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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12 H. RAY LAHR,) Case No. 02-8708 AHM (RZx)
13)
14 Plaintiff,) **PLAINTIFF'S OPPOSITION TO**
15) **DEFENDANTS' MOTIONS FOR**
16 v.) **SUMMARY JUDGMENT:**
17) **MEMORANDUM OF POINTS**
18 NATIONAL TRANSPORTATION) **AND AUTHORITIES AND**
19 SAFETY BOARD, *et al.*) **DECLARATION OF JOHN H.**
20) **CLARKE AND LODGED**
21 Defendants.) **VIDEOTAPES IN SUPPORT**
22) **THEREOF**

23 Date: December 15, 2003
24 Time: 10:00. a.m.
25 Place: Courtroom 14, 312 N. Spring
26 Street, Los Angeles, CA 90012
27 Judge: Honorable A. Howard Matz

- 28 (1) MEMORANDUM OF POINTS AND AUTHORITIES
- (2) DECLARATION OF JOHN H. CLARKE
- A. Affidavit of Brett Hoffstadt
 - B. Affidavit of Darryl Hambley
 - C. Affidavits of Rear Admiral Clarence A. Hill, Jr., USN (Ret)
 - D. Affidavit of Robert Donaldson

- E. Affidavits of Thomas Stalcup, Ph.D.
- F. Affidavit of David Neal
- G. Affidavit of Marge Krugar
- H. Affidavit of Gregory A. Harrison, Ph.D., P.E.
- I. Affidavit of Michael Hull, Ph.D.
- J. Affidavit of James A. Holtsclaw
- K. Affidavits of James D. Sanders
- L. Affidavit of James Speer
- M. Affidavit of Captain Richard Russell
- N. Affidavit of Vincent Fuschetti
- O. Affidavit of Major Fred Meyer (Ret.)
- P. Affidavits of Dwight Brumley
- Q. Affidavit of Dr. Vernon Gross
- R. Affidavit of Mike Wire
- S. Affidavit of Paul Angelides
- T. Captain David McClaine
- U. Affidavit of Lisa Perry
- V. Affidavit of Colonel Lawrence Pence USAF (Ret)
- W. Affidavit of Michael F. Rivero
- X. Affidavit of Captain H. Ray Lahr (Ret.)

- (3) LODGED VIDEOTAPES
 - 1. EXPERTS
 - 2. EXPERT EYEWITNESSES
 - 3. EYEWITNESSES
 - 4. ANIMATIONS
 - 4 (a) ANIMATION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiff will and hereby does oppose defendants' motion for summary judgment, on the grounds that genuine issues of material fact remain at issue and therefore defendants are not entitled to entry of judgment as a matter of law under Rule 56 of the Federal Rules of Civil Procedure.

This opposition is and will be based on the accompanying Memorandum of Points and Authorities; the attached Declaration of John H. Clarke and the exhibits thereto; the videotapes lodged herein; and the record in this case and such oral argument as may be presented at the motion hearing.

1 DATED: November 14, 2003.

2
3
4 By _____
5 JOHN H. CLARKE
6 Attorney for Plaintiff H. Ray Lahr

7 MEMORANDUM OF POINTS & AUTHORITIES

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LODGING – VIDEOTAPES

27	1. <u>EXPERTS</u> (Total Running Time: 16.5 minutes)	<u>Minutes/seconds</u>
28	Captain H. Ray Lahr (Ret) Air crash investigator.	1:45
	Dr. Vernon Gross, Former NTSB member	
	also, August 2000 Hearing excerpt.	2:44
	Colonel Lawrence Pence U.S. Air Force, Ret.	1:05
	Rear Admiral Clarence A. Hill, Jr., USN/Ret	
	Former Commanding Officer USS Independence	
	and air crash investigator.	2:45

