrax Files*, N.Y. Times, Aug. 13, 2002 (Ex. 55). After Mr. Kristof's May 24 column, he published four more columns criticizing the FBI's investigation and its failings in investigating Dr. Hatfill. Exs. 53, 54, 55, 56.

18. Some FBI personnel disclosed investigative information to the *Times*. As support for his columns, Mr. Kristof relied on investigative details disclosed to him by two FBI officials,

who disclosed to Mr. Kristof investigative information regarding Dr. Hatfill's ability to make anthrax, visit to an isolated residence, prescriptions for Cipro, possible motives for committing the anthrax attacks, anthrax vaccination status, FBI polygraph examination, the FBI's use of bloodhounds to investigate Dr. Hatfill, and the view within the FBI that Dr. Hatfill was probably the anthrax killer. Kristof Dep. at 176:7-177:6, 183:19-22, 185:12-22, 187:15-188:23, 194:14-24, 246:19-248:5, 255:15-259:15, 269:6-270:2, 272:9-273:21 (*Hatfill v. New York Times Co.*, No. 04-807 (E.D. Va.) (Ex. 28).

19. Congress picked up on criticism of the FBI by outsiders, and it pressed the FBI to show that it was making progress on the anthrax investigation. On June 18, 2002, three weeks after *The Anthrax Files* appeared in *The Times*, Professor Rosenberg received an audience with members of the staffs of Senators Leahy and Daschle, the two senators to whom the anthrax-laden letters were addressed. Answer ¶ 29 (Ex. 117); Congressional Contact Record (June 18, 2002) (Ex. 136).. Van Harp, then the Assistant Director in Charge of the Washington Field Office and one of the FBI officials responsible for the Amerithrax investigation, and other FBI officials were "summoned" to attend the meeting to listen to Professor Rosenberg's theory on who committed the anthrax attacks. Answer ¶¶ 11, 29 (Ex. 117); Harp Dep. at 26:18-27:2; 224:18-228:1 (Ex. 17); Adams Dep. at 152:6-154:8 (Ex. 1); Carey Dep. at 224:11-228:5 (Ex. 6); Ex. 136. At this meeting, Professor Rosenberg, who had been granted no official authority by the FBI, no access to any forensic tests conducted on the anthrax letters or the FBI's investigative file, and was "misinformed" about aspects of the investigation, explained to Senate staff members her theory of the case. Answer ¶ 29 (Ex. 117); Adams Dep. at 154:22-156:21 (Ex. 1); Carey Dep. at 225:8-227:10 (Ex. 6). It was clear that Professor Rosenberg was talking about Dr. Hatfill. Harp Dep. at 226:15-234:22 (Ex. 17); Adams Dep. at 156:7-13, 161:16-168:7 (Ex.

1); Carey Dep. at 225:8-235:8 (Ex. 6). She also expressed to the staffers her concerns about the FBI's handling of the investigation. Ex. 136.

20. The FBI is very conscious of its image in the eyes of Congress and the general public. It is concerned about maintaining a good public image generally. Lambert Dep. at 45:3-15 (Ex. 29); Roth Dep. at 25:20-26:19 (Ex. 39); Garrett Dep. at 17:8-17 (Ex. 15); Harp Dep. at 122:9-22 (Ex. 17); Weierman Dep. at 111:18-112:5 (Ex. 45); Carey Dep. at 56:3-57:5 (Ex. 6). The Agency Defendants were aware of mounting public criticism concerning the handling of the anthrax investigation. Harp Dep. at 38:11-22 (Ex. 17); Klaidman Dep. at 86:4-22 (Ex. 24); Kohl Dep. at 188:13-189:5 (Ex. 26). The Agency Defendants also were aware that members of Congress were criticizing the FBI and of pressures to solve the case. Lambert Dep. at 34:2-35:6 (Ex. 29); Harp Dep. at 40:4-42:6, 415:5-416:2 (Ex. 1); Adams Dep. at 51:19-53:5 (Ex. 1); Carey Dep. at 57:6-58:17 (Ex. 6). Indeed, Agency Defendants were aware of the debate within Congress concerning the FBI's institutional competence to investigate terrorism cases and the allocation of responsibility for investigating terrorism cases. Answer ¶ 30 (Ex. 117); Ashcroft Dep. at 45:11-46:6 (Ex. 2).

III. THE AGENCY DEFENDANTS' PRESS CAMPAIGN AGAINST DR. HATFILL

A. June 25, 2002: The First Search of Dr. Hatfill's Apartment

21. On June 25, 2002, one week after Professor Rosenberg's meeting on Capitol Hill, the FBI searched Dr. Hatfill's apartment under the full glare of the national press. Answer ¶ 31 (Ex. 117); Lambert Dep. at 74:1-5 (Ex. 29). On the day of the search, Dr. Hatfill agreed to meet with FBI special agents assigned to the Washington Field Office. The meeting was held at an office leased by the FBI in Frederick, Maryland, approximately seventy miles from Washington, D.C. Garrett Dep. at 62:7-64:19 (Ex. 15). At the conclusion of the meeting, Dr. Hatfill consented to have FBI agents search his Frederick, Maryland apartment. Answer ¶ 31 (Ex. 117).

After Dr. Hatfill consented to the search, he and the FBI special agents drove to the apartment, a drive of less than ten minutes. Answer ¶ 32 (Ex. 117).

22. Although agents on the scene took precautions to be inconspicuous, the media knew of the June search in advance. Expecting that a cooperative Dr. Hatfill would consent to the search of his apartment, the FBI had already prepared an Operations Plan for its “highly well planned” search. Roth Dep. at 160:13-161:12 (Ex. 39). The agents participating in the search took measures to prevent the public from readily identifying them as law enforcement. The search was designed to be covert rather than open. Garrett Dep. at 69:7-10 (Ex. 15); Harp Dep. at 277:20-278:11 (Ex. 17). Agent Roth testified that agents were instructed to use vehicles that were not obviously FBI vehicles, not to wear FBI raid jackets, hats, shirts, vests, or any other overt markings, and not to display their guns or badges. Roth Dep. at 165:22-166:20 (Ex. 39). In addition, Agent Garrett testified that FBI agents used encrypted radios to prevent the interception by others of their communications. Garrett Dep. at 69:17-70:4 (Ex. 15). Nevertheless, television and radio media from Washington, D.C. and Baltimore, Maryland arrived at Dr. Hatfill’s apartment “within a few minutes” after the search commenced. Answer ¶ 31 (Ex. 117), Garrett Dep. at 73:1-75:4, 79:19-80:11 (Ex. 15).

23. Agent Garrett testified that the media “obviously would have had to know in advance” that the FBI would be searching Dr. Hatfill’s apartment. Garrett Dep. at 75:9-22, 84:12-19, 94:1-13, 152:4-9 (Ex. 15); *see also* Corallo Dep. at 167:14-168:9 (Ex. 10) (testifying that “obviously, someone leaked”). Similarly, Agent Roth stated that, given the speed with which the press descended upon Dr. Hatfill’s apartment, the “likelihood that there was inside information was pretty high.” Roth Dep. at 174:12-175:13, 177:20-178:21 (Ex. 39). It takes at least seventy or eighty minutes (assuming no traffic) to drive to Dr. Hatfill’s apartment from

Washington, D.C. and Baltimore. Garrett Dep. at 64:9-19, 72:3-75:15, 79:4-80:21 (Ex. 15); Roth Dep. at 162:9-19 (Ex. 39).

24. A consensual search should not be conducted in front of the media. Harp Dep. at 280:10-281:3 (Ex. 17); Garrett Dep. at 83:20-22 (Ex. 15). Alerting the media in advance that the FBI will be searching an individual's residence is inappropriate and constitutes misconduct because it forewarns the individual to be searched, jeopardizing evidence and the agents' safety. Roth Dep. at 62:7-22, 175:14-176:2 (Ex. 39); Garrett Dep. at 51:12-52:15, 55:2-22, 97:12-98:11 (Ex. 15); Harp Dep. at 285:12-21 (Ex. 17). Such a public display also violates the privacy interests of the person whose premises are being searched. Garrett Dep. at 51:12-52:15 (Ex. 15).

25. Case agents were displeased that the media knew of the June search. Following the arrival of the media, which began broadcasting the search from outside Dr. Hatfill's apartment, Agents Garrett and Roth and Dr. Hatfill left his apartment and went to a hotel where they watched the live media coverage of the search. Def.'s Resp. to Pl.'s First Set of Req. for Admis. No. 265 (Ex. 120); Garrett Dep. at 81:14-82:2, 85:9-86:15 (Ex. 15); Roth Dep. at 173:10-174:7 (Ex. 39). The media presence at the search concerned the case agents on the ground; Dr. Hatfill had the right not to have his life and the FBI's investigation of him exposed. Garrett Dep. at 84:2-11 (Ex. 15); Harp Dep. at 275:2-3 (Ex. 17). Although the FBI had spoken to other scientists in the Amerithrax investigation, and had searched many scientists' homes with their consent, this was the first time that a consensual search of any of these scientists had been leaked to the media. Roth Dep. at 177:5-8 (Ex. 39); Answer ¶ 34 (Ex. 117).

26. As a result of the June 25 search, the "national spotlight" was on Dr. Hatfill. Roth Dep. at 186:8-187:3 (Ex. 39); Lambert Dep. at 83:18-84:3, 140:15-20 (Ex. 29); Garrett Dep. at 100:9-20 (Ex. 15). Articles and broadcasts following the June 25 search of Dr. Hatfill's

apartment linked Dr. Hatfill by name with the anthrax investigation and contained investigative details about Dr. Hatfill that were attributed to “government officials close to the investigation,” “law enforcement officials,” “federal officials,” “U.S. investigators,” and FBI officials. *See* Ex. 57-63; Answer ¶ 36 (Ex.117). Investigative information disclosed to the press included:

a. “I haven’t been able to get in touch with him, but a *law enforcement official* told me that [Dr. Hatfill] consented to the search so they didn’t need a warrant. And the *official* also said he’s someone that the investigators have spoken to before[....] The FBI has this list of people who they think have expertise and access to materials that makes them think, maybe, you know, one of these people might know something useful, and this guy’s on that list.” David Kestenbaum, *Ongoing Investigation into the Anthrax That Was Released in the US Last Fall*, Morning Edition (June 26, 2002) (Ex. 58) (emphasis added).

b. “A *U.S. law enforcement official*, speaking on condition of anonymity, told the AP that Hatfill’s security clearance expired and was never renewed. Such clearances must be renewed every five years. The *official* described Hatfill as one of perhaps 200 people the FBI is interested in investigating further. The FBI has conducted about 25 searches of homes or apartments, always with the consent of the person they have interviewed, the *official* said. Hatfill was first interviewed by the FBI in December, the *official* said.” Gretchen Parker, *Bioresearcher Whose Home was Searched Commissioned 1999 Anthrax Mail Attack Study*, Associated Press (June 27, 2002) (Ex. 60) (emphasis added).

c. “After its public show of investigative aggressiveness in Maryland Tuesday, and before the evidence had even been examined, *bureau officials* insisted the search of Hatfill’s apartment hadn’t produced anything significant. *The FBI* also pointed out that Hatfill agreed to do the search and is not considered a suspect. ‘I do not know what all of the results of

the search [of Dr. Hatfill's apartment] were, but I can tell you there were no hazardous materials found in the apartment' said a law enforcement source." Dave Altimari, et al., *The Case of Dr. Hatfill: Suspect or Pawn*, Hartford Courant (June 27, 2002) (Ex. 62) (emphasis added).

d. "Federal officials said on Thursday that Hatfill is on a list of 20-30 'persons of interest' and stressed that his property was searched because, like the others, he possesses the expertise to handle deadly pathogens and at one time had access to the anthrax strain used in the attacks. *FBI sources* have said they cannot place Hatfill near Trenton, N.J., where they believe the tainted letters were mailed." Dave Altimari & Jack Dolan, *Hatfill Teaching Bioterrorism Course*, Hartford Courant (June 28, 2002) (Ex. 63) (emphasis added).

27. Debra Weierman, a media representative for the FBI's Washington Field Office, testified that she disclosed to any reporter who inquired that Dr. Hatfill consented to the June 25 search of his apartment. Weierman Dep. at 14:7-16:5, 181:16-20 (Ex. 45).

28. FBI officials disclosed information about the investigation of Dr. Hatfill to ABC News. Brian Ross is the Chief Investigative Correspondent for ABC News. Ross Dep. at 7:16-22 (Ex. 37). Vic Walter is an investigative producer that works with Mr. Ross. Walter Dep. at 8:2-8:21 (Ex. 44). Messrs. Ross and Walter reported on the Amerithrax investigation and received investigative details about Dr. Hatfill from two FBI officials who insisted on anonymity. Ross Dep. at 18:14-19:14, 85:16-18 (Ex. 37); Walter Dep. at 8:22-9:9 (Ex. 44). Mr. Ross in his first deposition identified these FBI officials as "Source A" and "Source B." Ross Dep. at 34:19-35:18 (Ex. 37).

29. An FBI official disclosed investigative information to ABC voluntarily, intentionally, and willfully, but asked and continues to ask witnesses from ABC not to testify as to his identity. Mr. Ross testified that "Source A" knew he was a reporter and understood that he

intended to publish information he provided. Ross Dep. at 81:8-14, 88:4-90:6 (Ex. 37). “Source A” voluntarily, intentionally, and willfully disclosed investigative information about Dr. Hatfill to Mr. Ross. Ross Dep. at 90:7-92:6, 99:20-100:4, 203:15-22 (Ex. 37). “Source A” was familiar with the anthrax investigation, but did not want his name attributed to information he provided Mr. Ross. Ross Dep. at 82:9-12, 84:2-5 (Ex. 37). When Mr. Ross spoke with “Source A” regarding this lawsuit and the possibility that he may be required to disclose “Source A’s” identity, “Source A” stated that he was “very happy with their original agreement.” Ross Dep. at 43:13-49:13 (Ex. 37). Mr. Ross believed it did not need to be said that “Source A” would potentially get in trouble if his identity were revealed. Ross Dep. at 49:4-13 (Ex. 37).

30. Edwin Cogswell is the second FBI official who made disclosures about the investigation of Dr. Hatfill to ABC News. Mr. Ross identified Edwin Cogswell as “Source B” after the Southern District of New York overruled Mr. Ross’s claim of a reporter’s privilege and after Mr. Cogswell eventually consented to him doing so. Ross II Dep. at 305:17-306:12 (Ex. 38). Mr. Cogswell provided information about Dr. Hatfill to Messrs. Ross and Walter on the understanding that they would not disclose Mr. Cogswell’s identity. Ross Dep. at 99:4-7 (Ex. 37); Walter Dep. at 16:17-18:8 (Ex. 44). Mr. Cogswell, who knew in October 2004 that Dr. Hatfill was seeking to identify anonymous Agency Defendant officials who disclosed information about him, reaffirmed his desire for anonymity when Mr. Walter requested in advance of depositions in this case that he release Mr. Ross from his promise of confidentiality. Ross Dep. at 49:14-50:10, 65:3-66:15 (Ex. 37); Walter Dep. at 21:15-24:16 (Ex. 44); Cogswell Dep. at 90:17-93:17, 97:17-22, 116:16-120:8 (Ex. 8); Ex. 175. Only after Mr. Ross was ordered to disclose his anonymous FBI sources and faced potential contempt of court did Mr. Cogswell agree to waive the promise of confidentiality. Cogswell Dep. at 86:6-87:2, 93:9-17 (Ex. 8).

When deposed in this case, Mr. Cogswell did not deny disclosing information about Dr. Hatfill to Messrs. Ross or Walter. Cogswell Dep. at 50:1-52:22 (Ex. 8).

31. Mr. Cogswell's responsibilities at the FBI included responding to the media regarding the anthrax investigation. Mr. Cogswell was employed by the FBI at the time he provided Messrs. Ross and Walter information about Dr. Hatfill. Walter Dep. at 15:15-20 (Ex. 44). Mr. Cogswell has been an employee of the FBI for the past thirty years. From approximately mid-2002 until mid-2005, Mr. Cogswell worked as a Public Affairs Specialist in the FBI's National Press Office. From late-2003 to late-2004, Mr. Cogswell served as the Acting Unit Chief of the National Press Office and supervised approximately ten FBI employees. Cogswell Dep. at 19:12-22:13 (Ex. 8). Mr. Cogswell handled press inquiries concerning the Agency Defendants' Amerithrax investigation and Dr. Hatfill, and was sometimes even quoted. Cogswell Dep. at 31:13-32:15, 104:19-106:4, 109:6-18, 113:1-9 (Ex. 8); Exs. 111, 112. In addition, Mr. Cogswell handled press inquiries concerning the FBI's "transformation" to a more pro-active approach to terrorism investigations. Cogswell Dep. at 29:8-30:20, 154:5-155:6, 235:14-236:3 (Ex. 8). In discovery, the Agency Defendants did not identify Mr. Cogswell as an official involved in any way with inquiries from the press related to the Amerithrax investigation or Dr. Hatfill. Def.'s Resp. to Pl.'s Second Set of Interr. Nos. 19-21 (Ex. 122).

32. Mr. Cogswell was an ongoing source for ABC. Messrs. Ross and Walter had numerous conversations with Mr. Cogswell about the FBI's investigation of Dr. Hatfill, the first of which occurred shortly after the FBI's June 25 search of Dr. Hatfill's apartment. Ross Dep. at 92:19-93:10 (Ex. 37); Walter Dep. at 11:13-12:11, 14:2-5 (Ex. 44). Messrs. Ross and Walter testified that when they sought information from the FBI press office about the anthrax investigation, they were transferred to Mr. Cogswell. Walter Dep. at 11:6-9 (Ex. 44); Ross II

Dep. at 306:19-307:12 (Ex. 38). Mr. Cogswell knew that Messrs. Ross and Walter were reporters and that they intended to report information he provided. Ross Dep. at 98:10-99:3 (Ex. 37); Walter Dep. at 15:21-16:8 (Ex. 44). Mr. Cogswell willfully, intentionally, and voluntarily agreed to speak with Messrs. Ross and Walter and was never tricked or deceived into disclosing investigative information. Ross Dep. at 98:8-100:4, 203:15-204:3 (Ex. 37); Walter Dep. at 16:9-16 (Ex. 44). Although Mr. Cogswell was knowledgeable about the FBI's anthrax investigation, there were instances in which he was unable to immediately answer specific questions about the investigation, but would later contact Mr. Walter with the requested information. Ross Dep. at 59:8-61:1, 96:6-97:5 (Ex. 37); Walter Dep. at 19:15-21:8 (Ex. 44).

33. ABC reported to the public information, obtained from Mr. Cogswell and a second, still-unidentified FBI official, about the FBI's investigation of Dr. Hatfill. On June 26, 2002, the day following the televised search of Dr. Hatfill's apartment, Mr. Ross reported on ABC's Good Morning America that "the FBI says [Dr. Hatfill] is not considered a suspect, but what they call a person of interest," which had been disclosed by the FBI. Ex. 57; Ross Dep. at 78:9-21 (Ex. 37). Mr. Ross also reported a number of investigative details he learned from FBI sources, specifically that:

- a. Dr. Hatfill had consented to the search of his apartment. Ross Dep. at 74:17-76:3 (Ex. 37);
- b. Agents had "found nothing immediately incriminating, but that further lab tests [were being] run on material removed from Hatfill's apartment." Ross Dep. at 76:4-20 (Ex. 37); and
- c. "Investigators . . . [were] intrigued by the fact that Hatfill lived for years near a Greendale Elementary School while attending medical school in Zimbabwe," a fact

considered significant by investigators given that the return address on the anthrax letters was Greendale School. Ross Dep. at 77:18-78:8 (Ex. 37).

34. The media was also tipped to the FBI's search of Dr. Hatfill's storage unit in Florida. The same day the FBI searched his residence, it also conducted a search of Dr. Hatfill's storage unit in Ocala, Florida. Like the search of his apartment the previous day, the media again was present. Roth Dep. at 193:13-22 (Ex. 39). Agent Roth testified that "clearly someone in the know [was] saying something." Roth Dep. at 194:9-10 (Ex. 39).

35. ABC continued to report to the public information, obtained from Mr. Cogswell and a second, still-unidentified FBI official, about the FBI's investigation of Dr. Hatfill. On June 27, 2002, Mr. Ross again reported on Dr. Hatfill during ABC News's World News Tonight. Ex. 59. Mr. Ross testified that based on conversations with "Source A" and Mr. Cogswell, he reported that:

a. "The FBI is looking very closely at a government report written well before the attacks of last year. The report describes how an attack might be carried out. And the details are very similar to the actual attacks." Ross Dep. at 101:3-102:22 (Ex. 37);

b. "The FBI obtained a copy of the 1999 anthrax report last week, just before carrying out searches of Hatfill's Frederick, Maryland apartment and storage shed in Ocala, Florida." Ross Dep. at 105:3-15 (Ex. 37);

c. "[N]othing immediately incriminating was discovered during the searches" of Dr. Hatfill's apartment or storage unit. Ross Dep. at 107:4-17 (Ex. 37);

d. "Hatfill is one of 20 or 30 scientists under scrutiny and not officially considered a suspect." Ross Dep. at 107:18-108:12 (Ex. 37); Walter Dep. at 26:10-16 (Ex. 44);

e. Agents had discovered that Dr. Hatfill once lived near a Greendale Elementary School and this fact intrigued investigators. Ross Dep. at 109:11-111:8 (Ex. 37); Walter Dep. at 27:18-28:3 (Ex. 44).

B. August 1, 2002: The Second Search of Dr. Hatfill's Apartment

36. In May 2002, Dr. Hatfill secured a position as the Associate Director of the National Center for Biomedical Research and Training at Louisiana State University in Baton Rouge. He was hired to train state and local first responders to identify and react to biological attacks. His appointment was effective July 1, 2002. Answer ¶ 39 (Ex. 117); Guillot Dep. at 40:15-42:17 (Ex. 16).

37. *Newsweek* reported to the public information, obtained from the U.S. Attorney for the District of Columbia, about the FBI's investigation of Dr. Hatfill. According to a *Newsweek* article that appeared on newsstands on August 4, 2002, in late July 2002, FBI agents observed Dr. Hatfill throwing trash into a dumpster outside of his apartment building. Ex. 76; Klaidman Dep. at 45:11-47:4 (Ex. 24). Michael Isikoff testified that this information was leaked to him by an anonymous DOJ source. Isikoff Dep. at 65:15-18, 106:5-110:4 (Ex. 21). Mr. Isikoff later identified this source as Roscoe Howard, the United States Attorney for the District of Columbia. *See infra* Section II.D.

38. Dr. Hatfill cooperated with the FBI when it conducted a second search of his home, this time with a search warrant. On August 1, 2002, the FBI conducted a search of Dr. Hatfill's Frederick, Maryland apartment pursuant to a search warrant. Answer ¶ 42 (Ex. 117); Garrett Dep. at 34:3-8 (Ex. 15). Agent Garrett testified that Dr. Hatfill again fully cooperated with the FBI, despite the fact that the media had been present at the previous search. Garrett Dep. at 37:13-38:16 (Ex. 15). Agent Garrett testified that had he been in Dr. Hatfill's position,

and in light of the fiasco surrounding the June 25 search, he would not have spoken with the FBI. Garrett Dep. at 99:13-21 (Ex. 15).

39. Case agents tried to make the second search inconspicuous. Because of the media coverage of the June 25 search, the FBI field agents participating in the search again used vehicles that were not obviously FBI vehicles, did not wear raid jackets, hats, shirts, or any other overt markings, and did not display their guns or badges. Roth Dep. at 198:15-200:8 (Ex. 39); Harp Dep. at 283:6-17 (Ex. 17). Nevertheless, Agent Roth expected the press to be on hand for this search—at this point, “it was a given” that the press would be present. Roth Dep. at 200:9-15 (Ex. 39).

40. The media was tipped to the second search by someone who had been briefed on the FBI’s investigative plans. Media vans and helicopters from Washington, D.C. and Baltimore, Maryland once again appeared within minutes after the FBI commenced its search of Dr. Hatfill’s apartment and began broadcasting live the search from outside Dr. Hatfill’s apartment. Garrett Dep. at 90:15-92:10, 94:1-5 (Ex. 15); Harp Dep. at 283:18-21 (Ex. 17); Def.’s Resp. to Pl.’s First Set of Req. for Admis. No. 271 (Ex. 120). Agent Roth testified that the intensity of the press’s presence at the August 1 search was nearly “a duplicate” of the press at the June 25 search. Roth Dep. at 197:20-198:4 (Ex. 39). Someone in the “chain of briefing” obviously alerted the press to the fact that the FBI was going to be executing a search warrant on Dr. Hatfill’s apartment. Garrett Dep. at 92:11-17, 94:6-13 (Ex. 15); Roth Dep. at 192:11-19 (Ex. 39).

41. *Newsweek* magazine, in particular, knew about the search in advance. The night before the August 1 search, a reporter from *Newsweek* phoned Dr. Hatfill’s father and told him that something big was going to happen the following day. Agent Roth met with Dr. Hatfill’s

father, apologized on behalf of the FBI, and stated that the search of Dr. Hatfill's apartment should not have been leaked. According to Agent Roth, someone in the chain of briefing leaked in advance that the FBI was going to search Dr. Hatfill's apartment. This leaked placed the agents' lives and Dr. Hatfill's life at risk. Roth Dep. at 191:1-193:12, 200:9-201:15 (Ex. 39).

