

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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: **Dkt. Nos. 06-1275-ag(L)** ;
INDUSTRIAL RISK INSURERS v. : 06-1320-ag (CON) ; 06-1340-ag (CON) ;
TRANSPORTATION SECURITY : 06-1359-ag (CON) ; 06-1367-ag (CON) ;
ADMINISTRATION : 06-1431-ag (CON) ; 06-1433-ag (CON) ;
: 06-1435-ag (CON) ; 06-1471-ag (CON) ;
-----X : 06-1483-ag (CON) ; 06-1488-ag (CON) ;
: 06-1503-ag (CON) ; 06-1517-ag (CON) .
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GABRIELLE v. TRANSPORTATION : Dkt. No. 06-1348-ag
SECURITY ADMINISTRATION :
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INSURANCE COMPANY OF GREATER :
NEW YORK v. TRANSPORTATION : Dkt. No. 06-1357-ag
SECURITY ADMINISTRATION :
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U.S. COURT OF APPEALS

**REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS'
MOTION FOR TRANSFER OF PETITIONS FOR REVIEW**

Preliminary Statement

Respondents Transportation Security Administration,
Department of Homeland Security, and United States of America
(collectively, "Respondents"), submit this reply memorandum in
further support of their motion for transfer of the above-
captioned petitions for review to the United States Court of
Appeals for the District of Columbia Circuit, pursuant to 28
U.S.C. § 2112(a)(5).

Contrary to petitioners' claims, respondents' motion to
transfer is not premature. Rather, respondents' motion timely
seeks to enforce the provisions of 28 U.S.C. § 2112(a)(5) - a
non-discretionary requirement that all petitions for review, if
filed more than ten days after the challenged order is issued,

must be transferred to the court of first filing, which here is the D.C. Circuit.

Indeed, it is petitioners who have acted prematurely by moving in the D.C. Circuit for a discretionary transfer before the petitions have been consolidated in that court. Under 28 U.S.C. § 2112(a)(5), a motion to transfer "for the convenience of the parties in the interest of justice" is made only after all petitions with respect to the same order have been consolidated. Thus, respondents respectfully request that this Court comply with the statutory directive and transfer these petitions for review to the D.C. Circuit.

ARGUMENT

A. Transfer Of the Petitions For Review of the February 7, 2006 Order Is Required By Statute

All of the petitions for review that have been filed in this Court and in the District of Columbia are subject to 28 U.S.C. § 2112, which addresses how to proceed when petitions for review of the same order are filed in more than one court of appeals. When the first of multiple petitions is filed more than ten days after the order is issued, the record must be filed in the first court of appeals in which such a petition was filed. Id. § 2112(a)(1). All petitions for review of that order must be transferred to the court of first filing. Id. § 2112(a)(5). The court of first filing may then transfer all of the petitions to any other court of appeals "[f]or the convenience of the parties

in the interest of justice." Id.

By contrast, when such petitions are filed within ten days of the order, the petitions are referred to the Judicial Panel on Multidistrict Litigation (MDL Panel) for random assignment under 28 U.S.C. § 2112(a)(1) & (3). Once the random assignment is made, the record for review is filed in the randomly-assigned court of appeals, and all petitions for review of that order must be transferred to the randomly-assigned court. Id. § 2112(a)(5). The randomly-assigned court may then transfer all of the petitions to any other court of appeals "[f]or the convenience of the parties in the interest of justice." Id.

The petitions respondents seek to transfer challenge the validity of the February 7, 2006 Order of the TSA ("February Order"). No petition for review of that order was filed within ten days of its issuance, and the first such petition was filed in the Court of Appeals for the District of Columbia Circuit. American Airlines, Inc. v. TSA, No. 06-1093 (D.C. Cir. March 17, 2006). Thus, under 28 U.S.C. § 2112(a)(1), the record regarding the February Order must be filed in the D.C. Circuit, and under § 2112(a)(5), all petitions for review of that order must be transferred to that Court. Respondents' motion simply seeks an order consistent with this statutory mandate.

Other petitions filed in this Court and in the D.C. Circuit challenge a different TSA order issued on March 17, 2006 ("March

Order"). Because petitions for review of that order were filed in more than one court of appeals within ten days of its issuance, those petitions were referred by the TSA to the MDL Panel for random assignment under 28 U.S.C. § 2112(a)(1) & (3). On April 18, 2006, the MDL Panel issued an order reflecting a random assignment of the listed petitions to the Second Circuit and designating this Court as the court in which the relevant record is to be filed.¹

Accordingly, under the MDL Order, all petitions for review of the March Order will be consolidated in this Court, and by statute, all petitions for review of the February Order "shall" be transferred to the D.C. Circuit. See 28 U.S.C. § 2112(a)(5). At that point, and not before, the question of where all petitions should be consolidated is properly considered.

Petitioners' claim that the requested transfer would be a waste of judicial resources, in light of the pending motion to transfer all the petitions from the D.C. Circuit to this Court, is neither accurate nor meaningful.² The statute expressly

¹ Respondents previously provided the Court with a copy of the MDL order, attached to a letter dated April 25, 2006, sent to the Clerk of the D.C. Circuit and copied to the Clerk of this Court. On April 27, 2006, petitioners also filed a Notice of the MDL Order in this Court.

² With their opposition to respondents' motion to transfer, petitioners provided this Court with copies of their motion to consolidate and transfer filed in the D.C. Circuit. Although they provided their moving papers and reply papers, they neglected to include any of the opposition papers, which we now

contemplates circumstances where filings are made in different Circuits and sets forth a mechanism for consolidation in one Court. By this motion respondents take one step in the Congressionally mandated scheme - consolidation of all petitions regarding the February Order in the D.C. Circuit. Thereafter, discretionary motions to transfer "in the interest of justice" -- unlike this motion seeking nondiscretionary relief -- may properly be considered, either in this Court or the D.C. Circuit Court of Appeals.

B. The MDL Panel Order Does Not Require the Filing Of the Record Regarding the February Order In this Court

Petitioners mischaracterize the effect of the MDL Order. By its own terms, and by operation of law, the MDL Order applies exclusively to the petitions for review of the March Order, which were the only petitions subject to the MDL random selection process. Although various parties filed consolidated petitions for review of both the February and March Orders, the MDL Order is applicable only to petitions challenging the March Order. It says nothing about any petitions for review of the February Order. Thus, petitioners' statement that "it appears that" the record with respect to both the February and March Orders will be filed in this Court is utterly without basis. The record with respect to the February Order will be filed in the D.C. Circuit

provide as exhibits V & W to the accompanying declaration.

as required by 28 U.S.C. § 2112(a)(5).

Dated: New York, New York
May 2, 2006

Respectfully submitted,

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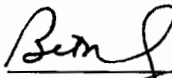
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CERTIFICATE OF SERVICE

I, Beth E. Goldman, Assistant United States Attorney for the Southern District of New York, hereby certify that on May 2, 2006, I caused a copy of (1) Reply Memorandum in Support of Respondents' Motion for Transfer of Petitions for Review, and (2) Declaration of Beth E. Goldman, dated May 2, 2006, to be served, by regular mail, upon all counsel on the attached Service List.