1	Commander William S. Donaldson USN/Ret (deceased)	
2	Nationally recognized air crash investigator.	1:20
3	Dr. Thomas Stalcup, Ph.D. Physicist	
4	also, August 2000 Hearing excerpt.	3:05
5	James K. Kallstrom,	
6	Assistant-Director-in-Charge New York Field Office.	0:42
7	Captain Richard Russell, Ret.	
8	Air crash investigator.	0:35
9	James Sanders, investigative reporter.	2:56
10	2. <u>EXPERT EYEWITNESSES</u> (Total Running Time: 1 hour, 11 min.)	
11	James Speer, Air Line Pilots Association representative,	
12	NTSB Flight 800 probe.	6:45
13	NTSB Investigator Hank Hughes.	1:05
14	August 2000 Hearing excerpt Master Chief Dwight Brumley, USN (Ret.)	1:40
15	Eastwind Captain David McClaine.	0:08
16	August 200 Hearing excerpt, also Major Fred Meyer (Ret)	51:00
17	3. <u>EYEWITNESSES</u> (Total Running Time 7.5 minutes)	
18	NTSB excerpt from August 2000 Hearing, also Paul Angelides.	3:10
19	NTSB August 2000 Hearing, also Mike Wire.	2:29
20	Lisa Perry.	0:35
21	Family member Marge Krugar.	0:30
22	NTSB August 2000 Hearing excerpt re witness 649.	0:27
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29	Missile Fire.	0:11
30	Missile Fire close-up.	0:11
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32	missile strike, military operating zone.	0:47
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. BACKGROUND**

3 On July 17, 1996, TWA Flight 800 left New York's Kennedy Airport, en
4 route to Paris with 230 persons onboard, 18 crewmembers and 212 passengers, 38
5 of whom were under the age of 18. Twelve minutes later, about 11 miles east of
6 East Moriches, Long Island, as the aircraft reached an altitude of 13,700 feet, its
7 flight ended in tragedy. The airliner plunged into a tranquil Atlantic Ocean,
8 preceded by multiple explosions.

9 The visibility, weather, location, and time of year made the tragedy the most
10 watched airline disaster in history. During the first hours after the crash, numerous
11 news stories related accounts of eyewitnesses having seen a flare-like object or
12 missile streaking up into the air, followed by the plane falling from the sky.
13 Officially, there are at least 736 eyewitnesses, along the coast of Long Island and
14 on nearby aircraft and watercraft, who saw various stages of the tragedy. The
15 NTSB's probe was its longest and most expensive, over four years and 40 million
16 dollars.

17 On November 6, 2003 plaintiff was forced to file his complaint anew,
18 itemizing the documents at issue and adding the CIA as a defendant.¹ All requests
19 pertain to the NTSB "zoom-climb" hypothesis, as pilots refer to such a climb.
20
21

22 ¹ As his Nov. 6 complaint recites (¶ 8), "Regrettably, plaintiff must proceed
23 by filing this action because the government refuses to properly identify the
24 records at issue." (Case No. 03-08023 CBM (CTx).) Plaintiff meant the
25 Court no disrespect by filing anew as opposed to filing a motion for leave to
26 file a supplemental pleading. He did so because his supplemental pleading
27 does not relate back. He filed anew to ensure constructive exhaustion of his
28 administrative remedies. Had either defendant responded before the Court
acted on any motion for leave to file supplemental pleading, the suit could
be dismissed as not yet ripe.

1 **II. NTSB HAS NO DELIBERATIVE PROCESS PRIVILEGE**

2 Exemptions are narrowly construed, reviewed *de novo*, with no deference to
3 the agency's action.²

4 **A. Not deliberative records**

5 5 U.S.C. § 552(b)(5) "exemption 5" provides that the FOIA does not apply
6 to matters that are:

7 "[I]nter-agency or intra-agency memorandums or letters which would
8 not be available by law to a party other than an agency litigation with
9 the agency."

10 Exemption 5 was intended to incorporate the government's common law
11 privilege from disclosure in litigation, including the deliberative process privilege.

12 The NTSB claimed deliberative process in over half of the 31 records it
13 identified. But plaintiff does not seek any deliberative records whatsoever. The
14 NTSB must produce only those records upon which its publicly released reports
15 are based, absent comments or data that were not ultimately incorporated into or
16 relied upon in its reports. There are four such reports, one written, and three video-
17 animations.³

18
19 ² Favish v. OIC, 217 F.3d at 1172 (9th Cir. 2000).