42. The FBI also conducted a second search of Dr. Hatfill's storage unit in Ocala, Florida and again the press was present. Given that there were four searches—two of Dr. Hatfill's apartment and two of his Florida storage unit—and that at all four searches the media showed up to observe the searches in progress, the lead case agent understood that “clearly someone in the know [was] saying something” to the press. Roth Dep. at 193:13-194:1-12 (Ex. 39).

43. The FBI freely disclosed that its search was pursuant to a warrant. During the August 1 search of Dr. Hatfill's apartment, Arthur Eberhart, the Special Agent in Charge of the FBI's Washington Field Office, testified that he received calls on his cell phone from at least two people, including Jim Popkin, an NBC News reporter, while in the FBI's command post. Mr. Popkin inquired whether the FBI was executing a search warrant. Mr. Eberhart testified he “probably would have” disclosed that the search of Dr. Hatfill's apartment was being conducted pursuant to a warrant. Eberhart Dep. at 13:10-24, 41:7-42:17, 50:17-24 (Ex. 13).

44. By late spring 2002, Special Agent in Charge Eberhart worked almost exclusively on the day-to-day investigation of the anthrax mailings. His involvement included setting up a biocontainment facility in Congress to examine the letters and later directing the scientific aspects of the investigation. Mr. Eberhart participated in daily briefings about the investigation and attended weekly briefings of FBI Director Mueller. Mr. Eberhart testified that he handled numerous inquiries from several reporters regarding the anthrax investigation and specifically

about Dr. Hatfill, whose name came up all the time in inquiries from the press. Eberhart Dep. at 14:6-16:24, 37:17-38:21, 50:12-55:10, 65:3-66:15 (Ex. 13).

45. Articles and broadcasts following the August 1 search of Dr. Hatfill's apartment contained investigative details about Dr. Hatfill that were attributed to "authorities," "law enforcement officials," "federal law enforcement sources," a "top Justice Department source," an "FBI spokesman," "FBI officials," "government sources," a "senior FBI official," and "Justice Department officials." Answer ¶ 56 (Ex. 17); Exs. 64-72, 105. This investigative information included:

a. "Dr. Hatfill's name was *leaked* today as a potential suspect in the anthrax murders of late last year. . . . We begin with anthrax and the man *authorities* are, for the first time, calling a potential suspect. . . . After the first search in late June, *sources* said nothing incriminating was found. While Hatfill gave his permission then, this time investigators came armed with a search warrant. They also searched a friend's residence. It is not clear what brought investigators back, but Hatfill, who *sources* say was being called a person of interest, is now, according to those same *sources*, a potential suspect in the anthrax investigation. . . . *Sources* say Hatfill has previously been interviewed by the FBI and polygraphed." Kelli Arena, et al., *Anthrax Investigation Focuses on One Man*, CNN Newsnight Aaron Brown (Aug. 1, 2002) (Ex. 64) (emphasis added).

b. "*Sources* said authorities also searched the apartment of a Hatfill friend. . . . *Sources* said Thursday's search of Hatfill's apartment, situated next to Fort Detrick, was conducted with a search warrant, unlike the previous search of his residence on June 25, which was consensual. At the time FBI agents also searched a storage locker Hatfill used in Florida. No incriminating evidence was found in the searches, *sources* said. . . . *Sources* said Hatfill took

a polygraph but the results were inconclusive.” Kelli Arena, *FBI Searches Apartment in Anthrax Probe*, CNN.com (Aug. 1, 2002) (Ex. 65) (emphasis added).

c. “The last time his residence was searched, it was consensual. And *sources* told us then there was absolutely no evidence of anything that would implicate Dr. Hatfill, but there is something that has come up between now and then which has brought FBI agents back to the scene. . . . Some *sources* (are) now calling him a potential suspect.” Kyra Phillips & Kelli Arena, *Washington-area Scientist’s Residence Searched*, CNN Live on Location (Aug. 1, 2002) (Ex. 66) (emphasis added).

d. “FBI agents investigating last fall’s series of anthrax attacks on media and political figures searched the Frederick, Md. apartment Thursday of a former researcher at the military’s top biological weapons facility, *two law enforcement officials* told United Press International. . . . But on Thursday morning, agents were denied permission by Hatfill to search the residence a second time. Agents procured a search warrant from a federal judge, according to *federal law enforcement sources*, and proceeded with a search midday. However, a *top Justice Department source* said there was no immediate plan to charge Hatfill or seek an arrest warrant. *Law enforcement sources* confirmed that the search warrant was based on new information in the case, but refused to comment on its specific nature.” P. Mitchell Prothero, *FBI Searches Home in Anthrax Case*, United Press International (Aug. 1, 2002) (Ex. 67) (emphasis added).

e. “The Associated Press, citing *unnamed government sources*, said investigators were acting on a search warrant *FBI officials*, speaking on background, said last month that nothing incriminating was found in the June 25 search of Hatfill’s apartment.

But tests to detect anthrax spores had not been completed.” Frank Roylance, *Scientist’s rooms searched again*, The Baltimore Sun (Aug. 2, 2002) (Ex. 69) (emphasis added).

f. “Another *FBI official*, however, said the bureau has, within the last several days, become far more suspicious of Hatfill. The investigation into the scientist ‘began as due diligence, but in pursuing all possibilities, it has now become more than that. There is a greater sense of urgency and anticipation.’ Recent searches and developments in the investigation into Hatfill have ‘created a lot of interest and a lot of activity and a lot [of] enthusiasm,’ said the *FBI official*, who is privy to the scientific aspects of the investigation. Hatfill was ‘in the area’ during the search, according to the *FBI official*, who asked to remain anonymous. . . . Some *Justice Department officials* suggested that Hatfill fits [the FBI] profile, as least in part. But in other respects, his career and personality seem at odds with the official profile.” Josh Meyer & Megan Garvey, *FBI Returns to Md. Home in Anthrax Probe*, Los Angeles Times (August 2, 2002) (Ex.70) (emphasis added).

46. Defendants told the media that they had obtained a warrant for the August search. The press reported that the FBI searched Dr. Hatfill’s properties pursuant to a search warrant. Answer ¶ 44 (Ex. 117). FBI Spokeswoman Weierman disclosed to the press that Dr. Hatfill’s apartment was searched pursuant to a warrant. Weierman Dep. 93:16-94:19, 181:16-20 (Ex. 45). She claimed she was authorized to disclose to the press that the search warrant was necessitated by Dr. Hatfill’s refusal to consent to the search. Weierman Dep. at 373:12-21 (Ex. 45). Ms. Weierman also disclosed that the search was conducted in connection with the anthrax investigation. Weierman Dep. at 374:11-21 (Ex. 45). Ms. Weierman falsely claimed that she was authorized to make these disclosures. Weierman Dep. at 373:8-21 (Ex. 45). Defendants admitted Ms. Weierman was not, in fact, authorized to disclose to the press that Dr. Hatfill’s

apartment was being searched pursuant to a warrant or that the warrant was necessitated by Dr. Hatfill's refusal to cooperate. Def.'s Resp. to Pl.'s Second Req. for Admis. Nos. 380, 398 (Ex. 123); Lambert Dep. at 159:12-160:8 (Ex. 29); Harp Dep. at 291:12-296:12 (Ex. 17).

47. Assistant Director Harp told Kelli Arena of CNN that the FBI was executing a search warrant. Harp Dep. at 385:14-386:15 (Ex. 17). Ms. Arena attributed this information to anonymous sources. Ex. 65. Assistant Director Harp had "pretty frequent" contact with the press and spoke "dozens" of times "off-the-record" with reporters, which Mr. Harp understood to mean that the press would not reveal his name. Harp. Dep. at 67:18-68:22, 70:20-75:14 (identifying approximately thirteen reporters with whom he discussed the anthrax investigation), 112:10-115:21, 154:2-158:22 (Ex. 17). Mr. Harp's responsibilities included speaking with the press on a "daily basis" and he had complete discretion to speak to the press about the Amerithrax investigation. Harp Dep. at 69:1-9 (Ex. 17); Def.'s Resp. to Pl.'s First Set of Interr. No. 13 (Ex. 119). Mr. Harp agreed to provide information about the anthrax investigation to reporters on an anonymous basis because he believed it was important to show that the FBI was actively working the case given the criticism about the FBI's handling of the investigation. Harp Dep. at 120:19-121:14 (Ex. 17).

48. Assistant Director Harp made disclosures to the press anonymously, "on background," in the belief that they somehow did not count. In addition, on multiple occasions, Assistant Director Harp spoke to reporters about the anthrax investigation "on background"—*i.e.*, on a not-for-attribution basis—about the developments and progress in the investigation. Harp Dep. at 108:13-110:1 (Ex. 17). The FBI's National Press Office arranged "background" interviews for Mr. Harp. Accordingly, Mr. Harp engaged in wide-ranging discussions with reporters and made disclosures he would not otherwise have made. Harp Dep. at 434:15-436:11

(Ex. 17). Mr. Harp, however, did not consider the information he disclosed during “background” interviews to be “disclosures” because the interviews were “scheduled by the Press Office.”

Harp Dep. at 110:12-111:5 (Ex. 17).

C. The Leaks Cost Dr. Hatfill His Job

49. On August 1, 2002, Darrell Darnell, the lead program manager in the DOJ’s Office of Domestic Preparedness, was watching television in his office when he saw the second search of Dr. Hatfill’s apartment being broadcast live on cable news channels. Part of Mr. Darnell’s job was to oversee a government-funded program at LSU to provide training to first responders about incidents involving biological weapons (hereafter the “LSU First Responder Training Program”). Answer ¶¶ 14, 45 (Ex. 117); Darnell Dep. at 13:16-15:16 (Ex. 12).

50. After it was reported that the search of Dr. Hatfill’s apartment was being conducted pursuant to a warrant, Mr. Darnell telephoned Dr. Hatfill’s supervisor at LSU—Dr. Steven Guillot—and instructed him to remove Dr. Hatfill from the LSU First Responder Training Program immediately. At this time, Dr. Hatfill had not been arrested or charged with any wrongdoing. Answer ¶ 45 (Ex. 117); Darnell Dep. at 42:19-44:20, 103:21-104:2 (Ex. 12).

51. Moreover, prior to the August 1 search, the Agency Defendants were aware that Dr. Hatfill had previously consented to the search of his apartment and that the June 25 search had been broadcast live on television. Ms. Henke stated in a September 9, 2002 email that “up until August 1, [Office of Justice Programs] did not make any request to LSU regarding staffing. Several individuals utilized by [the Office for Domestic Preparedness] for training allowed voluntary searches of their homes or answered questions posed by the FBI, which included Mr. Hatfill (first round of media inquiry).” Email from T. Henke to D. Daniels (Sept. 9, 2002) (Ex.

148) (“June Darrell [Darnell] talked to LSU—they knew re consensual search from Hatfill but no reason to do anything”).

52. Tracy Henke, the Principal Deputy Assistant Attorney General at the Office of Justice Programs, informed her boss, Assistant Attorney General Deborah Daniels, about the decision to remove Hatfill; Ms. Daniels, who could have countermanded the order, approved of the removal. Answer ¶¶ 12, 47 (Ex. 117).

53. After discussing Dr. Hatfill’s removal from the LSU First Responder Training Program with Mr. Darnell and Timothy Beres, the Acting Director of the DOJ’s Office of Domestic Preparedness, Ms. Henke directed Mr. Beres to send an email to LSU to confirm the instruction to remove Dr. Hatfill and to create an official record. Answer ¶¶ 13, 48 (Ex. 117); Darnell Dep. at 64:16–66:18 (Ex. 12); Beres Dep. at 36:12-38:14 (Ex. 4). Mr. Beres confirmed Mr. Darnell’s instructions by email to Dr. Guillot. Mr. Beres wrote: “I want to reiterate that the Office of Justice Programs/Office for Domestic Preparedness directs that the Louisiana State University Academy of Counter-Terrorist Education immediately cease and desist from utilizing the subject matter expert and course instructor duties of Steven J. Hatfill on all Department of Justice funded programs.” Beres Dep. at 25:2-26:21 (Ex. 4); Ex. 141; Answer ¶ 48 (Ex. 117).

54. The Directive not to use Dr. Hatfill had nothing to do with his performance. Dr. Guillot objected to the DOJ’s directive; Dr. Hatfill had not been convicted of anything and Dr. Hatfill was an important part of the program and it was not an appropriate time to remove him. Beres Dep. at 34:10-35:17 (Ex. 4). In fact, Dr. Guillot had been told by FBI Special Agent David Dawson (co-lead investigator of the Amerithrax investigation) that the FBI had found nothing implicating Dr. Hatfill in the anthrax attacks and that he was not considered a suspect. Guillot Dep. at 37:15-39:20 (Ex. 16); Roth Dep. at 15:17-16:4 (Ex. 39). Nevertheless, LSU was

not in a position to challenge the DOJ's order; Dr. Hatfill was immediately removed from performing his duties. The DOJ's directive effectively ended Dr. Hatfill's employment at LSU as his position was funded entirely through the DOJ's grant. Guillot Dep. 24:14-25:10, 42:10-17, 65:15-69:4 (Ex. 16).

55. The Justice Department ordered Dr. Hatfill removed from the LSU First Responder Training Program because the press reported a crucial additional detail disclosed by the FBI: that the August 1, 2002 search was conducted *pursuant to a warrant*. Darnell Dep. at 103:21-104:2, 109:10-110:5, 116:6-12 (Ex. 12); Daniels Dep. at 25:15-26:13 (Ex. 11); Email from T. Henke to D. Daniels (Ex. 148) (stating that "Mr. Hatfill was the only individual associated with ODP training to have a 'warrant' issued"). That put Dr. Hatfill "in a different category." Daniels Dep. at 69:7-20 (Ex. 12).

56. The Justice Department official who initiated the decision to have Dr. Hatfill terminated admitted that it was driven by a "public relations concern" about the public disclosure that Dr. Hatfill's apartment had been searched pursuant to a search warrant. Darnell Dep. at 45:4-9 (Ex. 12). Assistant Attorney General Daniels thought it an appearance problem to have "a person, who obviously the Department thinks may have been involved with the anthrax mailing, teaching a course about that very thing on behalf of the Department." Daniels Dep. at 28:15-31:9 (Ex. 11). One of her underlings explained that the Agency Defendants "would look sort of foolish" if the public learned that one part of DOJ was investigating Dr. Hatfill while another part was using him "on a project that was if not directly at least tangentially related to what was occurring on the television." Darnell Dep. at 42:19-45:16, 63:1-19, 75:1-9, 83:10-84:7 (Ex. 12); *see also* Ashcroft Dep. at 248:1-16 (Ex. 2) ("Well, you know, it would be a kick in

the head if a person were to be involved in the anthrax and he were a department employee.”); Israelite Dep. at 98:13-99:7 (Ex. 23).

57. The Justice Department has blackballed Dr. Hatfill: it has categorically excluded Dr. Hatfill from working on any DOJ-funded projects and he may not be hired by DOJ on a grant as long as he remains a “person of interest” or “potential suspect.” He remains blackballed by the Agency Defendants today. Daniels Dep. at 25:14-20 (Ex. 11) (explaining Hatfill is barred until he is “excluded as a potential suspect”); Darnell Dep. at 112:10–115:16 (Ex. 12).

58. The Justice Department did not inform Dr. Hatfill of the basis for its decision to have him removed from all DOJ-funded programs nor give him an opportunity to be heard or appeal the decision. Beres Dep. at 52:12-53:15 (Ex. 4); Henke Dep. at 162:6-167:18 (Ex. 19); Daniels Dep. at 49:12-51:12 (Ex. 11). In response to a congressional inquiry, the Agency Defendants admitted they have no laws, rules, policies, standards, or guidelines related to their ability to determine who should or should not work on DOJ-funded programs. Nor do they have an appeal process in place to challenge arbitrary decisions. Ltr. from D. Bryant to C. Grassley, at 1 (Oct. 18, 2002) (Ex. 153); Answer ¶ 82 (Ex. 117); Henke Dep. at 66:20-67:8 (Ex. 19).

59. The Justice Department’s blackballing of Dr. Hatfill is unique. The Agency Defendants are unaware of another case in which they barred an individual from working on any DOJ-funded grants. Ex. 153; Darnell Dep. at 165:21-167:14 (Ex. 12); Beres Dep. at 87:4-15 (Ex. 4); Garrett Dep. at 191:2-11 (Ex. 15). Indeed, FBI agents with collectively over one hundred years of experience testified that they were unaware of any instance in which the Agency Defendants requested that an employer terminate an employee because he was under investigative scrutiny. Garrett Dep. at 160:8-161:14 (Ex. 15); Roth Dep. at 114:16-115:1, 121:1-7 (Ex. 39); Eberhart Dep. at 10:21-13:9, 100:15-102:14 (Ex. 13); Lambert Dep. at 134:2-14 (Ex.

29); Harp Dep. at 305:13-306:4 (Ex. 17); *see also* Ashcroft Dep. at 251:8-14 (Ex. 2) (testifying that he is unaware of any other circumstances where the DOJ requested the termination of an employee in a private setting).

60. The Justice Department was willing to supplement its official written media statement about Dr. Hatfill's status at LSU with an unofficial oral media disclosure that the decision was linked to the anthrax investigation. Following the Agency Defendants' decision to have Dr. Hatfill removed from the LSU First Responder Training Program, the Agency Defendants learned that *The Washington Post* was planning an editorial concerning the Agency Defendants' directive to LSU that was expected to be hostile. Answer ¶ 72 (Ex. 117). The Agency Defendants agreed to issue a press statement that did not reveal why they ordered LSU to remove Dr. Hatfill from the LSU First Responder Training Program but merely explained that they had the authority to order Dr. Hatfill removed from the program and distinguished his "status as an employee of that University" from his service on DOJ-funded programs. Ex. 147; Daniels Dep. at 113:2-11 (Ex. 11). Barbara Comstock, the Director of DOJ's Office of Public Affairs, pointed out that under the draft official statement, "we don't in any way answer 'why' we did this, just say we CAN" Ex. 147; Comstock Dep. at 161:14-162:17 (Ex. 9); Daniels Dep. at 16:11-17:10 (Ex. 11). Assistant Attorney General Daniels replied: "We don't think you need to address that in this written statement. They [the press] will follow up anyway, and then someone can tell them that it would have been disruptive to the program and [not] conducive to a learning environment; possibly could have cast program into disrepute *if he turned out to be in fact the anthrax terrorist*" Ex. 147 (emphasis added); Answer ¶ 73 (Ex. 117).

61. Although put on notice of the proposed unofficial explanation, no Justice Department law-enforcement official objected to it. The recipients of Ms. Daniels's reply

included Michael Chertoff (then Assistant Attorney General for Criminal Division), Alice Fisher (then Deputy Assistant Attorney General, later Assistant Attorney General for Criminal Division), Barbara Comstock (Director of Justice Department Public Affairs), David Ayres (Chief of Staff to the Attorney General), David Israelite (Deputy Chief of Staff), Chris Wray (Principal Associate Attorney General, later Associate Attorney General for Criminal Division), David Higbee (DOJ White House Liaison), and Mark Corallo (Deputy Director, Justice Department Public Affairs). Ex. 147. None of the recipients of Ms. Daniels's suggestion objected to or commented on her proposal. Daniels Dep. at 184:11-22, 186:5-12 (Ex. 11).

D. August 4, 2002: Disclosures from the U.S. Attorney's Office for the District of Columbia

62. Justice Department officials Daniel Seikaly and Roscoe Howard disclosed information to *Newsweek* about the use of dogs to investigate Dr. Hatfill. On August 4, 2002, *Newsweek* published an exclusive story detailing specific and sensitive investigative techniques used by the FBI to investigate Dr. Hatfill. Mark Miller, et. al, *The Hunt for the Anthrax Killer*, *Newsweek*, Aug. 12, 2002 (Ex. 76); Klaidman Dep. at 46:8-47:4 (Ex. 24) (explaining that issues are on newsstands eight days before their publication date). This story described how specially trained bloodhounds had tracked the scent from the anthrax-laced letters to Dr. Hatfill and places he frequented. Ex. 76. Yet, no one at *Newsweek* witnessed the dogs in action. Klaidman Dep. at 70:5-7 (Ex. 24); Isikoff Dep. at 63:18-64:11 (Ex. 21). *Newsweek* reporters Daniel Klaidman and Michael Isikoff consulted with two DOJ sources—Daniel Seikaly and Mr. Howard—for the article. Klaidman Dep. at 32:20-34:8 (Ex. 24) (describing two DOJ sources); Klaidman II Dep. at 10:13-11:20 (revealing formerly anonymous source “DOJ-4” to be Daniel Seikaly), 16:10-17:12 (testifying that Michael Isikoff received confirming information from Roscoe Howard) (Ex. 25); Isikoff II Dep. at 226:16-229:18 (Ex. 22) (confirming his formerly anonymous “Source

A” to be Roscoe Howard); Howard Dep. at 8:1-9:19 (Ex. 20) (admitting being a “confidential source” for Isikoff).

63. Mr. Seikaly served as Chief of the Criminal Division of the U.S. Attorney’s Office for the District of Columbia from August 2001 to August 2004. In that position, he was responsible for supervising all federal criminal prosecutions and investigations in the District of Columbia. Seikaly Dep. at 26:10-29:3 (Ex. 40); Ex. 182; Def.’s Resp. to Pl.’s Second Set of Interr. No. 25 (Ex. 122); Ex. 181 at 3.

64. What Mr. Seikaly learned about the investigation of Dr. Hatfill by the FBI and Justice Department came from regular briefings, as a part of his job. The U.S. Attorney’s Office for the District of Columbia had the lead role in the Amerithrax investigation. Kenneth Kohl was the Assistant U.S. Attorney in charge of the case; he reported to William Blier, who reported to Mr. Seikaly. Seikaly Dep. at 34:17-35:19 (Ex. 40). Mr. Seikaly participated in regularly scheduled meetings with the FBI about the anthrax investigation. These briefings were attended by Messrs. Seikaly, Howard, Blier, and Kohl from the U.S. Attorney’s office. The purpose of these meetings was for the FBI to provide the U.S. Attorney’s Office information concerning the progress of the investigation. Seikaly Dep. at 36:20-46:2.

65. Mr. Seikaly knew Mr. Klaidman was a reporter. Klaidman Dep. at 132:13-15 (Ex. 24); Seikaly Dep. at 75:21-76:1 (Ex. 40). Mr. Seikaly also knew that Mr. Klaidman intended to publish the information Mr. Seikaly provided. Klaidman Dep. at 132:16-19 (Ex. 24). Mr. Seikaly voluntarily, intentionally, and willfully disclosed to Mr. Klaidman investigative information about Dr. Hatfill; Mr. Klaidman never tricked or deceived Mr. Seikaly into disclosing any information. Klaidman Dep. at 133:18-135:17 (Ex. 24).

66. Mr. Klaidman agreed with Mr. Seikaly that he would not identify Mr. Seikaly as a source. Klaidman Dep. at 116:16-117:22 (Ex. 24). In Mr. Klaidman's twenty-years of experience, Agency Defendant officials generally insist on anonymity because they do not want to get in trouble. Klaidman Dep. at 113:8-116:9 (Ex. 24). A few weeks prior to Mr. Klaidman's deposition, Mr. Seikaly requested that Mr. Klaidman not reveal Mr. Seikaly as a confidential source. Klaidman Dep. at 124:6-126:3 (Ex. 24).

67. Mr. Seikaly spoke to *Newsweek* with the knowledge of his boss, Mr. Howard, but without the knowledge of the official responsible for dealing with the press. Mr. Klaidman spoke with Mr. Seikaly numerous times about the information contained in *Newsweek's* article about the bloodhounds. Klaidman Dep. at 81:11-82:12 (Ex. 24). Mr. Seikaly told Mr. Klaidman that he obtained his information about the investigation of Dr. Hatfill from "briefings" he received in his "supervisory position as head of the Criminal Division" Klaidman II Dep. at 41:12-42:6, 57:15-59:19 (Ex. 25). Mr. Howard, then the U.S. Attorney and Mr. Seikaly's boss, admitted that Mr. Seikaly informed him that he had recently had a conversation with Mr. Klaidman and that *Newsweek* was going to run a story about the anthrax investigation; but Mr. Howard claimed not to have inquired further into the substance of Mr. Seikaly's communication with Mr. Klaidman. Howard Dep. at 118:3-126:9 (Ex. 20). Channing Phillips, Mr. Howard's Chief of Staff and spokesman for the U.S. Attorney's Office, was the designated media contact for the office, but was unaware of Mr. Seikaly's communications with the media. Phillips Dep. at 41:17-43:13, 156:18-157:3 (Ex. 35); Def.'s Resp. to Pl.'s Second Set of Interr. No. 25. (Ex. 122).

