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aviation defendants have highlighted the enormous scope of the discovery they seek from the Government, including, among other things, vast amounts of intelligence information held by various Government law enforcement and intelligence agencies; information concerning the Government's investigation of the attacks, which as defendants acknowledge is the largest investigation in Federal Bureau of Investigation ("FBI") history; and intra-government communications regarding threats to civil aviation. They seek not only document discovery but also dozens of depositions of Government officials, including multiple 30(b)(6) depositions. It is clear from the motion papers that the aviation defendants intend to embroil the Government, the parties, and the Court in extensive, time-consuming and exceptionally burdensome discovery, and litigation regarding the scope of such discovery -- for the purpose of obtaining evidence of little or no relevance to this case.

Third, this motion should not be understood as a motion to compel Government discovery over the Government's objections. As the Court correctly indicated at the March 22 conference, this is a motion regarding the relevance of certain Government discovery. The motion does not challenge the responses to specific discovery requests already provided by the Government, or that will be provided, pursuant to United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). Thus, Government objections other

than relevance, including objections based on the law enforcement privilege, the bar against disclosure of classified national security information, and the deliberative process privilege, among others, are reserved for another day.

As set forth below, the aviation defendants utterly fail to establish the relevance of the only discovery properly before the Court on this motion -- intelligence and other threat information known (or not) to the Government before September 11 that was not conveyed to the aviation defendants. To the extent the aviation defendants have also raised in their motion their desire to obtain investigative documents pertaining to the execution of the September 11 attacks and information regarding aviation security procedures in effect before September 11, the Government has not contested the relevance of much of the requested information. Indeed, although the aviation defendants neglect to mention it other than in the last footnote of their brief, the Government has already begun producing documents from the FBI and the Transportation Security Administration ("TSA") and has agreed to produce a 30(b)(6) witness or witnesses to address several relevant topics on which they have sought discovery from the Federal Aviation Administration ("FAA") and TSA.

Accordingly, the Government requests that the Court deny the aviation defendants' motion and rule that pre-September

11 intelligence and other threat information known (or not) to the Government but not conveyed to the aviation defendants is not relevant to the matters at issue in this case, and that the burdens on the Government, the parties and the Court that such discovery will entail far outweigh any potentially relevant evidence that might emerge.

ARGUMENT

_____I

THE GOVERNMENT HAS AGREED IN PRINCIPLE TO PROVIDE AND HAS ALREADY BEGUN TO PRODUCE A SUBSTANTIAL AMOUNT OF THE INFORMATION ADDRESSED IN THE AVIATION DEFENDANTS' MOTION

There is no present dispute as to much of the information sought in the aviation defendants' motion. The Government is cooperating with the parties to provide reasonably available, non-classified, non-privileged documents and information gathered by the FBI and TSA, and to provide Rule 30(b)(6) testimony from the FAA and TSA, which together are likely to address much of the information sought in two of the three categories identified in the motion.

A. Information Concerning the Planning and Execution of the Plot

First, the aviation defendants seek information concerning "the planning and execution of the September 11th plot." Memorandum of Law in Support of the Aviation Defendants' Motion for Focused Discovery From the Government ("Mem.") at 11. A substantial amount of the information requested by the aviation

defendants, as they acknowledge, Mem. at 13, is contained in documents or other evidence collected by the FBI in its investigation of the September 11 attacks. On March 16, 2007, in response to a series of requests from various parties, the Government advised the parties that the FBI was prepared to work with them to provide reasonably available, non-classified, non-privileged information that is relevant and material to litigation, in accordance with the Department of Justice's ("DOJ's") Touhy regulations. See Declaration of Sarah S. Normand dated May 25, 2007 ("Normand Decl."), Exh. A (letter to parties enclosing requests received prior to March 16, 2007); 28 C.F.R. §§ 16.21 et seq. In an effort to streamline the search and review process, eliminate duplication of effort, and reduce the burden of responding to piecemeal requests, the Government requested that the parties make any further requests within 30 days. Normand Decl., Exh. A. Between March 16 and April 16, all parties submitted additional requests to the Government. See Normand Decl. ¶ 5 & Exhs. B-E.

As we advised the Court at the status conference on March 22, 2007, the FBI has dedicated a team of personnel to gather and review documents requested by the parties. Normand Decl. ¶ 8. To date, FBI personnel have logged more than 2000 hours in this process. Id. This does not include the efforts of other DOJ personnel, including attorneys and staff in the U.S.

Attorney's Office for the Eastern District of Virginia responsible for the prosecution of Zacarias Moussaoui and in DOJ's National Security Division. Id. We have produced more than 400 pages of FBI documents to date, largely interview reports of aviation defendant employees and others, and further productions will be forthcoming. Id. ¶ 9.