20 ³ Lodged Videotape # 4 Animations includes the three animations:
21 1. November 17, 1997 video-animation (CIA-produced, both NTSB
22 and CIA deny being initiating agency).
23 2. December 8, 1997 video-animation "*Flight Path View*"
24 3. December 8, 1997 video-animation "*Flight Path View From Ground*"
25 4. NTSB written reports, including 3-part Main Wreckage Flight
26 Path Study:
27 • November 21, 1997, the NTSB EX 22C *Main Wreckage*
28 *Flight Path Study*
• January 31, 2000, 18-page NTSB EX 22C *Addendum I to*
Main Wreckage Flight Path Study
• June 9, 2000 10-page NTSB EX 22F *Addendum II to*
Main Wreckage Flight Path Study

1 **B. Exemption 5 does not apply to factual documents**

2 Conclusions as to factual matters are not privileged.

3 In construing the deliberative process privilege under the FOIA, the
4 Supreme Court in EPA v. Mink, 410 U.S. 73, 89 (1973), recognized the distinction
5 between "materials reflecting deliberative or policy making processes on the one
6 hand, and purely factual, investigative matters on the other." "The privilege
7 applies only to the 'opinion' or 'recommendatory' portion of [a document], not to
8 factual information which is contained in the document." Coastal States Gas Corp.
9 v. Department of Energy, 617 F.2d 854, 867.(D.C. Cir. 1980).

10 Additionally, contrary to defendant's claim, the selection of facts to be
11 included in a report is not part of the deliberative process.⁴

12 And, contrary to the NTSB's claim, the reports of outside consultants, like
13 party members, are afforded no deliberative protection under exemption 5.⁵

14 **C. No protection for records adopted in agency disposition**

15 The four sets of zoom-climb calculations are adopted in its four publicly
16 released reports. In 1997, the Seventh Circuit rejected an exemption 5 claim
17 ordering disclosure of records underlying a published agency report. The record at
18 issue was an inter-office memorandum relied upon by the Watergate Special
19 Prosecutor in declining to seek an indictment of President Nixon.

20 [The exemption is] overridden by the fact that the... memorandum was
21 expressly adopted or incorporated as part of a final disposition of the
22 allegations of criminal liability of President Nixon and is therefore
23 disclosable under 5 U.S.C. § 552(a)(2)(A)*** Thus, we hold that, if
24 an agency chooses expressly to adopt or incorporate by reference an
25 intra-agency memorandum previously covered by Exemption 5 in

26
27 ⁴ Playboy Enterprises v. Dept. of Justice, 677 F.2d 931, 935-36 (DC Cir.
1982).

28 ⁵ See Union of Concerned Scientists v. NRC, 824 F.2d 1219 (D.C. Cir 1987)
(expert scientific opinion not deliberative).

1 what would otherwise be a final opinion, that memorandum may be
2 withheld only on the ground that it falls within the coverage of some
3 exemption other than Exemption 5.⁶

4 . "[A]s a general principle... action taken by a responsible decision-maker in
5 an agency's decision making process which has the practical effect of disposing of
6 a matter before the agency is 'final' for purposes of FOIA." Bristol-Meyers v. FTC,
7 589 F.2d 18, 25 (D.C. Cir. 1978). The NTSB's zoom-climb animations and written
8 reports unequivocally reflected its final disposition.

9 The fact that this first animation differed by 50% from the NTSB's other two
10 animations released about a month later (and in its subsequent written reports), is
11 irrelevant. Defendant cannot now claim that its first such animation, broadcast to
12 tens of millions on CNN and all three networks, did not have "the practical effect
13 of disposing of [the] matter." Id.

14 **III. NTSB'S VAUGHN INDEX GROSSLY INADEQUATE**

15 **A. Deliberative process claims**

16 The NTSB's Vaughn index lists 31 records, each preceded by a 3 to 11 page
17 discussion. The released information included five records already in the public
18 domain. Sixteen of the discussions make the claim of deliberative process.

19 Often repeated in the 31 discussions is that "[t]he five-member Safety Board
20 is the ultimate decision-maker as to the probable cause(s) of an accident," implying
21 that the four reports at issue here are deliberative in nature as having been
22 presented to the Safety Board. This claim, which would shield from disclosure the
23 records underlying virtually every public government report, is patently false.