68. Mr. Seikaly disclosed to Mr. Klaidman detailed information concerning the FBI's investigation of Dr. Hatfill, which *Newsweek* reported in its issue dated August 12, 2002. Ex. 76. The information he disclosed to Mr. Klaidman included that:

- a. The FBI had used bloodhounds in the anthrax investigation early in the week of July 29, 2002. Klaidman Dep. at 45:11-46:16 (Ex. 24); Klaidman II Dep. at 50:20-53:12 (Ex. 25);
- b. The bloodhounds had been presented with "scent packs" lifted from the anthrax-tainted letters. Klaidman Dep. at 59:8-17 (Ex. 24); Klaidman II Dep. at 53:19-57:14 (Ex. 25);
- c. "[A]gents [had] quietly brought the dogs to various locations frequented by a dozen people they considered possible suspects—hoping the hounds would match the scent on the letters." Klaidman Dep. at 61:13-63:4 (Ex. 24);
- d. "In place after place, the dogs had no reaction. But when the handlers approached the Frederick, Md., apartment building of Steven J. Hatfill . . . the dogs immediately became agitated." Klaidman Dep. at 66:22-68:6 (Ex. 24);
- e. The bloodhounds "were barking and howling and straining at their leashes" at search sites associated with Dr. Hatfill. Klaidman Dep. at 51:12-53:8 (Ex. 24);
- f. On August 1, agents arrived at Dr. Hatfill's apartment "with the bloodhounds in tow. When they entered the apartment building, one of the dogs excitedly bounded right up to Hatfill." Klaidman Dep. at 80:7-81:10 (Ex. 24);
- g. "The agents also brought the bloodhounds to the Washington, D.C. apartment of Hatfill's girlfriend and to a Denny's restaurant in Louisiana, where Hatfill had

eaten the day before. In both places, the dogs jumped and barked, indicating they'd picked up the scent." Klaidman Dep. at 61:13-62:20, 69:9-17 (Ex. 24);

h. The bloodhound evidence led investigators to "believe they were finally on the verge of a breakthrough," but the FBI was not "close to making any arrests in the case." Klaidman Dep. at 71:21-72:10, 87:9-22 (Ex. 24), Klaidman II Dep. at 43:17-47:4 (Ex. 25);

i. Dr. Hatfill "waived his physician-patient privilege so investigators could ask his doctor about Hatfill's prescription for Cipro," who explained that "[Dr.] Hatfill had an infection." Klaidman Dep. at 91:17-92:21 (Ex. 24).

69. On June 2, 2005, the Agency Defendants responded to Dr. Hatfill's interrogatory requesting a description of any communications related to the anthrax investigation between Agency Defendant officials and the media. Mr. Seikaly verified under penalty of perjury the interrogatory response purporting to detail his communications with the press regarding Dr. Hatfill; however, this interrogatory response omitted Mr. Seikaly's communications with Mr. Klaidman about Dr. Hatfill. Def.'s Resp. to Pl.'s Second Set of Interr. No. 25 (Ex. 122).

70. Mr. Seikaly did not deny the disclosures to which Mr. Klaidman testified, although he had the opportunity to do so. On October 10, 2007, Mr. Seikaly was deposed in this case after releasing Mr. Klaidman from his promising of confidentiality. When questioned about the investigative information concerning Dr. Hatfill he disclosed to Mr. Klaidman, Mr. Seikaly repeatedly invoked his privilege against self-incrimination under the Fifth Amendment of the U.S. Constitution. Seikaly Dep. at 75:3-82:13, 91:12-98:14, 124:12-133:20, 140:2-142:21, 144:20-145:13, 157:13-17, 162:14-19, 174:2-183:12, 196:5-197:16 (Ex. 40).

71. What Mr. Howard learned about the investigation of Dr. Hatfill by the FBI and Justice Department came from regular briefings, as a part of his job. Mr. Howard served as the

U.S. Attorney for the District of Columbia from August 2001 to May 2004. As the U.S. Attorney, he supervised all criminal prosecutions in the United States District Court for the District of Columbia. Ex. 181 at 1-2; Ex. 183. With respect to the anthrax investigation in particular, he was the director of the investigation and the ultimate authority on any charging decision. Howard Dep. at 34:18-37:17, 30:8-19, 209:6-14 (Ex. 20). All of the information Mr. Howard received about the investigation came from regular briefings with his staff and FBI officials. Howard Dep. at 34:18-36:4, 30:8-19 (Ex. 20); *see also* Howard Dep. at 214:2-215:22 (defense counsel admitting that “all the information [Mr. Howard] obtained was from briefings”).

72. Mr. Howard gave information to the press, including Newsweek’s Michael Isikoff, voluntarily, intentionally, and willfully. Mr. Howard frequently spoke with the press, which he considered “simply part of the job.” Howard Dep. at 114:22-117:5 (Ex. 20). In fact, he found the “extraordinary amount of press interest” in certain cases “one of the . . . great things about the job.” Howard Dep. at 61:2-4 (Ex. 20). Mr. Howard spoke numerous times with Mr. Isikoff about the investigation of Dr. Hatfill. Isikoff Dep. at 143:12-144:14, 153:20-155:11 (Ex. 21); Howard Dep. at 134:1-6 (Ex. 20) (admitting to “several” calls from Isikoff). Mr. Howard knew Mr. Isikoff was a reporter. Isikoff Dep. at 164:3-7 (Ex. 21); Howard Dep. at 132:7-12 (Ex. 20). Mr. Howard voluntarily, intentionally, and willfully communicated investigative information to Mr. Isikoff; Mr. Howard was never deceived or tricked into providing any information. Isikoff Dep. at 170:13-172:9 (Ex. 21).

73. The Justice Department did not enforce its guidelines purporting to regulate Mr. Howard’s communications with the press, nor did it ensure that its designated press officer be aware of Mr. Howard’s media efforts. The U.S. Attorney’s Manual requires that U.S. Attorneys

coordinate the news media efforts with the Office of Public Affairs in cases that “transcend their immediate district or are of national importance.” USAM § 1-7.320 (Ex. 188). Mr. Howard admitted that the anthrax investigation transcended his immediate district and was of national importance, but he did not report his communications with Mr. Isikoff to the Agency Defendants’ Office of Public Affairs and denied being required to do so. Howard Dep. at 155:21-156:5, 163:16-166:14 (Ex. 20). In practice, Mr. Howard could and did speak to the press without the knowledge or presence of Mr. Phillips or any other official. Phillips Dep. at 41:17-43:13, 148:3-150:10 (Ex. 35). In fact, no one at the U.S. Attorney’s Office knew Mr. Howard was communicating with Mr. Isikoff about the anthrax case. Howard Dep. at 69:17-70:1 (Ex. 20). Although in charge of press relations for the office, Mr. Phillips referred calls he received from the press concerning the Amerithrax investigation to main Justice or the FBI. Phillips Dep. at 47:15-48:18 (Ex. 35).

74. Mr. Howard sought to hide his identity, including, initially, from discovery in this action. Mr. Howard agreed to speak with Mr. Isikoff in exchange for Mr. Isikoff’s promise that he would not use Mr. Howard’s name. Isikoff Dep. at 168:18-169:15 (Ex. 21); Howard Dep. at 9:11-19; 134:7-135:9 (Ex. 20). Mr. Howard wanted anonymity “[b]ecause in general, the policy of the Justice Department—and especially in this administration—people aren’t authorized to talk on the record.” Isikoff Dep. at 34:8-35:13, 168:18-169:15 (Ex. 21). Mr. Isikoff requested on two occasions that Mr. Howard release him from his promise of confidentiality for purposes of his deposition in this action. On the first occasion, Mr. Howard refused to waive the promise of confidentiality. On the second occasion, after the Court overruled Mr. Isikoff’s assertion of “reporter’s privilege,” Mr. Howard released Mr. Isikoff from his promise of confidentiality for “[n]o particular reason.” Howard Dep. at 242:19-244:13 (Ex. 20).

75. Mr. Howard confirmed some information for Mr. Isikoff, based on briefing by the FBI. Although he denied making certain disclosures and claimed memory failure as to others, Mr. Howard admitted that he confirmed information Mr. Isikoff had about the FBI's use of bloodhounds in its investigation of Dr. Hatfill. In fact, Mr. Howard was "sure" that some of the information he told Mr. Isikoff came from "a briefing by the FBI." Howard Dep. at 145:7-146:10 (Ex. 20). Notwithstanding, Mr. Howard confirmed this because he did not want the investigation he headed to be "looked at as any kind of joke" and he wanted to inform the public that the bloodhounds were "an effective tool as opposed to grasping for straws." Howard Dep. at 130:8-133:19, 141:22-149:11, 154:11-21 (Ex. 20); Isikoff Dep. at 64:12-67:4 (Ex. 21). Mr. Howard admitted, however, that "even the mere confirmation of facts already leaked would be damaging to the investigation." Howard Dep. at 211:7-213:9 (Ex. 20).

76. Despite Mr. Howard's testimony admitting that he discussed with Mr. Isikoff the FBI's use of bloodhounds to investigate Dr. Hatfill, the Agency Defendants' interrogatory response describing Mr. Howard's communications with the press concerning Dr. Hatfill, which Mr. Howard verified under penalty of perjury, stated that "[i]n general, in response to press inquiries, [Mr. Howard] would not confirm or deny information about plaintiff" and that "[o]n some occasions, without confirming or denying the truth of the propositions the reporters posed to Mr. Howard, he attempted to dissuade them from printing certain stories regarding the investigation and/or plaintiff." Def.'s Interr. Resp. to Pl.'s Second Set of Interr. No. 25 (Ex. 122).

77. An FBI official disclosed investigative information to *Newsweek* voluntarily, intentionally, and willfully, but asked witnesses from *Newsweek* not to testify as to his identity. Mr. Isikoff also consulted an official within the FBI—identified as "Source B"—about the

investigation of Dr. Hatfill. Isikoff Dep. at 91:5-11 (Ex. 21). Mr. Isikoff's FBI source knew Mr. Isikoff was a reporter and requested anonymity in exchange for information. Isikoff Dep. at 179:2-4, 182:2-20, 184:15-185:4 (Ex. 21). Mr. Isikoff's FBI source voluntarily, intentionally, and willfully disclosed to Mr. Isikoff information about Dr. Hatfill and the anthrax investigation. Isikoff Dep. at 185:5-14 (Ex. 21). Mr. Isikoff communicated with this FBI official numerous times about the anthrax investigation and Dr. Hatfill. Isikoff Dep. at 173:20-174:4, 178:2-10 (Ex. 21). FBI "Source B" disclosed that the FBI was conducting lab tests on items seized from Dr. Hatfill's apartment even though it found nothing linking Dr. Hatfill to the anthrax attacks. Isikoff Dep. at 117:11-118:5 (Ex. 21).

78. Assistant Director Harp confirmed the dogs story for *Newsweek* before publication. Prior to the publication of the *Newsweek* article containing the investigative information disclosed by Messrs. Howard and Seikaly, Assistant Director Harp communicated with *Newsweek* reporter Eleanor Clift regarding this information. Mr. Klaidman testified that he was aware that Ms. Clift had consulted a confidential source within the FBI. Klaidman Dep. at 30:3-32:1 (Ex. 24). Ms. Clift had a "litany" of "information on the investigation," later reported in the August 12, 2002 *Newsweek* article, she wanted Mr. Harp to confirm. Mr. Harp informed Ms. Clift that her information was generally "pretty accurate." Harp Dep. at 398:2-406:14 (Ex. 17). This type of communication with the press was not unusual for Mr. Harp. He testified that on multiple occasions he confirmed for reporters the accuracy of investigative information. Harp Dep. at 349:18-350:20, 423:8-425:11 (Ex. 17). Confirming the accuracy of investigative information, however, is inappropriate. Kortan Dep. at 57:19-61:7 (Ex. 27).

79. The *Newsweek* disclosures concerned line prosecutors and agents working the anthrax case, and they had a leak investigation started. The leaks of investigative information

about Dr. Hatfill that appeared in the *Newsweek* article were inappropriate and egregious. Roth Dep. at 233:16-234:9 (Ex. 39). They concerned Mr. Kohl, the line prosecutor in charge of the case. Kohl Dep. at 58:17-21 (Ex. 26). The day after the *Newsweek* story appeared in print, Mr. Kohl expressed his concern about the article to Mr. Harp and the squad supervisors. The Agency Defendants claim that later that day, a criminal leak investigation was initiated. Kohl Dep. at 56:8-58:12 (Ex. 26); Ex. 142. Mr. Kohl also expressed his “concern that there had already been leaks in the case” directly to Attorney General Ashcroft in early August, immediately after the *Newsweek* article ran. Kohl Dep. at 56:8-58:16 (Ex. 26). Approximately a week after the leak investigation was opened, however, there was no “indication that an investigation [was] ongoing;” neither Mr. Kohl nor any of the agents had been interviewed. Ex. 143.

80. Mr. Howard was aware of the leak investigation. Howard Dep. at 198:21-199:2 (Ex. 20). Although Mr. Howard communicated with Assistant Director Harp about the leak investigation, he never told Mr. Harp that he had spoken with *Newsweek* about the use of the bloodhounds to investigate Dr. Hatfill. Howard Dep. at 206:14-207:21 (Ex. 20). Similarly, there is no evidence that he told Mr. Harp or any other investigator that Mr. Seikaly had spoken to Mr. Klaidman or that Mr. Seikaly knew in advance that the *Newsweek* article was coming out. Instead, Mr. Howard directed a subordinate, Bill Blier, to inquire about the FBI’s investigation, and in an email copied to Mr. Seikaly, Mr. Howard voiced concern about “the FBI investigating its own,” and thought the U.S. Attorney’s Office should do the “‘internal inquiry’” it represented to the press it would do. Ex. 143; Howard Dep. at 204:1-205:15 (Ex. 20).

81. In the initial phase of discovery, Dr. Hatfill requested that the Agency Defendants “[d]escribe all information received by the United States Department of Justice identifying any person as the source of any Leaks.” The Agency Defendants’ response, which included Mr.

Howard's name in the signature block, failed to disclose Mr. Seikaly's or Mr. Howard's communication with *Newsweek* about Dr. Hatfill. Def.'s Resp. to Pl.'s First Set of Interrs. No. 14 (Ex. 119).

E. "Person of Interest"

82. Attorney General Ashcroft learned that Steven Hatfill was on the FBI "person of interest" list through briefings on the Amerithrax investigation he received as Attorney General. In 2002, John Ashcroft was the Attorney General of the United States. He headed the Justice Department—the agency of the United States government responsible for enforcement of federal criminal laws and domestic terrorism investigations. Attorney General Ashcroft had ultimate authority for supervising all the operations and functions of the DOJ, including the FBI, which is the principal investigatory arm of the DOJ. Answer ¶ 9 (Ex. 117). Mr. Ashcroft was briefed on the FBI's investigation of Dr. Hatfill and told during these briefings that Dr. Hatfill was a "person of interest." Ashcroft Dep. at 19:9-21:2, 105:19-106:17, 125:22-126:18 (Ex. 2); Harp Dep. at 86:7-87:20 (Ex. 17); Roth Dep. at 68:18-69:2 (Ex. 39); Kohl Dep. at 159:13-160:18(Ex. 26); Mueller Dep. at 63:21-64:3 (Ex. 32); Ex. 146.

83. Attorney General Ashcroft described Dr. Hatfill as a "person of interest" in the FBI's anthrax investigation thrice in media appearance, including on two nationally televised morning shows. On August 6, 2002, Attorney General Ashcroft appeared on morning television. On CBS's "The Early Show," Attorney General Ashcroft stated that Dr. Hatfill was "a person of interest" in the Amerithrax investigation. Answer ¶ 51 (Ex. 117); Ashcroft Dep. at 94:4-95:5 (Ex. 2); Ex. 107. Then on NBC's "Today Show," Attorney General Ashcroft repeated his disclosure, stating that Dr. Hatfill was "a person that—that the FBI's been interested in." Answer ¶ 51 (Ex. 117); Ashcroft Dep. at 95:6-96:11 (Ex. 2); Ex. 108. On August 22, 2002, during a press conference at the Peter Rodino Federal Building in Newark, New Jersey, Mr.

Ashcroft told the assembled media that “Mr. Hatfill is a person of interest to the Department of Justice, and we continue the investigation.” Answer ¶ 63 (Ex. 117); Ashcroft Dep. at 173:7-174:2 (Ex. 2); Ex. 109.

84. The Attorney General’s intentional “person of interest” announcement about Dr. Hatfill relayed a sensitive investigative fact in FBI files. Mr. Ashcroft voluntarily and intentionally disclosed that Dr. Hatfill was a “person of interest” in the Amerithrax investigation, a sensitive investigative fact; Mr. Ashcroft believed it “accurately and appropriately reflect[ed] the relationship between the department and the individual.” Ashcroft Dep. at 136:10-137:6, 177:5-179:17 (Ex. 2); Kohl Dep. at 149:22-150:4 (Ex. 26); Garrett Dep. at 189:18-22 (Ex. 15). When Mr. Ashcroft disclosed that Dr. Hatfill was a “person of interest,” he disclosed information contained in the Agency Defendants’ files. Roth Dep. at 59:9-18 (Ex. 39).

85. Defendants identified Dr. Hatfill, alone as on their “person of interest” list intentionally. Although there were many individuals on the FBI’s list of “persons of interest,” the only individual ever identified as such was Dr. Hatfill. Ashcroft Dep. at 127:18-22, 137:7-22, 144:2-145:4 (Ex. 2); Sierra Dep. at 157:21-158:12 (Ex. 41); Roth Dep. at 61:18-22 (Ex. 39); Comstock Dep. at 56:2-13 (Ex. 9); Harp Dep. at 162:18-163:3 (Ex. 17). Attorney General Ashcroft disclosed that Dr. Hatfill was a “person of interest” in order to support the law enforcement mission of the Agency Defendants, to advance their interests, and to describe Dr. Hatfill’s status in the anthrax investigation accurately. Ashcroft Dep. at 107:19-109:5, 119:20-120:15, 134:22-136:8 (Ex. 2); Eberhart Dep. at 32:19-33:6 (Ex. 13) (stating purpose in disclosing that Dr. Hatfill was a “person of interest” was to let the public know where the investigation stood and not to “hide behind the badge”). Mr. Ashcroft believed he could “appropriately” release information about an uncharged individual to “assure the public” of the Agency

Defendants' investigative activities. Ashcroft Dep. at 37:22-38:17, 208:18-209:9 (Ex. 2). Mr. Ashcroft, however, never discussed with anyone his decision to identify Dr. Hatfill as a "person of interest" and never sought anyone's counsel concerning the appropriateness of such a disclosure. Ashcroft Dep. at 103:19-104:16, 121:15-122:15 (Ex. 2). Identifying an individual such as Dr. Hatfill as a "person of interest" can be self-serving; the Agency Defendants were getting pressure from the public, including politicians, about the pace of the investigation and identifying a particular individual was a way of showing the public that the Agency Defendants were making progress in the case. Garrett Dep. at 28:12-29:10 (Ex. 15).

86. In addition to Attorney General Ashcroft, other Agency Defendant officials identified Dr. Hatfill as a "person of interest." Ms. Weierman was quoted by the press on August 2, 2002, as having identified Dr. Hatfill as a "person of interest." Ex. 68. Ms. Weierman testified that she may have made this statement, which occurred during a period when she was receiving hundreds of calls a day from the press. Weierman Dep. at 227:2-231:12 (Ex. 45). Moreover, Ms. Weierman has no doubt that when the press attributes a piece of information or quote to an FBI official, such attributions are accurate. Weierman Dep. at 358:8-13 (Ex. 45). Special Agent in Charge Eberhart disclosed to the press that Dr. Hatfill was a "person of interest." Eberhart Dep. at 85:25-86:17 (Ex. 13). Deputy Public Affairs Director Mark Corallo testified that he, too, spoke to the press "off the record" about Dr. Hatfill being a "person of interest," that he did so in his official capacity as a Justice Department spokesman, and that such "off the record" discussions with the media were "absolutely" commonplace, even "routine" for Washington "press professionals." Corallo Dep. at 218:8-220:5 (Ex. 10).

87. The public identification of Dr. Hatfill, alone, as an FBI "person of interest" caused the public and media to suspect him of involvement in the anthrax attacks. According to

Agent Roth, following the Agency Defendants' identification of Dr. Hatfill as a "person of interest," Dr. Hatfill "got lit up" in the press. Agent Roth acknowledged to Dr. Hatfill that he was being treated viciously and terribly by the press. Roth Dep. at 70:4-71:4, 86:6-90:3, 320:3-18 (Ex. 39). The press did not view the term "person of interest" as a benign investigative designation; rather, it was understood in a pejorative sense. Lambert Dep. at 63:20-64:16, 68:4-70:3, 82:16-83:5 (Ex. 29); Kohl Dep. at 184:5-185:3 (Ex. 26). The identification of Dr. Hatfill as a "person of interest" led the press and public to believe that Dr. Hatfill was involved in the anthrax attacks. Roth Dep. at 71:5-20 (Ex. 39); Lambert Dep. at 88:16-90:8, 154:3-155:9 (Ex. 29). Indeed, FBI Special Agent James Fitzgerald testified that upon hearing Attorney General Ashcroft identify Dr. Hatfill as a "person of interest," his immediate reaction as a seasoned FBI agent was that "maybe [the FBI] finally ha[d] someone in the anthrax case." Fitzgerald Dep. at 10:10-11:22, 103:17-104:8 (Ex. 14).

88. The Agency Defendants are unapologetic about these disclosures. Attorney General Ashcroft did not know whether the Agency Defendants owe Dr. Hatfill an apology, and does not believe that he owes one himself, even if his statements caused Dr. Hatfill harm. Ashcroft Dep. at 265:4-266:7 (Ex. 2). Other Agency Defendant officials were similarly unapologetic. *See* Reynolds Dep. at 106:13-18 (Ex. 36) (denying having the "basis of knowledge to judge" whether anyone owes Dr. Hatfill an apology). The Agency Defendants have never apologized to Dr. Hatfill.

89. Although he could have, the Attorney General refused to do anything to lessen the impact caused by his public identification of Dr. Hatfill, alone, as an FBI "person of interest." On September 11, 2002, Attorney General Ashcroft was given the opportunity on CNN's "Larry King Live" to change or clarify what being considered a "person of interest" meant. Ex. 110 at

21; Ashcroft Dep. at 179:11-183:9 (Ex. 2). Despite knowing the “discomfort” his comments caused within the FBI and DOJ, and despite a formal complaint filed by Dr. Hatfill’s attorney with the Agency Defendants, Mr. Ashcroft chose not to clarify his comments. Ashcroft Dep. at 114:7-116:6, 122:16-123:16, 166:13-171:17 (Ex. 2). In fact, in all of Mr. Ashcroft’s public comments regarding the anthrax investigation, he has never clarified what he meant by the term “person of interest.” Ashcroft Dep. at 189:21-190:7 (Ex. 2). In his comments to the press, Mr. Ashcroft could have explained that the “person of interest” category was invented for the express purpose of describing people who had relevant information but were in all likelihood innocent. *See supra* ¶ 9. He could have stated that Dr. Hatfill had fully cooperated in all phases of the FBI’s investigation. Garrett Dep. at 38:19-39:14 (Ex. 15); Lambert Dep. at 78:8-79:4 (Ex. 29). He could have stated that Dr. Hatfill was not a suspect in the attacks that killed five people. Harp Dep. at 192:2-17 (Ex. 17). Mr. Ashcroft could have stated that Dr. Hatfill was presumed innocent. Ashcroft Dep. at 182:22-183:9 (Ex. 2). Instead, he said nothing of the sort.

90. Though reluctant to criticize the Attorney General, many lower-level FBI officials were dismayed by the Attorney General’s public identification of Dr. Hatfill, alone, as an FBI “person of interest.” The public identification of Dr. Hatfill as a “person of interest” surprised many law-enforcement agents within the FBI. Garrett Dep. at 39:16-42:12 (Ex. 15); Roth Dep. at 55:11-56:18 (Ex. 39); Harp Dep. at 88:13-91:22 (Ex. 17). Most lower-level personnel recognized it as improper. Brad Garrett, a line agent on the case, admitted that the disclosure was “contrary to how we operate and function day to day.” Garrett Dep. at 40:15-16 (Ex. 15). If the Attorney General had worked for Agent Garrett instead of the other way around, Agent Garrett would “[c]ertainly not” have authorized him to publicly label Dr. Hatfill as “person of interest”—“[i]t was wrong to do that.” Garrett Dep. at 26:16-22, 33:9 (Ex. 15). Ms. Weierman

admitted that had Mr. Ashcroft's comments been by an FBI official, it would have been improper, violated the Agency Defendants' guidelines, and constituted misconduct. Weierman Dep. at 46:6-47:18 (Ex. 45). FBI media representative Peter Murray similarly admitted it violated agency regulations as he understood them. Murray Dep. at 124:17-125:9 (Ex. 33). Agent Harp, while very reluctant to criticize the Attorney General, admitted the disclosure was "improper." Harp Dep. at 93:21-94:12 (Ex. 17) Agent Lambert could not identify any positive effect on the investigation. Lambert Dep. at 72:20-73:7 (Ex. 29). He also agreed that the announcement could have caused Dr. Hatfill serious harm (though calling it speculative) and admitted the FBI had never done anything to ensure Dr. Hatfill's safety. *Id.* at 88:21-90:8; *see also* Ashcroft Dep. at 151:20-152:22 (Ex. 2) (admitting he had done nothing to ensure Dr. Hatfill's safety after making the "person of interest" announcements). Even FBI Director Mueller reluctantly admitted that the announcements had not helped the investigation. Mueller Dep. at 69:1-13 (Ex. 32)

91. The Agency Defendants' public identification of Dr. Hatfill as a "person of interest" prompted an inquiry from Senator Grassley concerning the term. In a letter to Senator Grassley, the Agency Defendants admitted that as early as June 26, 2002, "unnamed sources at the FBI" had described Dr. Hatfill as a "person of interest." Although Defendants' litigation position remains that they do not know the identities of the "unnamed sources at the FBI [who] first described Steve Hatfill as one of many 'persons of interest,'" the Agency Defendants were able to tell Senator Grassley in 2002 that the "phrase was used to deflect media scrutiny from Dr. Hatfill and to explain that he was just one of many scientists who had been interviewed by the FBI and who were cooperating with the anthrax investigation." Ltr. from D. Bryant to C. Grassley (Nov. 4, 2002) (Ex. 132); *see also* Ex. 154.

