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

REPLY BRIEF OF CROSS-APPELLANT H. RAY LAHR

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I. THE ISSUE OF FRAUD IS BEFORE THE COURT IN THIS *DE NOVO* REVIEW AND PLAINTIFF HAS NOT WAIVED HIS RIGHT TO ASSERT FRAUD

Here, federal officers acted outside the outer perimeter of their statutory duties as federal officers, and Exemption 5's deliberative process privilege does not protect the records at issue from disclosure.

Notwithstanding the parties' agreement that the standard of review in this case is *de novo*, the government argues that plaintiff waived his right to assert fraud by not making his fraud argument in the district court. *See* Def. Response at 16-17. The government's reliance on *Self-Realization Fellowship Church v. Ananda Church of Self-Realization,* 59 F.3d 902, 912 (9th Cir. 1995) is misplaced. There, the court states that it "may exercise discretion to consider a waived issue in certain cases, one such case being when the issue presented is a pure question of law." (citations omitted). Here, because the government filed no transverse affidavits contravening plaintiff's many allegations of fraud, there is no question of fact on this issue, and, thus, the issue is a question of law.

Additionally, this Court has the discretion to act *sua sponte* on grounds not directly raised by the parties where the claim sought to be raised on the first time on appeal is necessary to a proper determination, is required in the interests of justice, when the case must be remanded and the issue is

likely to arise again,[1] or where the issue is of a general public interest,[2] as here.

As the court observed in *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002), "[b]ecause our standard of review is *de novo*, we conduct an independent examination of the entire record." The appellate court reviews the decision "from the same position as the district court." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002).

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[1] CJS, Appeal and Error § 297, LIMITATIONS OF, AND EXCEPTIONS TO, RULE:

> An appellate court has the discretion to act, *sua sponte*, on grounds not directly raised by the parties. *** Where the consideration of a claim sought to be raised on the first time on appeal is necessary to a proper determination of a case or is required in the interests of justice, or where the determination of a question would be [a] dispositive issue of law on its merits, such matters may be considered although first raised on appeal. *** Some authorities hold that although questions not ruled on in the court below are not proper before the court below, yet when the case must be remanded, and the questions are likely to arise again, the court will consider them.

[2] *Id.* § 299: "Questions of a general public nature, public policy or interest, or public welfare may be determined by the appellate court without having been raised in the trial court."

II. THE DELIBERATIVE PROCESS PRIVILEGE IS SUBJECT TO A BALANCING TEST, AND FRAUD VITIATES THE PRIVILEGE

The deliberative process privilege under the FOIA is adjudicated under a balancing test, like assertions of privilege in discovery disputes. 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."[3] In discovery disputes, courts weigh the relative need of the parties and the kind of litigation involved. This is a balancing test. In FOIA actions, however, the balancing test is slightly different. The identity and purpose of the requestor are irrelevant in deciding whether to order disclosure. Under the FOIA, the sole factor weighing in favor of disclosure is the statute's purpose of opening up the inner workings of government to public scrutiny.

But here, the district court's failure to employ a balancing test was harmless error if the Court finds fraud. The privilege simply does not protect communications which demonstrate government misconduct. The government's attempt to distinguish plaintiff's cited cases regarding fraud's vitiation of the deliberative process privilege fails. Defendants merely

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[3] 5 U.S.C. § 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency litigation with the agency."

observe the plaintiff's authorities on this issue were not FOIA cases. (*See* Def. Response at 19-20). Both *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs,* 60 F.3d 867, 885 (1st Cir. 1995), as well as *Tri-State Hosp. Supply Corp. v. U.S.,* 226 F.R.D. 118, D.D.C., 2005, correctly recite the law that fraud vitiates the deliberative process privilege, and the government cites no authority to the contrary.

III. LAHR PROVED FRAUD

The District court's order addressed government impropriety. (See Pl. Brief at 28-32). Plaintiff addresses some of this evidence here (limited by this Court's page limitation), on the issue of fraud.

On December 30, 1996, five months after the July 17, 1996 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).

Thus, in December of 1996, the zoom-climb conclusion was born. In November, 1997, it was released as a documentary, including a video-animation, via ABC, CBS, NBC, and CNN.[4] It claims that only 21

[4] *See* Lodging. *Flight 800 CIA Animation* transcript excerpts, I # 28 Ex 19 *Donaldson Aff*. at 118-19.

eyewitnesses reported an object ascending, and purports to demonstrate what these 21 actually saw: After an explosion in front of the wings, the front third of the fuselage fell, while the latter two-thirds of the aircraft changed its trajectory from horizontal to almost vertical. "Just after the aircraft exploded," the narrator explains, "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."

Two-thirds of the aircraft is said to have zoomed up 3,200 feet.

The next day, on November 18, 1997, Boeing issued a press release distancing itself from the CIA's broadcast,[5] and neither the government nor the media ever showed the animation again. (Boeing removed this press release from its website. The NTSB removed all Flight 800 animations from its website.)

Captain Lahr explains the genesis of the zoom-climb:

> 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 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.
> (*Lahr Aff*. I # 28 ¶ 88 at 288. Lodged.)

[5] I # 28 Ex 19 *Donaldson Aff*. Bates 121.

Plaintiff's facts come from an impressive array of 29 fact and expert witnesses. In any event, the facts must be taken as true, as "Plaintiff's assertions have not been repudiated." (Order V # 104 at 1105).

