Nos. 06-56717 & 06-56732

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

H. RAY LAHR,

Plaintiff-Cross-Appellant/Appellee,

v.

NATIONAL TRANSPORTATION SAFETY BOARD, ET AL.,

Defendants-Appellants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CROSS-APPELLANT H. RAY LAHR'S OPENING BRIEF

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STATEMENT OF JURISDICTION

Appellee agrees with appellants' statement of (a) the statutory basis of subject matter jurisdiction of the district court, (b) the basis for claiming that the judgment or order appealed from is final, (c) the dates of entry of the judgment or orders appealed from and the dates of filing of the notices of appeal, and (d) the statutory basis for the jurisdiction of this Court.

STATEMENT OF THE ISSUES

(1) Whether plaintiff's offer of proof showed fraud or illegality, and if so, whether this vitiates the government's deliberative process privilege.

(2) Alternatively, whether the FOIA's balancing test applies to deliberative process privilege assertions under Exemption 5, and if so, whether the balancing of competing interests mandates disclosure here.

(3) Whether CIA records generated after its publication of its "zoom-climb" animation are predecisional under the FOIA, entitling the CIA to withhold these records under the deliberative process privilege.

(4) Whether the inputs used in the NSA's time-step computer program used to simulate Flight 800's post-initiating event flight path are segregable from the simulation itself.

(5) Whether the NTSB's in house time-step simulation run of Flight 800 must be fully disclosed.

(6) Whether the NTSB must disclose its time-step simulation run of the descent of Flight 800's debris.

(7) Whether the government's search for responsive records was adequate.

(8) Whether the government's *Vaughn* index was adequate.

STATEMENT OF THE CASE

The genesis of this FOIA action is the July 17, 1996 downing of Trans World Airlines Flight 800. Twelve minutes after departing from John F. Kennedy International Airport in New York City, en route to Charles de Gaulle International Airport in Paris, France, 12 miles off the coast of Long Island, the aircraft crashed into the Atlantic Ocean, tragically taking the lives of 230 people, thirty-eight of whom were under the age of 18. It is the most controversial aircraft disaster in history. The source of the controversy is the government's explanation.

On November 17, 1997, the three major networks broadcast excerpts of the CIA-produced animation entitled, *What Did The Eyewitnesses See?* CNN broadcast the 14-minute animation in its entirety. It depicts the CIA conclusion that, at 13,800 feet, a spontaneous spark from a fuel indicator in the empty center fuel tank caused an explosion which blew the front third of the aircraft from the fuselage, and, while the nose descended, two thirds of the aircraft ascended 3,200 feet, to an altitude of 17,000 feet, before beginning its descent. In August of 2000, the NTSB issued its final report, agreeing with the CIA's initiating event conclusion as well as the "zoom-

climb" conclusion, albeit to an altitude of 14,800 feet, cutting the CIA's 3,200-foot climb conclusion by half.

Plaintiff Captain H. Ray Lahr ("plaintiff" or "Lahr") brought this action seeking disclosure of "all records" upon which the Central Intelligence Agency's (CIA) and the National Transportation Safety Board's (NTSB) zoom-climb conclusions were based.

On the government's three motions for summary judgment, the district court issued two opinions, granting in part and denying in part the government's motions. The court held:

(1) Exemption 3 was properly asserted to shield CIA information and NSA records;

(2) No Boeing-supplied data was proprietary information under Exemption 4;

(3) Exemption 5's deliberative process privilege shielded some of the records, but that others must be disclosed in whole or in part; and

(4) The FOIA's two privacy exemptions, 6 and 7(C), do not shield the names of eyewitnesses and FBI agents from disclosure.

After the court entered final judgment and ordered disclosure of certain records, both parties appealed. Plaintiff appeals the district court's adverse holdings on the issues of:

(1) The applicability of the deliberative process privilege;

(2) The production of the NTSB's computer simulation run of the aircraft's post-initiating event flight trajectory;

(3) The segregability of the data used in the NSA's flight trajectory computer simulation;

(4) The adequacy of the government's searches; and

(5) The adequacy of the government's *Vaughn* index.

The government's appeal challenges the district court's holding that the FOIA's two privacy exemptions do not shield the names of eyewitnesses and FBI agents from disclosure.

STATEMENT OF THE FACTS

A. The Flight 800 Tragedy and Ensuing Government Misconduct

On July 17, 1996, the military issued a warning that it was dangerous for civilian aircraft to fly below 10,000 feet in Military Operating Zone[1] Whisky 105 ("W-105"), whose western edge was around 15 miles off Long Island's coast. At 8:00 p.m., the military was conducting classified military maneuvers.

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[1] *See Airman's Information Manual* § 3:43 defining warning zone: "[Warning zones] denote the existence of unusual, often invisible, hazards to aircraft, such as artillery firing, aerial gunnery, or guided missiles."

At 8:00 p.m.:

- National Guard pilots Major "Fritz" Meyer and Captain Chris Bauer were taking off in their helicopter, for a night refueling exercise off the shoreline of Long Island. As it was still daylight, they elected to practice runway approaches until dark.

- Captain David McClaine and First Officer Vincent Fuschetti were piloting East Wind Flight 507, having left Boston, bound for Trenton, New Jersey.

- Chief Petty Officer Dwight Brumley was a passenger on US Air Flight 217, from Charlotte, North Carolina to Providence, Rhode Island.

- A Navy P-3 has taken off from the Brunswick Naval Air Station and was proceeding to a military exercise in the military warning areas southeast of New York City. The P-3 is a "sub hunter," loaded with sophisticated Radar and sensitive submarine detection equipment.

- At JFK, TWA Flight 800, a Boeing 747, closed its doors, with 230 passengers and crew aboard. It was bound for Charles DeGaulle Airport, Paris, an eight-hour flight. The flight would end 50 nautical miles due east.

At 8:19 p.m., Flight 800 took off.

Shortly before 8:30 p.m.:

- A surface-to-air missile launched from offshore, well behind the aircraft's position. It traveled northeast along the coast, steadily climbing, a bit erratically (correcting itself), at first at about 20-degrees, steadily increasing its rate of climb, at supersonic speed.[2] As its altitude climbed to above Flight 800's 13,800 feet, the missile went into an overshoot correct mode,[3] where its flight path turned smooth (because the "control surfaces on the missile" had gone "full throw and they hit stops and they stay[ed] there" no longer erratically correcting) and carved an arc in the sky – finishing with a flight path that looked like the Nike swish trademark, only upside-down.

- Ahead of the Flight 800's position and closer to it than the first missile's firing position, a second missile fired, also from offshore. Its climb angle was steeper than the other.[4]

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[2] *See* I # 28 at 58 ¶ 4, *Hill Aff.*: (quoting Commander William S. Donaldson): "When you see a streak go up, and go up 13,800 feet, in seconds, 4 or 5, 6, 7 seconds, that's supersonic. Yeah, it's supersonic. Only a fighter aircraft or a missile can achieve those kinds of speeds. And an investigator can pretty quickly determine, as the FBI guys did, that when you're 8 or 10 miles away and you see something go that high that quick, its just a matter of trigonometry. I mean any high school kid can figure it out. It's got to be a missile."

[3] *Id.* at 212 ¶ 55 *Meyer Aff.* Lodged. *See also* animations Lodged.

[4] *See* I # 28 at 54, *Hill Aff.*, (quoting Commander William S. Donaldson): "Suffolk County Police Department and special agent of the FBI… Bongardt… us[ed] global positioning satellite (GPS) portable equipment coupled with a had-bearing compass… able to more precisely determine two distinct firing positions, both of which were in range of Flight 800 when it exploded had… missiles been launched… [I] duplicated the efforts… using the same type of GPS equipment and hand-bearing compass with a different mix of eyewitnesses… same conclusion… surface positions at sea…" *Id.* at 101 Ex 15 *Donaldson Aff.*: Triangulation of Witness Bearing Lines.

At 8:30 p.m.:

- Flight 800 climbed eastbound, through 13,000 feet, en route to its assigned altitude of 15,000 feet. Its landing lights were on, a usual procedure in crowded air terminal areas.

- About 30 miles directly ahead of Flight 800, McClaine and Fuschetti, in Eastwind 507, were approaching it while descending to 16,000 feet. McClaine was following Flight 800's landing lights.

- About 10 miles to the north, Meyer and Bauer were making an approach to the Hampton airport in a Blackhawk National Guard helicopter, when they visually picked up the missile fire.

- From the south, US Air approached and was to cross overhead of Flight 800 about 8,000 feet above it. Brumley, from his vantage of a window seats on the right side and ahead of the wing of his aircraft (likely the closest eyewitness), saw a missile rise up and arc over towards Flight 800.

- Almost directly overhead, the Navy P-3 crossed Flight 800's path from north to south.

- Hundreds of other witnesses along the Long Island coast followed missile fire rising from the surface.

At 8:31 p.m., about eleven minutes after Flight 800 departed, when the airplane reached an altitude of 13,800 feet, 2.6 miles above sea level, approximately 9 miles from the Long Island barrier reefs, 12 miles east of Center Moriches, the two missiles intersected, almost dead on.

- One missile entered Flight 800 just below the left wing, traversed the center of the aircraft through rows 17, 18, and 19, and exited the right side of the fuselage,[5] bringing debris with it.[6]

- Just after (or before) that missile sliced through the aircraft. the second missile exploded outside the aircraft's lower left side,[7] collapsing the nose gear doors inward, completely

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[5] *Id.* at 185 ¶ 3 *Sanders Aff.*: "[TWA Captain] Terry Stacy began to feed me a series of documents that I analyzed bad to do with the debris field…. When I showed him this trail, he, for the first time, and this was at the end of November [1996]… He goes, 'my God there is a reddish orange residue trail right there. I think it the very same seats row 17, 18 and 19, that the FBI back in early September took samples and it refused to share the analysis on those samples."

[6] *Id.* at 76 *Donaldson Aff.*: (quoting Commander William S. Donaldson): "As I predicted in 1997, and as Military missile experts privately told FBI Agents in 1996, the missile's extreme energy level would carry it clear and create its own separate debris field. This is precisely what the radar video captured. The missile established a debris field… approximately 1.6 NM southwest of the aircraft nose impact point and 2.8 NM southwest of main body ocean impact… The NTSB made no effort at recovery in this area. The FBI's records and maps, left aboard the contract boats handling the secret missile recovery effort, prove the FBI was specifically looking for a missile body as well as the stinger missile first stage pictured in their operations manual." *See also id.* at 95 Ex 9: Map of debris fields & air traffic.