92. The Agency Defendants have refused to provide the names of other individuals considered to be “persons of interest” in the anthrax investigation because such information is extremely sensitive and compiled for law enforcement purposes. The Agency Defendants’ personnel admit that disclosing the identity of an uncharged individual in an investigation is inappropriate, harmful to the investigation, and serves no legitimate law enforcement purpose. In addition, disclosing the identity of an uncharged individual in an investigation could adversely affect him, stigmatize him by connecting his name in the minds of the American public as someone involved in the anthrax attacks, potentially expose him to physical harm and retaliation, and cause him embarrassment and humiliation. *See* Answer ¶ 21 (Ex. 117); Lambert Dep. at 80:19-83:17, 87:2-90:8, 98:9-99:20, 112:9-113:20 (Ex. 29); Mueller Dep. at 36:22-37:18, 45:8-46:2, 78:21-81:2 (Ex. 32); Roth Dep. at 33:19-34:13, 42:19-43:9, 59:11-15, 83:2-86:5, 90:20-92:15 (Ex. 39); Kohl Dep. at 154:10-15, 214:22-216:4 (Ex. 26); Garrett Dep. at 27:18-33:19, 44:18-46:13, 59:12-22, 189:2-190:11 (Ex. 15); Weierman Dep. at 22:10-16 (Ex. 45); Murray Dep. at 30:3-31:6, 37:2-38:18, 121:3-14, 210 (Ex. 33); Harp Dep. at 168:11-169:7, 192:18-193:6, 195:20-196:7, 204:22-206:3 (Ex. 17); Adams Dep. at 41:8-22 (Ex. 1); Reynolds Dep. at 83:14-85:4 (Ex. 36). Unless there are exigent circumstances, the name of an uncharged individual should never be revealed, and in the Amerithrax case, there were no exigent circumstances justifying the release of Dr. Hatfill’s identity. Mueller Dep. at 37:11-38:2 (Ex. 32).

93. Michael A. Mason, the Assistant Director in Charge of the FBI’s Washington Field Office following Mr. Harp’s retirement in May 2003, stated he “object[ed] to [the] phrase [‘person of interest’] in all cases and prefers to identify people only when they are formal suspects and the FBI has enough evidence to charge them with a crime. Naming someone as a person of interest does not help an investigation” and “can unfairly harm a person’s reputation.”

Assistant Director Mason also stated “there is absolutely zero value to coming forward with names or definitions of persons of interest.” Ex. 172.

94. The Attorney General’s public identification of Dr. Hatfill, alone, as an FBI “person of interest,” became the Defendants’ institutional public position on Dr. Hatfill. Director Mueller was displeased with Mr. Mason’s reported comments. Answer ¶ 100 (Ex. 117). After Mr. Mason made these comments, he was informed by Director Mueller’s deputy, Bruce J. Gephardt, that his “person of interest” comments had not gone over well at FBI headquarters because they were clearly inconsistent with what the Attorney General had publicly stated. Lambert Dep. at 193:9-197:5(Ex. 29); Mueller Dep. at 90:5-92:17 (Ex. 32); Weierman Dep. at 157:19-161:7 (Ex. 45). It is understood among the FBI’s management level officials that it was inappropriate for anyone in the chain of command to take a position contrary to that taken by the Attorney General. Lambert Dep. at 199:6-201:11 (Ex. 29).

95. The FBI and Justice Department know that publicly linking uncharged individuals to terrorism, even short of an open accusation, can be extremely damaging to them. In the wake of the terrorist attacks of September 11, 2001, the Agency Defendants detained a number of individuals in the course of the investigation into those attacks. In a lawsuit filed by the Center for National Security Studies, the Agency Defendants refused to release the names, arguing that releasing the names of individuals suspected of some involvement in the attacks or who were material witnesses could undermine the integrity and efficacy of the investigation, allow terrorist groups to map and interfere with the investigation, violate these individuals’ privacy—forever connecting them to the September 11 attacks, jeopardize their safety, subject them to intimidation and harassment, and cause them embarrassment and humiliation. *See* Ex. 157; Reynolds Dep. at 53:13-85:4 (Ex. 36); Ashcroft Dep. at 69:15-88:15 (Ex. 2).

F. The Leak Campaign Continued

96. Following the *Newsweek* article about the bloodhounds and Agency Defendants' public pronouncement that Dr. Hatfill was a "person of interest" in the anthrax investigation, reporters continued to publish investigative information about Dr. Hatfill attributed to U.S. and federal officials, "government officials," "investigators," "the FBI," a "senior federal official," "officials at several law enforcement agencies," "law enforcement sources," "federal law enforcement sources," a "federal law enforcement official familiar with the investigation," "authorities," "FBI sources," and "Justice Department officials." *See* Ex. 71-80. This investigative information included:

a. "US officials say that while they're no closer to arresting a suspect, they now have one more reason to investigate a former government researcher who worked in the Army's biological weapons lab. . . . Government officials today confirm the search was ordered after bloodhounds showed apparent reactions to scents at the apartment of Dr. Steven Hatfill and at the Washington, DC, apartment of his girlfriend. The dogs were first allowed to sniff the anthrax letters sent to Senators Daschle and Leahy after lab workers removed all traces of the deadly spores In both cases, they showed signs of recognizing the scent, officials say." Pete Williams, *FBI Re-searches Dr. Steven Hatfill's Apartment*, The News with Brian Williams (Aug. 5, 2002) (Ex. 71) (emphasis added).

b. "[O]fficials at several law enforcement agencies acknowledged that while they may not have singled Hatfill out as a suspect, they have aggressively investigated him to determine whether he mailed the letters. One said that while the number of 'persons of interest' has remained constant in recent months, many people have been cleared, only to be replaced by others. But Hatfill has remained on the list the entire time and has been investigated perhaps more extensively than anyone else, the official said. . . . Law enforcement sources said privately

that they found an unusual type of glove in the Dumpster, as well as ‘other items associated with laboratory paraphernalia,’ but that testing for anthrax subsequently proved negative.” Lisa Getter & Josh Meyer, *Scientist Angrily Denies Role in Anthrax Attacks*, Los Angeles Times (Aug. 12, 2002) (Ex. 75) (emphasis added).

c. “NEWSWEEK also previously reported that FBI investigators had found a draft of a novel by Hatfill on his computer hard drive. The novel, *government sources* told NEWSWEEK, dealt with a bioweapons attack on the United States. . . . *FBI sources* refuse to call Hatfill as ‘suspect’ but say he is, like about two dozen others on rolling list, a ‘person of interest’ because of his background.” Mark Miller, *A ‘Person of Interest’*, Newsweek (Aug. 12, 2002) (Ex. 77) (emphasis added).

d. “*Two Justice Department officials*, speaking on condition of anonymity, said divers were searching at least one pond, but they would not say what was being sought.” Curt Anderson, *Justice Says ‘Person of Interest’ Label for Hatfill Not Meant to Cast Suspicion*, Associated Press (Dec. 12, 2002) (Ex. 80) (emphasis added).

97. For ABC News’s reports on August 11 and 12 and October 22, 2002 (Ex. 73, 74, 78), Messrs. Ross and Walter reported the following based on disclosures by Mr. Cogswell and other FBI sources:

a. Investigators were interested in Dr. Hatfill because he was said to be “mad at the government” shortly before the attacks and “many in the FBI thought that perhaps gave him the motive for some kind of revenge against the government.” Ross Dep. at 112:20-113:16, 115:21-117:13 (Ex. 37);

b. Dr. Hatfill is “known as a person who has worked around anthrax experts, although the FBI concedes, he could not himself make anthrax, does not have what they call bench skills to make it.” Ross Dep. at 120:5-121:20 (Ex. 37);

c. The bloodhound evidence reported by *Newsweek* was accurate and “most significant to the FBI,” and while “the bloodhound evidence does not justify an arrest warrant, [it] provides a lead which cannot be overlooked.” Ross Dep. at 133:18-136:6, 146:11-21 (Ex. 37);

d. “[S]imply put, there’s just not enough, unlike other government scientists, to now clear Hatfill and they are unimpressed by his news conference denials.” Ross Dep. at 137:19-138:13 (Ex. 37); Walter Dep. at 30:6-13 (Ex. 44);

e. “[A]uthorities say they are building what they describe as a growing case of circumstantial evidence” against Hatfill. Ross Dep. at 140:20-141:14 (Ex. 37); Walter Dep. at 32:1-4, 92:2-9 (Ex. 44);

f. “While Hatfill is still not officially called a suspect, he still clearly is the main focus of the FBI, even though he continues to deny any involvement.” Ross Dep. at 148:2-12 (Ex. 37); Walter Dep. at 33:9-13 (Ex. 44).

98. FBI Agent Eberhart became a source for ABC News before retirement, and continued to provide ABC information after retirement. Mr. Walter also consulted with Agent Eberhart about the investigation of Dr. Hatfill. Walter Dep. at 54:17-58:5 (Ex. 44). Mr. Eberhart admitted he “absolutely” understood that since Mr. Walter was a member of the press, he would likely report information Mr. Eberhart provided. Eberhart Dep. at 75:23-77:1 (Ex. 13). The Agency Defendants’ description of Mr. Eberhart’s contacts with the press regarding Dr. Hatfill contained in their interrogatory responses omits Mr. Eberhart’s discussions with Mr. Walter

about Dr. Hatfill. Def.'s Resp. to Pl.'s Second Set of Interr. No. 25 (Ex. 112); Eberhart Dep. at 62:2-64:19 (Ex. 13).

99. The FBI allowed Agent Eberhart to provide information about the anthrax investigation to ABC both before and after retirement. Prior to Mr. Eberhart's retirement from the FBI, he disclosed to Mr. Walter that Dr. Hatfill was still the "person of interest" in the anthrax investigation. Walter Dep. at 57:10-59:15 (Ex. 44); Eberhart Dep. at 85:23-86:3 (Ex. 13). Following Mr. Eberhart's retirement, he continued to communicate with Mr. Walter about the anthrax investigation. Eberhart Dep. at 45:13-48:20, 70:20-23 (Ex. 13). Agency Defendants allowed Mr. Eberhart to discuss the investigation with Mr. Walter. Walter Dep. at 60:2-61:22 (Ex. 44). Mr. Eberhart again disclosed to Mr. Walter that Dr. Hatfill was still a "person of interest" and the focus of the investigation. Eberhart Dep. at 85:25-88:15 (Ex. 13); Walter Dep. at 60:2-62:15, 65:13-22 (Ex. 44); Ex. 88; Ex. 91. Mr. Eberhart also disclosed that the Agency Defendants' case against Dr. Hatfill was "circumstantial." Eberhart Dep. at 90:10-22 (Ex. 13); Walter Dep. at 70:1-16 (Ex. 44); Ex. 91. Furthermore, Mr. Eberhart testified that it would not surprise him if he told reporters that Dr. Hatfill was a suspect. Eberhart Dep. at 65:3-66:15 (Ex.13); Ross Dep. at 257:14-258:5 (Ex. 37).

100. The FBI and Justice Department knew that reporting on their investigation had made Dr. Hatfill the main suspect in the anthrax killings in the eyes of the public, yet they made no effort to correct the impression. The Agency Defendants understood that because of the leaks of investigative information, the press formed the view that Dr. Hatfill was the prime suspect in the anthrax murders. Roth Dep. at 71:5-20, 157:14-158:20 (Ex. 39); Beres Dep. at 71:15-18 (Ex. 4); Harp Dep. at 142:11-16 (Ex. 17). Dr. Hatfill's name was the only one connected to the anthrax attacks and there was a perception that the investigation was focused on him. Roth Dep.

at 157:14-158:20 (Ex. 39); Kohl Dep. at 97:2-98:1 (Ex. 36). The Agency Defendants' personnel admit, however, they made no effort to dampen the media's enthusiasm about Dr. Hatfill as the likely anthrax killer. Harp Dep. at 143:11-145:16, 164:11-18 (Ex. 17); Lambert Dep. at 298:9-301:7 (Ex. 29); Answer ¶ 121 (Ex. 117).

101. Sensitive law enforcement information about Dr. Hatfill attributed to "sources," a "Justice Department prosecutor," "federal law enforcement sources," "investigators," "law enforcement officials," "federal law enforcement officials familiar with the probe," a "senior federal law enforcement official," "authorities," and "the anthrax investigation team" continued to be reported in 2003. *See* Exs. 81–99, 103. This investigative information included:

a. "Federal investigators on the anthrax task force continue to focus on former government scientist Steven J. Hatfill as the man most likely responsible for the bioterror attacks last year that killed five people, even though they have found no hard evidence linking him to the attacks, according to *several officials who attended a recent task force summit meeting in Washington and talked with ABCNEWS on the condition of confidentiality. . . . Officials who attended the task force summit* say the government is attempting to build a circumstantial evidence case against Hatfill, although *one official* acknowledged 'we may have enough right now to get an indictment but we don't have anywhere near enough to get a conviction.' The FBI had hoped an extensive search last month of lakes and ponds in a Maryland state park near Hatfill's home in Frederic [sic], Md., would turn up new evidence but *officials* tell ABCNEWS nothing of significance was discovered by government divers. *One official* said the search was triggered by credible information that Hatfill may have disposed of laboratory equipment in the ponds and that additional dives were planned. *Officials attending the meeting* also told ABCNEWS that FBI agents plan another round of interviews with other

persons of interest, including some current and former government scientists. . . . ‘It’s an attempt to rule out anybody else who has come across our radar,’ said *one investigator*. ‘Then, we can focus entirely on Hatfill,’ the *investigator* said.” Ex. 81 (emphasis added).

b. “A *senior federal law enforcement official*, speaking on condition of anonymity, said it was [Dr. Hatfill’s] work [constructing a mock biological laboratory and training State Department employees on how to respond to biological attacks] that caught the FBI’s attention as agents searched for people in the United States who might be capable of making deadly anthrax spores into a weapon.” Ex. 95 (emphasis added).

c. “No traces of anthrax were found in tests of soil samples taken from a Maryland pond drained in June by the FBI, *law enforcement officials* said Friday. Authorities found a gun, a bicycle, fishing lures and ‘a lot of junk, but nothing of an evidentiary nature in the anthrax case,’ said one *official*, speaking on condition of anonymity.” Ex. 96 (emphasis added).

d. “Meanwhile, tests on mud, water and junk taken from a pond near Frederick drained by the FBI in June have detected no spores of anthrax, The Washington Post reported yesterday. The *law enforcement official* confirmed the report, while cautioning that not all tests are complete. The pond draining, based on a tip about Hatfill, accounts for only a small fraction of the money expended by the FBI and Postal Inspection Service to trail Hatfill, search places he’s lived and trace his activities before the anthrax letters were mailed in 2001.” Ex. 98 (emphasis added).

102. FBI and Justice Department officials disclosed investigative information to *The Washington Post* voluntarily, intentionally, and willfully, but asked witnesses from the *Post* not to reveal their identity. Allan Lengel is a staff reporter for *The Washington Post*. Lengel Dep. at 17:17-18:13 (Ex. 30). In the course of his reporting on the anthrax investigation, Mr. Lengel

consulted nine FBI and DOJ officials—all of which insisted on anonymity because they were not supposed to be publicly discussing the investigation. Lengel Dep. at 36:10-41:3, 149:17-150:20, 161:1-162:16 (Ex. 30). All of Mr. Lengel's sources within the Agency Defendants knew he was a reporter. Lengel Dep. at 203:2-15 (Ex. 30). Mr. Lengel's DOJ and FBI sources voluntarily and willfully disclosed to Mr. Lengel investigative information about Dr. Hatfill; they were never tricked or deceived into disclosing any information about Dr. Hatfill. Lengel Dep. at 213:12-214:15, 217:14-22, 220:19-221:5, 223:7-15, 225:9-17, 228:9-19 (Ex. 30).

103. Daniel Seikaly and Roscoe Howard were the two Justice Department sources for Mr. Lengel. Prior to his April 2006 deposition, several of Mr. Lengel's DOJ and FBI sources agreed to allow Mr. Lengel to reveal in his deposition only the agency for which they worked. Lengel Dep. at 180:22-181:20, 248:13-249:4 (Ex. 30). Messrs. Seikaly and Howard were both anonymous sources for Mr. Lengel. Howard Dep. at 8:1-9:19, 168:9-169:8, 170:15-22 (Ex. 20); Lengel Dep. at 345:16-347:13, 349:13-351:13 (Ex. 30). After Mr. Lengel was ordered to reveal his sources, Messrs. Seikaly and Howard waived their promise of confidentiality. Howard Dep. at 244:14-245:15; Lengel Dep. at 345:22-346:5, 349:19-350:1 (Ex. 30). Mr. Lengel then testified that the sources he initially identified in his first deposition as "DOJ-1" and "DOJ-2" were Mr. Seikaly and Mr. Howard, respectively. Lengel Dep. at 346:21-347:6, 350:10-13 (Ex. 30).

104. Mr. Seikaly disclosed to Mr. Lengel sensitive information about the FBI's search of Maryland ponds as a part of their investigation of Dr. Hatfill. Messrs. Seikaly and Lengel had numerous conversations about the anthrax investigation and Dr. Hatfill. Lengel Dep. at 188:13-21; 348:2-349:3 (Ex. 30). On occasion, Mr. Seikaly was able to disclose information to Mr.

Lengel only after checking for the answer. Lengel Dep. at 321:15-325:22 (Ex. 30). Mr. Seikaly disclosed to Mr. Lengel the following information concerning the pond search:

- a. “[T]he search is tied to scientist Steven Hatfill.” Lengel Dep. at 56:5-14 (Ex. 30);
- b. “[T]he search was triggered by a hypothetical statement Hatfill had made about anthrax.” Lengel Dep. at 58:19-59:4, 96:18-98:1 (Ex. 30);
- c. Hatfill “talked hypothetically about how he might dispose of contaminated material in the water.” Lengel Dep. at 112:19-114:16 (Ex. 30);
- d. “[T]he FBI now plans to drain one of the ponds in another search for sunken evidence.” Lengel Dep. at 70:18-72:13 (Ex. 30);
- e. “Two sources familiar with the items recovered from the pond described a clear box, with holes that could accommodate gloves to protect the user as he worked.” Lengel Dep. at 72:14-73:7 (Ex. 30);
- f. Agents “recovered vials and gloves wrapped in plastic. Lengel Dep. at 72:14-73:7, 94:22-96:1 (Ex. 30);
- g. “Tests for the presence of anthrax bacteria on the equipment are continuing, after two rounds of tests produced conflicting results.” Lengel Dep. at 94:22-96:1 (Ex. 30);
- h. “Lab tests of soil samples taken from a Frederick pond that the FBI drained in June have shown no traces of anthrax bacteria.” Lengel Dep. at 104:5-105:1 (Ex. 30);
- i. There was some skepticism among investigators concerning the under-water theory, *i.e.*, that the perpetrator could prepare the envelopes under water. Lengel Dep. at 73:8-74:4 (Ex. 30); *see also* Exs. 82, 85, 93, 97.

105. Defendants did not reveal Mr. Seikaly's disclosures to Mr. Lengel in discovery, and Mr. Seikaly declined the opportunity to deny those disclosures. The Agency Defendants' interrogatory response describing Mr. Seikaly's communications with the press about Dr. Hatfill, which Mr. Seikaly verified under penalty of perjury, omitted Mr. Seikaly's communications with Mr. Lengel regarding the investigative information contained in Paragraph 104. Def.'s Resps. to Pl.'s Second Set of Interrs. No. 25 (Ex. 122). In the fall of 2007, Dr. Hatfill's counsel questioned Mr. Seikaly regarding the disclosures contained in Paragraph 104. In response to each question, Mr. Seikaly invoked his privilege against self-incrimination under the Fifth Amendment of the U.S. Constitution. Seikaly Dep. at 98:15-107:22, 111:11-115:4, 120:41:16-126:9, 127:17-133:20, 140:2-142:21, 157:13-17, 162:14-21, 177:7-186:1 (Ex. 40).

106. Mr. Lengel testified that his still-anonymous FBI sources disclosed that:

a. "The FBI has again returned to a forested area in Frederick to search for clues in the anthrax killings case." Lengel Dep. at 46:12-48:14 (Ex. 30);

b. "Agents who arrived this week plan to conduct a more 'thorough' search of the Frederick Municipal Forest, expanding it to a remote area where they have not looked before." Lengel Dep. at 50:12-52:2 (Ex. 30);

c. "[A] weeklong search of ponds and woods in the area last month netted some material that were being tested for links to the anthrax attacks." Lengel Dep. at 54:22-55:13 (Ex. 30);

d. "[I]nvestigators are trying to determine whether Hatfill, a former scientist at the U.S. Army's principal biodefense laboratory at nearby Fort Detrick, disposed of any containers or byproducts that may be linked to the anthrax spores that were sent through the mail." Lengel Dep. at 60:1-61:1 (Ex. 30);

- e. “[T]he FBI now plans to drain one of the ponds in another search for sunken evidence.” Lengel Dep. at 70:18-71:7 (Ex. 30);
- f. “Two sources familiar with the items recovered from the pond described a clear box, with holes that could accommodate gloves to protect the user as he worked.” Lengel Dep. at 72:14-73:7 (Ex. 30);
- g. “Also recovered were vials wrapped in plastic.” Lengel Dep. at 72:14-73:7; 94:6-96:1 (Ex. 30);
- h. “Tests for the presence of anthrax bacteria on the equipment are continuing, after two rounds of tests produced conflicting results.” Lengel Dep. at 94:6-96:1 (Ex. 30);
- i. “Lab tests of soil samples taken from a Frederick pond that the FBI drained in June have shown no traces of anthrax bacteria.” Lengel Dep. at 109:7-11 (Ex. 30);
- j. “FBI officials knew the laborious undertaking was a long shot but, after much internal debate, decided to proceed rather than be second-guessed as to whether they were being thorough enough.” Lengel Dep. at 117:3-12 (Ex. 30);
- k. “[T]he FBI continued to analyze the plastic box and other items recovered from the pond by divers over the winter.” Lengel Dep. at 114:17-115:20 (Ex. 30);
- l. Dr. Hatfill “had obtained a prescription for the antibiotic Cipro, which could be used to fight anthrax infection, not long before the attacks.” Lengel Dep. at 135:16-136:15 (Ex. 30);
- m. “Hatfill had even gotten pulled over by D.C. police while driving along Wisconsin Avenue on May 9, 2002. . . . He eventually pleaded guilty to driving while impaired

and was sentenced to 11 months of supervised probation.” Lengel Dep. at 133:6-135:5, 137:13-21 (Ex. 30); *see also* Exs. 82, 85, 93, 97, 99.

107. Messrs. Isikoff and Klaidman reported on the FBI’s search of the Frederick, Maryland pond. Mark Miller et. al, *Finally, the FBI Uncovers a Tantalizing Clue*, Newsweek, May 26, 2003 (Ex. 86). Mr. Isikoff confirmed with his Agency Defendant sources that “acting on a tip, FBI divers recovered a plastic container from the depths of an ice-covered pond near Frederick, Md.” and that “[w]hile some law-enforcement officials [were] taking the novel [under-water anthrax] theory seriously, others have dismissed it as fantasy.” Isikoff Dep. at 128:3-129:22, 131:7-132:9 (Ex. 21).

108. Mr. Klaidman communicated with Mr. Seikaly about the FBI’s search of the pond; Mr. Seikaly disclosed to Mr. Klaidman on an anonymous basis the following information:

a. “Earlier this year, acting on a tip, FBI divers recovered a plastic container from the depths of an ice-covered pond near Frederick, Md.” Klaidman Dep. at 102:15-103:7 (Ex. 24);

b. “The tipster [precipitating the pond search] was an acquaintance of Hatfill’s.” Klaidman Dep. at 107:7-10 (Ex. 24); Klaidman II Dep. at 64:16-67:9 (Ex. 25);

c. “[A]gents searched the pond after interviewing the friend.” Klaidman Dep. at 107:11-108:16 (Ex. 24);

d. In his interview with the FBI, the friend/tipster “relayed a provocative conversation he’d had with [Dr. Hatfill].” Klaidman Dep. at 107:11-108:16 (Ex. 24);

e. “Hatfill, the [tipster] told the bureau, was questioning the FBI’s current theory of the case, that whoever manufactured the anthrax would have needed access to

sophisticated equipment and a lab. He said the toxic bacteria could be made in the woods and the evidence could be tossed ‘in a lake.’” Klaidman Dep. at 107:11-108:16 (Ex. 24);

f. “While some law-enforcement officials are taking the novel [underwater] theory seriously, others have dismissed it as fantasy.” Klaidman Dep. at 106:17-107:4 (Ex. 24); *see also* Ex. 86.

g. “Next month the FBI may drain the entire pond in hopes of finding new evidence.” Klaidman Dep. at 110:1-7 (Ex. 24);

h. “One item agents might be looking for: a wet suit that could have been used and disposed of by the anthrax attacker.” Klaidman Dep. at 110:8-111:12 (Ex. 24); *see* Ex. 86.