The multiple requests submitted by the parties to the FBI, to which the FBI is in the process of responding, address a host of information concerning "the planning and execution of the September 11 plot." Mem. at 11. For example, defendants state in their motion that they seek information concerning weapons the hijackers may have brought aboard the airplanes, how the hijackings were carried out, and the hijackers' planning and preparation for the attacks (including information concerning pre-9/11 flights and weapons purchases by the hijackers and the contents of Mohamed Atta's checked baggage). See Mem. at 11-14. This information, and much more, is encompassed within the voluminous requests that the parties have made of the FBI to which the FBI has already begun responding. See, e.g., Normand Decl., Exh. A, Tabs B-D; Normand Decl., Exhs. B-E.¹

¹ Among the initial materials gathered by the FBI, with the assistance of the United States Attorney's Office for the Eastern District of Virginia, are documents concerning pre-9/11 flights and weapons purchases by the hijackers. Normand Decl. ¶ 10; see also Normand Decl., Exh. A at Tab B, No. 41c-d & Tab D, Nos. 1, 7. This material is still in the process of being reviewed, but we expect that information in these categories will

B. Information Concerning the Government's Regulation and Oversight of the Civil Aviation Security System

The second category of information sought by the aviation defendants concerns "the Government's regulation and oversight of the civil aviation security system." Mem. at 17. TSA has already produced nearly 9,000 pages of documents in response to defendants' document requests. See Normand Decl. ¶ 11 & Exh. F. These documents address a wide variety of topics relating to aviation security. See id. Exh. F.

The aviation defendants have also requested that the FAA provide a Rule 30(b)(6) deposition on multiple topics. See Normand Decl., Exh. G. As we advised the Court at the status conference on March 22, the FAA and TSA, which assumed responsibility for the FAA's security functions following the September 11 attacks, have agreed in principle to provide a Rule 30(b)(6) deposition, and we have met and conferred initially with the defendants regarding an appropriate list of topics. Normand Decl., Exh. H; Tr. Mar. 22, 2007, at 47-48. While FAA and TSA have not yet made a final determination with regard to the precise scope of the testimony they will authorize under the applicable Touhy regulations, see 6 C.F.R. §§ 5.41 et seq.; 49 C.F.R. §§ 9.1 et seq., we expect to provide testimony concerning a number of the requested topics, although not necessarily as

be released in the near term. Normand Decl. ¶ 10.

framed by defendants. See Normand Decl., Exh. H.

All of the topics identified in the aviation defendants' motion on the subject of "the Government's regulation and oversight of the civil aviation security system," Mem. at 17, are contained within their request for Rule 30(b)(6) deposition testimony:

- Defendants state in their motion that they seek information concerning the respective roles of the Government and the aviation defendants concerning civil aviation security, including the FAA's role in promulgating Federal Aviation Regulations, whether the FAA requirements constituted "minimum standards," the responsibilities of air carriers versus airport operators, and the "FAA's role in identifying threats to civil aviation and determining how to protect the civil aviation system from terrorist attacks." Mem. at 3-4, 18-21. These topics all appear in defendants' Rule 30(b)(6) deposition notice. See Normand Decl., Exh. G, Topics 20-21.
- Defendants seek information concerning checkpoint and selectee screening procedures and purported "no fly" lists. Mem. at 21, 30. Defendants' Rule 30(b)(6) deposition notice contains multiple topics relating to screening procedures and the alleged "no-fly" list. See Normand Decl., Exh. G, Topics 2, 4, 6, 9, 35.
- Defendants seek information concerning aviation security system design, implementation, and improvements, Mem. at 30, and the effectiveness of the civil aviation security system prior to September 11, 2001, including whether the system was "designed to be 100 percent effective" and the findings of Red Team investigations or other tests of checkpoint screening performance, Mem. at 22, 30. These topics, too, appear on defendants' Rule 30(b)(6) deposition notice. See Normand Decl.,

Exh. G, Topics 2, 6, 10-19, 20, 35.² Red Team information is also contained within the documents already produced by TSA. See Normand Decl. ¶ 11 & Exh. F.

- Defendants seek information concerning prohibited or restricted items, particularly knives, including the asserted awareness by FAA that "small knives posed a risk to security," and a purported "1993 proposal to ban knives." Mem. at 22-23, 30. Again, these topics all appear on defendants' Rule 30(b)(6) deposition notice. See Normand Decl., Exh. G, Topics 7-15.
- Defendants seek information concerning the asserted "consideration and rejection by the FAA of proposals in the 1970s for strengthened cockpit doors and other related features," Mem. at 23, and information concerning the "Common Strategy," Mem. At 3, 30, which likewise are topics listed in their Rule 30(b)(6) deposition notice, see Normand Decl., Exh. G, Topics 1 (Common Strategy), 36 (cockpit doors).
- Finally, defendants state in their motion that they seek information concerning "whether the FAA determined on the basis of threat information available prior to September 11 that any changes should be made in the nation's aviation security system," Mem. at 3, and communications between the FAA and the aviation defendants regarding threats to civil aviation, Mem. at 30. These topics as well are covered by the Rule 30(b)(6) deposition notice. See Normand Decl., Exh. G, Topics 4, 23-34.