A. DEFENDANTS' INITIATING EVENT THEORY IS IMPOSSIBLE

As Dr. Harrison concludes, today's A-1 jet fuel, like kerosene, is, by scientific definition, incapable of internal fire or explosion:

> [A]viation fuel having a flash point greater than 100 degrees F would be properly classified as a combustible liquid and NOT a flammable liquid…. [A]s an airplane gains altitude, the ambient temperature drops… [A] fuel tank carrying a combustible liquid is, by scientific definition, not capable an internal fire or explosion because there simply cannot be the presence of flammable vapors therein.
> (*Harrison Aff.* I # 28 ¶¶ 1, 3-4 at 161.)

The tank was completely empty, as Admiral Hill attests:

> Captain Mundo… used that sump pump to take out tiny residual jet fuel and any water that's present.… Consequently, we know that tank was empty… And there's no way that you can ignite a thimble-full of kerosene and blow off the left wing of the strongest airplane ever built.
> (*Hill Aff.* I # 28 ¶ 4 at 57. Lodged.)

Of course, there was no evidence of any spark, as the *International Association of Machinists and Aerospace Workers* reported in its April 2000 submission to NTSB's final Report (*Lahr Aff.* I # 28 Ex 10 ¶¶ 1-3 at 373):

> Examination indicates that the wiring was airworthy and safe for flight…. No evidence of improper, poor, or incomplete maintenance was found in the wreckage of the accident aircraft.

In over a decade since the disaster, not one Boeing 747 has undergone a single remedial measure to prevent a similar occurrence, including Air Force One.

B. THE GOVERNMENT'S TRAJECTORY THEORY IS IMPOSSIBLE

The government cannot be ignorant of these immutable physical laws. Thus, plaintiff proves fraud on this ground alone.

1. The aircraft immediately stalled — aerodynamics

Captain Lahr explains this aerodynamic principle, likening it to one child jumping off the low end of a teeter totter from while another child is up. The force of the falling child would carry on if not stopped by the ground. If the nose separated from any aircraft, the force pushing down on the remaining two-thirds of the fuselage would cause an immediate stall. Plaintiff explains, "[a]n aircraft in balanced flight is like a teeter totter… The aircraft stalls at an angle of attack of about 18 degrees… At that rate, TWA would have been stalled in about one and half seconds after nose separation." (*Lahr Aff.* I # 28 ¶ 59 at 281.)

Admiral Hill endorsed this observation by Commander Donaldson:

> Once it goes beyond about 20 degrees nose up, it can't fly any more because these wings are no longer into the wind they can't produce lift… It's called gravity. This 333 tons are going to

> stall… when the time the airplane quits flying, [it] is going down.[6]

2. The aircraft did not slow and so did not climb — physics

> The law of conservation energy says that you use kinetic energy and that's the speed you have already and you convert that to altitude but there is a price, the price that you pay is that you slow down. It's like when you ride a bike up a hill, at the top of the hill you're going pretty slow, you know, you use your energy up. Well the Radar data showed the plane did now slow down. If didn't slow down, it didn't climb. If it didn't climb, the witnesses didn't see the plane climb, they saw something else.
> (*Stalcup Aff*. I # 28 ¶ 3 at 133. Lodged.)

3. Eyewitnesses saw supersonic speed — trigonometry

Admiral Hill, 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… 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.
> (*Hill Aff*. I # 28 ¶ 4 at 588. Lodged.)

4. Loss of center-fuel-tank spar would result in loss of wings — engineering

Plaintiff's lodged animation demonstrates how the spar supporting the wings would have been destroyed by a center-wing-tank explosion. "As the accompanying animation illustrates, the initiating event in the Center Wing

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[6] *Hill Aff*. I # 28 ¶ 4 at 588. Lodged.

Tank results in the destruction of the Front Spar of the Wing Box, collapsing the wings." (*Rivero Aff*. I # 28 ¶ 13 at 271. Animation Lodged.)

Captain Young headed TWA's group. He too knows the aircraft's wings could not have survived the initiating event.

> The loss of the nose section caused an immediate and significant aft shift of the aircraft's center of gravity. The aircraft rapidly pitched upward to a high angle causing the ensuing failure of both the left and right wingtips. This was due to excessive positive 'g' forces…
> (*Young Aff*. II # 28 ¶¶ 2(a)-(b).)

Not surprisingly, the "[d]ebris field data indicates that Flight 800's left wing was damaged early in the crash sequence… [The] wing structure… [was] found in an area consistent with it separating from the aircraft within five seconds of the initial explosion." (*Stalcup Aff*. I # 28 ¶ 9 at 127.)

5. Engine thrust was cut with the loss of the nose — engineering

"In the TWA 800 case, the moment the explosion occurred, and the nose section was severed, there would have been no more engine thrust." (*Pence Aff*. I # 28 ¶ 6 at 266.)

C. GOVERNMENT VIOLATED NTSB ENABLING STATUTE

The NTSB's enabling statute provides for mandatory primary jurisdiction, as does its corresponding C.F.R.[7] The NTSB's jurisdiction "has priority over any investigation by another… agency."[8] This includes the FBI.