109. There is evidence of further disclosures by Assistant Director Harp, too. James Stewart of CBS News testified that he believed one of his FBI sources told him, as he reported on CBS News on May 8, 2003, that FBI divers searched the bottom of the pond in Frederick but came up empty handed. Stewart Dep. at 47:4-16 (Ex. 42); Jim Stewart, *Still No Arrest in Anthrax Attack Case*, CBS Evening News, May 8, 2003 (Ex. 83). Mr. Lengel testified that one of his FBI sources told him, as he reported on January 25, 2003, that “a weeklong search of ponds and woods in the area last month netted some materials that were being tested for links to the anthrax attacks.” Lengel Dep. at 54:22-55:9 (Ex. 30); Allan Lengel, *Hunt for Clues in Anthrax Case Revived*, Wash. Post, Jan. 25, 2003 (Ex. 82). Mr. Harp admitted he may have revealed both pieces of information to Messrs. Stewart and Lengel. Harp Dep. at 426:6-427:7, 344:21-345:9 (Ex. 17). Furthermore, Mr. Lengel reported on August 1, 2003, that “sources” said “[t]he search netted nothing more than a hodgepodge of items—a gun, a bicycle, fishing lures—none of which appeared to be linked to the case.” Allan Lengel & Guy Gugliotta, *Md. Pond*

Produces No Anthrax Microbes, Wash. Post, Aug. 1, 2003 (Ex. 97). Mr. Lengel testified that he only was able to remember one source for this information—Mr. Howard. Lengel Dep. at 110:3-111:7 (Ex. 30). Mr. Harp, however, admitted that he too may have revealed this information to Mr. Lengel. Harp Dep. at 430:8-431:7 (Ex. 17).

110. ABC News's Mr. Ross also continued to report on the FBI's investigation of Dr. Hatfill in 2003. Brian Ross, *Anthrax Letters Investigation of Steve Hatfill Continues*, World News Tonight with Peter Jennings, June 9, 2003 (Ex. 88); Brian Ross, *Anthrax Investigation FBI Searching Maryland Pond for Evidence in Anthrax Mailings*, Good Morning America, June 10, 2003 (Ex. 91). Mr. Ross's FBI sources, including Mr. Cogswell, disclosed that:

a. "[T]here are just too many questions about Hatfill to back off now." Ross Dep. at 170:12-15 (Ex. 37); Walter Dep. at 47:9-12 (Ex. 44);

b. "The FBI has not officially called him a suspect, but that is without a doubt what he is. In fact, the one and only suspect in the anthrax murders, even though not a shred of hard physical evidence against him exists." Ross Dep. at 257:14-258:5 (Ex. 37); Walter Dep. at 49:5-11 (Ex. 44);

c. "The FBI admits the case it has against Hatfill so far is only circumstantial, but still potentially significant." Ross Dep. at 185:2-16 (Ex. 37); Walter Dep. at 50:6-10 (Ex. 44);

d. "And officials also tell ABC News Hatfill has admitted he obtained a prescription for the powerful antibiotic Cipro just before the letters were mailed." Ross Dep. at 186:4-10 (Ex. 37).

111. Investigative information about Dr. Hatfill also was disclosed by Agency Defendant officials, including a "high-ranking FBI official" and a "top FBI source" to Toni

Locy, then a reporter for USA Today. Locy Dep. at 10:12-13:9, 114:12-115:5, 117:15-118:10 (Ex. 40); Toni Locy, *Anthrax Investigators Tail Scientist "24/7"*, USA Today, May 29, 2003 (Ex. 87); Toni Locy, Draft Article, USA Today, May 21, 2003 (Ex. 113). Ms. Locy consulted with approximately six FBI officials and several DOJ officials about the anthrax investigation—some of whom provided information about Dr. Hatfill. Locy Dep. at 46:16-48:18, 53:1-54:22, 105:15-106:2 (Ex. 40). Ms. Locy's sources worked for the Agency Defendants and were familiar with the anthrax investigation. Locy Dep. at 91:5-99:8 (Ex. 40). Ms. Locy's Agency Defendant sources knew she was a reporter. Locy Dep. at 106:3-8 (Ex. 40). All of her sources willfully and voluntarily provided her information about the anthrax investigation. Ms. Locy never used fraud or deceit in order to obtain information from her Agency Defendant sources. Locy Dep. at 111:6-113:6 (Ex. 40).

112. FBI and Justice Department officials disclosed investigative information to *USA Today* voluntarily, intentionally, and willfully, but asked and continue to ask the witness from *USA Today* not to testify as to their identity. Ms. Locy's sources requested anonymity because the anthrax investigation was ongoing and they were concerned about losing their jobs if it were discovered they had disclosed information. Locy Dep. at 82:2-16 (Ex. 40). Ms. Locy communicated with two of her sources—one of which is an FBI official—to request that they release her from her promise of confidentiality; both sources refused to waive their promise of confidentiality. Locy Dep. at 191:15-199:19 (Ex. 40). Mr. Cogswell was an anonymous source for Ms. Locy. Ltr. from R. Bernius to T. Connolly (Sept. 21, 2007) (Ex. 178); Cogswell Dep. at 86:6-87:2 (Ex. 8). Mr. Cogswell did not deny that he was a source for Ms. Locy of information about Dr. Hatfill. Cogswell Dep. at 54:12-55:15 (Ex. 8).

113. Ms. Locy's FBI and Justice Department sources disclosed to her that officials within the FBI believed Dr. Hatfill was the anthrax killer. Locy Dep. at 55:1-57:10 (Ex. 40). The "four law enforcement sources" and "investigators" relied on in Ms. Locy's reporting included Agency Defendant officials. Locy Dep. at 91:7-93:8 (Ex. 40); Ex. 87. These Agency Defendant officials disclosed to Ms. Locy that:

a. "[T]he real reason for the round-the-clock surveillance is rooted in the FBI's new mission of preventing terrorism. FBI officials believe they can't risk the embarrassment of losing track of Hatfill, even for a few hours, and then being confronted with more anthrax attacks."

b. "[T]he 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."

c. "[T]wo of the sources say evidence gathered against Hatfill . . . is largely circumstantial."

d. "[I]nvestigators have not been able to prove Hatfill did it, or rule him out."

e. "The FBI's suspicions center on what investigators say is Hatfill's penchant for exaggerating his credentials on resumes and in statements to other scientists."

f. "Investigators have been unable to rebut Hatfill's claims that he has never been to Trenton or Princeton, N.J. . . . Nor have they found any traces of anthrax in Hatfill's apartment, his girlfriend's home, his cars, a Dumpster near his home, or several places he visited."

g. "Some investigators thought they had a break in the case when divers searched a pond in Frederick, near Hatfill's former home, in December and January."

h. “The divers found an airtight plastic box and a rope, among other things. Initial tests showed traces of anthrax on the rope, leading some investigators to speculate that the attacker might have put the box in the water and then loaded anthrax powder into the five envelopes that were sent to the media and two U.S. senators. The rope, some investigators thought, could have been used to anchor the box in the pond. But the initial tests on the rope soon proved to be wrong, which one of the law enforcement sources blamed on poor lab work. The rope, box and other equipment found in the pond are undergoing more sophisticated tests, the four sources say. Depending on the results, they say, the FBI will decide whether to drain the pond to seek more evidence.”

i. “One of the law enforcement sources say investigators sometimes wonder whether they focused on Hatfill too soon and ignored someone who deserved more attention.”

j. “So much has gone into investigating Hatfill, the source says, that abandoning the focus on him ‘would be like starting all over.’”

k. “Maybe it was someone’s theory . . . [b]ut it was not the prevailing theory.”

l. “[I]nvestigators know better than to get excited about one of the many theories examined. ‘We have had too many left turns.’”

See Locy Dep. at 91:5-99:8, 114:12-115:1, 117:7-118:1 (Ex. 40); Exs. 87, 113.

114. FBI and Justice Department officials, including Edwin Cogswell, disclosed investigative information to CBS News voluntarily, intentionally, and willfully, but four of the FBI sources asked the witness from CBS News not to testify as to their identity; and, three continue to do so. Jim Stewart of CBS News, reported on the FBI’s investigation of Dr. Hatfill. Stewart Dep. at 9:1-10:1 (Ex. 42); Exs. 83, 94. Mr. Stewart consulted with a dozen sources

within the FBI and DOJ. Mr. Stewart promised four of these sources—all FBI officials— anonymity in exchange for investigative information about Dr. Hatfill. Stewart Dep. at 18:1-20:20 (Ex. 42). The promise of confidentiality between Mr. Stewart and his FBI sources was implicit because there are rules, regulations, and laws about the disclosure of information in ongoing investigations. Stewart Dep. at 37:21-39:9 (Ex. 42). One of Mr. Stewart's FBI sources was Mr. Cogswell. *See* Memorandum of Law in Support of Non-Party James Stewart's Motion for Reconsideration or, in the Alternative, Motion for Contempt at 11 (Dkt. # 211) (admitting that Cogswell was an anonymous source for Stewart). Mr. Cogswell did not deny that he was a source for Mr. Stewart of information about Dr. Hatfill. Cogswell Dep. at 53:16-54:10, 86:6-87:2 (Ex. 8).

115. Mr. Cogswell and the still-anonymous FBI officials disclosed information to Mr. Stewart voluntarily, intentionally, and willfully. Mr. Stewart communicated with his anonymous FBI sources about the anthrax investigation many times. Stewart Dep. at 99:2-21, 101:2-9, 103:2-7, 110:7-111:1, 116:17-121:4, 125:4-128:1, 131:19-22, 133:7-135:17 (Ex. 42). Mr. Stewart's FBI sources knew he was a reporter. Mr. Stewart's FBI sources voluntarily and willfully disclosed information about Dr. Hatfill; Mr. Stewart never tricked or deceived these FBI officials into disclosing investigative information about Dr. Hatfill. Stewart Dep. at 106:18-20, 113:8-114:7, 121:5-7, 124:11-125:3, 128:2-4, 130:18-131:6, 135:18-20, 137:15-138:3 (Ex. 42).

116. Mr. Stewart's FBI sources disclosed to him information about the investigative techniques used by the FBI against Dr. Hatfill. Stewart Dep. at 59:14-20 (Ex. 42). They told Mr. Stewart that they believed Dr. Hatfill to be "the leading suspect in the case." Stewart Dep. at 49:19-51:3 (Ex. 42). They further explained the basis for the FBI's interest in Dr. Hatfill.

Stewart Dep. at 62:17-64:10. The consensus among Mr. Stewart's sources was that there was progress in the investigation of Dr. Hatfill. Stewart Dep. at 48:18-49:18. In addition, Mr. Stewart's anonymous FBI sources disclosed the following information:

a. "Publicly, not much at all has happened in the FBI's anthrax investigation since this search last winter of a small pond in central Maryland. Divers went to the bottom, but came up empty handed." Stewart Dep. at 47:4-16 (Ex. 42);

b. "Privately, however, agents say it would only have been icing on the cake because they believe they already have their man, even if they never get his indictment." Stewart Dep. at 47:17-48:17, 52:12-54:2 (Ex. 42);

c. "Bioweapons researcher Dr. Steve Hatfill . . . remains the FBI's number-one suspect in the attacks, even though round-the-clock surveillance and extensive searches have failed to develop more than what is described as a circumstantial case." Stewart Dep. at 55:14-56:11, 56:22-57:10, 80:18-81:2 (Ex. 42); *see also* Jim Stewart, *Still No Arrest in Anthrax Attack Case*, CBS Evening News, May 8, 2003 (Ex. 83).

117. The FBI's National Press Office disclosed information to Mr. Stewart about the investigation of Dr. Hatfill. Mr. Stewart reported about Dr. Hatfill's work on a government-funded project to construct a mock biological-weapons laboratory for military training, the work on which led the FBI to focus its investigation on Dr. Hatfill. Ex. 94. Although Mr. Stewart did not recall the official's name, he testified that the FBI's National Press Office confirmed for Mr. Stewart the following information:

a. "The FBI acknowledged today that one of the reasons it was quick to zero in on germ warfare expert Dr. Steven Hatfill as a person of interest in the anthrax letter case is because Hatfill once helped build a mockup of the Iraq suspected mobile germ labs. Hatfill

collected parts for the mockup and supervised its construction at this Frederick, Maryland, metal shop in September 2001.” Stewart Dep. at 87:2-89:14 (Ex. 42);

b. “Months prior to the Iraqi investigation, U.S. Special Forces troops trained in Hatfill’s mockup to learn how to detect and disarm a germ lab should they encounter one in the war.” Stewart Dep. at 92:19-93:8 (Ex. 42);

c. “Law enforcement officials said, however, that the mockup was never made operational, that no anthrax spores were ever found on the equipment and that there is no evidence thus far linking Hatfill and the mockup to the anthrax attacks.” Stewart Dep. at 93:9-94:9 (Ex. 42).

IV. THE AGENCY DEFENDANTS’ RESPONSE TO THE LEAKS

118. The Agency Defendants engaged in a campaign of leaks against Dr. Hatfill without his consent and without keeping any accounting of their disclosures. *See* Garrett Dep. at 183:10-184:4 (Ex. 15) (agreeing it is a fair characterization); Harp Dep. at 162:7-16 (Ex. 17) (“it appears that way”); Kohl Dep. at 281:7-17 (Ex. 26) (testifying he would be “denying reality” if he did not admit the anthrax investigation was beset by leaks); Exs. 201, 202 (detailing disclosures by identified and unidentified FBI and Justice Department officials). Dr. Hatfill did not provide his consent to the disclosure of any investigative information about him or about the FBI’s investigation of him. Ashcroft Dep. at 134:8-21 (Ex. 2); Cogswell Dep. at 126:9-15 (Ex. 8); Def.’s Resp. to Pl.’s First Set of Req. for Admis. Nos. 7-8, 48-49, 74-75, 87-88, 128-129, 141-142, 167-168, 180-181, 221-222, 234-235, 248-249 (Ex. 122); Def.’s Resp. to Pl.’s Second Req. for Admis. Nos. 301, 361, 373, 379, 439, 463, 489 (Ex. 123); Def.’s Resp. to Pl.’s Third & Fourth Req. for Admis. No. 834 (Ex. 124); Def.’s Am. Resp. to Pl.’s First & Second Req. for Admis. Nos. 22-23, 61-62, 206-207, 313 (Ex. 126). Dr. Hatfill requested that the Agency Defendants provide an accounting of all disclosures of Privacy Act information about Dr. Hatfill.

Pl.'s First Set of Req. for Docs. No. 4 (Ex. 118). The Agency Defendants have not maintained a running tabulation of disclosures concerning Dr. Hatfill and have refused to provide Dr. Hatfill an accounting of Privacy Act disclosures. Answer ¶ 119 (Ex. 117); Def.'s Resp. to Pl.'s First Set of Doc. Req. No. 4 (Ex. 118); Def.'s Resp. to Pl.'s Second Req. for Admis. No. 299 (Ex. 123).

119. The Agency Defendants' personnel were divided in their attitude toward the leaks. Some FBI agents had never worked a case with so many leaks and were surprised sensitive investigative information was disclosed to the press. Roth Dep. at 222:17-224:19 (Ex. 39); Harp Dep. at 392:6-19 (Ex. 17). Others were not surprised by the number of leaks in the Amerithrax investigation because they had seen it happen so many times in high profile cases in which the Agency Defendants were involved. Garrett Dep. at 101:8-102:8 (Ex. 15); Lambert Dep. at 141:9-142:9 (Ex. 29). U.S. Attorney Howard was not at all alarmed; in fact, he testified that "in cases like this, the fact that information gets in the press is sort of [the] norm. None of it was alarming." Howard Dep. at 49:12-15 (Ex. 20). He further explained: "[the U.S. Attorney's Office had a lot of cases that had a lot of very intense media scrutiny. You know, some of it led to leaks, reports in the paper, I mean, that were I guess categorized as leaks. It's kind of—I mean, it's the nature of the job. It's just the nature of these investigations." Howard Dep. at 63:10-17 (Ex. 20). Mr. Howard actually thought "the extraordinary amount of press interest" that large investigations generated was "one of the . . . great things about the job." Howard Dep. at 60:22-61:7, 185:6-187:4 (Ex. 20) (testifying that "the fact that the media was covering [the Amerithrax investigation] was all in all helpful").

120. The Agency Defendants knew investigative information about Dr. Hatfill was being leaked to the press. They exchanged emails about it at the time. *See, e.g.*, Exs. 158, 164, 166, 167, 174. Their officials even admitted in depositions, with varying degrees of candor, that

they were aware of the leaks. *See* Ashcroft Dep. at 23:15-27:17, 57:19-58:11 (Ex. 2) (admitting being made aware of information about the case reported in the press that should not have been); Harp Dep. at 33:6-34:20, 51:3-10 (Ex. 17) (testifying he was “certainly” aware of leaks and that the information was coming from somewhere, but it was only “possible” the FBI was releasing it); Roth Dep. at 273:11-16 (Ex. 39) (“There are a lot of leaks in our case, yeah.”); Mueller Dep. at 12:9-22 (Ex. 32) (admitting he was aware of leaks); Garrett Dep. at 138:14-139:17 (testifying he discussed the leaks and that they were wrong with another case agent) (Ex. 15); Lambert Dep. at 206:22-207:4 (agreeing everyone on investigative team recognized there was an enormous number of leaks) (Ex. 29).

121. In particular, the Agency Defendants understood that the leaks had to be coming from people who had knowledge of the investigation. The FBI Director understood “persons who had in part participated in some way in the investigations . . . [and] who had access to the information, must have been disclosing some of the information,” although that opened up a number of possibilities. Mueller Dep. at 15:11-17:4 (Ex. 32). Agent Roth believed the leaks “were coming from someone that was either tapping into ACS . . . [and] looking at our documents or they were coming from people that were getting briefed by us up the chain or . . . sideways in the chain.” Roth Dep. at 255:5-10 (Ex. 39). The lead prosecutor, considering the accuracy of some of the disclosures and the closely held nature of the information, believed “that there were leaks that occurred from . . . either people directly involved or who had been briefed.” Kohl Dep. at 38:10-13 (Ex. 26); *see also id.* at 22:6-23:2 (testifying he was concerned leaks were coming from someone either working on or briefed on the investigation). Mr. Seikaly testified that information he received from FBI briefings would often appear in the press shortly after, or sometimes even before, the briefing, so he “assumed that if [he] heard it from the FBI, it would

be in the paper in a day or two.” Seikaly Dep. at 42:6-43:19, 49:17-51:4 (Ex. 40); *see also* Howard Dep. at 48:1-22 (Ex. 20) (testifying he believed investigative information would become well known in the press shortly after briefings with the FBI, and he assumed it was coming from either the FBI or the Postal inspectors).

122. Line agents were frustrated with the leaks because they closely held sensitive investigation information only to have it leaked. Kohl Dep. at 36:10-17 (Ex. 26); Roth Dep. at 183:4-184:6 (Ex. 39); Eberhart Dep. at 20:16-21:1 (Ex. 13). Some officials believed that, in general, leaks were more likely to come from supervisors or others briefed on the work of the line agents and prosecutors. Garrett Dep. at 148:16-149:18 (Ex. 15); Roth Dep. at 183:14-184:16 (Ex. 39); Kohl Dep. at 39:10-40:5 (Ex. 26).

123. As such, agents were concerned about the number of individuals being briefed about the investigation—many of whom had no need for the investigative information, but nevertheless received the information because of the high-profile nature of the case. Eberhart Dep. at 22:7-24 (Ex. 13); Harp Dep. at 56:16-58:1 (Ex. 17); Kohl Dep. at 42:21-45:11 (Ex. 26). The number of people briefed or participating in some way on the anthrax case was so numerous the Agency Defendants protested in discovery that they were unable to even identify them. *See* Defs.’ Resp. to Pl.’s First Set of Interrs. No. 1 (Ex. 119) (“There are hundreds of individuals across the legislative, executive, and judicial branches of the federal government who at some point have ‘participated in any way’ or been ‘briefed’ about various aspects of the investigation.”); Def.’s Resp. to Pl.’s Second Req. for Admis. No. 298 (Ex. 123) (stating that “the sheer number of persons who were ‘briefed on’ or had ‘participated’ in the investigation into the anthrax mailings would have made it infeasible for OPR to have ‘questioned’ every such person”).

124. The Attorney General knew of the leaks and did nothing to safeguard the information. Attorney General Ashcroft was aware of the leaks and voiced concern that they “may have been coming from federal law enforcement investigators,” including FBI personnel. Ashcroft Dep. at 24:7-27:17 (Ex. 2). Nevertheless, neither he, anyone on his staff, nor anyone within the DOJ prepared any written directive ordering that the leaks stop or informing subordinates that anyone caught leaking would suffer severe consequences. Ashcroft Dep. at 239:6-15 (Ex. 2); Kohl Dep. at 262:8-18 (Ex. 26); Comstock Dep. at 274:6-277:5 (Ex. 9); Mueller Dep. at 104:15-105:5 (Ex. 32). In fact, Attorney General Ashcroft’s own chief of staff and deputy chief of staff testified that they were not aware of any action taken by the Attorney General, the Deputy Attorney General, the Office of the Attorney General, the Department of Justice or the FBI to stop leaks. Ayres Dep. at 254:5-255:20 (Ex. 3); Israelite Dep. 155:12-156:22 (Ex. 23). Instead, Mr. Ashcroft expected that Director Mueller would handle the situation, although he gave the Director no specific directions. Ashcroft Dep. at 30:11-31:22 (Ex. 2).

125. The FBI Director also knew about the leaks and did nothing effective to safeguard the investigative information. Director Mueller also voiced concern about the leaks. He testified that he understood that investigative information from the Amerithrax case was being leaked and that the leaks “must have been” coming from “[c]ertain persons who had in part participated in some way in the investigation . . . [and] had access to the information,” including the FBI. Mueller Dep. at 14:5-16:5 (Ex. 32); Kohl Dep. at 19:19-20:7 (Ex. 26). Director Mueller, however, never issued any written directive ordering that the leaking of information about the Amerithrax investigation stop and informing subordinates that anyone caught leaking would suffer severe consequences. Mueller Dep. at 105:6-19 (Ex. 32); Harp Dep. at 61:6-62:1 (Ex. 17),

Lambert Dep. at 204:22-205:18, 207:7-208:11 (Ex. 29); Eberhart Dep. at 19:17-20:7 (Ex. 13); Kortan Dep. at 54:7-19 (Ex. 27). In June 2003, Ms. Weierman prepared a written communication purporting to be from the Acting Assistant Director in Charge stating that no one should discuss the Amerithrax case with the media; this written communication was directed only to employees of the Washington Field Office and stated no consequences for disclosing information to the press. Email from D. Weierman to [REDACTED] (June 4, 2003) (Ex. 165).

126. Assistant Director Harp testified that he met with Mr. Mueller “dozens and dozens” of times on the anthrax investigation. Yet, during these meetings, the problem of leaks was never discussed. Director Mueller made only a single comment to Mr. Harp to the effect that Mr. Harp should “make sure there’s no leaking” from the Washington Field Office. Mr. Harp testified that this conversation took place approximately in late 2002 or early 2003. Harp Dep. at 30:7-32:3, 35:4-36:6 (Ex. 17). Mr. Harp, however, never asked anyone whether they were the source of any the leaks nor did he prepare a written directive ordering the leaks to stop. Harp Dep. at 51:11-54:8, 98:12-22 (Ex. 17); Eberhart Dep. at 25:25-26:7 (Ex. 13). Special Agent in Charge Eberhart was not aware of any action Mr. Harp took to stop the leaks; nor did Mr. Eberhart personally take any steps to stop the leaks. Eberhart Dep. at 23:20-25 (Ex. 13).

127. Director Mueller refused to order an aggressive investigation of the leaks. Agent Lambert raised with Mr. Mueller his concerns about the number of leaks following several articles quoting FBI officials. Because Mr. Lambert suspected the leaks were coming from the FBI, he suggested to Director Mueller that a leak investigation be opened and everyone on the case administered a polygraph examination. Director Mueller, who had the authority to approve this action, denied Agent Lambert’s request because such an investigation would be too difficult and bad for FBI morale. Roth Dep. at 34:14-35:13, 239:2-240:1, 274:1-17 (Ex. 39); Kohl Dep.

at 19:19-21:19 (Ex. 26); Mueller Dep. at 99:12-102:2 (Ex. 32). Director Mueller never ordered any investigative efforts designed to uncover the source of the leaks; instead, he ordered that investigative information not be shared among the three investigative units involved in the anthrax investigation. While “such compartmentalization within the Amerithrax taskforce would inhibit [the FBI’s] ability to connect the dots,” it did “not cause a narrowing of the universe of people with knowledge of the case.” Lambert Dep. at 205:19-206:18, 350:8-356:5 (Ex. 29); *see also* Email from M. Mason to R. Lambert (Sept. 25, 2003) (Ex.170) (explaining Agent Lambert’s opposition to compartmentalization).