Dated: New York, New York
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SECURITY ADMINISTRATION :
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DECLARATION OF BETH E. GOLDMAN

BETH E. GOLDMAN, pursuant to 28 U.S.C. § 1746, declares
as follows:

1. I am an Assistant United States Attorney in the
office of Michael J. Garcia, United States Attorney for the
Southern District of New York, one of the attorneys representing
respondents Transportation Security Administration ("TSA"),
Department of Homeland Security, and United States of America
(collectively, "Respondents"), in the above-captioned petitions
for review (the "Petitions").

2. I submit this declaration in support of
Respondents' motion to transfer the Petitions to the U.S. Court
of Appeals for the District of Columbia Circuit, pursuant to 28
U.S.C. § 2112(a)(5).


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3. Annexed hereto as Exhibit V is a copy of the Opposition to Motion to Transfer filed by respondents in the United States Court of Appeals for the District of Columbia Circuit.

4. Annexed hereto as Exhibit W is a copy of the Opposition to Motion to Consolidate and Transfer filed by American Airlines, Inc. and AMR Corporation in the United States Court of Appeals for the District of Columbia Circuit. Various other parties who filed petitions for review in the D.C. Circuit have joined in American's opposition to the motion to transfer the petitions to this Court.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
May 2, 2006



BETH E. GOLDMAN
Assistant United States Attorney

[CASE NOT YET SCHEDULED FOR ORAL ARGUMENT]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ADELALIDE MAUREEN DRISCOLL,)	
Individually and as the)	
Executrix of the Estate of)	
PATRICK JOSEPH DRISCOLL,)	
et al.,)	
)	
Petitioners,)	
)	
v.)	Nos. 06-1123,
)	06-1124
TRANSPORTATION SECURITY)	
ADMINISTRATION, DEPARTMENT of)	
HOMELAND SECURITY, and the)	
UNITED STATES of AMERICA,)	
)	
Respondents.)	

OPPOSITION TO MOTION TO TRANSFER

INTRODUCTION

The above-captioned petitions for review challenge two Transportation Security Administration (TSA) Orders (dated February 7 and March 17, 2006, respectively) declining to disclose Sensitive Security Information related to airport security. The petitioners in those two petitions (the “movants”) filed a motion (the “Transfer Motion”) to have all petitions seeking review of these Orders consolidated and transferred from this Court to the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 2112(a)(5), which permits such transfers “for the convenience of the parties in the interest of justice.” Because the factors this Court considers under that statute weigh against such a transfer, the motion should be denied.

The parties agree regarding the five factors relevant to this Court’s decision under § 2112(a)(5). As described in detail below, three of those factors - the nationwide impact of the litigation, the familiarity of the courts with parties and issues, and the caseload of this Court – weigh heavily against transfer. The other factors – the location of parties and counsel, and the number of truly aggrieved parties – are neutral. Thus, under this Court’s precedents, transfer is inappropriate.

The movants’ contrary argument is based largely on the relationship between the petitions for review and litigation currently pending in the United States District Court for the Southern District of New York arising out of the September 11, 2001

terrorist attacks. Specifically, the movants claim that section 408(b)(3) of the Air Transportation Safety and System Stabilization Act, P.L. 107-42 (ATSSSA) (codified as a note to 49 U.S.C. § 40101), requires all litigation related to those attacks to be conducted in that district court, which, according to the movants, constitutes an implicit requirement that any petition for review on a related topic must be heard by the United States Court of Appeals for Second Circuit.

Reliance on section 408(b) of ATSSSA is misplaced because all parties to all of the petitions for review agree that it does not apply directly to the petitions here, which must be heard in a court of appeals in the first instance under 49 U.S.C. § 46110. Indeed, Congress provided venue over these petitions only in “the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person [filing the petition] resides or has its principal place of business.” 49 U.S.C. § 46110(a).

While Congress thus provided that some petitions for review of the TSA Orders at issue here could be filed in the Second Circuit, this Court is the only one in which Congress specified that all such petitions could be filed. To the extent all such petitions ultimately should be consolidated – a point on which all parties appear to agree – § 46110(a) demonstrates that they should be consolidated in this Court, rather than in the Second Circuit.

The movants urge this Court to transfer these cases because of alleged misconduct by the petitioners here. But the claims of misconduct are without basis.

First, the filing of petitions for review in this Court was not improper. In fact, the petitioners complied with 49 U.S.C. § 46110. Nothing prevented the movants from filing first in the Second Circuit. Second, the movants' claim that the petitioners have improperly attempted to affect the record on appeal is similarly without merit. Nothing done by the petitioners affects the relevant record, which consists only of the administrative record relied on by TSA in issuing the Orders.

There is considerable heated rhetoric in the Transfer Motion concerning allegations that other petitioners have engaged in improper conduct. However, the bottom line is that the relevant factors under the law make clear that this Court, rather than any other, is the appropriate forum to decide the important administrative law issues here concerning implementation by TSA of a nationwide policy decision designed to protect aviation security.

BACKGROUND

1. Statutory and Regulatory Background

TSA is charged with overseeing the nation's transportation security, including the security of the civil aviation system. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597, 597-604 (2001). Among other

responsibilities, Congress has directed TSA to prohibit the disclosure of information relating to civil aviation security if disclosure would be detrimental to transportation security. See 49 U.S.C. § 114(s). TSA has promulgated regulations implementing this statutory directive. See 49 C.F.R. Pt. 1520.

Pursuant to TSA’s regulations, access to sensitive information relating to civil aviation security -- called “Sensitive Security Information” or “SSI” – is limited to persons, such as airport operators and air carriers, who have a regulatory “need to know” the information, including carrying out security requirements imposed by federal law. See 49 C.F.R. §§ 1520.9(a)(2) & 1520.10. In TSA’s view, persons who want or need access to SSI for purposes of private civil litigation do not have a “need to know” this sensitive aviation security information within the meaning of its regulations. Id. § 1520.10. However, by regulation, TSA may authorize conditional disclosure of SSI to a person who does not have a regulatory need to know the information “upon the written determination by TSA that disclosure of such records or information, subject to such limitations and restrictions as TSA may prescribe, would not be detrimental to transportation security.” 49 C.F.R. § 1520.15(e).

2. The TSA Orders at Issue

The instant Petitions arise from two orders issued by TSA in response to requests by parties to consolidated private tort litigation pending in the Southern

District of New York that arises out of the terrorist attacks of September 11, 2001. See In re September 11 Litigation, 21 MC 97 (AKH) & 21 MC 101 (AKH) (the “September 11 Litigation”). Various plaintiffs in the September 11 Litigation, including several petitioners here, administratively sought access to SSI for use in the litigation, and specifically requested that TSA grant an exception to the regulatory prohibition against disclosure of SSI.¹ Defendants in that litigation also sought authorization from TSA to disclose SSI as part of their defense.