Although the government's initial claims were unclear, the FBI did seize control. Immediately, as reported in December of 1997 by AVIATION WEEK AND SPACE TECHNOLOGY:

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[7] 49 C.F.R. Part 831, *Accident/ Incident Investigation Procedures;* 831.5 *Priority of Board Investigations*:

> Any investigation of an accident or incident conducted by the Safety Board… has priority over all other investigations of such accident or incident conducted by other Federal agencies… Nothing in this section impairs the authority of other Federal agencies to conduct investigations of an accident… provided they do so without interfering with the Safety Board's investigation. The Safety Board and other Federal agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner.

[8] 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. The Board shall provide for appropriate participation by other departments, agencies, or instrumentalities may not participate in the decision of the Board about the probable cause of the accident.

> On July 21, 1996… Assistant U.S. Attorney Valerie Caproni informed Norm Weimeyer, head of the Flight 800 probe's operations group, "that no interviews were to be conducted by the NTSB." Safety board investigators could review FBI-supplied documents on the witnesses, "provided no notes were taken and no copies were made."[9]

An excerpt of Dr. Gross's last appearance on CNN:

> Well, I actually think it's [FBI investigation] unprecedented because, by 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. (*Gross Aff*. I # 28 ¶¶ 4-5 at 218. Lodged.)

While Congress did later amend Title 49 to provide a mechanism requiring accident probes to be declared a criminal probe before the FBI can divest the NTSB of primary jurisdiction,[10] it was not as if the government needed to codify the absence of FBI primary jurisdiction in a civil probe. Here, the NTSB's surrender of its primary jurisdiction was illegal.

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[9] Caproni served as head of the head of the DOJ Criminal Division for the Eastern District of New York, and is now FBI general counsel. *See Corporate Legal Times*, "The Chosen One," Oct. 2004, R. Vosper: "In addition, Caproni ruffled some feathers when she charged James Sanders, a freelance journalist, for removing a piece of the wreck in order to test it in a lab for explosive residue… 'Conspiracy theorists came out of the woodwork before the last piece of the plane hit the Atlantic,' she says."

[10] *See* 49 U.S.C. § 1131(a)(2)(B) (Board divested of lead status only where Attorney General in consultation with NTSB Chairman determine cause an intentional criminal act.)

And what is this Court to make of the CIA's jurisdiction? The deliberative process privilege pertains to deliberations of agency policy or decisions and reports within the agency's statutory jurisdiction. The CIA's primary function is obtaining and analyzing information about foreign governments, gathering information internationally which is relevant to American security, around the world. Additionally, the agency sometimes engages in propaganda and public relations efforts. Its statutory authority does not extend to disseminating propaganda in the United States.

D. COVER-UP

The April, 2000, *International Association of Machinists and Aerospace Workers* submission to NTSB final Report (*Lahr Aff.* I # 28 Ex 10 at 372) states:

> We feel that our expertise was unwelcome and not wanted by the FBI…. The threats made during the first two weeks of the investigation were unwarranted and are unforgettable!

1. NTSB violated a fundamental tenet of aviation disaster probes – the Party Process

In major investigations the Board employs the Party Process, establishing investigative groups. Each group, which is made up of specialists from the parties, is led by a chief investigator, called the Group Chairman. The groups which are formed vary depending on the nature of the accident.

The Party Process is codified, and mandatory ("shall"). It is a fundamental principle of NTSB disaster probes. *See* 49 U.S.C. § 1131 (a)(3) *General Authority*, ending: "The Board and other departments, agencies, and instrumentalities shall ensure that appropriate information developed about the accident is exchanged in a timely manner."

Here, to conceal the true post initiating event flight trajectory of the aircraft's main wreckage (the absence of a zoom-climb), the government failed to form an NTSB Flight Path Group. As a necessary corollary, the government prevented the NTSB Witness Group from performing its function of gathering evidence of eyewitness accounts of the wreckage's trajectory.

(a) Failure to form Flight Path Group

Dennis Crider alone wrote the NTSB's *Trajectory Study*. *See Lahr Aff*. I # 28 Ex 15 at 394.

Had the NTSB formed a Flight Path Group, the basis for the zoom-climb conclusion would be in the NTSB's public docket, and plaintiff would not be before this Court seeking redress. As discussed below, the CIA and NTSB fraudulently input data and formulae into its simulations.

Captain Lahr's affidavit:

> [T]here should have been a Flight Path Group… Since a Flight Path Group was not formed, ALPA and the other parties to the

> investigation have no knowledge of the zoom-climb data and conclusions furnished by the NTSB to the CIA, nor any knowledge of the information used by the NTSB for its own video animations.
> (*Lahr Aff*. I # 28 ¶¶ 47-48 at 279.)

The *Air Line Pilots Association* (ALPA) submission to NTSB's Final Report discounted Crider's Study:

> [W]e are concerned that this [flight path] analysis was essentially accomplished by only one individual at the Board, with little or no party input or participation.…
> (*Lahr Aff*. I # 28 Ex 5 at 335.)

(b) Failure to use Witness Group

The FBI's segregation of witness accounts from the NTSB (as well as from the public) also violated the NTSB's Party Process, as Captain Lahr explains.

> [T]he FBI immediately blocked the Witness Group from its function of interviewing witnesses, and it was disbanded. Later the Witness Group was reformed to study the FBI FD-302s… Never before in my experience with NTSB accident investigations have I seen the NTSB refuse to conduct Witness Group interviews of key eyewitnesses, especially when the eyewitness testimony was pivotal…
> (*Lahr Aff*. I # 28 ¶¶ 52-54 at 280.)