128. U.S. Attorney Howard did virtually nothing to combat the leaks. He was not “focused” on the leaks either; that information about the Amerithrax investigation was being leaked to the press was not his “primary concern.” Howard Dep. at 89:20-90:12 (Ex. 20). Mr. Howard never sent any written communication to employees and officials in the D.C. U.S. Attorney’s Office directing that the leaking of investigative information was unacceptable; nor did he ever discuss the inappropriateness of leaks during any meeting within the U.S. Attorney’s Office. Howard Dep. at 98:21-99:10 (Ex. 20); Phillips Dep. at 153:5-17 (Ex. 35). Instead, Mr. Howard personally conducted an internal inquiry to determine whether his “house was in order.” But he admitted that his internal inquiry did not actually involve asking or interviewing individuals concerning whether they were the source of any leaks. Howard Dep. at 91:20-97:3 (Ex. 20). Mr. Howard knew that Mr. Seikaly had spoken to Mr. Klaidman of *Newsweek*, but he never inquired of Mr. Seikaly concerning the substance of his conversations. Howard Dep. at 118:3-130:7 (Ex. 20).

129. Amerithrax investigatory records on the FBI’s “persons of interest” were retrievable by those persons names or other identifiers. The Amerithrax investigation was

opened under a particular unique identifying number within ACS—the Agency Defendants’ system of records. Roth Dep. at 101:22-102:12 (Ex. 39); Lambert Dep. at 126:9-129:6 (Ex. 29). The Agency Defendants’ system of records had specific “subnumbers” for individual “people of interest,” and, in practice, they made information retrievable by a specific subnumber assigned to each individual. Lambert Dep. at 127:16-129:6 (Ex. 29); *see generally id.* at 114:13-132:18 (describing ACS and paper “rotor” systems of investigative files).

130. Amerithrax investigatory records on Dr. Hatfill were retrievable by his name or other identifiers. The Agency Defendants maintain “records” within a “system of records” from which information can be retrieved by the name of Steven J. Hatfill or some other identifying particular assigned to Dr. Hatfill. Defs.’ Resp. to First Set of Reqs. for Admis. Nos. 3-4 (Ex. 120); Roth Dep. at 101:22-105:13 (Ex. 39); Lambert Dep. at 121:22-129:6 (Ex. 29); Garrett Dep. at 87:13-88:4, 143:20-144:22 (Ex. 15). All investigative techniques used and information gathered by the Amerithrax squad about Dr. Hatfill were done for the purpose of the criminal investigation and would therefore be contained within ACS. Harp Dep. at 309:5-310:5 (Ex. 17); Roth Dep. at 104:12-105:13 (Ex. 39); Lambert Dep. at 136:15-20 (Ex. 29); Answer ¶¶ 116.v.x (Ex. 117). As a practice, one of the uses of ACS is to retrieve information by an individual’s name or other personal identifier. “Everybody” with access to ACS can use it to retrieve information regarding Dr. Hatfill. Roth Dep., 267:12-19 (Ex. 39).

131. Widespread access to the ACS made the Amerithrax investigatory records widely available within the FBI. The ACS files containing the Amerithrax investigation electronic records were “an open book.” Roth Dep. at 275:13-277:20 (Ex. 39). “[E]very 302 goes in there, every OPS plan goes in there. So if someone wants to watch the case remotely they can get some really good information” Roth Dep. at 276:15-19 (Ex. 39). Officials assigned to the

Amerithrax investigation were concerned that officials without a “need to know” were not only being briefed on the investigation, but were accessing the ACS system to read documents uploaded into the system. Kohl Dep. at 220:13-223:14 (Ex. 26).

132. Defendants were aware that Amerithrax files were accessible to, and being accessed by, people who had no need to know their content, yet they did not investigate those people. Agent Roth testified that he attempted to determine who was accessing the ACS Amerithrax files. When someone accesses ACS, the Agency Defendants are able to determine who accessed a particular file. Agent Roth’s inquiry, which covered a “period of time that wasn’t really long,” resulted in a “blizzard of paper” he described as “massive.” The number of individuals accessing the Amerithrax ACS files was so numerous Agent Roth estimated it would have taken an investigation the size of the Amerithrax investigation to figure out everyone who was accessing the Amerithrax files. Although the Agency Defendants never undertook such an investigation, Agent Roth did identify some of the individuals without a “need to know” who were accessing the anthrax investigative records. Agent Roth approached a “couple” of these individuals and told them “we prefer you didn’t get into the case. Stop.” Agent Roth then “passed it up the chain.” Roth Dep. at 275:13-277:20, 280:17-289:10 (Ex. 39). No further action, however, was taken; indeed, no one has ever been punished for leaks from the anthrax investigation. *See infra* ¶ 141.

133. Despite the leaks and despite knowing the ACS Amerithrax files were being accessed by individuals without a “need to know,” the Agency Defendants did not password protect or otherwise restrict access to the Amerithrax records contained within their “systems of records.” The Agency Defendants have the capacity to do so and in fact routinely restrict access to cases involving national security. Answer ¶ 120 (Ex. 117); Roth Dep. at 284:16-288:10 (Ex.

39); Mueller Dep. at 34:21-35:4 (Ex. 32). Nor did they limit access to the system of records only to individuals with a “need to know.” Instead, nearly the entire FBI has access to the system, including 14,000 Special Agents and the vast majority of 10,000 support employees, and other state, federal and local government personnel working on any FBI task force. Roth Dep. at 267:12-268:11, 277:21-280:11, 284:8-15 (Ex. 39); Kohl Dep. at 219:17-221:5 (Ex. 26).

134. The Agency Defendants have known—for years—that their investigative file system, ACS in particular, was vulnerable to unauthorized disclosures. It was, for instance, the method which notorious Russian spy and FBI traitor Robert Hanssen “exploited almost exclusively in his last period of espionage” A Review of FBI Security Programs (“Webster Report”) at 37, Mar. 31, 2002 (Ex. 199); *see also id.* at 38-49 (describing ACS security weaknesses). The Webster Report warned that “the FBI’s computer security problems . . . all flow from a pervasive inattention to security, which has been at best a low priority in recent years.” *Id.* at 37. The FBI knew “its ACS databases” were “a form of electronic open storage that allows essentially unregulated downloading and printing.” *Id.* at 75. In Hanssen’s own words, “[a]ny clerk in the Bureau could come up with stuff on that system. It was pathetic. . . . It’s criminal what’s laid out. What I did is criminal, but it’s criminal negligence . . . what they’ve done on that system.” *Id.* at 14. Indeed, at least one clerk did unlawfully access ACS. *See* Report to Congress on the Activities and Operations of the Public Integrity Section for 2003 at 29 (Ex. 200) (announcing guilty plea by “Narissa Smalls, a legal technician in FBI Headquarters,” who queried the ACS for information on subjects of Washington Field Office drug investigations, then gave the information to her associates).

135. Nor was Robert Hanssen the only FBI agent unable to resist the temptation to abuse the wide-open ACS system. New Mexico FBI Special Agents Jeffrey Royer and Lynn

Wingate used it between March 2002 and April 2002 to retrieve and sell information on individuals and companies for a market-manipulation scheme. *See Indictment, United States v. Elgindy, et al.*, 2001-CR-2074 (E.D.N.Y., 2001) (Ex. 191). Nada Nadim Prouty, a Lebanese WFO Special Agent who got U.S. citizenship through immigration fraud, used easy access to the ACS to obtain investigative information on Hezbollah. *See Second Superseding Information, United States v. Prouty*, No. 07-20156 (E.D. Mich. 2007) (Ex. 196).

136. The ACS security weaknesses exposed to the public in the 2002 Webster Report were not news to the Agency Defendants. Warnings from the DOJ's own Inspector General have gone unheeded for years. "The serious security flaws in the FBI's ACS system—which have been discussed in prior OIG reviews and internal FBI inspection reports—have been apparent since the system's inception in 1995, but they have not been remedied." A Review of the FBI's Performance in Deterring Detecting, and Investigating the Espionage Activities of Robert Philip Hanssen, Unclassified Executive Summary at 23 (Aug. 2003)) (Ex. 194) (Ex. 193).

137. In addition to the security flaws of the Agency Defendants' system of records, the Agency Defendants failed to properly train their employees regarding the Privacy Act. All Agency Defendant attorneys and related professionals are required to receive formal training in regard to the interpretation and application of the Privacy Act. Ex. 187 at DOJ00208. Neither Mr. Howard nor Mr. Seikaly received any training on the Privacy Act. Howard Dep. at 26:22-30:5 (Ex. 20); Seikaly Dep. at 29:19-30:1 (Ex. 40). Assistant U.S. Attorney Kohl knew only that the Privacy Act existed but had "never gotten into the weeds" on its provisions. Kohl Dep. at 27:2-28:2 (Ex. 26). Similarly, Ms. Henke testified that she has never received any training on the Privacy Act and her knowledge of the Act extended only to knowing that it exists. Henke

Dep. at 18:5-19:5 (Ex. 19). Agent Lambert had received no Privacy Act training after initial training at Quantico until he later went to work as a lawyer in the FBI General Counsel's Office. Lambert Dep., 100:2-101:12. *See also id.*, 102:2-102:12. Mr. Phillips thought the Privacy Act involved a concept of "relative obscurity." Phillips Dep. at 7:15-11:12 (Ex. 35). And Assistant Director Harp testified that he did not consider information he provided the press in an official FBI "background" interview to be a "disclosure" because the "background" interviews were scheduled by the Press Office." Harp Dep. at 110:12-111:5 (Ex. 17).

138. Personnel using and involved in the operation of the Amerithrax investigatory records had no effective instruction in Privacy Act protections. Attorney General Ashcroft testified that "[p]art of [his] responsibility as the Attorney General . . . is to both enforce and live within the law." Ashcroft Dep. at 99:19-21 (Ex. 2). Mr. Ashcroft, however, did not know whether he was responsible for enforcing the Privacy Act, whether disclosing investigative details about Dr. Hatfill was appropriate, consistent with the Privacy Act, or fair to Dr. Hatfill. Ashcroft Dep. at 15:21-16:7, 96:12-99:21, 141:12-143:3, 217:16-224:12 (Ex. 2). Moreover, officials responsible for handling press inquires never received any training on the provisions of the Privacy Act. Comstock Dep. at 9:19-21, 26:15-28:6 (Ex. 9) (DOJ's Director of Public Affairs); Corallo Dep. at 11:22-12:2, 36:4-21 (Ex. 10) (Deputy Director and Director of the DOJ's Office of Public Affairs). Mr. Cogswell—a confirmed source of unlawful disclosures about Dr. Hatfill—had no recollection of receiving any training on what could and could not be disclosed to the press or about the Privacy Act's provisions. Cogswell Dep. at 136:4-9, 148:5-149:4 (Ex. 8). Mr. Beres was unfamiliar with the Privacy Act. Beres Dep. at 18:12-19:9 (Ex. 4). Ms. Daniels was unfamiliar with the Privacy Act and never received any training on its provisions. Daniels Dep. at 14:19-15:17 (Ex. 11). Dwight Adams, the Director of the FBI's

laboratory, testified that with the exception of the training he received in 1983 at the FBI's academy in Quantico, Virginia, very little of which he can remember today, he did not receive any training on what information could be disclosed to the press or on the Privacy Act's provisions. Adams Dep. at 10:13-15, 43:8-45:7, 135:11-19 (Ex. 1); *see also* Mueller Dep. at 40:19-41:9 (Ex. 32). Mr. Stockham, the Supervisory Special Agent of the Evidence Response Team Unit, similarly received no training on the Privacy Act. Stockham Dep. at 19:17-19, 174:18-178:1 (Ex. 43). FBI Agent Richard Lambert's experience was similar. After basic training at Quantico, he had no Privacy Act instruction until he later attended law school and worked as an attorney in the FBI's General Counsel office handling Privacy Act matters. Lambert Dep., 100:2-101:12. He did not believe that FBI agents are generally familiar with the Privacy Act. Lambert Dep. at 100:2-102:12 (Ex. 29).

139. The FBI disregarded existing systems that could have helped them account for and deter disclosures. It maintained an online database at the FBI's National Press Office to capture and track all press inquiries received by the National Press Office. Kortan Dep. at 99:2-102:3 (Ex. 27); Weierman Dep. at 60:13-61:19 (Ex. 45). The database reflected the reporter who called, the subject matter of the inquiry, and the press representative who handled the inquiry. Ex. 184. Mr. Cogswell recorded his contacts with the press in those logs only "infrequently" and "didn't know why [people in the press office] were using it." For a significant period of time, the Agency Defendants failed to provide Mr. Cogswell access to the database. Cogswell Dep. at 165:5-170:2 (Ex. 8).

140. Dr. Hatfill complained to the Justice Department and FBI about the disclosures of investigatory information about him. On August 13, 2002, Dr. Hatfill's attorney, Victor Glasberg, filed a formal complaint on Dr. Hatfill's behalf with the FBI's Office of Professional

Responsibility and the DOJ's Office of Professional Responsibility. Answer ¶ 80 (Ex. 117). Mr. Glasberg's complaint focused on several issues, including the improper and highly prejudicial government leaks appearing in the August 12, 2002 issue of *Newsweek* concerning the use of bloodhounds. Ltr. from V. Glasberg to M. Defeo (Aug. 13, 2002) (Ex. 114). On August 16, 2002, Mr. Glasberg supplemented his formal complaint, adding a request that the professional responsibility officers at the Agency Defendants look into still more improper government leaks about investigative procedures and results. Ltr. from V. Glasberg to M. Defeo (Aug. 16, 2002) (Ex. 145).

141. The Justice Department made only a token effort to investigate the sources for the leaks and dropped even that when Dr. Hatfill sought civil relief. On April 11, 2003, in response to Mr. Glasberg's complaints, H. Marshall Jarrett sent a letter stating: "Each person interviewed denied, under penalty of perjury, having leaked any information to the media." Answer ¶ 84 (Ex. 117); Ex. 162. After Dr. Hatfill filed the present lawsuit, the Agency Defendants terminated any further investigation into the Agency Defendants' leaks of investigative information about Dr. Hatfill. Ltr. from H.M. Jarrett to T. Connolly (Sept. 26, 2003) (Ex. 171). On March 19, 2004, the Agency Defendants stated they were unable to identify any specific person as the source of any disclosures about Dr. Hatfill. Def.'s Resp. to Pl.'s First Set of Interr. No. 14 (Ex. 119). No Agency Defendant official has been punished for leaking investigative information about Dr. Hatfill. Ltr. from Jarrett to T. Connolly (Sept. 26, 2003) (Ex. 171) (stating "unable to identify the person or persons who leaked information about [Dr. Hatfill] to the media"); Ltr. from P. Freeborne to P. O'Donnell, at 3 (Nov. 21, 2007) (Ex. 179) (stating the Agency Defendants "have no knowledge of an FBI employee having been disciplined in connection with an investigation of the leaks").

142. The Justice Department and FBI failed to use investigative techniques reasonably calculated to actually identify leakers. The Agency Defendants did not polygraph anyone as part of their investigation of Mr. Glasberg's complaints and interviewed only a fraction of the officials with access to the Amerithrax information. Answer ¶¶ 83-84 (Ex. 117); Def.'s Resp. to Pl.'s First Set of Interr. No. 7 (Ex. 119) (stating Agency Defendants only interviewed fifty-nine individuals in connection with the investigation of unauthorized disclosures to the media regarding the anthrax investigation). The Agency Defendants did not interview many of the FBI and DOJ officials who were assigned to the Amerithrax investigation or dealt regularly with the press; in fact, many of these officials were never interviewed as part of any leak investigation. Corallo Dep. at 294:5-11 (Ex. 10); Cogswell Dep. at 109:20-115:7, 121:17-124:14 (Ex. 8); Adams Dep. at 26:12-14 (Ex. 1); Garrett Dep. at 24:12-19, 151:20-153:8 (Ex. 15); Kortan Dep. at 212:10-213:18 (Ex. 27). Nor was U.S. Attorney Howard asked if he was a source of any disclosures about the anthrax investigation. Howard Dep. at 99:11-101:10 (Ex. 20). No effort was ever made by anyone to determine who tipped off the media to the searches of Dr. Hatfill's apartment and storage unit. Roth Dep. at 186:2-7 (Ex. 39); Garrett Dep. at 85:3-8, 86:17-21, 88:4-16 (Ex. 15).

143. The Justice Department and FBI know how to conduct a leak investigation if they want to. A thorough and proper leak investigation, however, should have "focused" on "the upper management levels of the field offices and headquarters and the Department of Justice" because that is from where the majority of leaks come. Garrett Dep. at 148:22-149:7 (Ex. 15). Investigators should have pulled emails and telephone records for specific periods. Everyone who had access to the leaked information should have been interviewed under oath and polygraph examinations administered to a select group. The Agency Defendants should have

subpoened reporters and opened a grand jury investigation. Garrett Dep. at 148:16-151:18, 153:20-157:16 (Ex. 15); Lambert Dep. at 209:21-216:6 (Ex. 29). Reporters, however, were never asked by the Agency Defendants about their sources of investigative information. Reporters also testified in this action that their sources never refused to disclose investigative information because the Agency Defendants were cracking down on the leaks. Ross Dep. at 62:14-66:1 (Ex. 37); Klaidman Dep. at 37:1-38:6 (Ex. 24); Isikoff Dep. at 25:10-22 (Ex. 21); Lengel Dep. at 44:22-45:16 (Ex. 30); Stewart Dep. at 23:3-24:3 (Ex. 42); Locy Dep. at 66:9-67:15 (Ex. 31). Unless investigators employed every investigative technique at their disposal, it would not be a thorough investigation. Lambert at 213:22-216:6 (Ex. 29).

144. Investigative information about Dr. Hatfill attributed to “federal sources,” “law enforcement sources,” “law enforcement officials,” “investigators,” and “federal officials” continued to appear in news reports even after the filing of Dr. Hatfill’s complaint in August 2003. Exs. 110-102, 104, 106. This investigative information included:

a. “*Four federal sources* told the Daily News that (Dr. Kenneth) Berry is not the main focus of the FBI’s 2001 ‘Amerithrax’ probe. ‘They’re not really looking at him as a suspect,’ said *one law enforcement source*. ‘They’re doing the searches to clear him,’ said another. Ex-bioweapons researcher Steven Hatfill, who is suing the government for defamation, remains atop the list of ‘persons of interest,’ the *sources* said.” Ex. 106 (emphasis added).

b. “A team of more than 20 agents has been here since last Friday, focused on labs in two buildings. Investigators tell ABC News that recent scientific tests show the anthrax used in the attacks came from Ft. Detrick. And the search is on for another piece of evidence. . . . *Federal officials* tell ABC News the search is yet another effort to find evidence

against a former Ft. Detrick scientist, Steven Hatfill, who has been described as a person of interest. He has repeatedly and strongly denied any involvement.” Ex. 106 (emphasis added).

145. Mr. Cogswell, in particular, continued to make disclosures with impunity as Dr. Hatfill’s civil action continued. Messrs. Ross and Walter testified that Mr. Cogswell disclosed that the FBI’s activity at Fort Detrick was “part of a last-ditch effort . . . to find some hard evidence, and make a case against Hatfill that would stand up in court.” In addition, Mr. Cogswell explained that “[e]arlier this year, Hatfill sued the government for targeting him. But a Federal judge put the case on hold until October 1st, after officials said the case was at a critical juncture. That date now served . . . as a deadline for the FBI to either make a case or get off Hatfill’s back.” Ross Dep. at 187:12-188:3, 191:1-18 (Ex. 37); Walter Dep. at 52:6-54:3 (Ex. 44); Brian Ross, *Anthrax Investigation Last-Ditch Effort*, World News Tonight with Peter Jennings, July 20, 2004 (Ex. 102).

146. Mr. Lengel testified that Mr. Seikaly also continued to provide him with investigative information. Mr. Seikaly disclosed to Mr. Lengel that “[i]nvestigators have narrowed the likely source [of the anthrax] to a short list of labs, including Fort Detrick, the Dugway Proving Grounds in Utah, and Louisiana State University.” However, “[e]ven if tests point to one laboratory, it may not be clear who had access to the infectious bacteria.” In addition, Mr. Seikaly disclosed that “Hatfill continues to be a key focus of the probe” and is “still viewed” as a person of interest. Mr. Seikaly further stated that some “doubt that the team of 25 FBI agents and 12 postal inspectors will find evidence to make a case against anyone.” Lengel Dep. at 141:6-144:5, 165:16-166:8 (Ex. 30); Carol Leonning & Allan Lengel, *Judge Delays Lawsuit To Help Anthrax Probe*, Wash. Post, Mar. 30, 2004 (Ex. 100); Allan Lengel, *Anthrax Probers Still Seek Md. Leads*, Wash. Post, July 18, 2004 (Ex. 101).

147. Defendants were concerned about how the ongoing disclosures would appear to the Court. These leaks by Mr. Seikaly prompted the Court to observe “that somebody in the Justice Department, the executive branch of government, can stop it by letting it be known that this is unacceptable for these types of statements to be made. . . . [Y]ou all need to do something and let it be known that if people in Justice are going to do that, you are going to prosecute them.” Hr’g Tr. at 21:23-23:1 (Oct. 7, 2004) (Ex. 127); Answer ¶ 99 (Ex. 117). The Agency Defendants represented to the Court that they “in no uncertain terms, [have] made it known that [they] will not tolerate leaks and that [they] expect[] that there will be no leaks. . . . Leaks hurt the investigation, your Honor, as well. It is very damaging. And we want to solve it. We don’t want leaks of our investigation.” Hr’g Tr. at 23:2-15 (Ex. 127).

148. The Court’s concern, however, was insufficient to prompt the FBI or Justice Department to take obvious efforts to stem the leaks. In response to the Court’s question of whether there has been “some type of written communication coming from the top saying that this is unacceptable, it will not be tolerated, and if you are caught, you will be fired or punished,” the Agency Defendants assured the Court that “there have been communications from the top. There have, indeed, your Honor.” Hr’g Tr. at 23:17-22 (Ex. 127). In fact, there has been no written communication from the Agency Defendants directing that the leaks of investigative information stop and that anyone caught doing so will be fired or punished. *See supra* _____. Nor did the Court’s admonition prompt the Agency Defendants to send any such communication. Roth Dep. at 274:1-275:12 (Ex. 39); Lambert Dep. at 207:7-208:11 (Ex. 29); Ashcroft Dep. at 240:21-242:12 (Ex. 2).

149. Both the Justice Department and the FBI make “off the record” disclosures, protected by anonymity agreements with the media, as a matter of routine and official policy.

Press officials and reporters testified that the Agency Defendants routinely communicated with reporters on the understanding that an Agency Defendant official would not be identified by name. Comstock Dep. at 279:12-280:21 (Ex. 9); Corallo Dep. at 217:12-219:5 (Ex. 10); Locy Dep. at 32:13-42:3 (Ex. 31). In fact, the Agency Defendants' "official policy" allows their officials to brief the press "on background" and permits them to negotiate with reporters' attributions. Weierman Dep. at 172:17-173:17 (Ex. 45); Corallo Dep. at 212:6-12 (Ex. 10).

150. The Agency Defendants have taken steps in this litigation that have made identifying the leakers more difficult. They have refused to waive any institutional promise of confidentiality they received from the press in connection with their communications about the Amerithrax investigation. Email from A. Modlinger to T. Connolly (Feb. 9, 2006) (Ex. 176); Mueller Dep. at 122:16-123:16 (Ex. 32).

151. Likewise, many Agency Defendant officials refused to waive any promise of confidentiality they received from the press in connection with their communications about the Amerithrax investigation. Mueller Dep. at 122:16-123:16 (Ex. 32); Harp Dep. at 152:2-153:10, 160:4-14 (Ex. 17); Comstock Dep. at 297:18-305:15 (Ex. 9); Cogswell Dep. at 85:19-86:2, 87:9-16, 95:11-96:1, 96:5-97:8, 98:10-16, 101:10-102:17, 178:15-17 (Ex. 8); Sierra Dep. at 186:20-190:20 (Ex. 41); Seikaly Dep. at 153:9-155:20 (Ex. 40); Howard Dep. at 237:5-241:6 (Ex. 40); Ayres Dep. at 282:13-284:10 (Ex. 3); Eberhart Dep. at 73:8-74:9 (Ex. 13); Kortan Dep. at 215:1-220:5 (Ex. 27); Corallo Dep. at 227:19-238:9 (Ex. 10).

152. Some individual FBI personnel have even acted in concert to resist efforts to overcome their anonymity agreements with reporters. Upon receiving a waiver of confidentiality, Assistant Director Harp contacted Tom Carey, Dwight Adams, John Collingwood, and others to discuss whether they should waive promises of confidentiality they

had received from reporters because of the “negative inference to the person who did not.” *See* Harp Dep. at 177:3-185:5 (Ex. 17). These FBI officials reached a “consensus” that only if others waived confidentiality, would they waive the confidentiality extended to them by reporters. *Id.* Messrs. Harp, Carey, Adams, Collingwood, and the other FBI officials communicated to each other that they would not sign the waivers. *Id.* Mr. Harp conceded the refusal to waive confidentiality was “somewhat” inconsistent with the Agency Defendants’ stated purpose of getting to the bottom of the leaks. *Id.*

V. AGENCY DEFENDANTS’ LEAK TO CONGRESSIONAL MEMBERS AND STAFF

153. The Agency Defendants provided numerous briefings to Congress concerning the anthrax investigation. *See* Ex. 168, 169. During these briefings, the Agency Defendants disclosed sensitive law enforcement privileged information about the investigation and Dr. Hatfill. Exs. 140, 150, 180 (specifying redaction code “G” means “law enforcement privilege—the disclosure of this information could cause harm to, impede, impair, or hinder an investigation and/or investigative interest of the FBI). .