* * *

Thus, the information sought in two of the three categories identified by defendants in their motion -- information concerning the planning and execution of the September 11th plot,

² As to several of these topics, it is likely that FAA and TSA will produce documents in lieu of testimony. See Normand Decl., Exh. G.

and information concerning the Government's regulation and oversight of the civil aviation security system -- has already been requested by defendants in their Touhy requests, which are under active consideration by the relevant agencies. While the Government has not committed to provide particular documents or testimony, the FAA, TSA, FBI, and DOJ are cooperating with the parties and intend to provide reasonably available, non-privileged, non-classified information that is relevant and material to the litigation, in accordance with applicable Touhy regulations.

Of course, there will be documents and information that the Government will not produce, e.g., because they are classified,³ subject to the law enforcement, deliberative process or other privileges, or otherwise objectionable.⁴ See Normand Decl., Exh. A; 6 C.F.R. § 5.48; 28 C.F.R. § 16.26; 49 C.F.R. § 9.9. The Government has also advised the parties that it will

³ For example, several of defendants' citations to the 9/11 Commission Report refer to classified intelligence reports of statements by certain "high value detainees" who are being held in Department of Defense custody at the U.S. Naval Station in Guantanamo Bay, Cuba. See Mem. at 3, 13-14.

⁴ For example, as we have advised the aviation defendants, certain of the proposed Rule 30(b)(6) deposition topics appear to call for information protected by the deliberative process privilege, expert opinions, legal conclusions, or interpretations that go beyond the specific regulatory requirements at issue, and accordingly the FAA and TSA are not likely to authorize testimony on such topics, at least not as framed by defendants. See 49 C.F.R. § 9.9(b)-(c).

not respond to requests that are overbroad or unduly burdensome, and invited to the parties to meet and confer to narrow their requests as appropriate. Normand Decl., Exh. A; cf. Comsat Corp. v. Natl Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999) (federal agency's decision under applicable Touhy regulations not to comply with subpoena was reasonable, where compliance would "measurably strain agency resources and divert . . . personnel from their official duties").

Whatever disputes may arise in connection with the parties' requests for documents and deposition testimony, as the aviation defendants and the Government have previously agreed, such disputes may be brought to the Court for resolution in a challenge to the Government's Touhy responses under the Administrative Procedure Act. See Normand Decl., Exhs. I-J. However, with the exception of pre-September 11 intelligence or threat information known (or not known) to the Government but not communicated to the aviation defendants, the relevance of which defendants have not demonstrated, see infra, any such disputes are not ripe for review in the context of the present motion. See In re Secs. and Exch. Comm'n ex rel. Glotzer, 374 F.3d 184, 189-92 (2d Cir. 2004) (district court lacks jurisdiction over motion to compel deposition of federal employee where no final agency action on movant's Touhy request within the meaning of 5 U.S.C. § 704).

INTELLIGENCE AND THREAT INFORMATION KNOWN (OR NOT KNOWN)
TO THE GOVERNMENT BUT NOT COMMUNICATED TO THE AVIATION DEFENDANTS
IS NOT RELEVANT AND SHOULD NOT BE DISCOVERABLE IN THIS ACTION

A. Applicable Relevance Standard Under Rule 26

In 2000, Rule 26(b)(1) of the Federal Rules of Civil Procedure was amended to limit the scope of discovery to discovery "that is relevant to the claim or defense of any party."⁵ Only upon a showing of "good cause" could broader discovery of matters "relevant to the subject matter involved in the action" be obtained. Fed. R. Civ. P. 26(b)(1) (2007). The Advisory Committee notes to the new rule state that the "amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." Committee Note, 192 F.R.D. 340, 389. As the Supreme Court has noted, the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).

⁵ Although Rule 26 provides the applicable standard for assessing the relevance of any requested discovery, the Government does not believe that Rule 26 would govern the Court's review under the APA of an agency's denial of a request for information under Touhy. See, e.g., Comsat, 190 F.3d at 277 (applying arbitrary and capricious standard of review); see also United States Env'tl. Prot. Agency v. Gen. Elec. Co., 212 F.3d 689, 689-90 (2d Cir. 2000) (declining to decide standard of review applicable to Touhy denials).