From TWA Group Chairman Captain Young's affidavit:

> The non-governmental parties did not have access to the FBI Witness Summaries, which formed a significant foundation for the CIA simulation, until the middle of 1998. This was well after both simulations had been completed and were in the public domain.
> (*Young Aff*. I # 28 2(f) at 401.)

ALPA's NTSB Final Report submission also complained that "[c]ertain typical civil investigative practices, such as witness interviews and photographic documentation, were prohibited or sharply curtailed and controlled." (*Lahr Aff*. I # 28 Ex 5 at 334.)

2. Despite the hundreds of eyewitnesses to missile fire, the CIA animation fraudulently reported twenty-one

According to the CIA's account, broadcast to tens of millions of Americans, there were not hundreds of citizens who witnessed missile fire, but twenty-one (CIA video-animation Lodged):

> The 21 eyewitnesses whose observations began earlier described what was almost certainly the aircraft itself in various stages of crippled flight after it exploded.

After the NTSB Witness Group reconvened (it had been disbanded), the FBI did allow the Group to review some 302's. Out of its 736 302s, the FBI selected 458 for the Group's perusal, provided "no copies were made" and "no notes were taken." According to these 302s, almost 200 eyewitnesses "observed a streak of light," and almost 100 of them said it "originated from the surface." The NTSB still withholds this early *Witness Group Factual Report*, NTSB Exhibit 4A, from its public docket.[11]

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[11] *Donaldson Aff*. I # 28 Ex 16 at 108: "Of the 183 [eyewitnesses] who observed a streak of light… 96 said that it originated from the surface."

3. The FBI, CIA, and NTSB fraudulently misrepresented eyewitness accounts

The CIA never interviewed a *single* eyewitness. The NTSB interviewed *one*. The examples below of government fabrications of eyewitness accounts are but a few of *hundreds*. Of course, "[n]either the FBI nor the CIA nor the NTSB has produced a single eyewitness who saw TWA 800 zoom-climb upwards out of the initial fireball." (*Lahr Aff*. I # 28 ¶ 66 at 284).

(a) Captain David MacLaine — contemporaneous ATC transmission

The only witness ever interviewed by the NTSB was Captain David MacLaine. He was staring directly at Flight 800 when it exploded, piloting an aircraft at about 17,000 feet. The transcript of his real-time ATC transmission: "Ah we just saw an explosion up ahead of us here about sixteen thousand feet or something like that. It just went down – in the water." (I # 28 ATC Transcript *MacLaine* at 249.) MacLaine's next day Report also reported that the aircraft fell downwards.

When the NTSB interviewed MacLaine in March of 1999 – over two years after both the CIA and NTSB announced their zoom-climb conclusions – he was repeatedly clear that all the debris fell downwards out of Flight 800, not upwards. (I # 28 NTSB Interview Transcript David

MacLaine at 230-48.) Had the aircraft climbed, it would have done so through MacLaine's airspace.

(b) Mike Wire

The NTSB held in second and final "Sunshine" Hearing in August of 2000. Eyewitnesses were again banned, but the NTSB did discuss the accounts of several who had placed a full page ad in the *Washington Times*, entitled, *We Saw Missiles TWA Flight 800 Shot Down by Missiles,* and subtitled, *We Won't be Silenced Any Longer*. (*Lahr Aff*. I # 28 Ex 7 at 361.) The job of discrediting witnesses fell to psychologist Dr. David Mayer, head of the NTSB's "Human Performance Division."

The CIA had featured two of these eyewitnesses in its animation, Mike Wire and Dwight Brumley.

Mike Wire had been working on a bridge in Westhampton when he witnessed a streak of light ascending upward *emanating from the surface* and culminating in an explosion. The CIA Animation eliminated the streak's rise from the surface. The unofficial animation of Wire's view is lodged herein, as is the CIA's November 1997 depiction of his account. Wire's affidavit states that the CIA animation "didn't represent what I had testified to the agent as to what I saw out there." (*Wire Aff*. I # 28 ¶ 4 at 221. *See* Lodging.)

(c) Dwight Brumley

Traveling in a commercial plane above Flight 800, Brumley, a naval warfare expert, had seen a missile-like flare that culminated in an explosion.

> ***CIA Animation***: And his statement that the flare like object was traveling in an east-northeasterly direction agrees with the direction that Flight 800 is known to have been traveling when it exploded. So the flare like object he saw was almost certainly Flight 800 just after it exploded, not a missile.
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> ***Dwight Brumley***: It's a fact that whatever I saw, whatever the flare-like object in fact was, was moving with, in the same direction as US Air flight, it appeared to be climbing up and moving parallel with the US Air Flight. And the information that I have on the US Air flight is it was traveling north-northeast. The object that they had, as if, they animated it as if as if I was looking out the window and it's almost like it's crossing the front of the plane from left to right, going away from me, and that's not in fact what I saw. It wasn't even close to being an accurate representation of what I saw.
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> It really stood out the fact that here I am, I'm 25 years in the navy, 25-and-a-half years, was an electronic warfare technician, qualified C.I.C. watch-officer, surface warfare qualified, been stationed on an aircraft carrier, stood watch on an aircraft carrier as an assistant T.A.O. I understand relative motion, relative bearing, and I figured I would have been a good witness, probably, probably the only witness with that level of knowledge and expertise looking down on what became TWA 800, and I was just very very surprised. And to this day, still nobody has come and talked to me.
> (*Brumley Aff*. I # 28 ¶ 1 at 217. Lodged.)
>
> ***August 2000 NTSB Hearing, David Mayer***: The second witness in the ad was the witness who was on US Air Flight 217 and I explained to you that he couldn't have seen a missile hit TWA Flight 800 because the timing just simply doesn't work out. (*Lahr Aff*. II # 28 Ex 14 at 322.)