154. Defendants disclosed sensitive investigatory material, including information about the investigation of Dr. Hatfill, to Congressional intelligence committees despite the matter being outside their jurisdiction. On July 24, 2002, the Agency Defendants provided a briefing on the Amerithrax investigation to staffers of the “SSCI”—the Senate Select Committee on Intelligence. Ex. 140, 168. Sensitive law enforcement privileged information was disclosed by the Agency Defendants. Ex. 160, 180. The Agency Defendants’ follow-up actions to this briefing included “[c]all[ing] Ken Johnson [a staffer] w/ results of Hatfield’s [sic] record polygraph.” Ex. 140.

155. Defendants have admitted that the Congressional intelligence-committee briefings were improper. Between October 11, 2001 and July 24, 2003, the Agency Defendants provided at least sixteen briefings on the Amerithrax investigation to the members or staffs of the SSCI and the House Permanent Select Committee on Intelligence (“HPSCI”). Ex. 168. In a September 28, 2006 letter to Congressman Rush Holt, the Agency Defendants informed Mr. Holt, a member of the HPSCI, that they would not provide further briefings on the Amerithrax investigation to the HPSCI. The Agency Defendants admitted that its previous briefings to the HPSCI were improper: “Since we regard [the Amerithrax investigation] as a criminal law enforcement matter, rather than an intelligence activity, a briefing to the [HPSCI] would *not be appropriate nor consistent with our long-standing policy on pending matters.*” Ltr. from E. Kalisch to R. Holt (Sept. 28, 2006) (emphasis added) (Ex. 177).

156. Defendants also disclosed sensitive investigatory material, including information about the investigation of Dr. Hatfill, to Congressional victims of the anthrax mailings. The Agency Defendants provided numerous individual briefings to Senators Leahy and Daschle and their staffs during which they disclosed sensitive law enforcement information about the Amerithrax investigation. Exs. 137, 138, 139, 150, 151, 155, 156, 159, 160, 161, 163, 180; Harp Dep. at 217:6-218:13 (Ex. 17); Lambert Dep. at 35:21-36:5, 38:15-40:1 (Ex. 29). These briefings were provided to Senators Leahy and Daschle and their staffs because they were the targets or victims of the anthrax mailings. Adams Dep. at 52:7-53:15 (“we were talking actually to victims of the crime”), 136:3-16 (stating purpose of briefing was to inform “the victims – senators or their staff”) (Ex. 1); Harp Dep. at 40:20-41:17, 250:18-251:8 (Ex. 17). Dr. Adams, the Director of the FBI’s laboratory, testified that he felt “more free to be more open” with Senators Leahy and Daschle because they were the victims. Adams Dep. at 10:13-15, 138:19-

139:11 (Ex. 1); *see also* Harp Dep. at 220:20-221:14 (Ex. 17). The Agency Defendants did not require senate staffers to sign non-disclosure agreements nor did they check to see whether staffers had appropriate security clearances. Carey Dep. at 253:17-254:3 (Ex. 6); Harp Dep. at 272:2-8 (Ex. 17).

157. Defendants were on notice that the disclosures to Congress presented additional risks of further disclosure. Assistant U.S. Attorney Kohl expressed to Director Mueller his concerns regarding the FBI's policy of briefing members of Congress. Kohl Dep. at 19:19-20:17 (Ex. 26). Assistant Director Harp testified that he thought it was an unusual step to brief Senator Leahy's and Senator Daschle's staffs. Harp Dep. at 43:1-44:3 (Ex. 17). Nevertheless, because he had been ordered by FBI Headquarters to provide such briefings, Mr. Harp provided briefings during which he disclosed sensitive law enforcement information about Dr. Hatfill he would not have otherwise disclosed except for the authorization he believed he had from FBI headquarters. Harp Dep. at 218:14-221:14, 269:1-271:21 (Ex. 17); Mueller Dep. at 131:4-134:19 (Ex. 32).

158. The protected law enforcement information the Agency Defendants disclosed to Senators Leahy and Daschle and their staffs included information about Dr. Hatfill. Agent Lambert admitted that he disclosed Dr. Hatfill's status in the investigation, despite knowing that the information was sensitive law enforcement information and that such a disclosure was inappropriate. Lambert Dep. at 35:8-41:16 (Ex. 29). Assistant Director in Charge Harp similarly discussed with Senators Leahy and Daschle Dr. Hatfill's status as a person of interest. Harp Dep. at 211:4-213:18, 218:14-219:8 (Ex. 17).

159. On July 1, 2002, the Agency Defendants provided a briefing to Beryl Howell, a staffer for Senator Leahy. During this briefing, the Agency Defendants disclosed sensitive law enforcement information about Dr. Hatfill, including that Dr. Hatfill had consented to the FBI's

searches of his residence and Florida storage shed. Adams Dep. at 184:21-188:20 (Ex. 1); Carey Dep. at 235:9-236:16, 245:12-247:5 (Ex. 6); Anthrax Briefing, Senate Judiciary Committee (July 1, 2002) (Ex. 137).

160. Defendants made further disclosures about Dr. Hatfill to Ms. Howell by telephone. On July 12, 2002, the Agency Defendants participated in a conference call with Ms. Howell. The conference call was in response to an article in *The New York Times* concerning Dr. Hatfill, identified in the article as “Mr. Z.” Ex. 54. The article contained several allegations related to Dr. Hatfill, specifically his possible involvement in previous anthrax hoaxes and his purported ability to manufacture dry powder biological warfare agents. Ex. 310. During this conference call, the Agency Defendants disclosed sensitive law enforcement information, including information about a polygraph examination administered to Dr. Hatfill. Ex. 139; Carey Dep. at 255:19-257:22, 261:14-262:2 (Ex. 6).

161. Staffers, such as Ms. Howell, frequently read newspaper articles and then demanded briefings from the Agency Defendants on the information contained in those articles. Harp Dep. at 249:9-19, 251:12-252:12, 258:1-13 (Ex. 17); Carey Dep. at 272:20-273:5 (Ex. 6); Exs. 131, 149. Senate staffers requested investigative information about Dr. Hatfill and the Agency Defendants provided that information. Harp Dep. at 268:1-270:19 (Ex. 17); Roth Dep. at 153:16-154:8 (Ex. 39).

162. As part of their “follow-up” on a congressional briefing, the Agency Defendants disclosed to Senate Leahy’s staffer that: on June 25, 2002, agents executed consent searches on Dr. Hatfill’s residence, residence storage, vehicle, and Florida storage unit; on August 1, 2002, agents executed search warrants on Dr. Hatfill’s former and current vehicles, his residence, his girlfriend’s residence and vehicle, and his Florida storage unit; “Dr. Hatfill was identified as a

possible subject in the case within the first few weeks along with dozens of others;” Dr. Hatfill had been interviewed four times by the FBI and the dates of those interviews; and Dr. Hatfill consented to a polygraph examination in January 2002 and has resisted additional efforts by the FBI to reinterview and polygraph him. Other information the Agency Defendants disclosed as part of this “follow-up” has been redacted on the ground of law enforcement privilege. Ex. 151.152; Carey Dep. at 263:12-271:15 (Ex. 6).

163. It is inappropriate for the FBI to disclose to Congressional members or staffers investigative information about an uncharged individual because to do so could be stigmatizing and prejudicial to that person. Lambert Dep. at 35:8-20, 40:21-41:14 (Ex. 29). Disclosures to Congress of investigative information about Dr. Hatfill, including FBI searches of his properties, his polygraph examination, and interviews he has had with the FBI are inappropriate. Kohl Dep. at 236:5-245:21 (Ex. 26); Adams Dep. at 192:3-22 (Ex. 1). Congressional members and their staffs could have been briefed on the progress of the investigation without revealing specific investigative techniques directed towards a particular individual. Kohl Dep. at 230:1-8 (Ex. 26).

VI. THE AGENCY DEFENDANTS’ PUBLIC INVESTIGATION OF DR. HATFILL

164. Federal investigators showed a single photo of Dr. Hatfill to residents of Princeton, New Jersey, the location from where anthrax letters were mailed. Answer ¶ 68 (Ex. 117). FBI Special Agents testified that a single photo array is not typically used because it is so unreasonably suggestive it could never be used in a court of law. Reynolds Dep. at 30:14-33:22 (Ex. 36); Garrett Dep. at 184:6-186:14 (Ex. 15).

165. The FBI – falsely – told very close friends of Dr. Hatfill that their investigatory information revealed that he was the anthrax killer, and they specifically disclosed how their dog investigatory technique worked and had implicated Dr. Hatfill. Virginia Patrick—Dr. Hatfill’s friend and the wife of bioweapons expert William C. Patrick— testified that FBI agents

approached her as she was shopping in a supermarket. Patrick Dep. at 9:9-11:1 (Ex. 34). The agents requested that she return to her home with them immediately. Patrick Dep. at 9:9-11:1 (Ex. 34). When they arrived there, the agents told Mrs. Patrick that Dr. Hatfill was the anthrax killer, that they had a “smoking gun” to prove it, and that the “smoking gun” was that bloodhounds had identified Dr. Hatfill as the murderer. Patrick Dep. at 12:7-13:14 (Ex. 34). Mrs. Patrick told the agents she did not believe them; within minutes the bloodhounds and their handlers were on the Patrick’s property for a demonstration. Patrick Dep. at 13:18-15:16, 16:11-17:15 (Ex. 34).

166. The bloodhounds and their handlers were stationed near the Patricks’ home for the express purpose of providing the Patricks with a demonstration. Patrick Dep. at 14:15-15:16 (Ex. 34). Mr. Stockham was told by the FBI’s Washington Field Office to give the Patricks a demonstration of the bloodhounds. Stockham Dep. at 181:5-182:22 (Ex. 43). Mr. Stockham was further instructed to sit in his van on the roadside in Fredrick, Maryland, “somewhere near the house”, and wait until he was called by the agents at the Patricks’ home. Stockham Dep. at 196:8-197:17 (Ex. 43).

167. The FBI employed faux surveillance against Dr. Hatfill designed not for the covert gathering of evidence but for public consumption. The FBI placed Dr. Hatfill under “surveillance” that was pretty aggressive by surveillance standards. Harp Dep. at 198:14-20 (Ex. 17); Garrett Dep. at 124:1-14 (Ex. 15). Such overt surveillance can send a message to the public. Garrett Dep. at 127:2-7 (Ex. 15). On one occasion, an FBI agent following Dr. Hatfill drove his vehicle over Dr. Hatfill’s foot. Answer ¶ 105 (Ex. 117). The Agency Defendants rejected Dr. Hatfill’s extraordinary offer to wear a GPS device, surrender his passport, and have an FBI agent

in the car with him at all times in lieu of having agents tailing Dr. Hatfill. Answer ¶ 104 (Ex. 117); Garrett Dep. at 124:15-126:13 (Ex. 15); Roth Dep. at 295:11-296:14 (Ex. 39).

168. The FBI went out of its way to communicate to a potential employer its investigatory suspicions about Dr. Hatfill. In or around March 2003, Dr. Hatfill went to a McLean, Virginia hotel room to meet a prospective employer to discuss plans for Dr. Hatfill to provide consulting services. At the conclusion of his meeting, he and his prospective employer walked out of the meeting room and were met by FBI special agents conspicuously and intrusively pointing a video camera at the prospective employer. After being subjected to this invasion, the prospective employer no longer had any interest in hiring Dr. Hatfill. Answer ¶ 106 (Ex. 117); Hatfill Dep. at 290:8-291:18 (Ex. 18); Roth Dep. at 128:22-131:17 (Ex. 39).

VII. DISCLOSURES OF INVESTIGATIVE INFORMATION WERE INAPPROPRIATE AND ADVERSELY AFFECTED DR. HATFILL

A. The Agency Defendants' Policies Prohibited the Disclosure of Investigative Information About Dr. Hatfill

169. Defendants' disclosures violate their own regulations and norms. The Agency Defendants' policy concerning the disclosure of investigative information is dictated by 28 C.F.R. § 50.2. Ex. 185; Murray Dep. at 15:15-17 (Ex. 33). The Agency Defendants' rules prohibit public comment on uncharged individuals and investigative procedures, investigative techniques, and evidence (outside of formal criminal processes). Answer ¶ 79 (Ex. 117); Ex. 186; Lambert Dep. at 91:22-92:16, 98:20-99:20 (Ex.29); Weierman Dep. at 22:2-24:9, 27:3-18 (Ex. 45); Murray Dep. at 36:20-39:1, 141:14-142:6 (Ex. 33); Roth Dep. at 31:18-34:13, 41:19-42:11, 90:20-91:9 (Ex. 39); Kohl Dep. at 33:13-34:11 (Ex. 26). The rule prohibiting the disclosure of investigative information is steeped within the culture of the Agency Defendants such that any official would know it is inappropriate to disclose information about an uncharged individual or an ongoing criminal investigation. Kohl Dep. at 55:18-56:7, 66:22-68:11 (Ex. 26);

Harp Dep. at 48:5-14 (Ex. 17); Garrett Dep. at 42:20-44:17; 55:13-22 (Ex. 15); Lambert Dep. at 93:2-16, 100:9-103:9 (Ex. 29).

170. Investigative information is protected from disclosure in order to preserve the integrity of the investigation and the privacy of individuals, such as Dr. Hatfill, involved in the investigation prior to any public charging for violations of the law. It also serves to protect the rights of people not yet charged with a crime. Answer ¶ 79 (Ex. 117); Ex. 186; Ashcroft Dep. at 40:7-17, 50:3-16 (Ex. 2); Roth Dep. at 98:12-99:1 (Ex. 39); Garrett Dep. at 49:3-52:15, 60:9-61:21 (Ex. 15).

171. The disclosures of investigative information about Dr. Hatfill were inappropriate, jeopardized the integrity of the Amerithrax investigation, hurt the investigation, and were unfair to Dr. Hatfill. Mueller Dep. at 14:19-15:10, 35:5-19, 41:18-42:11 (Ex. 32); Weierman Dep. at 426:21-428:2 (Ex. 45); Roth Dep. at 43:3-9 (Ex. 39); Corallo Dep. at 192:13-193:11 (Ex. 10); Harp Dep. at 203:16-204:10 (Ex. 17); Garrett Dep. at 59:12-60:7; 138:14-139:7 (Ex. 15); Roth Dep. at 42:19-43:9 (Ex. 39); Ayres Dep. at 252:4-253:11 (Ex. 3); Adams Dep. at 31:22-32:21 (Ex. 1); Reynolds Dep. at 99:3-9 (Ex. 36).

172. The disclosures of investigative information about Dr. Hatfill reflected in Exhibits 57 to 106 were improper, constituted misconduct, served no legitimate law enforcement purpose, and adversely affected Dr. Hatfill. Harp Dep. at 49:9-51:1, 196:8-197:15, 419:8-420:11 (Ex. 17); Garrett Dep. at 57:17-59:2, 103:12-104:14 (Ex. 15); Weierman Dep. at 460:16-461:17 (Ex. 45); Murray Dep. at 85:14-86:15 (Ex. 33); Roth Dep. at 41:11-43:2, 236:2-243:12 (Ex. 39); Adams Dep. at 53:16-54:8 (Ex. 1); Lambert Dep. at 168:13-169:6 (Ex. 29).

173. There is no legitimate law enforcement purpose in disclosing in advance what investigative techniques the FBI may use or for what evidence investigators might be searching.

Garrett Dep. at 49:3-52:15 (Ex. 15); Reynolds Dep. at 136:2-139:20 (Ex. 36). It serves no legitimate law enforcement purpose and it is not a good investigative technique to announce in advance what the FBI plans to search because it could harm the investigation. Lambert Dep. at 267:12-22 (Ex. 29); Kohl Dep. at 107:22-108:3 (Ex. 26); Garrett Dep. at 50:17-54:2 (Ex. 15); Roth Dep. at 62:7-22, 94:17-95:3 (Ex. 39).

174. The Agency Defendants “generally view any unauthorized disclosure of information to the press regarding the anthrax investigation as harmful to law enforcement interests.” Def.’s Resp. to Pl.’s First Set of Req. for Admis. No. 14 (Ex. 120). None of the confidential law enforcement information leaked about Dr. Hatfill was disclosed for a legitimate law enforcement purpose. Reynolds Dep. at 27:21-28:6 (Ex. 36), Harp Dep. at 196:22-198:13 (Ex. 17); Lambert Dep. at 91:22-93:2, 104:3-20 (Ex. 29); Adams Dep. at 33:7-10 (Ex. 1); Kohl Dep. at 216:22-217:16 (Ex. 26); Garrett Dep. at 47:15-48:2 (Ex. 15); Roth Dep. at 30:15-34:13 (Ex. 39). The Agency Defendants could have assured the American public about the Amerithrax investigation without disclosing investigative details about Dr. Hatfill. Kohl Dep. at 271:3-21 (Ex. 26); Mueller Dep. at 35:5-36:21 (Ex. 32); Lambert Dep. at 177:11-22 (Ex. 29).

175. The release of investigative information stigmatized Dr. Hatfill, caused him embarrassment and humiliation, and subjected him to potential harassment and physical harm. Roth Dep. at 98:12-99:4 (Ex. 39); Garrett Dep. at 60:18-61:21, 139:8-17 (Ex. 15); Harp Dep. at 290:11-17 (Ex. 17). The Agency Defendants’ disclosures have caused Dr. Hatfill to suffer financial loss and have adversely affected his employment. Pl.’s Resp. to Defs.’ First Set of Interr. Nos. 3, 5-6 (Ex. 121); Hatfill Dep. at 280:14-281:12, 290:8-308:4 (Ex. 18); Chegne Dep. at 100:7-105:6 (Ex. 7). The Agency Defendants’ conduct has caused Dr. Hatfill’s personal and professional reputation to be adversely affected. Pl.’s Resp. to Defs.’ First Set of Interr. No. 3

(Ex. 121); Chegne Dep. at 100:7-105:6 (Ex. 7). The Agency Defendants' disclosures have caused Dr. Hatfill to suffer extreme mental and emotional distress. Pl.'s Resp. to Defs.' First Set of Interr. No. 8 (Ex. 121); Hatfill Dep. at 60:19-61:13, 308:5-310:6 (Ex. 18); Chegne Dep. at 100:7-105:6, 112:9-114:8, 120:10-121:1 (Ex. 7). Dr. Hatfill received treatment from a mental health professional because of the Agency Defendants' disclosures of investigative information about him. Pl.'s Resp. to Defs.' First Set of Interr. No. 9 (Ex. 121); Hatfill Dep. at 310:7-12 (Ex. 8). As of April 2008, a search of "Hatfill" and "anthrax" results in 2865 articles and broadcasts on Lexis-Nexis and 30,900 hits on Google. Exs. 189, 190. This stigma will likely last all of Dr. Hatfill's life; indeed, Richard Jewell's obituaries described him as a suspect in the Atlanta Olympic Park bombings. Ex. 114, 115.

B. The Agency Defendants' Disclosures of Investigative Techniques Used Against Dr. Hatfill Were Inappropriate

176. Disclosing that Dr. Hatfill was interviewed by the FBI is inappropriate, harmful to the investigation, constitutes misconduct, and adversely affected Dr. Hatfill. Weierman Dep. at 341:18-344:1 (Ex. 45); Roth Dep. at 94:2-16 (Ex. 39); Garrett Dep. at 50:12-51:11 (Ex. 15); Ex. 60.

177. Disclosing that Dr. Hatfill was administered a polygraph examination and the result of that examination is inappropriate, unethical, harmful to the investigation, and adversely affected Dr. Hatfill. Weierman Dep. at 51:21-52:15, 364:10-15, 366:8-367:6 (Ex. 45); Garrett Dep. at 49:12-17, 130:10-131:1 (Ex. 15); Exs. 64, 65, 87.

178. Disclosing that Dr. Hatfill was under 24-hour FBI surveillance and that the surveillance was necessary because the FBI did not want to risk the embarrassment of losing track of Dr. Hatfill and then being confronted with more anthrax attacks is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Roth Dep. at 95:4-96:8 (Ex. 39); Garrett

Dep. at 53:9-54:2, 127:18-129:5, 132:21-133:12 (Ex. 15); Fitzgerald Dep. at 162:18-20 (Ex. 14); Kortan Dep. at 30:10-31:10 (Ex. 27); Murray Dep. at 97:14-98:22 (Ex. 33); Exs. 83, 87, 167;

179. Disclosing information concerning searches conducted by the FBI in connection with its investigation of Dr. Hatfill is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Weierman Dep. at 51:21-52:15, 365:9-366:2 (Ex. 45); Ex.65.

180. Disclosing information concerning the FBI's use of bloodhounds to investigate Dr. Hatfill, their reactions to Dr. Hatfill and places associated with him, and that the bloodhound evidence was significant to investigators is inappropriate, harmful to the investigation, served no legitimate law enforcement purpose, and constitutes misconduct. Garrett Dep. at 116:13-117:8 (Ex. 15); Roth Dep. at 233:16-234:9 (Ex. 39) Weierman Dep. at 386:22-392:16, 399:20-400:16, 405:6-410:9, 421:14-422:5 (Ex. 45); Reynolds Dep. at 113:19-114:4, 115:3-19 (Ex. 36); Kohl Dep. at 30:19-32:4 (Ex. 26); Kortan Dep. at 28:1-29:13 (Ex. 27); Lambert Dep. at 276:16-282:8 (Ex. 29); Exs. 71, 72, 74, 76, 78, 99, 167.

181. Disclosing that the FBI plans to conduct a search of the pond in Frederick, Maryland, that the search is connected to Dr. Hatfill, that Dr. Hatfill had told an acquaintance that make-shift equipment used to make anthrax could be disposed of by throwing it in water, items discovered in the search, test results of items recovered in the search, and that the FBI's working theory is Dr. Hatfill deposited make-shift lab equipment in the pond is inappropriate, harmful to the investigation, violates Dr. Hatfill's privacy interest, and adversely affected Dr. Hatfill. Garrett Dep. at 52:16-53:7 (Ex. 15); Kortan Dep. at 33:2-34:3, 210:11-212:9 (Ex. 27); Lambert Dep. at 263:8-16, 276:16-282:8, 327:16-337:2 (Ex. 29); Kohl Dep. at 101:17-108:3 (Ex. 36); Murray Dep. at 97:14-98:22 (Ex. 33); Exs. 82, 85, 86, 93, 97, 167.

182. Disclosing in advance that the FBI will be searching properties associated with Dr. Hatfill, that the searches are related to the anthrax investigation, that a warrant was necessitated because Dr. Hatfill refused to cooperate with investigators, the results of a search, and whether the search was consensual or pursuant to a search warrant is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Weierman Dep. at 347:13-348:10, 355:15-356:16, 365:20-366:2, 404:10-405:2 (Ex. 45); Reynolds Dep. at 99:22-101:11 (Ex. 36); Fitzgerald Dep. at 159:19-161:4 (Ex. 14); Garrett Dep. at 50:4-11, 51:17-52:15, 54:16-55:11, 94:15-98:11; 103:12-104:6, 107:18-108:21, 132:21-133:12, 188:14-21 (Ex. 15); Lambert Dep. at 151:16-152:2, 156:22-160:19, 165:2-22, 223:18-225:17 (Ex. 29); Roth Dep. at 94:17-98:11, 202:8-203:1, 206:19-207:9 (Ex. 39); Murray Dep. at 106:22-110:6 (Ex. 33); Kohl Dep. at 264:16-266:2 (Ex. 26); Harp Dep. at 285:22-291:10 (Ex. 17); Exs. 57, 61, 63, 65, 70, 75.

C. The Agency Defendants' Disclosures Suggesting Dr. Hatfill Was the Likely Anthrax Killer Were Inappropriate.

183. Disclosing the whereabouts of Dr. Hatfill on a particular day in connection with the anthrax investigation was inappropriate and constitutes misconduct. Weierman Dep. at 357:6-20, 380:20-381:12 (Ex. 45); Lambert Dep. at 276:16-282:8 (Ex. 29); Exs. 63, 70, 99.

184. Disclosing information related to the strength of the evidence against Dr. Hatfill is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Roth Dep. at 97:21-98:4 (Ex. 39); Garrett Dep. at 56:2-8 (Ex. 15); Murray Dep. at 77:21-78:5 (Ex. 33).

185. Disclosing that recent searches and developments in the investigation of Dr. Hatfill have created a lot of enthusiasm for Dr. Hatfill is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Lambert Dep. at 165:2-166:20 (Ex. 29); Harp Dep. at 334:11-335:9 (Ex. 17); Ex. 70.

186. Disclosing that the FBI has a circumstantial case against Dr. Hatfill is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Lambert Dep. at 175:13-176:15 (Ex. 29); Reynolds Dep. at 125:15-128:11 (Ex. 36); Garrett Dep. at 120:2-22, 132:21-133:12 (Ex. 15); Mueller Dep. at 95:7-96:5 (Ex. 32); Harp Dep. at 201:19-202:21 (Ex. 17); Weierman Dep. at 418:22-419:20 (Ex. 45); Exs. 78, 81, 83, 84.