This case is especially well-suited to a determination by the Court of the scope of relevant evidence at this stage in discovery. This is a large litigation, involving many parties on each side, multiple incidents at issue, and application of the laws of different jurisdictions. It is a case in which the discovery process has already been long and time-consuming, and it is still far from over. The aviation defendants' broad requests for largely irrelevant information will unnecessarily extend discovery in this case, burden numerous federal agencies with heavy discovery obligations that will necessarily include, among other things, the review of voluminous classified and privileged materials, and embroil the Court and the parties in litigation over objections to and disputes regarding this large-scale discovery.⁶

Consequently, the Court must weigh the relevance of the discovery sought against the burdens such discovery will impose. See In re International Business Machines Corporate Securities Lit., 163 F.3d 102, 111 (2d Cir. 1998) ("'weak showing' of

⁶ That plaintiffs have, at various points, sought similar discovery from the Government, see Mem. at 4, 8-9, 16, has no impact on this motion. Neither side has demonstrated the relevance of pre-September 11 intelligence or threat information that was not communicated to the aviation defendants. Moreover, by focusing exclusively on plaintiffs' view of such discovery, which view they no longer hold, see Tr. Mar. 22, 2007, at 45, 49 & 50, the aviation defendants entirely ignore a key consideration on such a motion -- the burden that such discovery would impose on the Government agencies from which the material is sought.

potential relevance in . . . extensive discovery request was insufficient to outweigh the burden and expense of" further discovery). Thus, for example, in United States v. Duke Energy Corp., 214 F.R.D. 392, 393 (M.D.N.C. 2003), the court, applying the 2000 rule and heeding the Advisory Committee's admonition, weighed the burdens of requested discovery on the Government against its potential relevance and found that "the likely relevance and benefit of any of the discovery requested" was "far outweighed by the burden." In that case, the United States sued Duke Energy under the Clean Air Act for failing to use the best available technology in making modifications to seven power plants. Duke Energy sought discovery from the Department of Energy ("DOE") on the ground that DOE personnel may have participated at meetings with the Environmental Protection Agency ("EPA") at which the EPA's interpretation of the modification rules was discussed. Duke Energy claimed this discovery was relevant to its defense that the company did not receive fair notice from the EPA of its interpretation of the regulations and to its claim that the EPA changed its interpretation. The Government argued that the fair notice defense could not be bolstered by what Duke Energy did not know, and if Duke Energy did not already have these documents, DOE's documents would be irrelevant. The court agreed with the Government that discovery from DOE was of "minimal relevancy compared to the burden of the

request," and granted the motion for a protective order. Id. at 394.⁷

A similar balancing here of the burdens of the discovery sought by the aviation defendants against its potential relevance will lead to the same conclusion -- that the burdens to the Government, a non-party, far outweigh the potential relevance to the matters at issue in this case, and accordingly that such discovery should be denied.

⁷ By contrast, the cases cited by the aviation defendants, Mem. at 7, are not remotely similar to this case. See In re PE Corp. Secs. Litig., No. 3:00 CV 705 CFD TPS, 2005 WL 806719, at *2, *6 (D. Conn. Apr. 8, 2005) (ordering deposition in shareholder class action of National Institutes of Health doctor who negotiated with defendant company on behalf of federally funded Human Genome Project, where such negotiations were at issue in class action); In re Vioxx Products Liability Litig., 235 F.R.D. 334, 344-45 (E.D. La. 2006) (where relevance of testimony not disputed, court found that FDA acted arbitrarily and capriciously in failing to provide deposition of FDA employee who made numerous statements to the press and otherwise regarding Vioxx, and FDA failed to establish undue burden, including on the ground that the deposition would prompt further agency depositions); Fischer v. Cirrus Design Corp., No. 5:03-CV-0782, 2005 WL 3159658 (N.D.N.Y. Nov. 23, 2005) (ordering production of FAA documents pertaining to certification of aircraft model over FAA and defendant's trade secret objections, finding documents relevant to wrongful death action and trade secret information protected by protective order). Defendants' reliance on the Government depositions provided in In re World Trade Center Disaster Site Litigation, 21 MC 100 (AKH), Mem. at 7-8, is equally misplaced. There, the Government consented to provide limited, non-Rule 30(b)(6) deposition testimony of five agency officials on narrow topics of undisputed relevance to defendants' sovereign immunity defenses.