On February 7, 2006, TSA Administrator Edmund S. Hawley issued a Final Order (Exhibit A hereto, the “February 7 Order”) denying the requests of the parties to the September 11 Litigation for conditional disclosure of SSI. The Administrator determined that disclosure of SSI in the September 11 Litigation, even pursuant to protective measures proposed by the parties, presents a risk to transportation security that does not outweigh the immense public interest in protection of aviation security. See February 7 Order 5. Accordingly, consistent with the position taken by TSA in all other civil litigation since September 11, 2001 around the United States, the Administrator denied the requests for conditional disclosure of SSI because he did not

¹ Plaintiffs in that case declined to participate in the 9/11 victims compensation fund established by Congress, see ATSSSA §§ 401-09 (49 U.S.C. § 40101 (note)), and chose instead to sue airports, airlines, and others over the events of September 11, 2001.

find that such disclosure “would not be detrimental to transportation security.” See id.; 49 C.F.R. § 1520.15(e).

On March 17, 2006, TSA issued a second Final Order (Exhibit B hereto, the “March 17 Order”) in connection with the September 11 Litigation. In the March 17 Order, TSA made final SSI determinations as to more than 20,000 pages of documents submitted to TSA in the so-called “Second Wave of Discovery” in the September 11 Litigation. In that Order, TSA permitted disclosure of considerable material but declined to authorize disclosure of SSI.

3. The Petitions for Review

Pursuant to 49 U.S.C. § 46110(a), any person disclosing a substantial interest in an order issued pursuant to 49 U.S.C. § 114(s) – including both of the TSA Orders at issue here – may petition for review of that order in “the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.” Numerous parties to the September 11 Litigation – both plaintiffs and defendants – have filed petitions for review of these two TSA Orders. These include petitions seeking review of only the February 7 Order, only the March 17 Order, or both, and have been filed both in this Court and in the United States Court of Appeals

for the Second Circuit.² This Court has consolidated some such petitions that were filed in this court.³

4. Actions Required by 28 U.S.C. § 2112(a)

A specific statutory provision, 28 U.S.C. § 2112(a), governs instances, like those here, where multiple petitions for review of the same agency order are filed in different courts of appeals. Here, the statute provides for different procedures for the challenges to each TSA Order.

The first challenge to the February 7 Order was filed in this Court 38 days after the Order was issued. See Petition in No. 06-1093. Accordingly, as the movants concede, 28 U.S.C. § 2112(a)(1) & (5) requires that all petitions for review of that

² The consolidated petitions are: American Airlines, Inc. v. TSA, Nos. 06-1093 & 06-1100; Argenbright Security, Inc. v. TSA, No. 06-1101; Huntleigh USA Corp. v. TSA, No. 06-1103; Globe Aviation Servs., Inc. v. TSA, No. 06-1107; Boeing Co. v. TSA, No. 06-1108; US Airways, Inc. V. TSA, No. 06-1114. The petitions that have not been consolidated with the others are Cantor Fitzgerald Europe v. TSA, Nos. 06-1125 & 06-1126 and Massachusetts Port Authority v. TSA, [docket number unknown].

³ The Transfer Motion also requests that all petitions for review of the two TSA Orders in this Court be consolidated. The respondents do not oppose this motion, and note that the Court previously consolidated some of the petitions sua sponte. However, such consolidation may be premature if, as described below, a random assignment by the Multidistrict Litigation Panel requires that, at least temporarily, the petitions for review of the March 17 Order be lodged in a court of appeals different from the court hearing the petitions for review of the February 7 Order (namely, this Court).

Order be transferred to this Court. Transfer Motion 11. Respondents are filing a motion in the Second Circuit requesting such transfer shortly.

By contrast, because petitions for review of the March 17 Order were filed both in this Court and in the Second Circuit within ten days of that Order, the statute requires the Multidistrict Litigation (MDL) Panel to randomly select either this Court or the Second Circuit, and mandates that all petitions challenging that Order be transferred to the selected court of appeals. See 28 U.S.C. § 2112(a);⁴ Transfer Motion 11-12.

When these required procedures are completed, either all the petitions will be before this Court, or the petitions challenging the February 7 Order will be here and the petitions challenging the March 17 Order will be in the Second Circuit. At that point, whichever court(s) of appeals has the petitions will be able to transfer them to any other court of appeals “[f]or the convenience of the parties in the interests of justice.” 28 U.S.C. § 2112(a)(5).⁵

⁴ The statute requires TSA to file a notice with the MDL Panel, which it has done.

⁵ Because these initial steps required by the statute have not yet been taken, the Transfer Motion is premature and could result in the need for multiple additional transfers. Nonetheless, we believe it appropriate to address the issues raised by the Motion, which will change little if at all between now and the time at which it will be appropriate for this Court to decide the Motion.

5. The Motions to Transfer

On April 3, 2006, Petitioners in Nos. 06-1123 and 06-1124 (the “movants”) filed the Transfer Motion, seeking to consolidate all petitions challenging the February 7 and March 17 TSA Orders and to transfer such petitions to the Second Circuit.⁶ For the reasons that follow, transfer should be denied.

ARGUMENT

A. The Considerations Relevant to the Transfer Motion Weigh Heavily Against Transfer.

Petitioners invoke 28 U.S.C. § 2112(a)(5), which states that “for the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.” Liquor Salesmen’s Union Local 2 v. NLRB, 664 F.2d 1200, 1225 (D.C. Cir. 1981), describes the considerations relevant to the disposition of such a motion:

In fleshing out the phrase “for the convenience of the parties in the interest of justice,” the courts have considered the location of counsel, location of the parties, whether the impact of the litigation is local to one region, whether one circuit is more familiar with the same parties

⁶ On April 5, 2006, petitioners in Nos. 06-1125 and 06-1126 filed a motion to consolidate and transfer stating a desire to “incorporate and expressly rely on all arguments raised in the [Transfer Motion].” This response responds to the arguments of the Cantor Petitioners as well.

and issues or whether there is but one truly aggrieved party.

Here, these factors weigh heavily in favor of retaining the petitions in this Court

1. The motion emphasizes the location of “scores of Petitioners” who reside within the Second Circuit and are “already represented in New York by counsel being heard “across the street from the Second Circuit courthouse.” Transfer Motion 14. But the residence of the parties is “not a major factor.” Liquor Salesmen’s, 664 F.2d at 1209. This point is especially true here, because the petitioners live all over the country (and abroad),⁷ and the petitions for review of agency action will involve no trial, depositions, or evidence-gathering.

As for the location of counsel, the motion avoids this issue, instead emphasizing the fact that the counsel here already represent the petitioners in a case located in the Southern District of New York. Transfer Motion 14. But the relevant factor is the location of the counsel (not of a case in which those counsel are involved), and, interestingly, the counsel who signed the motion lists his location as Alexandria, Virginia, one site of the September 11, 2001 terrorist attacks located a few miles from this Court’s Courthouse, but hundreds of miles from the Second

⁷ One of the airplanes hijacked on September 11, 2001 crashed into the Pentagon, just across the river from this Court.

Circuit. See Transfer Motion 20.⁸ Of the other counsel whose names appear in the signature blocks of the documents attached to this motion (and the Cantor Petitioners' Motion), three are located in New York, two each in Illinois and New Jersey, and one each in Florida, Kansas, and Texas.⁹ Lead counsel who will represent TSA in the review of administrative action before this Court are at the Department of Justice, within this Circuit. Thus, this factor is neutral.