[7] *See, e.g.*, *id.* at 218 ¶ 7, *Gross Aff.*, Lodged: "When I saw photographs of the left side, with that large indentation forward of the wing… what in the world could cause it to be dented in. It would have to be something external to the aircraft." *See, e.g.*, II at 376 ¶ 8 *Lahr Aff.* Ex 10, April, 2000, *International Association of Machinists and Aerospace Workers* submission to NTSB final Report: "Approximately nineteen (19) holes in the fuselage below the L3 door that appear to originate from the exterior of the aircraft."

separating the nose from the fuselage, and blowing off at least one wing.[8]

"[I]t was so clear, and it was so vivid, was so obvious that what was happening was that this plane was being assaulted…"[9]

"When that aircraft was hit, it immediately began falling."[10]

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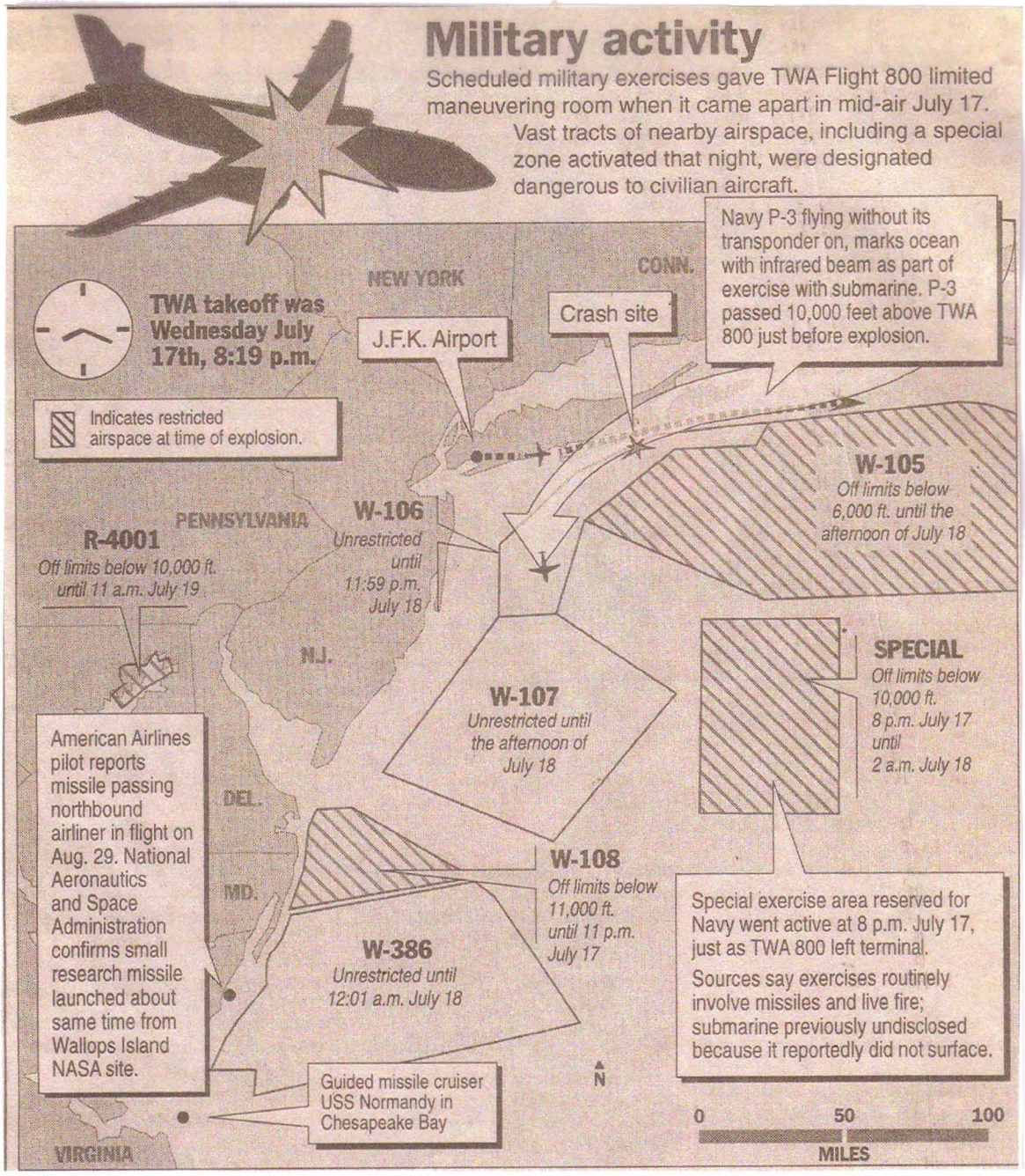
[8] *See, e.g.*, I at 47 *Hambley Aff*.: "[Upon initiating event] the aircraft structure supporting and supported by the wings… was destroyed so severely" *Id.* at 50 ¶ 12 *Hill Aff*.: "[A]lready lost one of its wings" *Id.* at 127 ¶ 9 *Stalcup Aff*.: "Debris field data indicates that Flight 800's left wing was damages early in the crash sequence… wing structure… found in an area consistent with it separating from the aircraft within five seconds of the initial explosion…" *Id.* at 243 *McClaine Aff*.: "I didn't see it pitch up, no. Everything ended right there at that explosion… I saw the wings blow off." *Id.* at 255 ¶ 19 *Perry Aff.*: "And then the left wing goes off in this direction."

[9] *Id.* at 258 ¶ 38. *See also, e.g*., *id.* at 136-56 *Stalcup Aff*. Ex 1 *TWA Flight 800 Probable Cause Announced*: "A surface-to-air missile, launched from the ocean off the coast of Long Island rose up and exploded at or near TWA Flight 800."

[10] *Id.* at 198 *Fuschetti Aff*.: "We witnessed TWA 800… landing lights to a ball of flames…. At no time did I see any vertical travel of the aircraft…" *Id.* at 200 ¶ 5(b) *Meyer Aff.*: Lodged: "When that aircraft was hit, it immediately began falling. It fell like a stone…. It never climbed." *Id.* at 242 *McClaine Aff*.: "The explosion just happened right in front of me there and it disappeared right there, with the two wings coming out the bottom…. it just disappeared right about the same level." *Id.* 243: "I didn't see it pitch up, no." *Id.* 250 (ATC tape): "[I]t just went down – in the water" *Id*. at 251: "[W]e are directly over the sight with that airplane or whatever it was just exploded and went into the water."

Surface vessels scattered.[11]

Reprinted from March 10, 1997 *Press Enterprise* Newspaper article, *New Data Show Missile May Have Nailed TWA 800, Debris Pattern Provides Key to Mystery* (II # 28 Ex 12 *Lahr Aff.* at 381)



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11 *See, e.g., id.* at 91 (quoting FBI SAIC Kallstrom): "They were [three] naval vessels that were on classified maneuvers…"

The FBI seized control of the investigation.

On December 30, 1996, five months after the disaster, a CIA analyst had an epiphany – "you can explain what the eyewitnesses are seeing with only the burning aircraft," as he freely admitted in 1999 (II at 303-05 *Lahr Aff*. Ex 1, April 30, 1999, Transcript of CIA Briefing to NTSB Witness Group):

> CIA ANALYST #1: The conclusion that the eyewitnesses were only seeing the burning aircraft was made at 10:00 p.m. at night on the 30th of December, 1996.
>
> MR. WALTERS: Was it really?
>
> CIA ANALYST #1: Yes, as I was sitting behind the computer…. There was a realization, having all the data laid out, that you can explain what the eyewitnesses are seeing with only the burning aircraft….
>
> Also, I immediately alerted, I called – the next morning I called the special agents I worked with at the FBI and explained what we were thinking…. We wanted them to be aware of this so that they could start proceeding with the investigation…"

Eleven months later, and 17 months after the tragedy, the FBI showed the CIA's 14-minute zoom-climb animation as part of the FBI's hour-long CNN press conference announcing its withdrawal from the probe, hosted by FBI Director-in-Charge of the New York Field Office, and Agent-in-Charge of the "investigation," James Kallstrom. The three networks broadcast portions of it that night. Neither the government nor the media ever showed

it again. *See* Lodging. *Flight 800 CIA Animation* transcript, I # 28 Ex 19

Donaldson Aff. at 118-19. Excerpts:

> Just after the aircraft exploded, it pitched up abruptly and climbed several thousand feet from its last recorded altitude of about 13,800 feet to a maximum altitude of about 17,000 feet. This is consistent with information provided by NTSB investigators and Boeing engineers who determined that the front third of the aircraft, including the cockpit, separated from the fuselage within four seconds after the aircraft exploded. This significant loss of mass from the front of the aircraft caused the rapid pitch-up and climb. The explosion, although very loud, was not seen by any known eyewitness. *** [I]t was difficult to see against the relatively light sky….*** [A]bout 20 seconds after it exploded, a fireball erupted from the aircraft…. [A]bout 42 seconds after it exploded, its left wing separated… [and] 49 seconds after the initial explosion, the burning debris hit the water. CIA analysts developed this model using observations from key eyewitnesses… *** [T]he 21 eyewitnesses whose observations began earlier [than the last explosion] described what was almost certainly the aircraft itself in various stages of crippled flight after it exploded. Those who said they saw something ascend and culminate in an explosion probably saw the burning aircraft ascend…*** [T]his may have looked like a missile attacking an aircraft.… To date, there is no evidence that anyone saw a missile shoot down TWA Flight 800. Initial speculation that a missile was involved…[12]

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[12] *Cf. Lahr Aff.* II ¶ 88 at 288, Lodged: "In order for the government to advance the mechanical failure theory, it was necessary to explain away the missile-like streak seen by… the eyewitnesses. The CIA made an astonishing proposal…. [T]he missile-like streak was the burning aircraft itself…. The CIA would have us believe that when the nose was blown away, the aircraft continued to fly and zoom-climb from 13,800 to 17,000 feet, before it rolled over and crashed into the sea. The burning zoom-climb is supposedly the streak seen by the eyewitnesses. Never mind that the eyewitnesses saw the streak rising from the surface, not from 13,800 feet."

The next day, on November 18, 1997, Boeing issued a press release (I # 28 Ex 19 *Donaldson Aff*. at 121, excerpts):

> Boeing was not involved in the production of the video shown today, nor have we had the opportunity to obtain a copy or fully understand the data used to create it. While we provided basic aerodynamic information to assist in the CIA's analysis of the airplane's performance, we are not aware of the data that was used to develop the video. The video's explanation of the eyewitness observations can be best assessed by the eyewitnesses themselves…"

In August of 2000, the NTSB had its second "Sunshine Hearing" and issued its final report, closing the case.

NTSB investigations are conducted under the Party Process, under which non-governmental groups, or parties, possessing expertise in particular disciplines, are included in the process. Up until the Flight 800 disaster, NTSB probes also freely included peer review and resultant cross checking.[13]

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[13] *Lahr Aff*. I # 28 at 279 ¶¶ 47-50: "[T]here should have been a Flight Path Group to study the trajectory of TWA 800 before and after the explosion. The evidence, data, and conclusions of that group should be a part of the public record. That group was not even formed. …. developed by a single NTSB technician, Dennis Crider, who worked with secret data, and who won't reveal his work. That violates all of the rules for accident investigations. Conclusions based on secret data and calculations that can't be independently verified are invalid for accident investigation purposes." *See also* II # 28 Ex 5 at 336 *Air Line Pilots Association* submission: "[W]e are concerned that this analysis was essentially accomplished by only one individual at the Board, with little or no party input or participation."

Analysis of the government's conduct during the four years following the Flight 800 tragedy is a study in government impropriety. The district court's review (reprinted *supra*) was limited to finding whether Lahr had shown government impropriety sufficient to counterbalance the privacy interests protected by two FOIA exemptions. The district court did set forth evidence of aspects of impropriety, but by no means included all evidence in the record of the government's pattern and practice of misconduct during the four years it had jurisdiction to conduct a probe.[14]

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[14] Lahr's 29 fact and expert witnesses include physicists, system engineers, aerodynamicists, six air crash investigators (three of whom were parties to the TWA Flight 800 probe), a retired Admiral (whose opinion is based on, *inter alia*, statements of former Chairman Joint Chiefs of Staff), a former NTSB Board member, seven eyewitnesses (four from the air) (two CIA-animation featured), and a victim's family member. As the district court observed, *inter alia*:

- There is not a single eyewitness who corroborates a "zoom-climb" theory.
- The CIA knowingly and falsely reported that only 21, and not hundreds, of eyewitnesses saw a projectile rising.
- A center-wing-tank explosion could not possibly have been the initiating event because the fuel tank was empty, there was no ignition source, and engine thrust was cut with the loss of the nose.
- In any event, the fuel is combustible, like kerosene, and is not flammable – it is incapable of exploding.
- The zoom-climb is impossible because at least one wing separated early in the crash sequence, a center-wing-tank explosion would have destroyed the spar supporting the wings, the aircraft did not slow and so could not have climbed.
- The alleged zoom-climb is aerodynamically impossible.