B. Intelligence and Other Threat Information Not Communicated to the Aviation Defendants Is Irrelevant to the Question of the Aviation Defendants' Liability to Plaintiffs

The only category of discovery sought by the aviation defendants that is properly before the Court on this motion, and to which the Government objects categorically, is discovery of intelligence and threat information held (or not) by the Government that was not conveyed to the aviation defendants. See Tr. Mar. 22, 2007, at 48-51, 80. Defendants argue that it is “[d]ifficult to conceive of any rational basis for carving out information not communicated to the aviation defendants,” Mem. at 4, but there is an obvious, logical line to be drawn between what the Government did or did not know about the terrorist threat prior to September 11, 2001, and what was communicated to the aviation defendants. This case is about the aviation defendants’ conduct; the reasonableness of that conduct is properly judged by reference to the information they knew or should have known, not information they could not have known because it was not communicated to them.

The Court has already ruled in connection with the World Trade Center Properties’ (“WTCP”) motion for a protective order that “the security practices of the World Trade Center Properties parties, whatever they were, have no relevance to the measures that were taken by the aviation defendants.” Hearing Tr. Feb. 26, 2007, at 11. As the Court recognized at the March

22, 2007 conference in this matter, the issue raised in this motion is substantially the same. See Tr. Mar. 22, 2007, at 48.

The aviation defendants insist here that they should be able to "discover and introduce evidence concerning what other entities with responsibility for aviation security did (or did not do)." Mem. at 24. They made a nearly identical argument in seeking to depose WTCP security officials. See Tr. Feb. 26, 2007, at 4-9. They claim that discovery of the Government will show that neither the FAA nor any other government agency ever proposed heightened security measures that the plaintiffs claim the aviation defendants had to adopt. Mem. at 25. However, as the Court has already held, "what other parties did or did not do is not relevant." Tr. Feb. 26, 2007, at 13.

The fact that the FAA and the aviation defendants were both concerned with "aviation security," Mem. at 25, does not alter this analysis. The FAA, as a regulator, was not similarly situated to the air carriers and other regulated parties. For that reason, the cases cited by the aviation defendants regarding custom and usage, Mem. at 24, are inapposite. Those cases address custom and practice of the industry of which the defendant is a member -- not the practice of a different industry or government entity. See Mem. at 24 (citing Gunther v. Airtran Holdings, Inc., 05 Civ. 2134 (MHD), 2007 WL 193592, at *10 (S.D.N.Y. Jan. 24, 2007) (airline industry practices in boarding

passengers with disabilities relevant to question of reasonableness of defendant airline's behavior); Trimarco v. Klein, 436 N.E.2d 502, 506, 56 N.Y.2d 98, 106-107, 451 N.Y.S.2d 52, 56 (1982) (custom and practice of local building industry to replace breakable glass shower enclosures with safety glass relevant to negligence of defendant landlord in not replacing breakable glass shower enclosure). Indeed, as the New York Court of Appeals explained in Trimarco, for customary practice and usage to be probative, it must "be fairly well defined and in the same calling or business so that 'the actor may be charged with knowledge of it or negligent ignorance.'" 451 N.Y.S.2d at 56, quoting Prosser, Torts [4th ed], § 33, at 168; Restatement, Torts 2d, § 295A, at 62, Comment a. Thus, by definition, evidence regarding steps taken or not taken by the Government in response to information in its possession, which were not known to the aviation defendants, does not constitute evidence of industry custom and usage and is not probative of whether the aviation defendants were negligent.

Contrary to the aviation defendants' contention, Mem. at 25, the Court's prior ruling in this case does not support their claim that the practice of the Government is relevant here. Rather, the Court expressly recognized that "custom and practice throughout the aviation industry" is relevant, Tr. Feb. 26, 2007, at 7 (emphasis added), not the custom and practice of other

industries or the Government. Indeed, in the very next sentence, ignored by the aviation defendants, the Court stated that foreseeability would not "be formed on what particular building projects did or did not do or what they foresaw or did not foresee," id. The identical logic applies to discovery from the Government because what the Government did or did not do with threat information that was not communicated to the aviation defendants has no bearing on the reasonableness of the aviation defendants' actions or what was foreseeable to them based on the information they had.

The aviation defendants insist that the plaintiffs, by their questioning of witnesses at depositions about their knowledge of Osama Bin Laden and al Qaeda, have shown an intent to allege that the aviation defendants knew or should have known about these imminent threats. Mem. at 26-27. According to the aviation defendants, they need discovery from the Government to show that the Government had greater information about al Qaeda and the threat of terrorist attacks than they did. Mem. at 27. Plaintiffs' questions, however, clearly seek to elicit information about what the aviation defendants knew or should have known and did or did not communicate to the security screeners. See, e.g., Mem. at 26 ("Did anyone from United Air Lines or from Argenbright ever tell you or the other screeners, to your knowledge, that in the summer of 2001 that the United

States was on a heightened alert for a potential terrorist attack?").⁸ What the Government knew on these subjects that was not communicated to the aviation defendants is clearly irrelevant to these questions. Even if the discovery were to demonstrate exactly what the aviation defendants say it would -- that "the CIA, FBI and FAA all had far greater information about al Qaeda and the threat of terrorist attacks on the civil aviation system than did any of the Aviation Defendants" -- the question of the aviation defendants' knowledge and use of that knowledge would not be any further elucidated. The Government's asserted superior knowledge has no bearing on what the aviation defendants knew, should have known or what they did with the information they already had.