24 Other frequently occurring phases and terms in the discussions include
25 "preliminary," "handwritten notes," "varying versions," "predecisional," and "does

26
27 ⁶ Niemeier v. Watergate Spec. Prosecution Force, 565 F.2d 967, 971-72 (7th
28 Cir. 1977), citing NLRB v. Sears, Roebuck, & Co. 421 U.S. 132, 95 S.Ct.
1504, 44 L.Ed.2d 29 (1975).

1 not reflect the agency's position." Plaintiff's response: Keep it all – except to the
2 extent that it does reflect the agency's position and was adopted in the agency's
3 reports. Plaintiff seeks only the records on which defendant's reports are based.

4 Once a record is relied upon in an agency disposition, it is no longer
5 preliminary. NTSB's Record No. 18 lists *Seven versions of a Presentation*
6 *concerning the Affects of Forward Fuselage Loss*. Exemption 5 gives the NTSB
7 no protection from producing those of its "seven versions" (inadequately
8 explained) that the agency did adopt. If the NTSB accepted one version, relying
9 on it in a public report of a conclusion, the deliberative character of that adopted
10 version no longer exists. The NTSB responds as if it were unaware of this.

11 **B. Failure to identify or produce records**

12 Plaintiff's itemization of 145 responsive records is taken from the NTSB's
13 own public docket and so the NTSB has no excuse for not identifying these records
14 in its Vaughn index. As plaintiff noted elsewhere, his assessment is that if the
15 NTSB's identification burden were measured by 100 yards, it would have moved a
16 few feet by its October 2 Vaughn index. In fact, there is no responsive data, nor
17 responsive formulas, anywhere in the NTSB's production. Plaintiff seeks formula
18 and data and computer simulations and software upon which the NTSB's reports
19 are based. There is no dispute as to whether these records exist. The NTSB
20 ignored plaintiff's requests as to both the NTSB's written report and its animations.⁷

21
22 ⁷ See November 6 *Plaintiff's Response Under Court's Order Entered October*
23 *31, 2003; Declaration of John H. Clarke*, p. 4: These [three] animations,
24 and the *Flight Path Study*, are the four public reports of the government's
25 varying zoom-climb hypothesis... Vaughn index provides its *Flight Path*
26 *Study* with the 64 graphs at issue here (Bates 460-509). The creation of each
27 graph entails applying data to a formula. The NTSB made a bald statement
28 that some releases would violate exemption 3, and ignored the others graphs.
Formulas, derived from learned treatises, are proprietary? All 64 data
entries involve proprietary information? No explanation. So, defendant
identified neither the responsive records upon which its written report was
based, much less any data upon which the video-animations were based.

1 The Court cannot adjudicate unidentified records.

2 The declaration of the NTSB's Doug Brazy openly states that "[t]he purpose
3 of this declaration is to provide... an explanation of why the animation is not
4 responsive to the FOIA request of H. Ray Lahr dated July 31, 2002."⁸ Brazy
5 relates that he "converted units of angular measurement," and that "either Dennis
6 Crider or I linearly interpolated all data to the thirty-times per second needed for
7 the animation software." Id. 515 ¶ 10. Mr. Brazy's modest reference to the
8 calculations he performed include no formula and no data. Crider also admits that
9 "information from the Trajectory Study was used for the simulation study" (Id. 428
10 ¶ 7), but he too identifies no data nor formulas, much less provide any such records
11 even in redacted form.⁹

12 And Mr. Brazy writes as if he is unaware of the first CIA-produced video-
13 animation (based on NTSB data and simulation), relating "[t]o the best of my
14 knowledge and belief, the NTSB did not create an animation that was shown on
15 November 17, 1997." Id. 520 ¶ 34.

16 Mr. Crider admits that the (unidentified) data provided to the CIA was
17 routed through him, raising the question of whether he is asserting that the CIA ran
18 its own aerodynamic time-step computer simulation. If so, Crider's declaration
19 directly contradicts the CIA's January 26, 2001 FOIA response to plaintiff's
20 requests, stating that the NTSB was the originating agency.¹⁰

21
22 ⁸ NTSB Vaughn index Brazy declaration ¶ 6 Bates 514-15.