The cover-up was so pervasive that nongovernmental parties smuggled out evidence.[15]

B. District court proceedings

Captain H. Ray "Lahr is a former Navy pilot and retired United Airlines Captain who has served as the Air Line Pilots Association's [ALPA] Southern California safety representative for over fifteen years." Order, V # 113 at 11650. Lahr served as ALPA representative in seven major NTSB probes, and "has an abiding interest in flight safety and aerodynamics." Docket # 132 at 4, fee order.

In 2001 the CIA wrote plaintiff:

> This acknowledges receipt of your 10 November 2000 letter requesting records under the provisions of the Freedom of Information Act (FOIA). Specifically, your request is for records pertaining to **the computer program and data used to produce the computer simulation of TWA Flight 800, 17**

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[15] I # 28 at 82-83 *Donaldson Aff.*, Ex D: two pages of debris field data smuggled out in 1996 by TWA Captain Terrell Stacey to investigative reporter James Sanders. *Id.* at 180 ¶¶ 2-4 *Holtsclaw Aff.*: "[In] 1996, I provided to Captain Richard Russell the Radar tape... recorded at the New York Terminal Radar Approach Control... I know this tape to be authentic because it was given to me by one of the NTSB accident investigation committee members.... The tape shows a primary target at the speed of approximately 1200 knots converging with TWA-800, during the climb out phase of TWA 800. It also shows a U.S. Navy P-3 pass over TWA-800 seconds after the missile has hit TWA-800." *Id.* at 180, *Sanders Aff.* Ex 1: Photograph of smuggled out seat padding of two reddish residue samples of missile exhaust, one of which *60 Minutes* gave to FBI.

> **July 1996, losing its nose section, then climbing about 3,000 feet.**…
>
> We understand your request to indicate your interest is focused on the separation of the aircraft's nose section from the fuselage, and the related data and resulting conclusions. We have researched this matter, and have learned that the pertinent data, and resulting conclusions, were provided by the National Transportation Safety Board (NTSB). CIA simply incorporated the NTSB conclusions into our videotape. Therefore… you may wish to submit your request to the NTSB…
> (emphasis in original, II # 28 Ex. 16 at 399)

Plaintiff did submit his request to the NTSB, and, on November 14, 2002, filed his FOIA complaint against the NTSB, seeking all records upon which the NTSB's zoom-climb conclusion was based, as well as records upon which the CIA's zoom-climb conclusion was based. *See* CA 02-08708-AHM.

On October 3, 2003, the NTSB filed its *Vaughn* index in that case, wherein the NTSB denied knowledge of records upon which the CIA had based its zoom-climb conclusion.[16]

On October 8, 2003, plaintiff filed a second FOIA request with the CIA, again seeking all records upon which its zoom-climb conclusion was

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[16] *See Second Amended Complaint*, III # 82 at 642 ¶ 11: "The NTSB responded that it did not have the records or knowledge of the 'pertinent data and resulting conclusions' that the CIA claimed to have 'simply incorporated' into its video-animation-report."

based.[17] On December 17, 2003, plaintiff amended his complaint to add the CIA as a defendant. (Plaintiff had initially filed this complaint[18] as a new case, and, in lieu of consolidating the cases, the court instructed plaintiff to file an amended complaint under the new case number, 03-8023, and the court dismissed the predecessor action without prejudice.[19])

On June 8, 2004, the NTSB moved for partial summary judgment on its redacted and withheld records.[20] Plaintiff's opposition papers included his *Statement of Genuine Issues*,[21] to which the NTSB did not respond. The court took the motion under submission.

In May of 2004, the court granted the CIA's motion to stay the proceedings as to it, granting it until February 28, 2005, to complete its search for, and processing of, CIA-originated records.[22] At the conclusion

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17 CIA FOIA request, II # 57 at 521-36.

18 *First Amended Complaint,* Docket # 5, Defendant's Excerpts at 8-13.

19 *See* CA 02-08708-AHM, Docket # 71, December 12, 2003, minute order: "In light of plaintiff filing a new complaint, Court instructs counsel to file proposed amended complaint under the new 2003 case number and dismiss the instant action without prejudice."

20 Docket # 27.

21 Docket # 41.

22 Docket # 20.

of the stay period, the Agency began making intermittent productions to plaintiff.

Because many of the CIA records produced to Lahr were generated after the November, 1997 broadcast of the CIA's zoom-climb animation (or were undated), they were not "records upon which its zoom-climb animation was based," and, so, Lahr filed a third FOIA request with the CIA, to include post-decisional zoom-climb records. While exhausting his administrative remedies under the FOIA, precedent to amending his complaint to obtain subject matter jurisdiction in the district court over these CIA records, on November 7, 2005, the National Security Agency (NSA) responded to plaintiff regarding the requested "copy of the computer simulation and animation program used by the CIA and/or the… NTSB."[23] The Flight 800 time-step simulation on which the CIA claims to have relied in reaching its zoom-climb conclusion was said to have been run on an NSA program.

After exhausting his administrative remedies as to the NSA, on February 6, 2006, plaintiff filed his Second Amended Complaint (SAC) to include the CIA's post-decisional records, and the NSA's records. SAC, III # 82 at 639-45. "The SAC seeks proper identification by the Defendants of records responsive to requests that Lahr has made under FOIA, preliminary

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[23] *Second Amended Complaint* # 82 ¶ 20 at 643.

and final injunctions prohibiting Defendants from withholding the records at issue, and a mandatory injunction requiring Defendants to make certain of their computer and software programs available to Plaintiff for inspection." Order, V # 104 at 1110.

On August 16, 2005, the CIA moved for partial summary judgment on the redacted or withheld records it had identified by that time.[24] Plaintiff's opposition papers included a *Statement of Genuine Issues*,[25] to which the CIA did not respond. On May 1, 2006, the CIA filed a second motion for partial summary judgment covering the additional redacted or withheld records it had produced or identified since it had filed its first dispositive motion.[26] Plaintiff's opposition papers again included a *Statement of Genuine Issues*,[27] to which the CIA again filed no response.

The district court took all three motions under submission after oral arguments and *in camera* reviews.[28] On August 31, 2006, it issued its

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[24] Docket # 59.

[25] III # 64 at 563-637.

[26] Docket # 85.

[27] IV # 88 at 977-1025.

[28] *See* minute orders including *in camera* submissions: (1) Docket # 45, September 27, 2004; (2) IV # 95 at 1058-59, July 12, 2006; (3) Docket # 103, August 14, 2006.

memorandum order, ruling on the CIA's second motion for partial summary judgment, granting it in part and denying it in part. On October 4, 2006, the court issued its second memorandum order, ruling on the NTSB's motion for summary judgment and the CIA's first motion for partial summary judgment, also granting in part and denying in part these two motions.

STANDARD OF REVIEW

The standard of reviewing a grant of summary judgment under the circumstances presented in this case is *de novo*. *See Klamath Water Users Protective Assoc. v. Department of Interior,* 189 F.3d 1034, 1037 (9th Cir. 1999), aff'd, 532 U.S. 1 (2001) ("where the adequacy of the factual basis is not disputed, the district court's legal conclusion whether the FOIA exempts a document from disclosure is reviewed de novo").

SUMMARY OF ARGUMENT

Exemption 5's deliberative process privilege is unavailable to the government for three reasons. First, and foremost, the Court must consider plaintiff's proffer regarding fraud, cited in his three Statements of Genuine Issue. Because the government submitted no response to this proof, plaintiff's allegations of fraud and cover-up are uncontroverted and must be viewed as conceded. Fraud or illegality vitiates any privilege. Second, even in the absence of fraud,

deliberative process assertions are to be analyzed under the FOIA's equitable balancing test, the application of which mandates disclosure here. Lastly, CIA records generated after its publication of its zoom-climb animation are not predecisional, and are therefore not privileged as deliberative under the FOIA.

The court erred in declining to make a finding of segregability of the inputs used in the NSA's time-step computer simulation program, holding that Exemption 3's applicability to disclosure of the program itself obviated any need for a determination of the segregability of these inputs.

Regarding the NTSB's time-step simulation of Flight 800's post initiating event flight path, the district court should have specifically ordered full disclosure of all such records. Additionally, the court held that the NTSB need not disclose its time-step simulation of the descent of Flight 800's debris, even though the simulation of the debris' descent is inextricably intertwined with the theory that two-thirds of the aircraft ascended, and notwithstanding that plaintiff had specifically requested these records.

The court held that the government's search for responsive records was adequate and that plaintiff had failed to show that specifically identified records exist, despite plaintiff's having filed ample evidence that the agencies have these records, most of which are in electronic form.

Additionally, defendants failed to account for records that it had referred to in its *Vaughn* index, and which the district court mentioned in its orders.

The government's *Vaughn* index was inadequate as having failed to address the records discussed in the foregoing paragraph, as well as failing to identify the computer programs corresponding to printouts it produced. Additionally, the dates on the records produced, including the simulation printouts, raises the question of whether the CIA actually analyzed the data before announcing its zoom-climb conclusion (which was preordained as discussed *supra*). The CIA's *Vaughn* index should address obvious issues raised by its productions. Why, for example, do the outputs recorded on the CIA's simulation printouts differ from one another, and why does one bear a 2004 date, almost four years after the matter was closed? Under the facts of this case, any remand should include an instruction that CIA affidavits be based on personal knowledge, where practicable.

ARGUMENT

The Freedom of Information Act, 5 U.S.C. § 552 was enacted "to permit access to official information long shielded unnecessarily from public view and... to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink,* 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). The Act seeks to ensure

that government officials are held accountable to an informed electorate. *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 243, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978). "Disclosure, not secrecy, is the dominant objective of the Act." *Department of Air Force v. Rose,* 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976).

Under 5 U.S.C. § 552 (a)(3)(A)(i), FOIA a request "reasonably describes" the records if it enables the agency to understand what is being sought.

I. PRIVILEGES ARE UNAVAILABLE TO SHIELD RECORDS GENERATED IN FURTHERENCE OF FRAUD OR ILLEGALITY

A. The Deliberative Process Privilege

Exemption 5 allows withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This language contemplates that the public will not be entitled to government documents which a private party could not discover in litigation with the agency. *United States v. Weber Aircraft Corp.,* 465 U.S. 792, 799-800, 104 S.Ct. 1488, 1492-93, 79 L.Ed.2d 814 (1984); *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 148, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29

(1975). Exemption 5 has been interpreted as preserving to the agencies such recognized evidentiary privileges as the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" privilege. *Parke, Davis & Co. v. Califano,* 623 F.2d 1, 5 (6th Cir.1980). The latter privilege is at issue in the present case.