It is similarly irrelevant that "notwithstanding their greater level of knowledge, none of the government entities deemed it necessary to share that information with the aviation defendants or to require modification of aviation security procedures." Mem. at 27. If the Government did not share the information, it is not relevant to the question of whether the aviation defendants acted reasonably.

Finally, the aviation defendants suggest that they want

⁸ In fact, each of the questions identified by defendants appears to be premised on documents, such as Security Directives and Information Circulars, or other information provided to the relevant aviation defendants prior to September 11, 2001. See Mem. at 26-27.

to argue that the Government, with all its resources, "was not able to do what Plaintiffs now claim the Aviation Defendants were negligent in not doing - *i.e.*, stopping the hijackers." Mem. at 29. Nothing prevents the aviation defendants from making that argument based on the information available to them. They need not depose Government witnesses and obtain Government intelligence information to establish that the Government did not prevent the September 11 attacks. Nor do they need to recreate the 9/11 Commission's investigation into the threat information available to the Government. Defendants' observation that the Commission Report is replete with references to the Government, Mem. at 10-11, is beside the point. The actions of various Government agencies were a key part of the Commission's investigatory mandate. Normand Decl., Exh. K (Preface to Commission Report), at xv. By contrast here, what the Government did or did not do with threat information available to it is not the subject of this case.⁹

⁹ The court should disregard the aviation defendants' passing suggestion that they "may" seek a jury determination of the government's "comparative negligence" under Article 16 of the New York Civil Practice Law and Rules. Mem. at 29 n.9. Defendants raise this issue, for the first time in more than five years of litigation, in a footnote at the end of their brief. They do not come close to establishing that Article 16 could apply where, as here, any recovery against the United States would be barred by principles of sovereign immunity. See, e.g., Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (United States and its agencies immune from judicial proceedings absent express waiver of sovereign immunity); 29 U.S.C. § 2680(h) (waiver of sovereign immunity in Federal Tort

C. The Burdens Imposed on the Government by the Discovery Sought by the Aviation Defendants Far Outweigh any Potential Relevance the Discovery May Have to this Case

The aviation defendants' discovery requests seeking vast amounts of intelligence and other information from various Government agencies, including the CIA, FBI, National Security Council ("NSC"), and FAA, would impose substantial burdens on the Government. First and most basic is the sheer volume of discovery sought, which would impose enormous burdens on the resources of already overburdened Government agencies. While the aviation defendants insist that the discovery they seek from the Government is focused, nothing about their requests is consistent with that claim. They seek wide-ranging discovery from four separate and independent agencies, each of which would be compelled to expend significant resources in responding to these requests.

Moreover, the requests themselves are voluminous. The list provided in the aviation defendants' brief includes a number of very broad topics of inquiry, including among others:

- Pre-September 11 threats to civil aviation,
- Pre-September 11 knowledge about Osama bin Ladin and al Qaeda, and

Claims Act "shall not apply to . . . [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused").

- Pre-September 11 knowledge about the hijackers.

See Mem. at 29-30. One would be hard-pressed to call this partial list of topics a focused inquiry.

Finally, notwithstanding repeated requests by the Government over the last several months for the aviation defendants to provide a list of Government witnesses they seek to depose, and despite various promises by counsel that the list was forthcoming, we still have not received a list of these witnesses.¹⁰ If we are to judge from the few requests for witnesses we have already received -- such as the requests for depositions of current and former FBI special agents and CIA analysts on subjects as broad as all "information available to the FBI [and the CIA] before September 11, 2001 regarding the likelihood of attacks by al-Qaeda and/or Usama Bin Laden," see Normand Decl., Exh. L & enclosed Affidavit of Desmond T. Barry, Jr., ¶ 11f -- it appears that the depositions they will want will be exceptionally burdensome. They say now that their "preliminary" view is that 20 to 30 government witnesses,

¹⁰ Since the fall of 2006, we have made repeated requests of the aviation defendants to identify Government witnesses whom they may wish to depose. Normand Decl. ¶ 17. In response to a request from the Court at the March 22, 2007 conference, defendants agreed to provide counsel with a list of the individuals from the Government whom they seek to depose. See id.; Tr. Mar. 22, 2007, at 53. They failed to produce such a list, and in letters dated May 7, 2007 and May 15, 2007, they advised that they would not do so until after the Court resolves the instant motion. Normand Decl. ¶ 17 & Exhs. M-N.

including "multiple 30(b)(6) representatives from each of these agencies [the CIA, FBI, NSC, and FAA]," "should be sufficient." Mem. at 29-30. A list of 20-30 Government witnesses from multiple agencies, which is likely to include current and former high-level Government officials, and which may not constitute the final count, is potentially cumbersome in the extreme.