187. Disclosing that the FBI has enough evidence to indict Dr. Hatfill but not enough to convict him is inappropriate, harmful to the investigation, constitutes egregious misconduct, and adversely affected Dr. Hatfill. Harp Dep. at 201:19-202:11 (Ex. 17); Lambert Dep. at 109:9-110:14, 170:5-172:14 (Ex. 29); Garrett Dep. at 56:10-57:3, 120:2-22 (Ex. 15); Reynolds Dep. at 125:15-128:11 (Ex. 36); Murray Dep. at 211:20-212:11 (Ex. 33); Ex. 81.

188. Disclosing information related to Dr. Hatfill's use of Cipro and that he waived his physician-patient privilege is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Kohl Dep. at 32:5-34:11 (Ex. 26); Kortan Dep. at 29:14-31:10 (Ex. 27); Lambert Dep. at 276:16-282:6 (Ex. 29); Murray Dep. at 97:14-98:22 (Ex. 33); Exs. 99, 167.

189. Disclosing whether Dr. Hatfill is cooperating with the FBI is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Lambert Dep. at 158:11-159:11 (Ex. 29); Roth Dep. at 93:20-98:11 (Ex. 39); Garrett Dep. at 49:19-50:2 (Ex. 15); Harp Dep. at 287:22-289:18 (Ex. 17); Ex. 70.

190. Disclosing that Dr. Hatfill is a person of interest, that he is under scrutiny by the FBI, and that he is a suspect is inappropriate, violates the Agency Defendants' policies, is harmful to the investigation, and adversely affected Dr. Hatfill. Weierman Dep. at 347:2-11, 361:20-362:11, 367:21-368:16, 411:13-413:8, 415:14-416:13 (Ex. 45); Murray Dep. at 124:17-

125:9 (Ex. 33); Lambert Dep. at 342:16-343:12 (Ex. 29); Garrett Dep. at 103:12-104:6, 132:21-133:12, 188:2-190:21 (Ex. 15); Exs. 57, 61, 64, 66, 77, 83, 101.

191. Disclosing that the FBI has new and continued questions about Dr. Hatfill is inappropriate and constitutes misconduct. Weierman Dep. at 398:22-399:18 (Ex. 45); Ex. 74.

192. Disclosing that Dr. Hatfill lived near a town called Greendale in which there was a Greendale School and that investigators are intrigued by this fact is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Garrett Dep. at 104:16-106:8 (Ex. 15); Lambert Dep. at 151:16-152:2 (Ex. 29); Weierman Dep. at 326:13-327:1, 334:20-336:12 (Ex. 35); Reynolds Dep. at 95:213-97:5 (Ex. 36); Exs. 57, 59.

193. Disclosing that the FBI continues to focus on Dr. Hatfill as the man likely responsible for the attacks is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Murray Dep. at 210:18-211:19 (Ex. 33); Harp Dep. at 419:9-420:11 (Ex. 17); Kortan Dep. at 38:1-42:4 (Ex. 27); Garrett Dep. at 119:2-21, 122:11-18, 129:17-130:9 (Ex. 15); Lambert Dep. at 151:16-152:2, 168:13-170:4, 340:1-341:4 (Ex. 29); Weierman Dep. at 430:8-432:1 (Ex. 45); Exs. 81, 87, 100, 158.

194. Disclosing that the FBI is interviewing others in order to rule them out so it can focus on Dr. Hatfill is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Garrett Dep. at 121:2-122:2 (Ex. 15); Murray Dep. at 212:12-214:15 (Ex. 33); Ex. 81.

195. Disclosing that locating evidence in a search related to Dr. Hatfill would have been icing on the cake because the Agency Defendants believe they already have their man is inappropriate, harmful to the investigation, and adversely affected Dr. Hatfill. Lambert Dep. at 173:22-174:21 (Ex. 29); Garrett Dep. at 132:2-19 (Ex. 15); Mueller Dep. at 94:22-95:6 (Ex. 32); Kohl Dep. at 267:16-268:14 (Ex. 26); Exs. 83, 83.

196. Disclosing that the FBI has become far more suspicious of Dr. Hatfill is inappropriate and constitutes misconduct. Murray Dep. at 207:4-209:4 (Ex. 33); Weierman Dep. at 379:15-380:13 (Ex. 45); Lambert Dep. at 163:20-164:21 (Ex. 29); Garrett Dep. at 109:2-15 (Ex. 15); Roth Dep. at 232:1-6 (Ex. 39); Ex. 70.

197. Disclosing that Dr. Hatfill fit the profile of the anthrax killer is inappropriate, constitutes misconduct, and adversely affected Dr. Hatfill. Weierman Dep. at 382:1-383:6 (Ex. 45); Lambert Dep. at 166:1-167:8 (Ex. 29); Garrett Dep. at 110:13-111:16 (Ex. 15); Roth Dep. at 232:15-233:7 (Ex. 39); Ex. 70.

198. Disclosing that Dr. Hatfill was mad at the government and that the FBI believed that gave him a motive to commit the attacks was inappropriate and constitutes misconduct. Weierman Dep. at 393:22-395:22 (Ex. 45); Ex. 73.

199. Disclosing whether Dr. Hatfill had the bench skills to make anthrax was inappropriate. Weierman Dep. at 394:18-395:4 (Ex.45); Ex. 73.

200. Disclosing that the FBI was returning to Fort Detrick as part of a last-ditch effort to make a case against Dr. Hatfill is inappropriate, constitutes gross misconduct, and egregious unethical conduct. Weierman Dep. at 259:10-260:8 (Ex. 45); Ex. 102.

VIII. THE AGENCY DEFENDANTS' "SYSTEM OF RECORDS" CONTAINS "RECORDS" ABOUT DR. HATFILL RETRIEVABLE BY HIS NAME OR OTHER PERSONAL IDENTIFIER

201. Information about the following can be retrieved from the Agency Defendants' system of records by Dr. Hatfill's name or some other identifying particular:

a. Whether dogs operating under the auspices of the FBI were used to investigate Dr. Hatfill and scent articles used, places visited, places and persons sniffed, and the dogs reactions. Def.'s Am. Answer to Pl.'s First Am. Compl. ¶¶ 57.v,y, 66.q, t, 97.d (Ex. 125);

Def.'s Am. Resp. to Pl.'s First & Second Req. for Admis. Nos. 59-60 (Ex. 126); Stockham Dep. at 38:17-46:10, 88:16-95:8 (Ex. 43);

b. That the FBI searched Dr. Hatfill's apartment on June 25, 2002. Answer ¶ 37.a (Ex. 117); Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos., 246-247) (Ex. 120);

c. That Dr. Hatfill consented to the search of his apartment. Answer ¶ 37.b (Ex. 117);

d. The results of the search of Dr. Hatfill's apartment. Answer ¶ 37.d (Ex. 117);

e. That the FBI searched a storage shed maintained by Dr. Hatfill in Ocala, Florida. Answer ¶¶ 37.o, 57.s (Ex. 117); Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos., 372 (Ex. 120);

f. That the FBI searched Dr. Hatfill's apartment on August 1, 2002. Answer ¶ 57.a (Ex. 117);

g. That the June 25, 2002 search was consensual but the August 1, 2002 search was conducted pursuant to a warrant. Answer ¶ 57.b (Ex. 117); Def.'s Resp. to Pl.'s First Set of Req. for Admis. No. 378 (Ex. 120);

h. That Dr. Hatfill refused to consent to the August 1, 2002 search. Answer ¶ 57.d (Ex. 117);

i. The date and location of searches related to Dr. Hatfill. Answer ¶ 116.a (Ex. 117);

j. Evidence sought or obtained in searches related to Dr. Hatfill. Answer ¶ 116.c (Ex. 117); Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos. 5-6 (Ex. 120);

- k. Any items physically removed from locations that were searched for reasons having to do with investigative interest in Dr. Hatfill. Answer ¶ 116.d (Ex. 117);
- l. Whether, during a search, Law enforcement officials recovered from Dr. Hatfill's computer a draft novel authored by Dr. Hatfill. Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos. 72-73 (Ex. 120);
- m. Dr. Hatfill's whereabouts at the time investigators conducted the August 1, 2002 search of his apartment. Def.'s Resp. to Pl.'s First Set of Req. for Admis. No. 360 (Ex. 120);
- n. That the FBI searched Dr. Hatfill's car. Def.'s Am. Answer to Pl.'s First Am. Compl. ¶ 37.s (Ex. 125);
- o. That the FBI searched the residence of a friend of Dr. Hatfill. Def.'s Am. Answer to Pl.'s First Am. Compl. ¶ 57.e (Ex. 125); Def.'s Am. Resp. to Pl.'s First & Second Req. for Admis. Nos. 18-19 (Ex. 126);
- p. Whether Dr. Hatfill possesses the expertise to handle deadly pathogens. Answer ¶ 37.t (Ex. 117);
- q. That divers were searching at least one pond. Answer ¶ 97.h (Ex. 117);
- r. That Dr. Hatfill was a former government scientist who used to work in the biological weapons defense program at Fort Detrick. Answer ¶ 37.e (Ex. 117);
- s. That Dr. Hatfill worked for the National Institutes of Health. Answer ¶ 37.f (Ex. 117)
- t. That Dr. Hatfill attended medical school in Zimbabwe/Rhodesia. Answer ¶ 37.k (Ex. 117);

- u. That Dr. Hatfill worked at Fort Detrick until 1999. Answer ¶ 57.i (Ex. 117);
- v. That Dr. Hatfill worked with a Pentagon contractor. Answer ¶ 57.k (Ex. 117);
- w. That Dr. Hatfill received his medical degree from the University of Zimbabwe. Answer ¶ 66.m (Ex. 117);
- x. That Dr. Hatfill did post-graduate work in South Africa. Answer ¶ 66 (Ex. 117);
- y. That Dr. Hatfill left USAMRIID and thereafter worked at S.A.I.C. Answer ¶ 97.jj (Ex. 117);
- z. Dr. Hatfill's employment history. Answer ¶ 116.f (Ex. 117);
- aa. Dr. Hatfill's educational history. Answer ¶ 116.j (Ex. 117);
- bb. That Dr. Hatfill worked at the U.S. Army Medical Research Institute of Infectious Diseases in Fort Detrick, Maryland ("USAMRIID"). Def.'s Resp. to Pl.'s First Set of Req. for Admis. No. 178-179 (Ex. 120);
- cc. That Dr. Hatfill was a "person of interest" in the anthrax investigation. Answer ¶¶ 37.g, 57.f, 66.w, 116.l (Ex. 117); Def.'s Resp. to Pl.'s First Set of Req. for Admis. No. 232-233 (Ex. 120); Def.'s Am. Answer to Pl.'s First Am. Compl. ¶ 116.m (Ex. 125);
- dd. That Dr. Hatfill continued to be a "person of interest." Answer ¶ 102.q (Ex. 117);
- ee. Whether Dr. Hatfill is or is not considered a suspect. Def.'s Am. Answer to Pl.'s First Am. Compl. ¶¶ 37.r, 57.g, 116.u (Ex. 125); Def.'s Am. Resp. to Pl.'s First & Second Req. for Admis. No. 312 (Ex. 126);

ff. That the FBI had interviewed Dr. Hatfill as early as December 2001.

Answer ¶ 37.h (Ex. 117);

gg. That the FBI interviewed and polygraphed Dr. Hatfill. Answer ¶ 57.h (Ex. 117);

hh. The times, dates, and substance of conversations Dr. Hatfill had with Amerithrax investigators. Answer ¶ 116.n (Ex. 117);

ii. Whether the FBI had questioned Dr. Hatfill in its anthrax investigation. Def.'s Resp. to Pl.'s Second Req. for Admis. No. 300 (Ex. 123);

jj. That Dr. Hatfill once lived near a neighborhood in Harare, Zimbabwe, known as "Greendale." Answer ¶¶ 37.l, 66.o (Ex. 117); Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos. 85-86 (Ex. 120); Def.'s Resp. to Pl.'s Second Req. for Admis. No. 488 (Ex. 123);

kk. Places Dr. Hatfill had lived, and places he had lived near (*e.g.*, any place or institution allegedly known formally or informally by a name including the word "Greendale"). Answer ¶ 116.k (Ex. 117);

ll. Polygraph examinations administered to Dr. Hatfill, including the results of such examinations and any official assessments of those results. Answer ¶¶ 57.h, 66.y, 116.p (Ex. 117); Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos. 46-47 (Ex. 120);

mm. The extent to which Dr. Hatfill had cooperated with investigators. Answer ¶ 116.e (Ex. 117)

nn. Dr. Hatfill's medical history. Answer ¶ 116.i (Ex. 117);

oo. Whether or not Dr. Hatfill waived his physician-patient privilege so that investigators could obtain his medical records. Def.'s Resp. to Pl.'s Second Req. for Admis. No. 438 (Ex. 123);

pp. The times, dates, and substance of conversations that Amerithrax investigators had with persons other than Dr. Hatfill, in which Dr. Hatfill was named or mentioned. Answer ¶ 116.o (Ex. 117);

qq. Whether FBI agents showed a photograph of Dr. Hatfill to people in the area of Princeton, New Jersey. Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos. 139-140 (Ex. 120);

rr. Dr. Hatfill's whereabouts on the dates that anthrax laden-letters were mailed in the Fall of 2001. Def.'s Resp. to Pl.'s First Set Req. for Admis. Nos. 165-166 (Ex. 120);

ss. Whether Dr. Hatfill was in Florida at the time that the anthrax-laden letter was sent to the America Media Company. Def.'s Resp. to Pl.'s Second Req. for Admis. No. 462 (Ex. 123);

tt. Dr. Hatfill's work on a mobile biological laboratory, including that Dr. Hatfill assisted with the construction of a "nonfunctional" mock mobile biological laboratory, collected parts and equipment for the mock mobile biological laboratory, supervised the mock mobile laboratory's construction at a Frederick, Maryland fabricator, and that the mock mobile biological laboratory was used by Dr. Hatfill in training U.S. special operations troops on how to detect and disarm a biological laboratory encountered overseas. Def.'s Am. Resp. to Pl.'s First & Second Req. for Admis. Nos. 204-205 (Ex. 126) (admitted "to the extent that the information is described in the deposition of *Gary Boyd in Hatfill v. The New York Times Corp.*, No. 04-807 (E.D. Va.)"); Boyd Dep. at 398:6-422:8, 436:9-445:2 (Ex. 5); cf. Answer ¶¶ 97.qq, rr, 116.g (Ex. 117) (alleging specifics about Dr. Hatfill and the mock laboratory being retrievable by Dr. Hatfill's name in Defendant's system of records);

uu. Whether the FBI undertook surveillance of Dr. Hatfill during its Anthrax investigation. Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos. 219-220 (Ex. 120);

vv. Dr. Hatfill's driving record prior to September 2003. Def.'s Resp. to Pl.'s Third & Fourth Req. for Admis. No. 833 (Ex. 124);

ww. Whether Dr. Hatfill lost, or was denied a security clearance. Def.'s Resp. to Pl.'s First Set of Req. for Admis. Nos. 126-127 (Ex. 120).

202. The Agency Defendants' system of records contains records of all investigative techniques used by the FBI, the results of those investigative techniques, and all information collected by the Agency Defendants in the course of their investigation of Dr. Hatfill. The Agency Defendants' system of records also includes all internal electronic communications about the FBI's investigation of Dr. Hatfill, follow up on leads, tasking to other field offices, and all reports of investigative activities, *e.g.*, "302s." Information about the following can be retrieved from the Agency Defendants' system of records by Dr. Hatfill's name or some other identifying particular, *see supra* ¶¶ 3, 129-130, 201:

- a. The FBI had become far more suspicious of Dr. Hatfill;
- b. That the FBI has aggressively investigated Dr. Hatfill;
- c. That Dr. Hatfill is the key focus of the FBI's anthrax investigation;
- d. That the FBI was very confident that Dr. Hatfill was responsible for the anthrax attacks;
- e. That the FBI already had its man, Dr. Hatfill, even if it never got his indictment;
- f. That Dr. Hatfill remained the number one suspect, even though investigators had failed to develop more than a highly circumstantial case against him;

- g. Whether the FBI believed that Dr. Hatfill is the number one suspect in the Anthrax Murders;
- h. That federal investigators might have had enough evidence to indict Dr. Hatfill but nowhere near enough for a conviction;
- i. That investigators were attempting to rule out anyone else who had come across their radar so they could focus entirely on Dr. Hatfill;
- j. That the government might bring charges against Dr. Hatfill that were unrelated to the anthrax attacks;
- k. Investigative analysis of, or speculation about, whether Dr. Hatfill could, would, or should be charged with any crime unrelated to the anthrax attacks;
- l. Whether or not the United States government contemplated bringing unrelated charges against Dr. Hatfill if it was unsuccessful in making a case against him for the Anthrax Murders;
- m. Whether Dr. Hatfill had any involvement in the mailing of two anthrax hoax letters sent from abroad in 2001;
- n. Whether or not investigators were focusing on hoax letters and their possible connection to Dr. Hatfill;
- o. That the government had obtained documents under grand jury subpoena and interviewed hundreds of people to construct an elaborate day-by-day timeline of Dr. Hatfill's activities;
- p. Whether or not a grand jury subpoenaed documents used by investigators to construct a timeline of Dr. Hatfill's activities;

- q. That Dr. Hatfill had or may have had access to anthrax while working at Fort Detrick;
- r. That Fort Detrick, where Dr. Hatfill used to work, was one of three laboratories the FBI had identified as the likely source of the anthrax used in the attacks;
- s. Whether or not investigators have determined that the anthrax used in the Anthrax Murders originated from Fort Detrick;
- t. That Dr. Hatfill is considered by the FBI to be on a list of individuals who have the expertise and access to materials to make anthrax;
- u. Whether Dr. Hatfill had the technical ability to produce or send anthrax of the type(s) or quality(ies) used in the 2001 attacks;
- v. Whether Dr. Hatfill had access to anthrax of the type(s) used in the 2001 attacks;
- w. Whether or not Law enforcement officials obtained information from a source or otherwise that Dr. Hatfill had been seen near ponds near Frederick, Maryland;
- x. Whether or not Dr. Hatfill was ever seen near the pond searched by investigators near Frederick, Maryland;
- y. That what was discovered by Law enforcement officials in the Frederick Pond searches is contained within a record;
- z. That pond searches were triggered by information that Dr. Hatfill may have disposed of laboratory equipment in the ponds;
- aa. That a friend of Dr. Hatfill's told the FBI that Dr. Hatfill had once said the anthrax could be made without access to sophisticated laboratory equipment, and/or that it could be made in the woods and the evidence tossed in a lake;

- bb. That bloodhounds led the FBI to at least one pond;
- cc. That Dr. Hatfill was seen in the vicinity of at least one pond;
- dd. That investigators were looking for clothing or equipment that might have been used to work with anthrax before being thrown in to the pond;
- ee. That nothing of interest was discovered in the pond searches;
- ff. That divers in one pond search recovered a clear box with holes in it that could accommodate gloves to protect the user as he worked;
- gg. That items discovered in the pond searches were being tested for anthrax spores or any other link to the anthrax attacks;
- hh. That initial tests on a clear box and items recovered in a pond search turned up traces of anthrax but later tests were negative;
- ii. Whether or not investigators searched the ponds near Frederick, Maryland to determine whether Dr. Hatfill disposed of any containers or byproducts of anthrax production;
- jj. That additional pond searches were planned;
- kk. That the cost of the Frederick pond search was only a fraction of the money spent by the FBI and Postal Inspection Service to trail Dr. Hatfill, search places he lived, and trace his activities at or about the time the letters were mailed in 2001;
- ll. Investigative theories about whether Dr. Hatfill had a motive for taking some kind of revenge on the government;
- mm. Whether Dr. Hatfill could make weaponized anthrax;
- nn. Whether the culprit could have used a clear box with holes in it to commit the anthrax attacks;

- oo. That the FBI was looking closely at a 1999 bioweapons report about mailed anthrax that was commissioned by Dr. Hatfill from a leading bioweapons expert;
- pp. That the amount and quality of anthrax used in the Leahy and Daschle letters were similar to what was described in the 1999 report;
- qq. That Dr. Hatfill worked on, saw, or otherwise came in contact with, including classified training programs and a 1999 study of a hypothetical anthrax attack carried out by mail;
- rr. Whether or not Dr. Hatfill commissioned a report while he was employed at SAIC regarding distribution of anthrax through the mail;
- ss. That information regarding the accuracy of any resume or purported resume of Dr. Hatfill is contained within a record;
- tt. That some agents were suspicious of Dr. Hatfill in part because of his apparently padded résumé;
- uu. Investigative analysis of, or information or speculation about, any résumé or purported résumé of Dr. Hatfill's;
- vv. That some agents were suspicious of Dr. Hatfill in part because of comments he had made about the dangers of biological attacks against the United States;
- ww. That Dr. Hatfill's blood had been tested;
- xx. That the FBI sent two teams of agents to Africa to investigate whether Dr. Hatfill developed expertise with anthrax in the 1970s and 80s when he attended medical school in Rhodesia/Zimbabwe;
- yy. Dr. Hatfill's activities in Rhodesia/Zimbabwe or South Africa;

zz. Whether or not the FBI sent teams of investigators to Africa to investigate Dr. Hatfill's background;

aaa. That Dr. Hatfill fit the FBI's profile of the anthrax mailer in some respects but not in others;

bbb. Whether or not investigators believed Dr. Hatfill fit an FBI behavioral profile of the person responsible for the Anthrax Murders;

ccc. That certain investigative techniques were part of a last-ditch effort by the FBI to find some hard evidence against Dr. Hatfill that would stand up in court;

ddd. That Dr. Hatfill's girlfriend moved to the United States from Malaysia and an anthrax hoax letter was mailed from Malaysia;

eee. That the FBI sought help from police in Kuala Lumpur, investigating any possible connection with Dr. Hatfill and a former girlfriend from Malaysia;

fff. That Dr. Hatfill left USAMRIID in 1999 to take a job with SAIC working on bioterror training for the CIA, Army Special Forces, and other government clients;

ggg. That Dr. Hatfill's responsibilities at USAMRIID included the writing of bioterror scenarios, and that one bioterror scenario envisioned by Dr. Hatfill actually happened in Wichita, Kansas in 1998;

hhh. That Dr. Hatfill had received prescriptions for Cipro from his doctor not long before the anthrax attacks, that Dr. Hatfill was taking Cipro at the time of the anthrax attacks, and that Dr. Hatfill obtained Cipro from a doctor other than the one who performed surgery on Dr. Hatfill;

iii. That Dr. Hatfill was in England at the time an anthrax hoax letter was sent to Senator Daschle from England;

jjj. That Dr. Hatfill was attending a United Nations-sponsored bioweapons training session while he was in England;

kkk. Whether or not investigators obtained the records of Dr. Hatfill's car rental while in England;

lll. That Dr. Hatfill was the only attendee to rent a car at the U.N. training seminar;

mmm. That the FBI tracked Dr. Hatfill's movements before and after the U.N. training program;

nnn. That the FBI asked British police to help retrace Dr. Hatfill's every move while he was in England;

ooo. That SAIC colleagues claimed to have seen Dr. Hatfill remove biological material carriers from the facility;

ppp. That several of Dr. Hatfill's associates mentioned him as someone who should be interviewed by the FBI;

qqq. That Dr. Hatfill's friend Bill Patrick told the FBI that he was under the impression that the 1999 study he wrote for Dr. Hatfill about anthrax in the mail would be used for preparedness training, but that in fact the study received no attention until 2002;

rrr. That specially trained bloodhounds showed reactions to scents at Dr. Hatfill's apartment and the apartment of his girlfriend;

sss. That the bloodhounds individually reacted in all the same places;

ttt. That the bloodhounds did not show any reaction at places associated with dozens of other people the FBI was investigating;

uuu. That the dogs' reactions were used as a basis for a warrant to search Dr. Hatfill's apartment;

vvv. That the bloodhound evidence persuaded the Amerithrax task force to place Dr. Hatfill under 24-hour surveillance;

www. That the FBI was unable to rebut Dr. Hatfill's assertion that he had never been to Princeton, New Jersey;

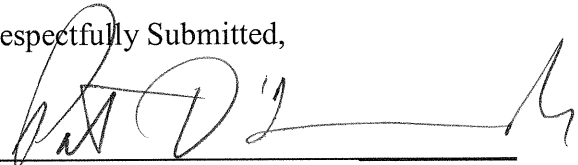
xxx. That agents surveilling Dr. Hatfill's apartment watched him pitch loads of his belongings into a dumpster, and wondered whether he were getting rid of evidence;

yyy. That surveillance of Dr. Hatfill was driven by the FBI's unwillingness to risk the embarrassment of losing track of him even for a few hours;

zzz. That Dr. Hatfill lost his CIA clearance and his job at SAIC after failing certain questions in a polygraph test regarding his experiences in South Africa.

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Respectfully Submitted,



Thomas G. Connolly, D.C. Bar # 420416
Mark A. Grannis, D.C. Bar # 429268
Patrick O'Donnell, D.C. Bar # 459360
Harris, Wiltshire & Grannis, LLP
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036
Telephone: (202) 730-1300
Facsimile: (202) 730-1301