The language of Exemption 5 is cast in terms of discovery law; the agencies need turn over no documents "which would not be available by law to a private party in litigation with the agency." This discovery standard can only serve as a "rough guide" to the courts, *EPA v. Mink,* 410 U.S. 73, 86, 93 S.Ct. 827, 835, 35 L.Ed.2d 119 (1973), since decisions as to discovery are usually based on a balancing of the relative need of the parties, and standards vary according to the kind of litigation involved. Furthermore, in FOIA cases, the factor weighing in favor of disclosure is not the relevance to the issues being litigated, as it is in discovery disputes.[29] Rather, the interest

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[29] *See, e.g.*, *Chaplaincy of Full Gospel Churches v. Johnson,* 217 F.R.D. 250, D.D.C., 2003: "Because the deliberative-process privilege is a qualified privilege, it may be overcome by a sufficient showing of need by the party seeking discovery. *Id.* Once the government has asserted the privilege, the court must balance the party's need against the harm that may result from disclosure, taking into account the relevance of the evidence, the availability of other evidence, the seriousness of the litigation and the issues involved, the role of the government in the litigation, and the possibility of future timidity by government employees." (citation omitted)

in disclosure under the FOIA is its narrow purpose of opening up the inner workings of government to the light of public scrutiny. Disclosure turns on the nature of the document and what it reveals about the operation of government and not on the identity or purpose of requestor.

B. The Deliberative Process Privilege does not Shield Disclosure of Records Generated in Furtherance of a Fraud or Crime

Applying the FOIA's equitable balancing test to the privacy exemptions,[30] the district court found that "the government acted improperly in its investigation of Flight 800, or at least performed in a grossly negligent fashion." V # 104 at 1110. The court properly reviewed the evidence cumulatively, "taken together." *Id.* The court correctly applied the comparatively light burden applicable to balancing under privacy

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[30] 5 U.S.C. § 552 (b)(6) permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."

5 U.S.C. § 552(b)(7)(C) provides that the FOIA does not apply to matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of law enforcement records or information... could reasonably be expected to constitute an unwarranted invasion of personal privacy..."

exemptions (b)(6) and (b)(7)(C), as defined by the Supreme Court's 2004 decision in *Favish*: [31]

> [W]here... the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred... [T]he less stringent standard we adopt today is more faithful to the statutory scheme.

The district court did not adjudicate whether plaintiff had made a *prima facie* case of fraud in the underlying activities which generated the records at issue. Because fraud or illegality vitiates any privilege, as a matter of law, this was error. *See Tri-State Hosp. Supply Corp. v. U.S.,* 226 F.R.D. 118, D.D.C., 2005:

> The deliberative process privilege yields, however, when government misconduct is the focus of the lawsuit. In such instances, the government may not use the deliberative process privilege to shield its communications from disclosure. Thus, "if either the Constitution or a statute makes the nature of governmental officials' deliberations *the* issue, the privilege is a nonsequitur." *In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency,* 145 F.3d 1422, 1424 (D.C.Cir.1998) (citations omitted). Simply put, when there is reason to believe that government misconduct has occurred, the deliberative process privilege disappears. *Id.; In re Sealed Case,* 121 F.3d 729, 746 (D.C.Cir.1997). *See also In re Subpoena Served Upon Comptroller of Currency,* 967 F.2d 630,

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[31] *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570, 1581 (U.S. 2004).

634 (D.C.Cir.1992); *Alexander v. FBI,* 186 F.R.D. 170, 177 (D.D.C.1999) (citations omitted).

Where there is reason to believe that the documents sought may shed light on government misconduct, "the privilege is routinely denied" on the grounds that shielding internal deliberations in this context does not serve "the public's interest in honest, effective government." *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs,* 60 F.3d 867, 885 (1st Cir. 1995).

The privilege does not apply where the plaintiff's allegations "place the deliberative process itself directly in issue." *Dominion Cogen D.C., Inc. v. District of Columbia,* 878 F.Supp. 258, 268 (D.D.C. 1995).

Similarly, under the crime-fraud exception, communications with an attorney for the purpose of perpetrating or facilitating a crime or fraud in the future are not privileged. *United States v. De La Jara*, 973 F.2d 746, 748 (9th Cir. 1992). Some courts have held that the government's burden of proof under the crime-fraud exception is a preponderance of the evidence, while others have held it to be at least probable cause, as in *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1416 (11th Cir. 1994).

Just as it was in the district court, this Court's review of the uncontested evidence is cumulative, "taken together."

The district court's opinion refers to the Bates pages in docket # 28, volumes I and II. The court held (V # 104 at 1105-09):

Here, Plaintiff seeks to prove that Defendants participated in a massive cover-up of the true cause of the crash of Flight 800, which he believes was a missile strike from an errant missile launched by the United States military….

According to Plaintiff then, the government withheld evidence from the Flight 800 probe.[FN 7] The government altered evidence during the investigation.[FN 8] Evidence was removed

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FN 7 *See Affidavit of Rear Admiral Hill*, at ¶ 17, Exh. C, pp. 2-3 (Bates 46-47) (adopting claims of William Donaldson, a deceased Naval Commander, that the NTSB assisted DOJ in hiding a witness and that the head of the FBI investigation placed the investigation in "pending inactive status" to avoid testing missile theory and to hide witness testimony); *Affidavit of James Speer*, at ¶¶ 14-15 (Bates 184) (ALPA's representative during the official probe claims that FBI covered up positive test for nitrates and hid airplane part); *Perry Aff*., ¶ at 50 (Bates 253) (FBI agent stated witness was too far away to see what she claimed); *Lahr Aff.,* at ¶ 5 2-54 (Bates 273) (FBI would not allow Witness Group to conduct witness interviews, contrary to normal NTSB procedure); *Young Aff*., at ¶ 2(f) (Bates 394) (non-governmental parties to investigation had no access to FBI witness summaries for over year).

FN 8 *See Sanders Aff*., at ¶¶ 9-10 (Bates 178-79) (investigative journalist quoting TWA pilot and participant in investigation, who claims center wing tank was altered after it was recovered).

from the reconstruction hangar.[FN 9] The government misrepresented radar data, which does not correspond to the "zoom-climb" conclusion.[FN 10] Radar data[FN 11] and flight recorder data[FN 12] are missing. It appears that underwater videotapes of the debris from the plane have been altered.[FN 13]

FN 9 *See Lahr Aff.*, Exh. 10, at ¶ 1 (Bates 370) (citing International Association of Machinists and Aerospace Workers' finding that investigation team's Cabin Documentation Group stated cabin wreckage began to disappear from hangar, and this appeared to be due to FBI; FBI never provided list of items taken, tests done or results, or whether wreckage was returned).

FN 10 *See Fourth Schulz Aff.*, at ¶¶ 1-13 (electronic engineer claims that radar data shows immediate descent of aircraft after explosion).

FN 11 *See Stalcup Aff.*, at ¶ 4 (Bates 126) (systems engineer with Ph.D. in Physics states last Riverhead data sweep shows four data points deleted from where a missile trajectory would have been located).

FN 12 *See First Schulze Aff.*, at ¶ 5 (Bates 467) (NTSB investigators admitted "mishandling" last one-second line of data from tape; three to four seconds eventually determined to be missing).

FN 13 *See Speer Aff.*, at ¶ 30 (Bates 186-87) (videotape shown had gaps in time clock, and agent refused to show unedited videotape).

The government concealed the existence of missile debris field and debris recovery locations.[FN 14] At its first public hearing, the NTSB did not permit eyewitness testimony.[15] Many eyewitnesses vehemently disagree with the conclusions the CIA expressed in the video animation.[FN 16] The CIA falsely reported that only twenty-one eyewitnesses saw anything prior to the beginning of the fuselage's descent into the water.[FN 17] The FBI

FN 14 *See Donaldson Aff*., at ¶ 4, Exh. 1, p. 2 (Bates 69) (Commander William S. Donaldson, a recognized aircraft crash investigator now deceased, stated that missile established a separate debris field due to extreme energy level carrying it past plane, which was captured by radar video; NTSB made no effort at recovery in area, and FBI records and maps show it was specifically looking for missile body and first stage), ¶11 14-19 (Bates 54-55), Exh. 9 (Bates 88) (map of alleged debris field); *Speer Aff*., at ¶ 21 (Bates 186) (keel beam recovery location changed by FBI).

FN 15 *See Hill Aff*., at ¶ 7, Exh. 1, p. 2 (Bates 46) (no witnesses allowed to speak at hearings); *Lahr Aff.*, at ¶ 24 & Exh. 2 (Bates 269, 306-09) (FBI objected to use of CIA video and witness materials or testimony at public hearing).

FN 16 *See Brumley Aff*., at ¶¶ 1-2 (Bates 210) (representation in video isn't close to what he saw); *Wire Aff*., at ¶¶ 2-5 (Bates 214) (what was in video did not represent what he had told agent); *Fuschetti Aff*., at ¶¶ 1-2 (Bates 191) (pilot of other plane never saw vertical movement); *Meyer Aff*., at ¶ 5(b) (Bates 193) (aircraft never climbed); *Angelides Aff*., at ¶ 5 (Bates 215) (animation bore no resemblance to what he saw); *Lahr Aff*., at ¶ 66 (Bates 277) (not aware of any witness produced by FBI, CIA or NTSB that corroborated "zoom-climb" theory).

FN 17 *Donaldson Aff*., Exh. 16 (Bates 101) (Witness Group factual report states that, of 183 witnesses who observed a streak of light, 96 said it originated from the surface).

took over much of the investigation from the NTSB, which should have been in charge,[FN 18] and the CIA never shared its data and calculations of the trajectory study with others for peer review, which would have been appropriate.[FN 19]

Plaintiff also submits evidence that the government's conclusion that there was a center-wing fuel tank explosion and the government's "zoom-climb" theory were physically impossible under the circumstances. For example, evidence suggested there was no spark in the center-wing fuel tank.[FN 20]

FN 18 *See Speer Aff*., at ¶ 12 (FBI took over investigation even though not qualified); *Meyer Aff*., at ¶ 5(d) (Bates 192) (FBI would not allow NTSB Witness Group chairman to interview Meyer); *Gross Aff*., at ¶¶ 4-5 (Bates 211) (NTSB is charged with this sort of investigation); *Lahr Aff*., Exh. 5 (Bates 3 25-29) (Air Line Pilots Association stated that typical investigative practices such as witness interviews and photographic documentation, were prohibited or curtailed and controlled due to criminal investigative mandate), Exh. 10 (Bates 365) (trade union party to investigation was at first excluded by FBI).

FN 19 *See Hill Aff*., at ¶ 3 (Bates 50) (usual to share information and assessments for peer review); *Lahr Aff*. at ¶¶ 47-48,50 (Bates 272) (flight path group should have been formed and conclusions part of public record, but party process was violated; conclusions that cannot be independently verified are not valid for accident investigation purposes); *Young Aff*. at ¶ 2(f) (Bates 394) (non-governmental parties did not participate in simulation work).

FN 20 *See Donaldson Aff*., Exh. 1, p. 3 (Bates 70) (no signs of metal failure on wing's scavenge pump*); Lahr Aff*., at Exh. 10, § 4, ¶¶ 1-3 (Bates 366) (union report compiled by International Association of Machinists and Aerospace Workers found there was no spark in the center fuel tank).

Once an explosion occurred, engine thrust would have been cut off with the loss of the nose of the plane.[FN 21] Furthermore, the aviation fuel used in Flight 800 is incapable of an internal fire or explosion.[FN 22] The zoom-climb theory is impossible because at least one wing separated early in the flash sequence.[FN 23] Additionally, a steeper climb would likely result in a reduction in ground speed, which contradicts radar evidence.[FN 24] In fact, Plaintiffs evidence suggests the "zoom-climb" theory is aerodynamically impossible.[FN 25]

FN 21 *See Affidavit of Lawrence Pence* (retired Air Force Colonel and Defense Intelligence Agency aide), at ¶ 6 (Bates 259).

FN 22 *See Harrison Aff.*, p.2, at ¶¶ 1-9 (Bates 153) (combustible liquid, as used in airplanes, is not capable of internal fire or explosion because of lack of flammable vapors in tank).