2. The nationwide nature of these petitions – illustrated by the varied locations of petitioners' counsel and forthrightly acknowledged on page 15 of the Transfer Motion – weighs heavily against transfer to the Second Circuit. This Court has repeatedly noted that the fact that a case involves an issue of national concerns weighs against transfer out of this Circuit. See Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB, 694 F.2d 1289, 1300-01 (D.C. Cir. 1982); Public Service Comm'n for N.Y. v. Federal Power Comm'n, 472 F.2d 1270, 1273 (D.C. Cir. 1972). The Transfer Motion suggests abandoning this Court's precedent in light of ATSSSA

⁸ Other documents list the same law firm with an address in New York, as well. See Rule 26.1 Corporate Disclosure Statement for "Certain Underwriters at Lloyds Comprising Syndicate Nos. 33, 1003, 2003, 1243 and 0376."

⁹ The attorney with the Texas address and one of the New Jersey attorneys are members of different law firms that have offices in this Circuit, but not in the Second Circuit. See <http://www.saul.com/offices/details.aspx?officeID=160> (visited April 9, 2006); http://www.zelle.com/sub/firm_offices.html (visited April 7, 2006).

section 408(b)(3) (codified as a note to 49 U.S.C. § 40101):

The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

The petitions for review at issue here are not such “claims,” but instead are petitions for review of federal agency action, taken as part of a nationwide policy concerning proper treatment of SSI designed to protect aviation security. Indeed, petitioners have so recognized by filing their petitions in the courts of appeals under 49 U.S.C. § 46110, rather than in the Southern District of New York under the above-quoted provision. See Transfer Motion 1. The quoted statutory provision is thus irrelevant.

Even more important, the relevant statutory provision, 49 U.S.C. § 46110(a), evinces a Congressional preference that these petitions remain in this Court. That provision allows a petitioner to file in “the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.” Under this provision, some petitions for review of the TSA Orders could have been filed in any court of appeals where the hundreds of affected parties reside (presumably every

Circuit in the country), but the only court that Congress empowered to hear every such petition is this Court. See, e.g., Cantor Transfer Motion 2-3 (noting that certain petitioners could not file in the Second Circuit because their principal offices are located in London).¹⁰

Thus Congress indicated a clear preference that this Court handle petitions of this nature by statutorily vesting it with venue over all the petitions challenging the TSA Orders at issue here, while vesting the Second Circuit with venue over only some of these petitions. That is hardly unusual or surprising, given that “the vast majority of challenges to administrative agency action are brought” to this Circuit. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 535 n.14 (1978); Patricia M. Wald, The Contribution of the D.C. Circuit to Administrative Law, 40 Admin. L. Rev. 507, 508-14 (Fall 1988). This Court has greater experience and expertise in this area than does any other Circuit.

3. This point leads naturally to a discussion of the relative familiarity of this Court and the Second Circuit with the parties and issues in these petitions. The Transfer Motion suggests that the Second Circuit is more familiar with both the

¹⁰ Although the movants complain that the Aviation Defendants engaged in “jurisdictional games” by filing petitions in this Court, they ignore the fact that, by statute, these defendants could not file in the Second Circuit, and that the movants have themselves filed petitions in this Court.

parties and the issues because of its current consideration of Chowdhury v. Transportation Security Administration, No. 03-40783 (2d Cir.). See Transfer Motion 15-18. As an initial matter, however, that case gives the Second Circuit no additional familiarity with any relevant party. The only parties in common between Chowdhury and the petitions at issue here are the respondents – TSA, the Department of Homeland Security, and the United States – hardly parties with which the Second Circuit is more familiar than this Court.¹¹ We also note that Chowdhury demonstrates the nationwide nature of the issues concerning SSI because it involves a request for SSI to be used in the underlying private civil litigation in the Northern District of California.

The issues in Chowdhury also involve TSA’s refusal to disclose SSI. But there is no indication that the three judges (two of whom are on senior status) who heard oral argument in Chowdhury (much less the entire Second Circuit) developed any appreciable expertise as a result. Moreover, the statement that “a decision from the Second Circuit is expected,” Transfer Motion 13, is speculative. The movants failed to disclose that in fact, the Second Circuit may not rule any time soon in Chowdhury

¹¹ Page 12 of the Transfer Motion notes that some of the petitioners participated in Chowdhury as amici. But the movants provide no support for the notion that prior such participation gives them any greater claim or connection to the forum they prefer for this case.

because of the pending bankruptcy of one of the airline parties in the underlying litigation there, as the order from the district court in that case (attached as Exhibit C hereto) indicates.

By contrast, this Court has not only received briefs and held oral argument in a case involving the denial of access to SSI, it has actually issued a published decision. In Jifry v. TSA, 370 F.3d 1174, 1182 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005), this Court upheld the use of SSI to revoke pilots' airmen certificates over the pilots' protests that they lacked access to relevant SSI. Moreover, as noted above, this Court is by far the most expert in weighing issues of administrative law, which is what is involved here. Indeed, as noted above, of all the Circuits, Congress opened only this one to all petitioners under 49 U.S.C. § 46110. Accordingly, the courts' relative familiarity with the relevant parties and issues weighs against transfer.

4. The "caseloads of the respective courts" here also weighs against transfer, despite the statements in the Transfer Motion to the contrary. The motion states that both this Court and the Second Circuit have "crowded dockets." See Transfer Mot. 17 (citing Lear Declaration, Exhibit J). The statistics cited in the Transfer Motion (Lear Declaration, Exhibit J) show that, as of September 30, 2005, this Court had 1,463 pending cases (163 pending cases per active Judge), while the Second Circuit

had 9,965 pending cases (767 pending cases per active Judge). In other words, the Second Circuit has approximately seven times as many cases as this Court and approximately five times as many cases per active Judge. Obviously, this factor weighs heavily against transfer to the Second Circuit.

5. The Transfer Motion suggests that the “most significantly aggrieved” petitioners are the “victims of 9/11.” Transfer Motion 18. As noted above, many such victims reside outside the Second Circuit. In any event, as this Court has made clear, unless a party is not genuinely aggrieved at all (and the Motion certainly does not allege this as to any petitioner, some of whom are defendants in the Southern District of New York litigation), the Court will not inquire as to the parties’ relative degree of aggrievement. Liquor Salesman, 664 F.2d at 1206; Oil, Chemical & Atomic Workers, 694 F.2d at 1299-1300. As to the relevant question of “whether there is but one truly aggrieved party,” the answer is obviously “no,” and therefore this factor is neutral.

In sum, of the five factors relevant to a discretionary transfer decision under § 2112(a)(5), three (the national impact of the litigation, court familiarity with parties and issues, and the caseloads of the respective courts) strongly favor this Court, while the remaining two (location of counsel and parties, and whether there is only one truly aggrieved party) are neutral. Accordingly, the motion should be denied.

B. The Other Issues Raised by the Motion are Irrelevant Diversions.

In addition to discussing the factors relevant to a transfer decision under section 2112(a)(5), the Transfer Motion discusses at length several issues that are not germane.