23 ⁹ "A district court that 'simply approves the withholding of an entire
24 document without entering a finding of segregability or the lack thereof,'
errs." Krikorian v. Department of State, 984 F.2d 461, 467 (D.C. Cir. 1993).

25 ¹⁰ Aug. 2, 2003 *Plaintiff's Motion for Vaughn Index*, Exhibit E: Jan, 26, 2001
26 CIA FOIA response, in part: [T]he pertinent data, and resulting conclusions
27 were provided by the National Transportation Safety Board (NTSB). CIA
28 simply incorporated the NTSB conclusions into our videotape... [T]he
agency that originated the information has the responsibility for making
decisions about the release...

1 The questions surrounding the November 17 video remain unanswered.
2 Who is the originating agency of the data upon which it is based, the NTSB or the
3 CIA? Does the NTSB claim that the CIA ran its own aerodynamic simulation, and
4 if so, that the NTSB has no record of it?

5 **IV. BOEING HAS NO PROPRIETARY INTEREST**

6 The NTSB's nondisclosure is also based on Boeing's claim of trade secret or
7 proprietary interest in the records under exemption (b)(4).¹¹ Boeing's summary
8 judgment motion fails for four independent reasons, and it too is deficient in its
9 obligations under Vaughn.

10 **A. Already public**

11 From 1997 through July 2002, Boeing employed aerodynamicist Brett
12 Hoffstadt. Mr. Hoffstadt is "intimately familiar with the... types of tools...
13 available to professionals to make such calculations for all types of aerospace
14 vehicles, including commercial aircraft."¹² He explains that Analytical Methods,
15 Incorporated, sells a widely used computational fluid dynamics (CFD) computer
16 program (VSAERO), and sells the geometry of Boeing 747s. Mr. Hoffstadt's
17 affidavit demonstrates the futility of defendants' trade secret argument:

18 Any competent aerodynamicist can learn to use VSAERO.

19 With the 747 geometry available from AMI, he or she can calculate
20 the aerodynamic pressures and forces on the aircraft. These forces
21 can then be used to accurately predict or simulate the performance and
22 motion of the aircraft. In fact, tools such as VSAERO are used
23 precisely for these applications.

24
25
26 ¹¹ 5 U.S.C. § 552 (b)(4)(b); "This section does not apply to matters that are –
27 *** (4) trade secrets and commercial or financial information obtained from
28 an individual and privileged or confidential"

¹² A Hoffstadt Aff. ¶ 5 Bates 35.

1 VSAERO and other comparable CFD tools can calculate the
2 effect on performance due to either small or large changes in an
3 aircraft configuration. Small changes could be different airfoil shapes
4 or different wing tip shapes. Large changes could be major portions
5 of the aircraft that are added, modified, or removed (such as the front
6 third of the aircraft).

7 Differences between the 747-100 and 747-200 or -300 aircraft,
8 based on publicly available information, are another example of
9 modifications that a user can make to the aircraft geometry used in
10 VSAERO.

11 Results and analyses using tools such as VSAERO and existing
12 aircraft geometries are routinely published in professional journals
13 and conference proceedings, which are then available to the public.¹³

14 Plaintiff's affidavit too belies Boeing's argument:

15 The performance data and the weight and balance data is given
16 to every operator of a Boeing aircraft, and it is generally known
17 by competitors as well. Thus, the detailed operational performance of
18 B-747s is certainly not a secret, being available from at least four
19 sources.

- 20 1. Operator Handbooks
- 21 2. B-747 Flight Training Simulator
- 22 3. B-747 Flight Data Recorders
- 23 4. Authoritative treatise¹⁴

24 Moreover, four models have succeeded the Flight 800 aircraft, a 747-100.
25 Boeing placed the 747-100 in service in 1969, succeeded by the 747-200 in 1983,

26
27 ¹³ Id. ¶¶ 9-11.

28 ¹⁴ X Lahr Aff. ¶ 43 Bates 272.

1 the 747-300 in 1989, and the 777 in 1995.¹⁵ Boeing's burden includes an
2 explanation of how the withheld data, of a model placed in service 34 years ago,
3 and succeeded by three successive models, could harm Boeing competitively.