FN 23 *See Rivero Aff.*, at ¶ 13 (Bates 264) (center-wing tank explosion collapses wings); *Stalcup Aff.*, at ¶ 9 (Bates 120) (debris field indicates left wing damaged early in crash sequence); *Young Aff.*, at ¶J 2(a)-(b) (Bates 393) (loss of nose, and then wings, caused significant reduction in forward momentum and kinetic energy).

FN 24 *See Donaldson Aff.*, at ¶¶ 68, 72 (Bates 62-63) (applies principles to evidence); *Stalcup Aff.*, at ¶ 3 (Bates 126) (examines physical principles).

FN 25 *See Hill Aff.*, at ¶ 4 (Bates 51) (airplane at more than twenty degrees inclination will stall because it will no longer produce lift); *Pence Aff.*, at ¶ 8 (Bates 259) (same); *Lahr Aff.*, at ¶ 62 (Bates 275) (plane would have stalled about one and a half seconds after nose separation); *see generally Third Lahr Aff.* (under physical characteristics concluded by government, aircraft could never have reached impact point).

> Finally, Plaintiff also claims that there were "military assets" conducting classified maneuvers in the area at the time of the crash, and several vessels in the area remain unaccounted for.[FN 26]
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> [FN 26] *See Donaldson Aff*., at ¶ 11 & Exh. 7 (Bates 53, 85-86) (there were 25 vessels in area of crash that NTSB and Navy were unwilling to identify), at ¶ 11, Exh. 6 (Bates 82-83) (Schiliro letter, on behalf of FBI, acknowledging existence of unidentified vessel), at ¶ 11 & Exh. 7 (Bates 269, 306-09) (three naval vessels on classified maneuvers and helicopter were part of radar hits); *Perry Aff*., at ¶ 9-12 (Bates 246) (military ship had passed close to shore earlier that day); *Hill Aff*., at ¶ 14 (Bates 43) (one surface ship left area at 32 knots). *See also Donaldson Aff*., Exh. 16 pp. 4-5 (Bates 99-100) (U.S. Navy P-3 was allegedly passing by, turned around, and briefly assisted in recovery efforts; P-3 had broken transponder); *Holtsclaw Aff*., at ¶¶ 2-4 (Bates 173) (radar tape shows U.S. Navy P-3 passed over plane seconds after missile hit).

Cumulative analysis of the government's probe into the Flight 800 tragedy presents an overwhelming case of promotion of fraud, and criminality. The district court observed: "Here, Plaintiff seeks to prove that Defendants participated in a massive cover-up of the true cause of the crash of Flight 800, which he believes was a missile strike from an errant missile launched by the United States military." V # 104 at 1105. The court also held that "on this motion, at least, Plaintiff's assertions have not been repudiated." *Id*. The government contested none of plaintiff's assertions, including allegations of fraud and cover-up. This, of course, vitiates any

privilege the government might otherwise have available to it. Had the district court properly applied the law to the government's privilege assertions, it would have ordered disclosure of what otherwise may be deliberative materials.[32]

Moreover, the record herein demonstrates that the CIA did not sufficiently analyze data before[33] it announced its zoom-climb conclusion to the world. The post-decisional records demonstrate the CIA's trial-and-error effort to harmonize the data[34] with the already released zoom-climb conclusion. The district court did not recognize this.

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[32] *See* Record 27 described by plaintiff IV # 90 at 1043 and III # 86 at 733-34, discussed by court V # 113 at 1195-96. Record 28 described by plaintiff IV # 90 at 1043 and III # 86 at 735-36, discussed by court V # 113 at 1196-97. Record 43 described by plaintiff IV # 90 at 1045 and III # 86 at 802-04, discussed by court V # 113 at 1197-98.

[33] *See, e.g., Clarke Decl*., IV # 90 at 1034-49, listing 23 contested CIA records, only 11 of which predate the broadcast of the CIA animation.

[34] *See, e.g*., *Schulze Decl*., II # 69 at 558 ¶ 13: "The CIA stated its video simulation was based on thousands of hours… However, no supporting aerodynamic calculations were begun until almost a year later." *And see Stalcup Aff*., II at 541 ¶ 14: "It appears that most, if not all of the flight path calculations provided in the release packet were carried out after the animation's rendering. Most of these calculations were hand-written and created after the animation's public release."

Plaintiff alleges serious misconduct. Helicopter pilot Major Fred Meyer won the Distinguished Flying Cross for rescuing downed pilots in North Vietnam during the Vietnam War. He is very familiar with the appearance of missile fire. As Meyer was piloting a Blackhawk helicopter on July 17, 1996, he scanned the horizon off Long Island's coast, and picked up the track of one missile just as it began carving a smooth arc in the sky; in an "overshoot-correct" mode. Major Meyer is also a lawyer. Plaintiff is in accord with Meyer's legal assessment that defendants are guilty of covering up[35] 230 counts of homicide. *Meyer Aff.*, I # 23 at 213 ¶¶ 56-59 (Lodged):

> This was not an accident. This aircraft was shot down. Suppose you had a Navy ship out there doing an exercise and they inadvertently fired a missile that locked on. You can say that that's an accident. I'm sorry – I guess my legal training doesn't allow me to think that. If you're conducting a missile shoot under the main traffic control routes into New York City, you have exhibited in my mind depraved indifference to human life. That's not an accident – under any statute – any codes anywhere. That's murder. Now, if it was a foreign force – that's murder…. The only reason we're here is to say it's no accident. Somebody shot this aircraft down. We want to know who. We want to know the truth.

"[A] basic purpose of the FOIA is to... [provide] a needed check against corruption." *N.L.R.B. v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 242 (1978).

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[35] *See, e.g.*, 18 U.S.C. § 3, *Accessory After the Fact*.

All FOIA exemptions are grounded in public policy considerations. Because Exemption 5 is concerned with protecting the deliberative process itself, some courts under some circumstances focus less on the material sought, and more on the effect of the material's release. Where fraud is present, the material's release works to deter future frauds.

II. ALTERNATIVELY, ABSENT FRAUD, THE DELIBERATIVE PROCESS PRIVILEGE DOES NOT APPLY TO POST-DECISIONAL RECORDS, AND THE APPLICATION OF THE FOIA'S BALANCING TEST WOULD MANDATE DISCLOSURE

A. The FOIA's Balancing Test Applies to Exemption 5

Even if the government's fraud would not result in the vitiation of its privilege claims, the trial court erred in holding that the "balancing test is inapplicable to Exemption 5." V # 104 at 1124 n. 33. The court in *General Services Administration v. Benson*, 415 F.2d at 880 (9th Cir. 1969) correctly observed that traditional equity principles are to be applied in deciding whether intra-agency memoranda is protected under exemption (b)(5):

> In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles, and determine the best course to follow in given circumstances. The effect on the public is the primary consideration.

Had the district court applied these equitable principles here, it would have found that plaintiff's analysis of the NSA's simulation's outputs was relevant, because plaintiff proved that the inputs were knowingly false.[36]

B. Post-decisional Records are not a part of the Deliberative Process

Exemption 5 cases contrast agency documents leading to a decision with documents explaining or interpreting the decision after the fact. Post-decisional records are not privileged. Moreover, explanations of decisions are subject to the increased public interest occasioned by the curiosity of knowing the basis for an agency decision already made.

The district court in its second order adopted the CIA's view that its records generated after the release of its zoom-climb animation were entitled to be treated as predecisional under the FOIA. V # 113 at 1194-95:

> The Court agrees with Plaintiff that the CIA animation was a final disposition of that agency. However, just because it was a final disposition does not mean it was the only final disposition. The CIA could have published some sort of addendum stating it had received and considered new data and that it had (or had not) changed its ultimate conclusion. Although this is not what occurred, it also is not what was required. Defendants have presented uncontroverted evidence that the CIA analyzed new

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[36] *See 3d Lahr Aff.,* IV # 87 at 964, 69 ¶¶ 5, 22): "[T]his computer run does enable us to identify some of the faulty assumptions… *** As you can see, if the aircraft had traded speed for altitude in a zoom-climb, it could never have reached the impact point…"

> data that led it to reach a conclusion. That the later conclusion was no different than the previous one does not preclude it from being "final" for purposes of FOIA. Therefore, the Court finds that so long as the records in question predate the CIA's second conclusion concerning what eyewitnesses saw (which incorporated new data provided by the NTSB), they may properly be considered "predecisional" (if they otherwise qualify for that status).

This analysis is incorrect. *See* Appellant's lodging, CIA video-animation, *What Did The Eyewitnesses See?* Excerpts from the animation's transcript appear above. This animation, or excerpts from it, was shown to tens of millions of Americans on CNN and all three networks. There was no CIA "second conclusion." As the court observed in *Rockwell Int'l Corp. v DOJ*, 235 F.3d 598, 602 (D.C. Cir. 2001), "[i]t appears to us that the [Supreme] Court meant in *Sears* to establish as a general principle that action taken by the responsible decision maker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of FOIA."

A document is predecisional when it is "received by the decisionmaker on the subject of the decision prior to the time the decision is made," *Sears, Roebuck & Co.,* 421 U.S. at 151, 95 S.Ct. at 1517. "As a matter of logical extension of this principle courts have established the general rule that pre-decisional, deliberative memoranda are privileged, while post-decisional memoranda — communications designed to explain a

decision already made — are not." *Exxon Corp. v. Federal Trade Com'n*, 466 F. Supp. 1088, 1097 (D.C. 1978).

The fact that "the CIA could have published some sort of addendum" is irrelevant. It did not, and so the CIA's video-animation was unequivocally its final report. A record is predecisional only if an agency can identify a specific decision to which it is predecisional. *Maricopa Audubon Soc'y v. United States Forest Serv.,* 108 F.3d 1089, 1094 (9th . 1997).

The district court's first order held that while certain CIA records are post decisional as to the CIA's conclusion, these CIA records are still entitled to pre-decisional protection, for two reasons. First, the CIA later decided not to change its conclusion, and second, the NTSB's later conclusion transformed these CIA records into being pre-decisional under the FOIA.[37]

Aside from improperly viewing the district court record as providing a factual basis (viewed in the light most favorable to plaintiff) for a finding that there was a "second CIA conclusion," the court appears to have

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[37] Order, V # 104 at 1142: "The CIA video animation surely has the status of a final agency decision, but… the August 23, 2000 NTSB Aircraft Accident Report also is a final agency decision, and to the extent that it does not expressly incorporate the earlier CIA findings, further work on the matter after the November 17, 1997 broadcast would be predecisional."

concluded that the CIA and NTSB worked together on the zoom-climb conclusion, when, apparently, the NTSB's search revealed the existence of only two CIA-originated records.[38]

Plaintiff's need to amend his Complaint[39] the first time, to add the CIA as a defendant, became apparent only after the NTSB denied having any records upon which the CIA based its zoom-climb conclusion.[40]

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[38] *See e.g., Moye Decl*., Defendant's Excerpts, Vol. I at 31 ¶ 31: "[T]wo files found during the search for responsive materials [were] related to the animations contain[ing] data provided by the Central Intelligence Agency (CIA)." *Note*: Two records identified by the CIA as being at issue in its second summary judgment motion have CIA numbers affixed, but are also identified as the December 1997 "NTSB Record 33," and the undated "NTSB Record 34." *See Clarke Decl*. at 1052 ¶ 66; *id*. 1054 ¶ 76. Records at IV # 86 at 900-98 and *id.* at 937-941.