(d) Major Meyer

As Major Meyer was piloting a Blackhawk helicopter, 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. Having piloted a helicopter rescuing downed pilots in North Vietnam, Meyer is the only witness known to have a history of observing missile fire.

Meyer's Affidavit includes a transcript of his 51-minute talk before the Granada Forum, lodged herein. Meyer is unequivocal: He saw (1) missile fire, (2) military ordnance explosions, and (3) the aircraft "fell like a stone… from the first moment of the first explosion… It never climbed." (*Meyer Aff.* I # 28 ¶ 5(b) at 200. Lodged.)

The NTSB's "Human Performance Division" psychologist, Dr. Mayer, dismissed Meyer's account with one brief sentence: "He said he'd seen a fireball and the breakup sequence of the airplane, not a missile." (*Lahr Aff.* II # 28 Ex 14 at 322.)

4. All aspects of the probe evidence cover-up

The FBI forbade all NTSB from interviewing eyewitness.[12] The FBI excluded from NTSB's public Hearing discussion of eyewitnesses materials or FBI forensic test results, and the showing of the CIA's Animation and eyewitness testimony.[13] The government altered evidence,[14] deleted Radar

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[12] The FBI not only withheld its 302 eyewitness interview reports from the NTSB, it also prevented the NTSB from contacting any eyewitness directly. *See. e.g., Meyer Aff*. I # 28 ¶ 5(d) at 200), relating that FBI "forbade" NTSB Witness group Chairman Norman Weidermier from interviewing Major Fritz Meyer.

[13] The NTSB held a weeklong public hearing into the investigation in Baltimore beginning on December 8, 1997. The NTSB used the hearings to present a conclusion that the Center Fuel Tank exploded as a result of an unknown but internal ignition source. On December 3, 1997, two weeks after having announced the FBI's closure of its criminal case, the FBI's James Kallstrom wrote the NTSB's chairman James Hall to request suppression of information in the upcoming hearing, although the law required the NTSB to make the information public. (*See Lahr Aff*. II # 28 Ex 2 at 313.) Hall complied.

[14] NTSB investigator Hank Hughes (Lodged): "I actually found this man with a hammer pounding on a piece of evidence trying to flatten it out." *See also Sanders Aff*. I # 28 ¶¶ 9-10 at 185-86. Lodged: "[I] know piece bent down… [b]ecause I have the photos of these large pieces of the floor of the center wing tank shortly after they were brought into the hangar. They don't have that bend in them…. [T]hey couldn't live with that… because a mechanical would have blown that same piece down instead of up."

data,[15] deleted Flight Recorder data,[16] deleted excerpts of videotapes,[17] smuggled out missile evidence,[18] and

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[15] *See, e.g.*, Stalcup Aff. Docket # 28 ¶ 4 at 133. Lodged: "The last sweep of the River Head radar shows the four data points deleted and a pie wedge right where flight 800 was, and that's where any missile would have been that was going to hit it."

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[16] *See, e.g., Schulze Aff.* II # 28 ¶ 5 at 475: "Detailed analysis performed by me in conjunction with my peers of the NTSB's reports on the flight parameter data from the very end of the FDR tape revealed a clear and glaring omission of the last three to four seconds of the FDR tape data."

[17] *Speer Aff.* I # 28 ¶ 30 at 193-94 Lodged: Lodged: "[W]e were chaperoned, as in everything we did, by an FBI agent… So I look up at our FBI agent chaperone and [said], 'You know, this tape has been edited.' He says, 'No, it hasn't.' And I said, 'Well look at the gaps in the time clock here. There's no reason for those gaps to occur unless the tape has been edited. I want to see the unedited version. 'No,' was the response."

[18] April, 2000, *International Association of Machinists and Aerospace Workers* submission to NTSB final Report (*Lahr Aff.* I # 28 Ex 10 ¶ 1 at 377. Lodged.): "[C]abin wreckage began to disappear from the cabin wreckage hanger. Indications were that the disappearance was due to the removal of wreckage by the FBI." *See also* NTSB's Hank Hughes testimony (Lodged): "We found that seats were missing and other evidence had been disturbed. The FBI on my last complaint, did act, and they found that on 3:00 on a Saturday morning, two or three of their own agents were in our hanger. It was not authorized. I supervised that project and these people had no connection to it."

withheld[19] and misrepresented[20] forensic test results. The government misrepresented that a center-fuel-tank explosion was possible.[21] It falsely represented that there was "no physical evidence" of a missile strike.[22]

The cover-up was so pervasive that nongovernmental parties smuggled out evidence to give to the news media.[23]

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[19] *See, e.g., Speer Aff.* I # 28 ¶ 15 at 191. Lodged. "And the FBI said all right, all right, we'll send it to our real lab in Washington and that was a Sunday, Monday, after the accident, four or five days later, and the part has not been seen since, for five years now."