1. As the Motion shows, the movants incorrectly assumed that petitions for review of the two TSA Orders at issue here would only be filed in the Second Circuit. See, e.g., Transfer Motion 2. It is equally clear that the movants feel betrayed by the fact that, contrary to their expectation, the first such petition and subsequent petitions were filed in this Court. See, e.g., id. at 3 (accusing the Aviation Defendants of “reneging on the [district court] parties’ understanding”); id. at 9 (referring to the movants’ “misplaced” reliance “on the good faith of the Aviation Defendants”); id. at 19 (referring to the Aviation Defendants’ “gamesmanship,” “astonishing display,” and “covertly filed Petition in this Court”).

This Court must decide the motion to transfer on its merits under the relevant criteria, not on the movants’ sense of betrayal or use of intemperate language. Further, there is no claim of misconduct by the respondents, who dictated neither the location nor timing of the petitions that were filed.

2. The Motion suggests, without citation, that jurisdiction over these petitions must lie exclusively in the Second Circuit because they address “issues at the heart

of discovery” in the district court litigation in the Southern District of New York. Transfer Motion 2. In so arguing, the Motion ignores the relevant statutory language, which places venue in this Court (and, at least in some instances not the Second Circuit) to review the TSA Orders at issue, regardless of their relationship to any district court litigation. See 49 U.S.C. § 46110(a).

Moreover, in making this argument, the Motion inexplicably ignores the situation in a case it touts elsewhere. Chowdhury v. Transportation Security Administration, Nos. 03-40783, 04-1131, 04-1796 (2d Cir.), placed before the Second Circuit petitions to review TSA Orders that “went to the heart” of discovery in a case pending in the district court in the Northern District of California. See Chowdhury v. Northwest Airlines Corp., 226 F.R.D. 608 (N.D. Cal. 2004).

3. The Motion asserts that the first petition for review filed in this Court was “preemptive,” and “cut[] short the creation of the appellate record.” Transfer Motion 3. It repeatedly refers to the idea of using discovery in the district court to “create a record” relating to these petitions. Transfer Motion 6; accord Id. at 2, 8-10, 19.

Despite the frequency with which this claim is repeated, it is plainly wrong. As the Motion acknowledges, the petitions were filed under 49 U.S.C. § 46110(a), see Transfer Motion 1, and this Court has held that judicial review of TSA action under 49 U.S.C. § 46110 “is limited . . . to the administrative record that was before the

TSA when it [issued the challenged order].” Jifry v. TSA, 370 F.3d 1174, 1181 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005); see Van Dyke v. NTSB, 286 F.3d 594, 594 (D.C. Cir. 2002) (noting that, in petition under 49 U.S.C. § 46110, “[t]he question is whether there is ‘substantial evidence’ in the record to support” the administrative decision”); 28 U.S.C. § 2112(b) (defining the record as “the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned”).

Thus, discovery in the district court in New York after the issuance of the TSA Orders at issue here could not possibly have altered the administrative record upon which those Orders were based, and by which this Court will judge their validity under 49 U.S.C. § 46110. The movants’ many allegations about their inability to obtain discovery thus are quite puzzling given that the administrative law issues at

stake will be decided on the basis of the TSA agency record. Litigation maneuvering in the district court by any of the parties would appear to be irrelevant to that issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 2006, I filed and served the foregoing Respondents' Opposition to Motion to Transfer and the attached Certificate as to Parties, Rulings, and Related Cases by causing the originals and four copies of each to be sent to this Court by hand delivery, and by causing two copies of each to be served upon the following counsel by Federal Express overnight:

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Douglas Letter
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Exhibit A

February 7, 2006 TSA Final Order

Exhibit B

March 17, 2006 TSA Final Order

Exhibit C

Order in Chowdhury v. Northwest Airlines Corp.,
No. C02-02665 CRB (N.D. Cal. Oct. 5, 2005)

W

**UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

----- X		
AMERICAN AIRLINES, INC. and AMR CORP., :	:	
	:	
Petitioners, :	Case Nos.	06-1093
	:	06-1100
v. :	:	06-1101
	:	06-1103
TRANSPORTATION SECURITY :	:	06-1107
ADMINISTRATION, DEPARTMENT OF :	:	06-1108
HOMELAND SECURITY, et al., :	:	06-1114
	:	06-1123
Respondents. :	:	06-1124
	:	06-1125
	:	06-1126
	:	
	:	
----- X		

OPPOSITION TO MOTION TO CONSOLIDATE AND TRANSFER

Pursuant to Fed. R. App. P. 27, American Airlines, Inc. and AMR Corporation (collectively “American”), petitioners in Cases Nos. 06-1093 and 06-1100, oppose the Motion to Consolidate and Transfer filed in this Court pursuant to 28 U.S.C. § 2112(a)(5), on April 3, 2006, by petitioners-movants Adelaide Driscoll, et al. (“Driscoll Movants”) (Nos. 06-1123, 06-1124, pets. filed Apr. 3, 2006) (“Driscoll Motion”), and joined by petitioners-movants Cantor Fitzgerald Europe, et al. (“Cantor Movants”) (Nos. 06-1125, 06-1126, pets. Filed Apr. 5, 2005) (collectively, the “Movants”). The Driscoll and Cantor Movants urge this Court to transfer the Petitions filed in this Court for review of (1) the

Transportation Security Administration (“TSA”), Department of Homeland Security’s Final Order on Requests for Conditional Disclosure of Sensitive Security Information (“SSI”), dated February 7, 2006 (the “February 7 Order”) and (2) the TSA’s Final Order on Requests for Identification of Sensitive Security Information in Documents Submitted as Part of the Second Wave of Discovery, dated March 17, 2006 (the “March 17 Order”), from this Court to the United States Court of Appeals for the Second Circuit. Movants seek transfer despite an express recognition that this Court is the “presumptive” court for review of the February 7 Order under 28 U.S.C. § 2112(a) and despite the undeniable fact that the Orders are inextricably intertwined and should be reviewed by the same Court. None of Movants’ arguments is sufficient to overcome the presumption in favor of review by this Court: this Court is a fully appropriate venue – indeed, the most appropriate venue – for review of the TSA’s determinations regarding the use of Sensitive Security Information (“SSI”) in the underlying litigation. The Motion to Transfer should be denied.¹

Movants argue that because they are the parties aggrieved by the TSA’s Orders, although they failed to act for more than 38 days following the issuance of the February 7 Order, their choice of forum should control. They also argue that

¹ American has no objection to, and in fact strongly supports, the consolidation of all of the Petitions into a single case in this Court.

the Second Circuit is a more appropriate forum because the merits of the underlying personal injury and wrongful death cases in which the SSI questions arose will eventually be subject to review in the Second Circuit, although to date the Second Circuit has not reviewed any question at all relevant to the SSI issues in those cases. Finally, they raise a baseless series of accusations that American's counsel somehow acted improperly in filing its Petitions in accordance with the applicable statute.