[39] *First Amended Complaint,* Docket # 5, Dec. 17, 2003 ¶ 15: "The NTSB's October 2, 2003 *Vaughn* index indirectly denied having the records upon which the November 17 [1997] CIA-produced video was based…"

[40] *See e.g., Moye Decl*., Federal Appellant's Excerpts, Vol. I at 27 ¶ 38: "The NTSB does not know what, if any, information was used by the CIA in creating its video. The NTSB has no records responsive to requests 69, 79, 89, 95, 99, 109, 116, 123, 130, 137, and 144." *See* I # 23, above-referenced FOIA requests to the NTSB for records upon which CIA zoom-climb conclusion was based (formulas & data including simulation inputs, simulation itself, its printouts, Radar & FDR & CVR correlations with the zoom-climb, Boeing-supplied records, and any other records of the CIA's process of arriving its zoom-climb conclusion).

Moreover, the NTSB cannot, as a matter of law, cede primary jurisdiction to the CIA in violation of the NTSB's mandatory enabling statute,[41] try as it might. *See, e.g.*, *Gross Aff.*, V # 104 at 1124 ¶ 4-5. Lodged:

> [B]y a mandate of the Congress, there is one body, the National Transportation Safety Board, that is entirely charged with the investigation of any transportation accident… Any time you take away from the NTSB, which, by congressional charter, must be in charge, and have the FBI say that they [NTSB] will not investigate or interrogate any witnesses whatsoever, that immediately raises an issue in my mind about the politics of it.

Because the CIA never had jurisdiction to make any conclusion, its records are not entitled to protection as being pre-decisional. The government's hiding of which agency had jurisdiction should have consequences.

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[41] 49 U.S.C. § 1131 ¶ (a)(2), *General Authority*

* * *

(2) An investigation by the Board under paragraph (1)(A)-(D) or (F) of this subsection has priority over any investigation by another department, agency, or instrumentality of the United States Government.

III. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFF HAD MET HIS BURDEN OF PROOF OF SHOWING GOVERNMENT MALFEASANCE TO DICTATE DISCLOSURE UNDER THE FOIA'S PRIVACY EXEMPTIONS' BALANCING TEST

This case involves overwhelming evidence of government impropriety. The district court properly applied these uncontested material facts to the balancing test under Exemptions 6 and 7(C) (*infra* n. 30). V # 113 at 1187-88:

> *See Gordon v. Fed. Bureau of Investigation*, 388 F. Supp. 2d 1028, 1044 (N.D. Cal. 2005). In *Gordon*, plaintiffs argued that government redactions of Transportation Security Agency employees' names under Exemptions 6 and 7(C) were improper. The court found that the Government's creation and maintenance of travel watch-lists were part of government policy-making, and that "[k]nowing *who* is making government policy with respect to the watch lists is relevant to understanding how the government operates." *Gordon*, 388 F. Supp. 2d at 1041 (emphasis in original). The same could be said here. The FBI agents were integrally involved in developing the information that the government points to for its ultimate conclusion regarding the probable cause of Flight 800's crash. Similarly, when the reliability of an investigation's methodology is in doubt, investigators have less of a right to be sheltered from public scrutiny. *Castaneda v. United States*, 757.F.2d 101, 1012 (9th Cir. 1985).
>
> [B]ecause Plaintiff has alleged that "responsible officials acted negligently or otherwise improperly in the performance of their duties," the agents' privacy interest is diminished. *Favish*, 541 U.S. at 174; *see SafeCard Servs. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1205-06 (DC. Cir. 1991) (access to name which might confirm or refute evidence of agency impropriety increases public interest); *Neely v. Fed. Bureau of Investigation*, 208 F.3d 461, 464 (4th Cir. 2000) (with allegations of agency

> impropriety, release of names would help supplement public understanding of the agency's activities).
>
> The Court concludes that the release of the names of FBI agents could not reasonably be expected to constitute an unwarranted invasion of their privacy.

The government's analysis of the district court's order, put succinctly, is that "in six out of the last six such cases to reach the [Supreme] Court, privacy prevailed…. [and thus the] district court's judgment is directly contrary to settled Supreme Court jurisprudence…" Brief at 18. But holdings in cases where the requestor had not met his burden of showing government malfeasance by "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" under *Favish*[42] are meaningless without comparing the facts of those cases to the facts in the instant case. Such a comparison would be futile here because the government failed to dispute any material fact alleged, and, thus, these facts must be taken as true. Here, contrary to the government's bald assertion that plaintiff "failed to meet the threshold evidentiary test for establishing misconduct under *Favish*" (Brief at 12), the plaintiff has far exceeded his burden of proof of showing government

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[42] *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570, 1581 (U.S. 2004).

malfeasance to dictate disclosure under the balancing test applicable to the FOIA's privacy exemptions.[43]

Defendants also argue that "the lower court's rationale is also contrary to common sense since the sight of reporters staked out at the homes and businesses of newsworthy persons who 'decline to be interviewed' is a daily occurrence." Brief at 22. The government's view of the news media's interest in reporting eyewitness accounts in this matter is the opposite of the truth of the matter. The sad fact is that any eyewitness who wants to share

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[43] Other invalid government arguments:

- "[T]he lower court require[ed] the government [to]… proffer assertions by the eyewitnesses that they wish to avoid contact in order for Exemption 6 and/or 7(C) to apply" Brief at 20-21;
- "[A]fter Favish, a requester who asserts government misconduct as the public interest is held to a higher standard…" *Id.* at 32;
- "[T]he district court's statement that the 'CIA falsely reported that only twenty-one eyewitnesses saw anything prior to the beginning of the fuselage's descent into the water'… [is] incorrect… [because] the *Witness Group Report* stating… 'that of 183 witnesses who observed a streak of light, 96 said it originated from the surface'… concerns the timing of the sighting, while the referenced report concerns the origin of the sighting" *Id.* at 35-36;
- "[Claims of] government impropriety… involves pure speculation on the part of the district court with no evidentiary support in the record" *Id.* at 36; and
- "There simply is no support in the record that either the NTSB or the CIA (the named parties to this action) or the FBI (not a party) engaged in any improper conduct with regard to the witness statements." *Id.* at 38.

his or her observations with the public via the media must purchase advertising to do so. *See, e.g.*, Aug. 15, 2000, *Washington Times*' full page advertisement, *We Saw TWA Flight 800 Shot Down by Missiles*, subtitled *And We Won't Be Silenced Any Longer*.[44] II # 28 Ex. 7 at 361.

The government's Brief refers to the NTSB public docket entry of its February 2000 45-page *Witness Group Study Report* (Brief n. 1 at 6), authored by Dr. David L. Mayer. It was psychologist Dr. Mayer's task of dissembling witness accounts for media consumption.[45] Defendants cite Mayer's Report, which, of course, dismisses eyewitness accounts of missile fire, to give the Court the impression that the government fairly dealt with eyewitness accounts. Quite to the contrary, the inclusion of this Report, while excluding the October 1997 *Witness Group Factual Report* (I # 28 at 102) from the NTSB's public docket, is consistent with its pattern and practice of its obfuscation of evidence. Unlike Mayer's Report, the 1997 *Factual Report* recounts that the FBI forbade the NTSB Witness Group from

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[44] The advertisement's subtitles also include: *Hundreds of Eyewitnesses Know the FBI and CIA Lied!*; *We Want The National Transportation Safety Board To Tell The Truth*; *Here Are A Few Of The Hundreds Of Our Statements The FBI Concealed*, followed by six eyewitness accounts, and ending with, *America Must Know The Truth*.

[45] Mayer's explanations of six eyewitness accounts is riddled with falsehoods. *See* II # 28 at 392-93. *See also* Lodging, Aug. 2000 excerpts of "Sunshine Hearing."

interviewing any eyewitnesses, but finally (after the group was disbanded then re-formed) provided the Group access to 458 (of 756 available) redacted FBI 302 interview reports, on the condition that "no notes were taken and no copies made." Notwithstanding this curtailment of information available to the NTSB's Witness Group, it was able to determine that, according to these FBI 302s, 183 eyewitnesses had seen "a streak of light," 96 of whom "said that it originated from the surface."

IV. THE GOVERNMENT MUST DISCLOSE ITS COMPUTER TIME-STEP PROGRAM RUNS, WHICH SIMULATE THE AIRCRAFT'S FLIGHT PATH

Time step simulation programs are a common tool used by aerodynamicists.[46] The government's time-step simulations are central to this action.[47] Here, the CIA chose to use an agency's simulation whose

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[46] V # 104 at 1135 (Order citing *4th Hoffstadt Aff.*, II # 63 at 546-55): "CFD computer programs are used in the aerospace industry to calculate and simulate aircraft performance… AMI also sells the geometry of the 747-200 and the 747-300 for use with VSAERO… one can replicate the type of aerodynamic data contained in the withheld records…."

[47] *See 3d Lahr Aff.,* IV # 87 at 969 ¶ 23: "This lawsuit seeks the input data and formulas used for the CIA and NTSB simulations so that they can be either verified or disproved…. [A]ny competent aerodynamicist can write an iterative program for the flight path trajectory." (emphasis in original)

disclosure is exempt under FOIA's Exemption 3.[48]

A. The Inputs to the NSA's Simulation are Segregable

The "tabular" printout of the NSA's "MVS Trajectory" time-step simulation (IV # 86 at 741-768, plaintiff's Record 32) shows the outputs for the Fight 800 zoom-climb. The district court treated plaintiff's argument that the inputs should be ordered disclosed as an argument for disclosure of the simulation itself.[49]

The court ordered the NSA to submit an affidavit *in camera* to include "whether any portion of the program is segregable." IV # 95 at 1058. The requirement regarding segregability applies in Exemption 3 cases so that agencies must divulge all portions of documents that are not specifically

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[48] 5 U.S.C. § 552(b)(3): "(b) This section does not apply to matters that are * * * (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[].

[49] Order, V # 104 at 1151: "Plaintiff's argument… is based largely on his contention that the NSA failed to disclose (1) the dates the simulation program was used and (2) the inputs into the simulation. These arguments are irrelevant and misplaced. Defendants seek summary judgment that the program itself is exempted from disclosure, not merely that the simulation's inputs are exempt."

exempted from disclosure by statute.[50] The district court incorrectly held that the applicability of Exemption 3 to the simulation itself precluded disclosure of its inputs, irrespective of segregability.[51]

B. The NTSB's In House Time-Step Simulation of Flight 800 Must be Fully Disclosed

The NTSB's simulation is an Excel program, written and operated solely by the NTSB's Dennis Crider. Full disclosure could be accomplished by production of the program itself with its run of the Flight 800 simulation, which would allow plaintiff to analyze its formulas, inputs, assumptions, and outputs. Here, the Court commented on the NTSB's inputs in its discussion

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[50] *See Irons v. Gottschalk*, 548 F.2d 992 (D.C. Cir. 1976); *Hayden v. Nail Sec. Agency*, 608 F.2d 1381, 1390 (D.C. Cir. 1979), *cert denied* 446 U.S. 937 (1980).

[51] Order, V # 104 at 1152 n. 51: "Because Exemption 3 is applicable as to the software in its entirety, the Court need not address Plaintiff's contentions as to… the government's supposed failure to demonstrate that 'no segregable, nonexempt portions remain withheld.' *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686,700 (D.C. Cir. 1983), *vacated in part on oth. grounds,* 724 F.2d 201 (D.C. Cir. 1984); *Allen v. Cent. Intelligence Agency*, 636 F.2d 1287, 1293 (D.C. Cir. 1980)."