[20] Regarding the deposits of solid missile fuel in the reconstructed aircraft that TWA Captain Terrell Stacey had smuggled out to investigative reporter James Sanders, the NTSB announced that NASA Chemist Dr. Charles Basset had independently confirmed that the substance was, in fact, 3M glue used affix material to the seat backs. Dr. Basset responded with an affidavit: "The tests performed by me at NASA-KSC on samples Dr. Birky said were from… [the] cabin interior did not address the issue of origin of any reddish-orange residue…" *Sanders Aff.* I # 28 Ex 2 ¶ at 188.

[21] *Speer Aff.* I # 28 ¶ 31 at 188. Lodged: "And they had spiced it up [with] propane and hydrogen.… And then they put it on the evening news and so now everybody has seen that the government's opinion is that this fuel tank of a 747 is easy to blow up… which is, ah, is just about as close to lying to the public as you can get."

[22] *See, e.g., Stalcup Aff.* I # 28 ¶ 5 at 133. Lodged. "What troubles me most about what the government is saying about this decision's insistence is that there is no physical evidence of a criminal act, or a missile, or an explosion of any kind other than a center wing tank explosion. That is completely false." *See also id.* ¶ 6: "Once you find them [PETN & RDX], you know it's an explosive. [Q. Who found them?] The FBI. That true. That's why I – they admit that, and they say there's no evidence of a missile. Why?"

IV. LAHR PROVED NEXUS OF FRAUD TO RECORDS AT ISSUE

A record is protected by the privilege if its authors were acting within their statutory authority. Here, they were not. First, the author would have to be oblivious to the fact that the zoom-climb theory violates the laws of physics, as well as the fact that all forensic and testimonial evidence is consistent only with a missile strike. Second, the record itself must be consistent with good faith deliberation leading to a good faith conclusion of the existence of a zoom-climb.

Defendant identifies four records at issue under the deliberative process privilege. These documents are discussed in this section.

The government omitted its simulations' inputs from its discussion of withheld materials under Exemption 5's deliberative process privilege. Lahr addresses that issue below in his analysis of simulation inputs.

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23 *Donaldson Aff.*, I # 28 Ex D at 82-83: Two pages of debris field data smuggled out in 1996 by TWA Captain Terrell Stacey to investigative reporter James Sanders. *See also Holtsclaw Aff.* I ¶¶ 1-4 at 180: "[In] 1996, I provided to Captain Richard Russell the Radar tape... recorded at the New York Terminal Radar... 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." *And see Sanders Aff.* Ex 1 at 187: Photograph of smuggled out seat padding of two reddish residue samples of missile exhaust, one of which *60 Minutes* gave to FBI.

Plaintiff's uncontested facts demonstrate bad faith in the underlying activities which generated the records at issue, and the records at issue have an adequate nexus to fraudulent misconduct to vitiate the deliberative process privilege.

The district court inspected the four records *in camera*. Without submission to this Court for *in camera* review, the record is patently inadequate to permit *de novo* review. Should the government decline to submit these records *in camera*, plaintiff will move to the Court to order it to do so. (Plaintiff made this same point regarding the NSA's Affidavit submitted *in camera* to the district court. *See* Plaintiff's Opening Brief at 57.)

Record 27, identified as a March 3, 1998, CIA *Dynamic Flight Simulation*, is 18-pages. The district court described it as "analysis and preliminary conclusions" (V # 113 at 1195-96), and ordered the disclosure of only its title, date and bolded titles, holding the balance to be deliberative. Plaintiff knows little about this record. It seems to contain simulation inputs. As discussed below, to obtain the outputs that the government's simulations yielded, the government would have to dishonestly input data. Thus, the document reflects overt acts in furtherance of a conspiracy.

The district court identified Record 28 as a 17-page March 3, 1998, CIA "[d]raft report concerning preliminary analysis and conclusions regarding radar tracking." *Id.* at 1196-97. The court ordered the title, date, bolded titles, Figure 1 and accompanying notation, and the entirety of the Appendix to be released, and found the remainder to be "unsegregable" and exempt from disclosure as privileged. Not one of the dozen sets of Radar data is consistent with any scenario that included a zoom-climb. Thus, this "radar tracking" record also reflects overt acts in furtherance of a conspiracy. This conclusion is not dependant on whether the record contradicts any zoom-climb scenario. If this record reflects that Radar corroborates a zoom-climb, it is fraudulent. If the record contradicts any zoom-climb, it is further evidence that defendant's zoom-climb was knowingly false.

Record 43 is a five-page undated CIA "draft with handwritten annotations reflecting candid discussion and opinion * * * regarding CIA analysis of eyewitness report" about the crash, held to be exempt from disclosure in its entirety. *Id*. at 1197-98. Given that the CIA never interviewed a single eyewitness, as well as its dissemination of *scores* of fabrications regarding eyewitness accounts, this record cannot reflect good faith deliberations regarding eyewitnesses' accounts, but, rather, reflects efforts to cover them up.