The first argument rests on Movants' apparent presumption that they, rather than American or the other Aviation Defendants who have filed Petitions in this Court, are the only parties with a genuine interest in review or revision of the TSA's Final Orders. But that assumption is demonstrably mistaken: American submitted a written objection to the TSA regarding the non-disclosure of SSI for purposes of the record on appeal on December 12, 2005. American has repeatedly and consistently taken the position that the TSA's determinations regarding SSI will prevent American from effectively defending itself by demonstrating that its conduct on September 11, 2001 was consistent with the preemptive, exclusive federal standard of care embodied in the documents that TSA has precluded American from introducing in the litigation. *See, e.g.*, Ex. B to February 7 Order, Letter from Counsel for American to TSA, dated Dec 12, 2005, at 3; Ex A to

Declaration of Gerard R. Lear, dated Apr. 3, 2006 (“Lear Declaration”), 11/18/05 Tr. at 40-41.²

Movants’ second argument is contrary to 49 U.S.C. § 46110. Far from providing that the court in which an underlying litigation takes place is relevant to a determination of venue for an SSI appeal, the statute gives a petitioner three choices of forum for review: (1) this Circuit, which is universally available to all petitioners; (2) the Circuit in which petitioner resides; or (3) the Circuit in which it has its principal place of business. No mention at all is made of the Circuit in which underlying litigation might be subject to review; indeed, the statute precludes review in any District Court, in spite of the obvious fact that the District Courts are necessarily closer to the facts and issues in any litigation than the Circuit Courts. The statute clearly removes the analysis of SSI issues to a point “above the fray” of the underlying litigation. Chowdhury v. TSA, Nos. 03-040873, 04-1131, 04-1796 (2d Cir.), a case Movants cite throughout their papers, illustrates this statutory regime at work. In Chowdhury, the underlying litigation is in the

² To the extent that Movants raise arguments on the merits (including the entirety of Paragraph 16 of the Lear Declaration) other than to attempt to demonstrate that they are the only truly aggrieved party, those arguments are irrelevant to the question of transfer. Indeed, it is somewhat incongruous that Movants would attempt to preview their arguments on the merits to a Court that they urge should not decide them.

Northern District of California, but the Petition for review of the TSA's SSI determinations was filed in the Second Circuit, where Petitioner resided.

All of the factors cited by Movants as favoring transfer to the Second Circuit arise from the single fact that the underlying litigation is occurring in a District Court within that circuit. The statute, however, does not give that fact any relevance at all in the selection of a forum for review of an SSI determination by the TSA. Moreover, because of the geographic diversity of the parties and counsel, the Second Circuit is no more convenient a venue than this Court for the adjudication of this SSI appeal – and for the TSA may be considerably less so.

By contrast, review in this Court is particularly appropriate, given that the parties with an interest in the TSA's Final Orders come from all over the United States; as Movants' own petitions demonstrate, this Circuit is the only court open to all of the parties seeking review of the TSA's Final Orders. In addition, as Movants themselves note, "The issues arising out of the September 11 Actions – including the instant petitions – are of concern to the entire nation." It is therefore particularly important that the TSA's SSI determinations be subject to a consistent standard of review; this Court has recognized that the need for uniformity in reviews of agency actions with nationwide impact favors review by this Court. *See Oil, Chem. & Atomic Workers Local Union No. 6-418 v. N.L.R.B.*, 694 F.2d 1289, 1300-01 (D.C. Cir. 1982). Moreover, this Court is justly recognized for its

expertise in both administrative agency law and national security issues. In sum, Movants have failed to demonstrate any basis for disturbing the presumption in favor of this Court, which is uniquely suited to address the important issues presented by the Petitions for review of the TSA's Orders. The Motion to Transfer should be denied.

STATEMENT OF FACTS

The February 7 and March 17 Final Orders were issued in connection with wrongful death, personal injury, property damage, and business interruption litigation arising out of the September 11 terrorist attacks. The litigation is pending in the United States District Court for the Southern District of New York, before the Honorable Alvin K. Hellerstein. See *In re September 11 Litigation*, 21 MC 97 (AKH) (S.D.N.Y.) and *In re September 11 Property Damage and Business Loss Litigation*, 21 MC 101 (AKH) (S.D.N.Y.) (collectively "September 11 Litigations"). Pursuant to an agreed-upon procedure discussed with the Court, the TSA plans to issue a series of final orders, of which the February 7 Order was the first and the March 17 Order was the second.

The February 7 Order denied American's request to (1) rely upon in its defense and (2) as necessary, disclose to the Court, the finder of fact, counsel for other parties, certain fact and expert witness, and others specific documents that

were designated as “sensitive security information” (“SSI”) by the TSA.³ The February 7 Order also denied counsel for the plaintiffs and cross-claim plaintiffs (including Movants) in the September 11 Litigations access to unredacted SSI documents that are responsive to discovery requests served in those litigations. The February 7 Order described in detail the TSA’s rationale for concluding that the documents contained SSI, for determining that disclosure of the documents would be detrimental to the interests of aviation security, and for rejecting proposals for the conditional disclosure of SSI-containing documents in the September 11 Litigations. Some documents designated as SSI were withheld in their entirety; others were redacted or replaced with after-the-fact “SSI substitutes” created by the TSA.

American filed the first of a series of petitions seeking review of the Final Orders with this Court on March 17, 2003 (No. 06-1093), pursuant to 49 U.S.C. § 46110, thirty-eight days after the TSA issued the February 7 Final Order.

³ Among the documents addressed by the February 7 Order that American had sought permission to disclose are (1) the complete Checkpoint Operations Guide, including all exhibits and appendices, in effect as of September 11, 2001; (2) the complete Air Carrier Standard Security Program with all appendices and exhibits, in effect as of September 11, 2001 at Logan International Airport and Dulles International Airport; (3) all Security Directives issued by the Federal Aviation Administration (“FAA”) to Petitioners for the period January 1, 1996 through September 11, 2001; and (4) all Information Circulars issued by the FAA to Petitioners for the period January 1, 1996 through September 11, 2001.

American elected to file its petition in this Court as the most widely accessible of the only three courts of appeals open to its petition under 49 U.S.C. § 46110: the Third Circuit (where American is incorporated); the Fifth Circuit (where it has its principal place of business); and the D.C. Circuit (which is open to all petitioners under Section 46110). Thus, although Movants complain that the parties to the September 11 Litigations had a common “understanding” that Petitions for review of the TSA’s Orders would be filed in the Second Circuit, the Second Circuit was not an option open to American, which had waited until nearly two-thirds of the 60-day period for filing had elapsed before filing its Petition for review.

Coincidentally, also on March 17, 2006, the TSA issued the March 17 Order. The March 17 Order is a particular application of the policies articulated in the First Final Order, relating to the use and disclosure of so-called “Second Wave” documents containing “sensitive security information” (“SSI”) in the September 11 Litigations.⁴ Once again, some documents designated as SSI were withheld in their entirety, while others were redacted or replaced with after-the-fact

⁴ Among the Second Wave documents that American sought permission to disclose are (1) ground security coordinator training materials; (2) training materials concerning passenger screening and security procedures; (3) flight training manuals; (4) aircraft operation manuals; (5) ticketing information, incident reports, and investigative materials generated by American Airlines concerning the events of September 11, 2001; and (6) personnel files and lists of American Airlines employees.

“SSI substitutes” created by the TSA. The policies regarding the use and disclosure of the documents so designated were set forth in the February 7 Order.