Cf. Paisley (remanding for segregation and disclosure of Exemption 3 materials and for a more thorough *Vaughn* index); *Allen* (remanding for *in camera* inspection).

of the deliberative process privilege,[52] but did not specifically order disclosure of the Flight 800 computer run. Additionally, the NTSB should be ordered to disclose its "five pages of the main-body simulation executable,"[53] which plaintiff's experts will also analyze.

The court did order the NTSB to produce its time step simulation,[54] while recognizing that the NTSB had located records specific to its Flight 800 simulation run.[55] But it is not clear whether the court ordered disclosure of all records of the NTSB's in house time-step simulation of Flight 800.[56]

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[52] Order, V # 113 at 1203: "Plaintiff does not challenge that this record is predecisional, and the Court finds that it is. However, the Court does not agree with Defendants that the content of the simulation program, as opposed to that of the input or output files, is deliberative."

[53] Order, V # 113 at 1193 n. 29: "In response to the Court's order for *in camera* submission of the NTSB records, Defendants submitted 'five pages of the main-body simulation executable… This printout appears to consist of data matrices in binary code and would undoubtedly be incomprehensible to anyone lacking computer, technical or scientific expertise."

[54] Order, V # 113 at 1193.

[55] *Id.* at 1169: "[NTSB has] a copy of the executable computer simulation program from the TWA flight 800 investigation…. Later, Crider located both 'the last control system source file and the aerodynamics source file specific to TWA Flight 800.'"

[56] Plaintiff intends to seek leave of this Court to file a motion in the district court seeking clarification on this issue under Fed.R.Civ.P. 60(a).

C. The NTSB's Time-Step Simulation Run of the Descent of Flight 800's Debris Must be Disclosed – its BALLISTIC Program

The court did order the NTSB to provide the BREAKUP and BALLISTIC computer programs themselves (V #113 at 1163), and to "search for records of the formulas and data used for the BREAKUP program," but did not order a search for the inputs used for Flight 800 run of the BALLISTIC program. *Id.* The court agreed with the NTSB that, although plaintiff had requested both programs themselves, the BALLISTIC program was not used in the NTSB's computation of the zoom-climb.[57]

But the court was mistaken. Plaintiff specifically requested these inputs,[58] and, in any event, the flight-path of the debris descending is inextricably a part of the government's theory that two-thirds of the aircraft ascended.

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[57] Order, V #113 at 1176: "Defendants have adequately established that no records were responsive to FOIA request 77 because the BALLISTIC program was not used in any manner in connection with the 'zoom-climb conclusion.'"

[58] *See* NTSB FOIA Request 77, I # 23 at 19: "Formulas & Data entered into [the] computer BALLISTIC Program. *See* NTSB Exhibit 22A, p. 13."

V. THE GOVERNMENT'S SEARCH WAS INADEQUATE

A. Defendants must Search for Specific Records

After having been ordered to do so by the court, the parties filed their *Joint Chart* listing the "Records With Contested Withholdings." IV # 97 at 1060-77. In the accompanying Notice of Filing, plaintiff identified 15 "responsive records… for which defendants have failed to account," some of which are sets of records, such as Radar data. Plaintiff submitted evidence[59] in support of the existence of each of these records,[60] most of which are in electronic format, including a computer program the CIA claims to have used to correlate radar data with witness sightings,[61] and radar files characterized by plaintiff as the "work product of many hours of CIA radar tracking analyses and are key evidence…"[62]

The court recognized that plaintiff "argues that the CIA failed to identify nine responsive records which it maintains in electronic format."

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[59] *See Clarke Decl.*, IV # 90 at 1034-57, Excel chart of records at issue, cross-referencing evidence of existence of unidentified records.

[60] *See* evidence of existence of unidentified record following plaintiff's *Record Disposition Report*s, III # 86 at 659, 662, 666, 678, 688, 712, 719, 723, 726, 731, 772, 778, VI at 894, 930.

[61] *See Clarke Decl*., IV # 90 at 1045, Rotate MLM program.

[62] Plaintiff's *Document Disposition Report*, III # 86 at 731.

However, the court held, "Plaintiff offers no persuasive basis for finding that some of these records even exist." V # 113 at 1181-82.

The district court did not consider plaintiff's evidence on the existence of each of the unidentified records, and the CIA "ignored indications in the documents found in its initial search that there were responsive records elsewhere." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (DC Cir. 2003). The search was inadequate from the fact that the records themselves reveal "positive indications of overlooked materials." *Founding Church of Scientology of Washington, D. C., Inc. v. National Sec. Agency*, 610 F.2d 824, 837 (DC Cir. 1979). S*ee also Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1185 (DC Cir. 1996); *Krikorian v. Department of State*, 984 F.2d 461, 468 (DC Cir. 1993); *Weisberg v. U.S. Dept. of Justice*, 627 F.2d 365, 369-70 (DC Cir. 1980).

The CIA produced no Radar, Flight Data Recorder, Cockpit Voice Recorder data, or any other electronic record.

B. The CIA Must Produce the "Tauss Report" on Eyewitnesses

On December 5, 2003, the *Washington Times* reported on page A6 that the CIA had recently declassified a record generated during its probe,

written the CIA's Randolph M. Tauss.[63] The Tauss Report was so superlative, wrote the *Times*, that the CIA awarded Mr. Tauss a medal. The piece states that the CIA evidence was "extensive and compelling," but that "a few people" "persist" in their belief that the "government, for whatever reason, is covering up the true cause."

The district court accepted the CIA's bald claim that the Tauss Report was not among the records at issue.[64] However, in this action for disclosure of all records upon which the zoom-climb was based, Lahr does not see how a key report explaining away hundreds of eyewitness reports of missile fire is not a responsive record.

The *Times*' verbatim quotes satisfy the requirement that the publicly released information be "as specific as" the disclosure, and its being declassified means that it was "officially disclosed."[65] The CIA remains mute on its possession of this declassified award-winning responsive record.

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[63] *Wash. Times* "CIA on Flight 800," Dec. 5, 2003, the II # 63 at 545.

[64] Order, V # 113 at 1189: "The 'once-secret' report identified in the *Washington Times* article is not among the documents responsive to Plaintiff's FOIA request."

[65] *Cf.* CIA argument reprinted *Plaintiff's Statement of Genuine Issue*, III # 64 at 585 ¶ 53: "Even assuming, *arguendo*, that the name identified in… *Inside the Ring*, Wash. Times, Dec. 5, 2003, at A6, is a name that the CIA is withholding in this case, the association of that name with the information contained in the records responsive to plaintiff's request has not been officially acknowledged. [2nd Bur. Decl. ¶ 9]."

Perhaps there is no Tauss Report, or Randolph M. Tauss. The CIA must either produce the Tauss Report or explain its conspicuous absence in its *Vaughn* index.

VI. THE GOVERNMENT'S *VAUGHN* INDEX WAS INADEQUATE

"The *Vaughn* index 'functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision.'" *Favish v. OIC*, 217 F. 3rd at 1176 (9th Cir. 2000) (internal citation omitted), rev'd oth. gr. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

A. The government's *Vaughn* index must identify records correlating the Radar, Flight Data Recorder, Cockpit Voice Recorder, debris field data, and radio transmissions with its zoom-climb conclusion

The district court recognized that plaintiff's request encompassed "records of the timing sequence of the zoom-climb, including… radar, radio transmissions, and the flight data recorder… [and] correlation of the zoom-climb calculations with the actual radar plot" (V # 104 at 1103-04), but held that plaintiff had failed to establish "that the NTSB must have records of correlation of flight trajectory radar, radio transmissions and flight recorder data," having offered this "bald assertion [] based solely on his expert's opinion." V # 113 at 1172.

However, the defendants claim to have correlated radar and FDR data with its zoom-climb hypothesis, and the district court several times referred to these correlation records.[66] Defendants' *Vaughn* index should identify the records of the correlations it claims to have performed. Disclosure would likely reveal insufficient efforts in correlating the Radar and FDR data with the zoom-climb conclusion before its very public release.

B. The CIA's *Vaughn* index must provide Basic Information regarding the Simulation

The CIA's index omits the dates it allegedly ran the time-step simulation, and does not state whether it was the CIA or NSA who allegedly ran it, despite plaintiff's FOIA requests having specifically sought that information,[67] and despite plaintiff's having apprised the district court of this

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[66] *See, e.g.*, Order, V # 113 at 1174: "Brazy stated that the 'animations are a visual depiction of the data presented from the radar sources, the digital flight data recorder, and/or the data from the simulations presented in the Main Wreckage Flight Path and Trajectory Studies' *Id*…. [Brazy] also noted that the animations used 'verified data and FDR data'… *Id.* at 17-18. Crider agreed with Brazy's descriptions. *Crider Decl.*, at ¶¶ 50-51." *See also* Order V # 113 at 1203: "[Simulation results] best represent the action of the aircraft as reflected by the radar data. *Id.* at ¶¶ 8-9."

[67] *See* FOIA request 77 to CIA, II # 57 at 526. *See also* Order, V # 104 at 1103: "[Plaintiff's requests include] all records reflecting whether or not the NTSB conducted the computer simulations in-house, and, if not, all records of when, where, and by whom the computer simulations were performed."

Vaughn deficiency. As plaintiff noted in the district court, the CIA:

- Produced two printouts of a simulation, one dated "5/16/97," and the other bearing two dates, "3/98" and "3/15/04," and
- The results, or outputs, of the two printouts are different from one another.

Plaintiff is entitled to know at least whether the CIA claims that both records[68] were generated from the NSA's MVS program. The only discovery plaintiff had was the CIA's *Vaughn* index. Every *Vaughn* index must identify the record to which it refers, and here, that identification includes the identification of the software allegedly used to generate both printouts produced. (Plaintiff believes that the "5/16/97" graphical printout is not what it purports to be, but, rather, is merely made up graphs.[69])

"The description and explanation the agency offers should reveal as much detail as possible as to the nature of document without actually disclosing information that deserves protection." *Oglesby v. US Dept. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996).

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[68] *See* simulation printouts: III # 86 at 703-11, Graphical printout entitled "*TWA 800 Flight Simulation*," handwritten date "5/16/97;" and III # 86 at 703-11, NSA tabular printout entitled *"MVS Trajectory Program*," handwritten dates "3/98" and "3/15/04."

[69] *See Clarke Decl.*, IV # 90 at 1029 ¶ 19: "As far as plaintiff can tell, the CIA did not identify any time-step simulation predating its November 1997 public release of its zoom-climb animation."

C. The Court must review the NSA's *in camera* Affidavit for a finding of Segregability of Simulation Inputs, and should Order it Unsealed

The NSA's *in camera* affidavit is said to include "whether any portion of the program is segregable." IV # 95 at 1058 (discussed *supra*). Without disclosure here, the government's *Vaughn* index is patently inadequate to permit this Court to decide whether Exemption 3 was properly claimed.

Additionally, the affidavit should be unsealed, after redactions, at the Court's discretion, to permit plaintiff to file a transverse affidavit on remand, if necessary.[70] The common-law creates a "strong presumption in favor of public access to judicial proceedings," and the party seeking to seal records is obligated "to come forward with specific reasons why the record, or any part thereof, should remain under seal." *Johnson v. Greater Southeast Community Hospital Corp.*, 951 F.2d 1268, 1277-78 (D.C. Cir. 1997). "Under the First Amendment, the press and the public have [a] presumed right of access to court proceedings and documents." *Oregonian Publishing*

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[70] The affidavit should include, *inter alia*, a factual basis for the Court's determination of whether the government's disclosure of its simulation outputs does not work as a waiver of the nondisclosure of its inputs. *See, e.g., In re Sealed Case*, 676 F. 2d 793 (DC Cir. 982) (holding it inequitable to allow a corporation to foster the appearance of full disclosure and later withhold records that are properly characterized as underlying documents of its report to the SEC).