In evaluating the burden the requested discovery would place on the Government, the Court should be particularly mindful of the public's interest in ensuring that governmental resources are devoted to critical operational duties. The FBI, CIA, TSA and FAA each has as its principal responsibility safeguarding the security and safety of the public at large. The enormous time that these agencies must spend in gathering and reviewing discovery materials is time that cannot be devoted to their primary duties. While the merits of the Government's Touhy responses are not at issue here, we emphasize that courts have been exceedingly hesitant in such circumstances to order the diversion of governmental personnel to serve the interests of private litigants. See, e.g., Comsat Corp., 190 F.3d at 278; Moore v. Armour Pharm. Co., 927 F.2d 1194, 1197-98 (11th Cir. 1991) (subpoena for testimony properly quashed in order to preserve the Center for Disease Control's interest in "conserving the time and attention of its employees for the fight against AIDS"); Bobreski v. U.S. Env'tl. Prot. Agency, 284 F. Supp. 2d 67,

80 (D.D.C. 2003) (in upholding EPA's denial of Touhy request for testimony, court recognized the "strong public interest in maximizing the use of limited government resources" to further the agency's mission).

In addition to the burdens imposed by the volume of discovery requested, the requests also implicate highly sensitive information that is subject to important Governmental privileges. A significant amount of the information that the aviation defendants request is protected from disclosure because it involves classified national security information or matters protected by the law enforcement investigative privilege. The process of separating the classified information from the non-classified information, and making a determination as to whether the information should be withheld pursuant to the law enforcement investigative privilege, would be an extremely difficult and burdensome task. And, given the risk that classified information or law enforcement matters could be inadvertently disclosed, particularly in the context of a deposition, the Government would need to spend extraordinary time and effort on document review and witness preparation.

Further, the topics on which the aviation defendants seek discovery are likely to involve other unique Governmental privileges, including the deliberative process privilege. See, e.g., Mem. at 21 ("The Aviation Defendants also seek information

considered and policy choices made by the government in formulating the pre-September 11th aviation security system.”). The topics may also implicate the “Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications,” Cheney v. U.S. District Court, 542 U.S. 367, 385 (2004), for which a very high standard applies before discovery would be appropriate, id. at 382, 385. Much information is likely to be withheld on the basis of these privileges, and the potential for disputes and litigation is high.

Finally, the enormous burden that the requested discovery would place on the Government should not be countenanced where, as here, the information sought is readily available from another source -- specifically, the aviation defendants themselves. See Fed. R. Civ. P. 26(c) (discovery may be limited where information sought is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive”). The aviation defendants are the best source of information regarding what was and was not communicated to them by the Government in the months and years preceding September 11. They do not require discovery from the Government to prove their claim, for example, that “the government never provided the Aviation Defendants with a list of suspected terrorists” or “identified” any of the

September 11 hijackers "to the Aviation Defendants as suspected terrorists." Mem. at 28. The aviation defendants' own documents and witnesses are sufficient to establish the parameters of their knowledge of threat information pertaining to civil aviation prior to September 11.

CONCLUSION

The requests for pre-September 11 intelligence and threat information that was not communicated to the aviation defendants are almost certain to plunge the parties and the Court into a prolonged process. The aviation defendants have fallen well short of establishing that this discovery is in fact relevant to the matters at issue in this case, and the burdens to the Government far outweigh any potential benefit from these requests. The Court accordingly should deny the aviation defendants' motion and rule that pre-September 11 intelligence and other threat information not conveyed to the aviation defendants is not relevant or discoverable in this case.

Respectfully submitted,

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Assistant Attorney General

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U.S. Department of Justice

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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: 21 MC 97 & 101 (AKH)
In re September 11 Litigation : Relates to: All Cases
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DECLARATION OF SARAH S. NORMAND

SARAH S. NORMAND, 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, attorney for the United States of America and its various agencies and departments in the above-referenced action.

2. I submit this declaration in opposition to the "Aviation Defendants' Motion for Focused Discovery from the Government" in this matter.

3. Attached hereto as Exhibit A is a true and correct copy of the letter from Assistant U.S. Attorney Sarah S. Normand to liaison counsel in the above-referenced matter dated March 16, 2007, concerning the parties' various requests for documents from

the Federal Bureau of Investigation ("FBI"), and attaching the requests for FBI documents received as of March 16, 2007.