On March 20, American filed a Petition for review of the March 17 Order in this Court (under case no. 06-1100). On that same date, apparently prompted by American’s filing on March 17 in this Court, a property damage plaintiff (Industrial Risk Insurers) filed petitions for review of both the February 7 Order and the March 17 Order in the Second Circuit. A cascade of Petitions followed, some filed in this Court and some filed in the Second Circuit.⁵

As the multiple Petitions filed in this Court attest, the parties to the September 11 Litigations come from all over the United States (in fact, the world), and many parties on both the defense and plaintiffs’ sides of the litigation are not eligible under 49 U.S.C. § 46110 to file in the Second Circuit. Likewise, counsel

⁵ Petitions were filed with this Court by the defendants in the September 11 Litigations, including Argenbright Security, Inc.; Huntleigh USA Corporation; Globe Aviation Services Corp.; Globe Airport Security Services, Inc.; The Boeing Company; US Airways, Inc.; UAL Corp., United Airlines, Inc.; and US Airways Group, Inc. (With the exception of the petition of UAL Corp. and United Airlines, Inc, which was filed April 6, 2006, all of the September 11 defendants’ petitions were consolidated with American’s by the Court on its own motion on March 31, 2006.). Certain personal injury, wrongful death and property damage plaintiffs filed petitions with the Second Circuit. The Driscoll Movants and the Cantor Movants each later filed petitions with this Court, prior to making their motion to consolidate and transfer the petitions to the Second Circuit. A complete listing of the petitions for review of which American is aware may be found in the Certificate as to Parties, Rulings and Related Cases submitted with this Response.

for the parties come from all over the country. Liaison counsel for the Property Damage and Business Loss Plaintiffs is a Chicago law firm. Counsel representing the largest number of the remaining wrongful death plaintiffs is based in Charleston, South Carolina. Aviation defense counsel for Petitioners hail from Texas, Seattle, and Illinois, among other places. While there are certainly New York parties, represented by New York counsel, who have challenged the TSA's Final Orders, the interests implicated by the TSA's February 7 and March 17 Orders are hardly parochial.

ARGUMENT

I. The D.C. Circuit is the Appropriate Venue for Review of These Final Orders

Congress recognized that multiple parties with an interest in review of an agency order might file petitions in different Circuits for review of the same order and established a mechanism to determine which Circuit would hear the case.

Under 28 U.S.C. § 2112:

- If a single petition is filed within the first ten days following the agency's issuance of an order, the agency will file the record on review in the Circuit in which that petition is filed and any later-filed petitions will be transferred to that Circuit for consolidation with the first-filed petition.
- If more than one petition is filed in different Circuits within the first ten days following the agency's issuance of an order, the Judicial Panel on Multidistrict Litigation will choose among the Circuits in which petitions have been filed by lottery.

- If no petition is filed for the first ten days following the issuance of the order, the agency shall file the record on review in the first Circuit in which a petition is filed thereafter and all other petitions will be transferred to that Circuit for consolidation with the first-filed petition.

The statute thus creates a presumption in favor of the Circuit selected by the only party to file within ten days or the first party to file thereafter. That presumption can be overcome only if “for the convenience of the parties in the interest of justice, the court in which the record is filed . . .” determines to transfer all the proceedings with respect to the order at issue to a different Court of Appeals.

With respect to the February 7 Order, as Movants acknowledge, this Court is the presumptive court of review. Moreover, there can be no doubt but that the February 7 and March 17 Orders should be reviewed by the same court; the possibility that identical TSA policies could be overturned by one court and upheld by another would throw the September 11 Litigations into chaos. Courts have long recognized that closely-related agency orders must be reviewed together by the same court. *See, e.g., Natural Resources Defense Council, Inc. v. E.P.A.*, 673 F.2d 392, 399, n.16 (D.C. Cir. 1980).

A. This Court Is Uniquely Qualified to Review the Orders.

Here, the Movants have failed to show that either the interest of justice or the convenience of the parties requires the transfer of the proceedings regarding

either the February 7 Order or the March 17 Order from this, the presumptive forum, to the Second Circuit. To the contrary, of all of the Courts of Appeal, this Court is best suited to review the TSA's SSI determinations in a way that ensures nationwide uniformity. Congress has shown particular concern that the TSA's SSI determinations be consistent and subject to uniform analysis; in 2005 Congress enacted a statute requiring the TSA adopt uniform standards for the process and substance of SSI determinations. Pub. L. No. 109-90, 119 Stat. 2064, § 537, (2005). In light of that interest in consistency, as well as the significant national issues at stake, review in this Court is most appropriate. *See, e.g., Oil, Chem. & Atomic Workers Local Union No. 6-418*, 684 F.2d at 1300 (denying motion to transfer where "the parties operate on a national scale, and the impact of the litigation goes far beyond the interests of one region"); *Public Serv. Comm'n for the State of N.Y. v. F.P.C.*, 472 F.2d 1270, 1273 (denying motion to transfer where "[t]he entire Nation is interested in natural gas rates.").

Section 46110(a) provides that a petition for review of a TSA order concerning SSI can be brought by any party "disclosing a substantial interest in the order" in "the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." There is no one Court that can hear all of the Petitions based on the residency or principal place of business provisions

of 49 U.S.C. § 46110(a). The parties to the September 11 Litigations, all of whom have a “substantial interest” in the Final Orders, reside and have their principal places of business in multiple circuits. This Court, having been designated by Congress as the only universally available forum for the review of TSA’s SSI determinations, is the appropriate forum for these proceedings.

B. There Is No Reason To Prefer the Second Circuit Over This Court.

Movants urge transfer on the grounds that the Second Circuit is superior to this Court based on:

the location of counsel, the location of the parties, whether the impact of the litigation is local to one region, whether one circuit is more familiar with the same parties and issues or related issues than other courts, the caseloads of the respective courts, and whether there is but one truly aggrieved party.

Driscoll Motion at 13 (citing *Liquor Salesmen’s Union Local 2 v. N.L.R.B.*, 664 F.2d 1200, 1205 (D.C. Cir. 1981)). Contrary to Movants’ contentions, none of these factors favors the transfer of this action.

1. Location of Counsel and Parties

As described above, reflecting the national scope of the September 11 Litigations, parties and counsel are located all over the United States (and in some cases, including the Cantor Movants, outside the U.S.). Washington, D.C. is readily accessible by all the parties and their counsel. The TSA, the respondent agency in all of the Petitions, is headquartered in the District of Columbia, as is its

chief counsel in these review proceedings. *See* Entry of Appearance Form of Douglas Letter and Jonathan Levy, dated Mar. 30, 2006, (Nos. 06-110, 06-1101, 06-1103, 06-1107, 06-1108) (D.C. Cir.). Counsel for American has offices within the District of Columbia, and counsel for many of the other parties to the September 11 Litigations also have offices in the vicinity. Indeed, the Driscoll Motion was submitted by counsel located in nearby Arlington, Virginia. *See, e.g., Oil, Chemical & Atomic Workers Local Union No. 6-418*, 684 F.2d at 1301 (that an agency is headquartered and both petitioners' counsel have office in the Circuit weighs in favor of the denying the motion to transfer); *Am. Pub. Gas Ass'n. v. F.P.C.*, 555 F.2d 852, 857 (D.C. Cir. 1976) (denying transfer). This Court is no more difficult for the majority of petitioners to reach than the Second Circuit, and where, as here, the respondent agency is located in the District of Columbia the "convenience of the parties could hardly be as well served by venue elsewhere." *Am. Pub. Gas Ass'n.*, 555 F.3d at 857.