Record No. 74 is an NTSB 15-page debris field record, undated. It contains data, comments, and notes tracking the location in the ocean of debris from TWA Flight 800. The court held that only the comments and handwritten notes are exempt from disclosure. *See id*. at 1198-99. Clearly, the true debris field would also disprove the government's theory. The record herein contains a plethora of evidence of the falsification of the debris fields. If this document corroborates the zoom-climb theory, it is fraudulent. If it contradicts the zoom-climb, it is further evidence of knowledge of the falsity of the zoom-climb. Inspection of the record by the Court is necessary to conclude whether the comments and handwritten notes constitute further evidence of fraud.

Here, Lahr has made specific showings that particular documents were made in furtherance of the government's crime or fraud.

V. FAILURE TO IDENTIFY SIMULATION INPUTS

A. INTRODUCTION — TIME-STEP COMPUTATIONAL DYNAMIC SIMULATIONS

The government argues that plaintiff's position on what he seeks regarding the NSA's and NTSB's "simulation runs" is unclear. It is not. The government's Response (at 52) correctly distinguished a time-step computer simulation software program, the BREAKUP program, from its inputs specific to Flight 800's demise:

> [W]ith regard to the BREAKUP program, the court ordered the NTSB to search its records for "the formulas and data entered into the computer simulations" and provide any responsive records to plaintiff, subject to any applicable exemptions. *See* Fed. E.R. at 612. The court also ordered the agency to search for and, if located, to release the BREAKUP program itself…

The analysis is the same for the CIA and NTSB simulations.

Plaintiff seeks the data and calculations used by the CIA and the NTSB in their simulations of their zoom-climb theory.[24]

A computer time-step simulation is just like any other program yielding results from the operator's inputs. For example, in Quicken, a checking account program, the user's inputs are the starting balance, the bank's monthly checking fee, and, as checks are written, the amounts. The program's outputs include the balance.

The starting position of the aircraft in a simulation is analogous to the beginning balance. In Quicken, when the user writes a check, the program uses the previous balance as its starting point from which to measure the new balance. In an aircraft simulation, the program uses the ending position of the previous iteration as its starting point from which to compute the new position of the aircraft.

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[24] The government incorrectly asserts that "plaintiff does not challenge the adequacy of the NTSB's search." (Response at 35).

A time-step simulation run starts by entering the initial data into the program. The program then solves all of the aerodynamic equations for a very short time increment. Those results are then used as the input data for the next time increment. The process is repeated hundreds of times. Only a computer makes the laborious process feasible. Time-step fluid computational time-step simulations operate the same basic way as Quicken, except that they run hundreds of computations. Also, in Quicken, the inputs are only data, i.e., the starting balance and the check amounts. In a simulation, the inputs include formulae[25] as well as data.[26]

These inputs are, of course, segregable from the simulation program itself.

And, of course, the reliability of any simulation's outputs is dictated by the reliability of its inputs. Garbage in – garbage out. Simulation software programs apply immutable laws of physics. The only way to get

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[25] The basic simulation formulae are Newton's laws of motion resulting from gravity and the calculated aerodynamic forces.

[26] The initial data is taken from the flight data recorder, radar data, weather observations, and assumptions about aircraft integrity.

the government's conclusion out of such a program is to dishonestly submit its inputs.[27]

Both agencies' simulation runs are based on erroneous inputs hidden by a cloak of secrecy, and they are in patent violation of the NTSB's Party Process. Claiming the impossible, the government cannot show its work without showing that it is engaged in fraud.

B. NTSB SIMULATIONS

The NTSB ran a number of simulations specific to Flight 800, probably making numerous runs and many false assumptions to make the hypothetical trajectory fit the zoom-climb (predetermined by the CIA and broadcast nationally by the FBI).

Disclosure of the simulation run upon which the NTSB allegedly relied would reveal false assumptions and erroneous inputs. The district

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[27] The physics are essentially weight and balance. Both are determined for every flight before takeoff. The aircraft is loaded so that the center of gravity is located within a narrow range slightly ahead of the center of lift. The center of gravity is maintained within that range throughout the flight. The horizontal stabilizer provides a downward balancing force. If the center of gravity gets substantially behind the center of lift, the aircraft will pitch up, stall, and fall out of the sky. When Flight 800 lost its nose, it could not continue to fly, climb, and then dive, as depicted in the CIA and NTSB video animations.

court held that the simulation inputs were privileged as deliberative.[28] The dishonesty of the NTSB's inputs would be evident upon their disclosure and analysis – proving fraud, discussed *infra*.

C. CIA/NSA SIMULATIONS

The CIA (or NSA) already disclosed the outputs of its MVS (Multi-Vehicle-Simulation Program) in two records, Record 32 (IV # 86 at 741-768), a 28-page tabular printout, and Record 14, an 8-page graphical printout (IV # 86 at 703). Disclosure of the NSA's simulation's inputs would also reveal false assumptions and erroneous inputs.[29]

The results of the CIA and the NTSB simulations do not agree. The CIA claimed the zoom-climb was 3,200 feet and the NTSB claimed 1,600 feet, differing from one another by 100%.

As plaintiff pointed out in his opening brief (at 47), the requirement regarding segregability applies in Exemption 3 cases so that agencies must

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[28] 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."

[29] *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… *** [I]f the aircraft had traded speed for altitude in a zoom-climb, it could never have reached the impact point…"

divulge all portions of documents that are not specifically exempted from disclosure by statute.[30] The government simply ignores this authority.