Co. v. United States District Court, 920 F.2d. 1462, 1465 (9th Cir. 1990) *cert. denied*, 501 U.S. 1210 (1991).

D. The Government's *Vaughn* index should address All Records that plaintiff identified as Existing and Responsive

As discussed *supra*, plaintiff identified 15 "responsive records… for which defendants have failed to account," and submitted evidence in support of the existence of each of these records, most of which are in electronic format. The government's *Vaughn* index should identify all these records.

E. The CIA's *Vaughn* index should include Affidavits made on Personal Knowledge

Generally, affidavits made in support of summary judgment must be based on personal knowledge under Fed.R.Civ.P. 56(e). But under the FOIA, agency affidavits may be made based on information made available to the affiant in his or her official capacity. Here, plaintiff proved fraud. Thus, the government has much to hide in this litigation. The government should not be afforded the opportunity to make representations in its affidavits without exposure to court sanctions or criminal liability. None of the CIA's affidavits are based on personal knowledge.

In 2001 the CIA responded to plaintiff's FOIA request for the records at issue by claiming that "the CIA simply incorporated the NTSB

conclusions into our videotape...", and, that, "[a]ccordingly, you may want to submit your request to the NTSB…" This blatant fabrication was the CIA's first representation made in bad faith.

The CIA's final misrepresentation was made in August of 2005, to both plaintiff and the district court, when it filed records at issue. The CIA had removed the single most significant page in the case, the *TWA 800 Flight Simulation* graph reporting the zoom-climb. It depicts a climb to about 16,200 feet – 800 feet less than the animation's 17,000 foot zoom-climb.[71] That is 400 feet less than Record 32's[72] reported 16,600 foot climb. Later, the CIA later denied that this graph was a part of its *TWA 800 Flight Simulation* record.[73]

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[71] *See* CIA zoom-climb animation transcript, I # 28 at 118. *See also* animation, lodged.

[72] See *3d Lahr Aff.*, IV # 87 at 964-75 (analysis); IV # 90 at 1044 (description); III # 86 739-40 (*Record Disposition Report*); *Id.* at 741-68 (Record); *Id.* at 756 (climb altitude output in feet – "16,602.1732").

[73] IV # 101 at 1078 ¶ 4 *Plaintiff's Errata to Joint Chart*: "The CIA omitted from its submission to the Court the most significant of these graphs: The zoom-climb graph… is attached… " *See* graph *Id.* at 1097 and III # 86 at 708.

The CIA's conduct in between was not much better. In 2005 the CIA made three releases to plaintiff,[74] and later filed the records with the district court. By the time the CIA filed the records with the district court, plaintiff had almost finished organizing the CIA records already produced to him.[75] But the records filed in the district court were grouped entirely differently, as if the CIA had shuffled the pages before submitting them to the court. Significantly, the CIA had changed the seven-digit identifying number on many of the records before filing them with the court.[76] Adding to the confusion, the CIA's accompanying *Vaughn* index cited seven digit numbers

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[74] Feb 28, 2005, 261 pages; May 12, 2005, 585 pages; June 17, 2005, 73 pages.

[75] *See* Order, V # 113 at 1180: "Plaintiff argues that multiple records contained the same MORI numbers, and, conversely, other records were spread out in pages containing differing MORI numbers."

Notwithstanding the confusion, plaintiff was able to organize the records. He did so by numbering the records one through 81, grouped by agency, in chronological order with the undated records following with dated documents. Records for which defendants failed to account are denoted by a letter following the number (*e.g.*, 4A, 5A, 6A, and so on). *See* Excel chart, IV # 90 at 1034-57. *See also* records at issue, preceded by *Record Disposition Reports*, III # 86 at 653 through IV at 961.

[76] *See, e.g.*, Joint Chart, IV # 97 at 1068-75, listing six of 23 records by two seven-digit identification numbers. *See also* Judgment of the Court, V # 118 at 1209-10, ordering disclosure of four CIA records identified by two seven-digit numbers.

that corresponded to none of the seven digit numbers appearing on any records produced to either the court or plaintiff,[77] rendering the index useless. The CIA also omitted from its court filings the records which it claimed it produced without redaction,[78] further complicating plaintiff's task of comparing the records that he had received from the CIA, with those filed with the court.

Two months after having filed its *Vaughn* index (referring to seven digit numbers which did not match any records ever produced in the case), the CIA filed a table cross-referencing its heretofore unknown sets of seven digit numbers to the numbers appearing on the court-filed version of its production,[79] enabling plaintiff continue on unscrambling CIA productions.

About a year later, under court order, the parties submitted a chart identifying each contested record by both plaintiff's identifying number, and by the CIA's seven digit number(s). The chart included the heading, *Defs'*

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[77] *See* Defendant's Excerpts, Vol. I, CIA *Vaughn* index, Docket # 57 at 284-313, identifying records by seven digit "Document Numbers."

[78] Order, V #113 at 1179: "On August 16, 2005, the CIA supplemented this *Vaughn* index by submitting the *Second Buroker Declaration*, to which was attached copies of all records that were withheld only in part by the government."

[79] *See* Defendant's Excerpts, Vol. II, *2d Buroker Decl.*, Docket # 61 at 320.

Alternative ID No., under which appeared seven digit numbers corresponding to six records that the CIA had provided to plaintiff before filing the same records (with different identifying numbers) with the district court.[80] (The chart excluded the CIA's *Vaughn* index's meaningless seven digit "Document Number.")

The district court discussed most of plaintiff's complaints, but held that, "[n]otwithstanding that the CIA's MORI document numbering system is confusing and frustrating" (V #113 at 1180), "[t]he government's explanation is adequate, and Plaintiff's allegations are not evidence of governmental bad faith." *Id.* at 1181. The court did not consider the CIA's 2001 FOIA response misrepresenting that only the NTSB had generated responsive records, nor the CIA's final bad faith act of removing from its court-filed version of the *TWA 800 Simulation* printout the zoom-climb altitude graph.

Under *Allen v. CIA,* 636 F.2d 1287 (D.C.Cir.1980), agency bad faith is relevant because it undermines the credibility of the agency's statements in its affidavits. *See also Rugiero v. U.S. Dept. of Justice*, 257 F.3d 534 (6th Cir. 2001), observing, "'where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would *publicly*

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[80] Joint Chart, IV # 97 at 1066-76.

embarrass the agency or that a so-called '*cover up*' is presented, government affidavits lose credibility.' *Jones,* 41 F.3d at 243 (quoting *Ingle,* 698 F.2d at 267) (emphasis added)."

Should this matter be remanded for further proceedings, any further CIA affidavits should be based on personal knowledge, where practicable, including, at a minimum, the identification of which facts are based on personal knowledge and which facts are made based on information made available to the affiant in his official capacity.[81]

VI. CONCLUSION

The district court's failure to apply common law doctrines to its analysis of the government's privilege assertions does not require this Court to remand the privilege issue to the district court, because the record is sufficiently complete, and this Court can conduct the analysis itself.

Should this Court have reservations about finding that the government's conduct constitutes crime and fraud, a remand should include

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[81] Obvious issues about the NSA record include why it bears two dates, both of which are after the animation's release, and one of which is over six years after the CIA's release of its zoom-climb conclusion and over three years after the NTSB issued its final report. Another glaring irregularity is the fact that the outputs on the "5/16/97" graphs do not match the outputs on the "3/98 and 3/15/04" tabular printout.

instructions that plaintiff be granted leave to file a cross-motion for summary judgment. Perhaps, in light of plaintiff's very serious allegation of 230 counts of manslaughter and ensuing cover-up, in fairness and under due process, the government should have the opportunity to file a *Statement of Genuine Issues*, mandating contravening affidavits, on pain of conspicuous admission of crime and fraud.

In Federalist Paper No. 51, James Madison wrote that, although elections would be the "primary control on the government," "experience has taught mankind the necessity" of a system of checks and balances, to serve as an "auxiliary precaution" against corruption. Edmund Burke is commonly regarded as the source of the news media's being referred to a "Fourth estate" – the notion that the press (or media) is a fourth branch of government – which was, in Burke's eyes, more important than three branches of government ("Three Estates in Parliament; but in the Reporters' Gallery yonder, there sat a Fourth estate more important far than they all.")

In his second inaugural address, Thomas Jefferson, in discussing government criticism by the press, said that "[n]o experiment can be more interesting than that we are now trying, and which we trust will end in establishing the fact, that man may be governed by reason and truth. Our

first object should therefore be, to leave open to him all avenues of the truth."

The adjudication that plaintiff seeks – that the government's assertions of privilege are vitiated by its fraud in covering up the true initiating event of the Flight 800 disaster – is adjudication of a blatant failure of the experiment of our Founding Fathers.

TWA Flight 800 was shot from the sky in front of hundreds, if not thousands, of citizens, killing 230 people. The government hid which agency had jurisdiction, while altering, deleting, and hiding the evidence, *all of which is consistent only with missile fire*. The non-governmental parties to the "investigation" smuggled out evidence for independent analysis and to give to the media. Then the government closed the case, based on an unequivocally impossible theory, after which the news media repeatedly reported the government's assertion that there is "no evidence" to contradict its theory.

The Founding Fathers' experiment employed a system of checks and balances as auxiliary precautions because they knew from the history of mankind that unchecked government power leads to criminality. Even in situations in which the Judiciary usually defers to the Executive, such as when the President invokes a privilege, "the exercise of jurisdiction [is]

warranted" "[w]hen judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

VII. RELIEF SOUGHT

WHEREFORE, plaintiff seeks the following equitable relief:

- An adjudication that the government's assertions of privilege are vitiated by its fraud in covering up the true cause of the Flight 800 disaster, and a corresponding order of disclosure.

- Alternatively, a remand for a determination of the issue of fraud and illegality, after the filing, and adjudication, of Lahr's cross-motion for entry of partial summary judgment.

- An order of disclosure consistent with the conclusion that the deliberative process privilege under Exemption 5 is subject to the FOIA's balancing test.

- An order of disclosure consistent with the conclusion that CIA records generated after its broadcast of its zoom-climb animation are post-decisional.

- An order of disclosure of all records associated with the NTSB's time-step simulation of Flight 800, as well as its simulation run of the descent of Flight 800's debris.

- This Court's *in camera* inspection, and unsealing after the Court's redactions, of the NSA affidavit.

- An order of disclosure after a finding that the inputs to the NSA's simulation are segregable from the simulation itself, and, thus, do not fall within the purview of Exemption 3.

- Remand to the district court with instructions to order the government to conduct a search for additional responsive records, including the 15 specific records identified by plaintiff, as well as records of any correlations of the zoom-climb conclusion to other data, including data from Radar, the Flight Data Recorder, and the Cockpit Voice Recorder.

- Remand to the district court with instructions that further affidavits in the CIA's *Vaughn* index shall, when practicable, be based on personal knowledge under Fed.R.Civ.P. 56(e).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitations set forth in Rule 28.1 (e)(2)(B)(i) of the Fed. Cir. R. App. P. for the Ninth Circuit, uses a proportionally spaced font (Times New Roman), has a typeface of 14 point, and contains 16,222 words, according to the word processing system used to produce the text.

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John H. Clarke

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Fed. Cir. R. App. P. for the Ninth Circuit, counsel for the cross-appellant is not aware of any related cases pending in this Court.

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John H. Clarke

CERTIFICATE OF SERVICE

I hereby certify and affirm that on September 11, 2007, I filed and served a copy of the foregoing by hand to counsel of record listed below:

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_____
John H. Clarke