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Ms. Molly Dwyer
Clerk, United States Court of Appeals
for the Ninth Circuit
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Re: Lahr v. NTSB, et al., 06-56732, consolidated with Nos.
07-55709 and 06-56717
Date of argument: August 8, 2008
Panel: Honorable Marsha S. Berzon
Honorable Kim McLane Wardlaw
Honorable Roger J. Minor

Dear Ms. Dwyer:

Under Fed. R. App. P. 28(j), plaintiff H. Ray Lahr respectfully submits this letter containing pertinent and significant authorities that have come to his attention since oral argument. Kindly distribute it to the Panel.

In March 2008 the DC district court observed in *ICM Registry, LLC v. U.S. Department of Commerce*, 538 F. Supp. 2d 130, 133:

The so-called misconduct exception to the deliberative process privilege is a less well-settled doctrine. Circuit courts have acknowledged, in *dicta*, that the deliberative process privilege does not apply where there is reason to suspect government misconduct, but this exception to the (b)(5) exemption has never been applied in a holding at the Circuit level, nor has the scope of "misconduct" been clearly defined.

Here, the privilege is asserted regarding simulation inputs and three records submitted to this Court *in camera* (ORDER Docket 52), two of which Lahr filed with the Court, in redacted form. (Lahr's MOTION FOR *IN CAMERA* SUBMISSION Docket 47 Exhibits 1 and 2.)

From the released headings of the CIA's *Dynamic Flight Simulation* (written after release of CIA's animation), Record 27 undoubtedly purports to explain Flight 800's aerodynamics. That impossibility is among numerous issues that defendants admitted. "On this motion... Plaintiff's assertions have not been repudiated." *Order Pl.* Excerpts at 1105. *See also Id.* at 1111: "In fact, Plaintiff's evidence suggests the 'zoom climb' theory is aerodynamically impossible."^{FN 25}

Thus, how could Record 27, purporting to explain the impossible, *not* be made for the purpose of facilitating fraud?

The lower court instructed the parties to "discuss various candidates for possible appointment by the Court of a special master or court-appointed expert" (Docket 47 in 02-8708), but later denied Lahr's request for such an appointment (Docket 12 at Bates 1219.) Absent an order of disclosure here, an independent expert is needed to analyze Record 27.

Similarly with the CIA's Record 28, *Analysis of Radar Tracking*.

Lahr clearly proved that this tragedy was "not an accident – under any statute – any codes anywhere, that's murder."¹ This is "not repudiated," and, thus, constitutes "extreme government wrongdoing." *ICM Registry Id.*

Respectfully submitted,

John H. Clarke

Enclosures

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¹ Pl. Opening Brief at 35.