2. National Impact of the Litigation

Next, there can be little doubt that the TSA's SSI determinations are of national, rather than purely local, significance. The TSA is charged with making SSI determinations for the entire country, and is required to do so on a consistent basis. The question of the balance between the interests of private parties in access to full information – here in order to prosecute and defend the September 11

Litigations – and the need to protect sensitive information in order to ensure aviation security is clearly one that is not limited to any local community.

3. Familiarity with Issues

Movants' assertion that the Second Circuit is more familiar with the issues than this Court mistakes what the relevant issues are. The fundamental question on this appeal is not what happened on September 11, 2001 and who is responsible for it – issues that the Second Circuit is still a long way from addressing, in any event – but whether the TSA has made appropriate determinations of what information constitutes SSI and what policies and standards apply to the disclosure of SSI. While Movants can point to a single, long-pending appeal in the Second Circuit relating to SSI issues arising in the context of a very different civil rights case – which appears to have stalled as a result of the bankruptcy stay against the underlying litigation – this Court is recognized as a leading Court on issues of administrative agency law and questions of national security. Indeed, this Court has addressed TSA's evaluation of aviation security on multiple prior occasions. *See, e.g., Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004); *Coalition of Airline Pilots Ass'ns v. F.A.A.*, 370 F.3d 1184 (D.C. Cir. 2004).

Moreover, the Second Circuit has yet to hear any appeals in the September 11 Litigations relating to issues raised by the Petitions at all. The only September

11-related appeals heard to date by the Second Circuit concern very different issues from the ones implicated by review of the February 7 and March 17 Orders.⁶

Finally, Movants appear to argue that because American is not a truly aggrieved party, its choice of forum is not entitled to the statutory presumption. Movants' position is myopic: while it is correct, as Movants assert, that American has had access to its own SSI-containing material for purposes of formulating a defense, the formulation of a defense that a party cannot present to a court, trier of fact, or even an adversary is a singularly unsatisfying exercise. The gravamen of American's challenge to the TSA's Final Orders is that TSA's SSI determinations have precluded American from introducing the information to present an effective defense.

⁶ The only appeals that the Second Circuit has heard in the September 11 Litigations related to (1) whether German social insurers could maintain claims seeking recoupment of insurance benefits, *Grosshandels-Und Lagerei-Berufsgenossenschaft v. World Trade Center Properties, LLC*, 435 F.3d 136 (2d Cir. 2006); (2) whether the claims of rescue and clean-up workers who allegedly suffered respiratory injuries were embodied within the Air Transportation Safety and System Stabilization Act's grant of jurisdiction to the Southern District of New York, *McNally v. Port Auth. (In re WTC Disaster Site)*, 414 F.3d 352 (2d Cir. 2005); (3) whether the survivors of firefighters who lost their lives responding to the September 11 attacks could file suit alleging defects in the firefighters' radio-transmission communication equipment, when the survivors had filed claims with the Victim Compensation Fund, *Virgilio v. City of New York*, 407 F.3d 105, (2d Cir. 2005); and (4) whether the presumptive loss tables used to calculate awards by the Victim Compensation Fund violated the mandate of the ATSSSA that family members be compensated for their economic losses, *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003).

American's dilemma is very real. Among the documents that the TSA has determined American cannot introduce in their operative form are mandatory FAA requirements having the force of law that defined the security-related obligations of American on September 11, 2001. *See, e.g.*, 14 CFR § 108.9(a) (2001); 14 CFR § 108.25 (2001); 66 Fed. Reg. 37330, 37339 (July 17, 2001); 49 C.F.R. § 1542.303 (2004). Thus, there can be little disagreement that the requested documents collectively set forth the standard of care with which American was required to comply on September 11, 2001.

Civil litigation sometimes can proceed fairly without the parties having access to certain evidence because of its privileged status, but no litigation can proceed if the applicable standard-setting legal principles cannot be disclosed to the court or to the trier of fact. It would be unfair and a denial of due process to subject American to trials seeking billions of dollars in damages without permitting it to present in its defense the legal standards that governed its conduct. American is, by any measure, genuinely aggrieved by the February 6 and March 17 Orders. Its choice of forum is valid. *See Pub. Serv. Comm'n for the State of N.Y.*, 472 F.2d at 1272 (denying motion to transfer under § 2112(a) and announcing, "We think denial of the motion is in furtherance of the statutory scheme that appeal responsibility be determined by the filing of the first petition to review.")

II. American Has Not Engaged In Any Misconduct

Movants argue that somehow by filing a Petition in the statutorily designated, nationally available Court of Appeals 38 days after the February 7 Final Order was issued, American engaged in misconduct that warrants transfer. This is simply nonsense.

Movants attempt to make much of passing references to review of SSI in the Second Circuit that were made well before the TSA actually issued the February 7 Order. None of these references – most made by parties other than American – amount to a promise or agreement to seek review in the Second Circuit. Indeed, American, as a Delaware corporation with its principal place of business in Texas, simply could not file a Petition in the Second Circuit. 49 U.S.C. § 46110. Instead, these comments reflect the unremarkable circumstance that when the parties referred to review by the Court of Appeals without having 49 U.S.C. § 46110 in front of them, they referred to the Court in which appeals from the Southern District of New York are usually heard.

Movants raise a similarly misplaced argument that American somehow wrongfully cut off the development of the appellate record by filing its Petition before depositions could be conducted. In fact, Judge Hellerstein has *sua sponte* adjourned depositions until at least May 1, 2006, a date well after the 60-day time limit for appeal of the February 7 Order has expired. Nor have Movants explained

why they could not make any application they wished to enlarge the record on appeal just as easily after American's Petition (or indeed their own) as before. More fundamentally, the law is clear that the record that is relevant to review of an agency's actions is the record that was before the agency at the time the order was issued. See *Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("[i]f a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision. The Supreme Court's formulation in *Overton Park* cautions against both under- and over-inclusiveness in the administrative record before a reviewing court: . . . [t]o review more than the information before the Secretary at the time she made her decision risks our requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations.") (collecting authority) (internal citations omitted); *Env'tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981) ("[i]t is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made. The focal point for judicial review should be the administrative record already in existence, not some new record completed initially in the reviewing court."). Thus, the pertinent record as to these Final Orders was effectively closed on February 7 and March 17, and American's filing of its Petition did nothing to alter that fact.

Conclusion

None of Movants' arguments support the transfer of the Petitions for Review of the TSA's February 7, 2006 and March 17, 2006 Orders away from this Court to the Second Circuit. The Motion to Transfer should be denied.

April 10, 2006

Respectfully submitted,

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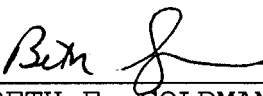
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CERTIFICATE OF SERVICE

I, Beth E. Goldman, Assistant United States Attorney for the Southern District of New York, hereby certify that on May 2, 2006, I caused a copy of (1) Reply Memorandum in Support of Respondents' Motion for Transfer of Petitions for Review, and (2) Declaration of Beth E. Goldman, dated May 2, 2006, to be served, by regular mail, upon all counsel on the attached Service List.

Dated: New York, New York
May 2, 2006



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