VII. DEFICIENT SEARCH AND *VAUGHN* INDEX

Pl. Brief at 51:

> Plaintiff submitted evidence[31] in support of the existence of each of these records,[32] most of which are in electronic format, including a computer program the CIA claims to have used to correlate radar data with witness sightings,[33] and radar files characterized by plaintiff as the "work product of many hours of CIA radar tracking analyses and are key evidence…"[34]

The government ignored plaintiff's proof. Def. Response at 34-36:

> The court succinctly and correctly found that "[p]laintiff offers no persuasive basis for finding that some of these records even exist. Nor is there evidence to suggest that the CIA searched in bad faith or did not conduct an adequate search for these records." *See* Fed. E.R. at 617-18. In his brief argument regarding this matter, plaintiff merely repeats his speculation

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

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

32 *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.

33 *See Clarke Decl*., IV # 90 at 1045, Rotate MLM program.

34 Plaintiff's *Document Disposition Report*, III # 86 at 731.

that such records do exist and that the CIA conducted an inadequate search for them.

Lahr's evidence amply demonstrates the existence of unidentified responsive records as well as the government's possession of them. Four records submitted show the existence of unidentified simulation inputs.[35] An October 1997 record refers to "new" Radar plots – otherwise not identified and not produced.[36] Another lists 27 CIA computer "output files" of Radar tracking,[37] but no such files were identified, much less produced. The CIA used a computer program to analyze witness sightings, but its *Vaughn* index fails to address the program or its inputs.[38] In November of 1997, on the eve the broadcast of the CIA animation and the concurrent

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[35] *See* Record 5A at Bates 664 (Flight path graph falsely reporting energy transfer – absence of data and calculations); Record 7A at Bates 681 (CIA to FBI PowerPoint presentation – absence records of this pre-March 1997 conclusion of zoom-climb apex of "16,800 ft."; Record 14A at Bates 714 (May 15, 1997 graphical printout of trajectory simulation – absence of inputs); Record 75A at Bates 932-34 (1) NTSB time-step simulation runs post-dating video-animation release – absence identification of data entered into multiple simulation runs).

[36] Record 18A at Bates 721 (CIA memorandum).

[37] Record 24A at Bates 732 (undated list of 27 CIA computer "output files" – the work product of many hours of CIA radar tracking analyses).

[38] *Record* 36A at Bates 780 is the computer printout of software "PROGRAM ROTATE MLM."

FBI's "closing" of the criminal case, the CIA sent the FBI an email attaching five "Final Reports to FBI." The CIA produced the email but withheld its five attached reports. [39] On March 3, 1997 the CIA submitted a request to Boeing seeking the aircraft's lift and drag, weight, center of gravity – all both before and after nose separation – a "problem statement."[40] No response was identified or produced. According a March 31, 1997 fax cover sheet, Boeing faxed the NTSB's Dennis Crider "additional information" he had "requested."[41] The fax is missing its attachment.

Plaintiff seeks records of correlation of various data to the simulation's outputs, particularly Radar data. The government and the district court recognized their existence. *See* Order, V # 113 at 1174, 1203:

> 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.
>
> * * *
>
> [Simulation results] best represent the action of the aircraft as reflected by the radar data. *Id.* at ¶¶ 8-9."

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[39] Record 20A-E at Bates 725.

[40] Record 4A at Bates 661.

[41] Record 57A at Bates 895.

Defendant's response simply did not address the existence of these records. "In short," the government summarized the court's order, "regarding any responsive 'correlation records,' they were fully described in the government's declarations, publicly available, previously released to plaintiff, or properly withheld." Def. Response at 41.

As a condition precedent to prevailing on this argument, the government must identify these records, which it cannot do. All available Radar evidence – from at least a dozen Radars – contradicts the zoom-climb conclusion. The government has much to hide in this case and the Court should scrutinize its claims accordingly.

Moreover, defendants' Response ignores the obvious questions raised by what it did provide regarding its simulations. Why is one alleged CIA simulation printout dated "5/16/97" and the other dated "3/98" and "3/15/04" – years after all agencies had closed the matter.[42] The government offers no explanation in either its *Vaughn* index nor in its Response.

The government argues its *Vaughn* index is entitled to a presumption of good faith, arguing the absence of evidence of bad faith impugning its

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[42] *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."

affidavits. Neither the district court nor the government considered the CIA's 2001 FOIA denial that it had *any* responsive records, which is, of course, clear evidence of bad faith. Additionally, defendants' Response (at 4) cites the district court's opinion in support of its assertion that plaintiff had "fail[ed] to provide support for conclusory statements that pages have been removed." (V # 113 at 1179.) However, where in the government's Excerpts is the *TWA 800 Flight Simulation* graph reporting the zoom-climb to about 16,200 feet – 800 feet less than the animation's 17,000 foot zoom-climb? It is only in plaintiff's Excerpts (III # 86 at 708) because the CIA removed this record, one of the most significant documents in the case, from its court-filed records.

Plaintiff argues that the government's affidavits should be based on personal knowledge, given the inescapable conclusion that a study of the government's probe into the disaster is a study in bad faith, and that the government has much to hide.

CONCLUSION

The government did not deliberate the aircraft's post-initiating event flight trajectory. It deliberated how to cover it up.

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 8,250 words, according to the word processing system used to produce the text.

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John H. Clarke

CERTIFICATE OF SERVICE

I hereby certify and affirm that on December 3, 2007, I filed and served a copy of the foregoing by hand and by e-mail to counsel of record listed below:

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