4. Attached hereto as Exhibit B is a true and correct copy of the letter (and enclosure) from Michael E. Elsner, Esq., to Assistant U.S. Attorney Sarah S. Normand dated April 16, 2007, requesting documents from the FBI on behalf of the personal injury and wrongful death plaintiffs.

5. Attached hereto as Exhibit C is a true and correct copy of the letter (and enclosure A) from Douglas J. Pepe, Esq., to Assistant U.S. Attorney Sarah S. Normand dated April 13, 2007, requesting documents from the FBI on behalf of the property damage and business loss plaintiffs. Jason Cohen, Esq., representing the World Trade Center Properties ("WTCP") defendants/cross-claimants, subsequently advised me that the WTCP parties joined in this request for FBI documents.

6. Attached hereto as Exhibit D is a true and correct copy of the letter from Desmond T. Barry, Jr., to Assistant U.S. Attorney Sarah S. Normand dated April 13, 2007, requesting documents from the FBI on behalf of the aviation defendants.

7. Attached hereto as Exhibit E is a true and correct copy of the spreadsheet provided to Assistant U.S. Attorney Sarah S. Normand by Paul V. Kelly, Esq., by email dated May 21, 2007, collecting the various requests submitted by all parties for FBI documents.

8. In response to the various requests for FBI documents, the FBI has dedicated a team of personnel to gather and review documents requested by the parties. To date, FBI personnel have logged more than 2000 hours in this process. This does not include the efforts of Department of Justice ("DOJ") personnel, including attorneys and staff in the U.S. Attorney's Office for the Eastern District of Virginia responsible for the prosecution of Zacarias Moussaoui and in DOJ's National Security Division.

9. The FBI has produced 428 pages of documents to the parties to date. These documents largely consist of interview reports of aviation defendant employees and others. Further productions of FBI documents will be forthcoming.

10. Among the initial materials gathered by the FBI, with the assistance of the United States Attorney's Office for the Eastern District of Virginia, are documents concerning pre-9/11 flights and weapons purchases by the hijackers. This material is still in the process of being reviewed by the FBI and DOJ, but we anticipate that information in these categories will be released in the near term.

11. Attached hereto as Exhibit F is a true and correct copy of the letter from Christopher R. Christensen, Esq., to Assistant U.S. Attorney Sarah S. Normand dated September 11, 2006, requesting certain documents from the Transportation

Security Administration ("TSA"). To date, TSA has produced 8487 pages of documents in response to this request, including, but not limited to, information relating to Red Team investigations.

12. Attached hereto as Exhibit G is a true and correct copy of the letter from Roger E. Podesta, Esq., to Assistant U.S. Attorneys Beth E. Goldman, Sarah S. Normand and Jeannette A. Vargas dated March 27, 2007, enclosing the aviation defendants' notice of Rule 30(b)(6) deposition of the Federal Aviation Administration ("FAA").

13. Attached hereto as Exhibit H is a true and correct copy of the letter from Assistant U.S. Attorney Jeannette Vargas to Roger E. Podesta, Esq., dated March 30, 2007, in preliminary response to the aviation defendants' March 27, 2007 letter and notice of Rule 30(b)(6) deposition of the FAA.

14. Attached hereto as Exhibit I is a true and correct copy of the letter from Desmond T. Barry, Jr., to the Court dated March 20, 2007.

15. Attached hereto as Exhibit J is a true and correct copy of the letter from Assistant U.S. Attorney Beth E. Goldman to the Court dated March 21, 2007.

16. Attached hereto as Exhibit K is a true and correct copy of the Preface to the 9/11 Commission Report.

17. Attached hereto as Exhibit L is a true and correct copy of the letter from Desmond T. Barry, Jr., to Assistant U.S.

Attorneys Goldman and Normand dated March 6, 2007, and enclosed Affidavit of Desmond T. Barry, Jr.

18. Since the fall of 2006, we have made repeated requests of the aviation defendants to identify Government witnesses whom they may wish to depose. In response to a request from the Court at the March 22, 2007 conference, defendants agreed to provide a list of the individuals from the Government whom they seek to depose. They failed to produce such a list. In letters dated May 7, 2007 and May 15, 2007, defendants advised that they would not do so until after the Court resolves the instant motion.

19. Attached hereto as Exhibits M and N, respectively, are true and correct copies of the letter from Roger E. Podesta, Esq., to Assistant U.S. Attorney Jeannette A. Vargas dated May 7, 2007, and the letter from Desmond T. Barry, Jr., Esq., to Marc S. Moller, Esq., dated May 15, 2007.

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

Dated: New York, New York
May 25, 2007

s/ Sarah S. Normand
SARAH S. NORMAND
Assistant United States Attorney