4 Boeing cannot withhold records of matters that other competitors already
5 know.¹⁶

6 **B. Boeing's performance data not proprietary**

7 Boeing's Motion for Summary Judgment is based on the argument that
8 NTSB Records 5-9 and 12 contain Boeing's trade secrets. However, plaintiff does
9 not seek Boeing trade secrets. As Boeing recites, in 1983, the D.C. Circuit defined
10 trade secret under the FOIA's exemption 4:

11 *A secret, commercially valuable plan, formula, process, or device that*
12 *is used for the making, preparing, compounding or processing of trade*
13 *commodities and that can be said to be the end product of either*
14 *innovation or substantial effort.*¹⁷

15 Plaintiff has "unique experience in regard to aircraft performance."¹⁸

16 Boeing cannot show a trade secret, as performance data is not secret.

17 There are two categories of information pertaining to the development
18 of a new aircraft: (1) design and manufacturing information to build
19 the aircraft, and (2) operation and performance information of the

20
21 ¹⁵ Id. Ex. 13 Bates 375-378.

22 ¹⁶ Hughes Aircraft v. Schlesinger, 384 F. Supp. 292 (N.D. Cal. 1974).

23 ¹⁷ Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d
24 1280 (D.C. Cir. 1983).

25 ¹⁸ X Lahr Aff. ¶ 118 Bates 287:

26 I have some unique experience in regard to aircraft performance.
27 Starting with the DC-10 in the late sixties and continuing to his
28 retirement in 1985, I was chairman of the ALPA Aircraft Evaluation
Committee. In that capacity, I was privileged to meet with the
management, the engineers, and the test pilots of all major
manufacturers including Boeing. Never was I refused an answer
about the performance of an aircraft.

1 finished product. Some information in the first category is
2 legitimately propriety such as wind tunnel testing to get the most
3 efficient shape, and the materials and manufacturing techniques
4 developed. However, there is no legitimate propriety information in
5 the second category. The zoom-climb pertains to performance.¹⁹

6 Boeing's argument that a competitor could use the data to build an airplane
7 or flight simulator is far-fetched. As we have seen, the information is public.

8 **C. Broader protection for "voluntarily produced" records**
9 **unavailable**

10 Defendants argue that disclosure of the voluntarily produced records at issue
11 could impede the NTSB's ability to obtain such records in the future. This
12 distinction of an industry's voluntary versus mandatory production to an agency is
13 made in Critical Mass²⁰ and National Parks,²¹ both cited by Boeing. The reasoning
14 is sound. But this broader protection for voluntarily produced records has no
15 application where the agency withholding the documents has subpoena power, as
16 does the NTSB.²² Because disclosure could have no effect on the NTSB's ability
17 to subpoena records in the future, Boeing's observation that it provided the records
18 "voluntarily" is wholly irrelevant.

19 ¹⁹ Id. ¶¶ 115-118 Bates 287.

20 ²⁰ Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F. 2d 871
21 (D.C. Cir. 1992) (en banc) *cert. denied*, 507 US 984 (1993).

22 ²¹ National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C.
23 Cir.1974).

24 ²² 49 USCA § 1113. Administration

- 25 (a) General authority. – (1) The National Transportation Safety
26 Board, and when authorized by it, a member of the Board, or an
27 administrative law judge employed by or assigned to the Board,
28 may conduct hearings to carry out this chapter, administer
oaths, and require, by subpoena or otherwise, necessary
witnesses and evidence.

1 **D. Boeing contemporaneous press release belies its present claim**

2 Boeing issued a press release on November 17, 1997 (which it has since
3 removed from its website), the very same day the government's first video-
4 animation, depicting a 3,200-foot climb, was televised. The press release in part::

5 Boeing was not involved in the production of the video shown today,
6 nor have we had the opportunity to obtain a copy or fully understand
7 the data used to create it. While we provided basic aerodynamic
8 information to assist in the CIA's analysis of the airplane's
9 performance, we are not aware of the data that was used to develop
10 the video. The video's observations of the eyewitnesses observations
11 can be best assessed by the eyewitnesses themselves.²³

12 Boeing wants it both ways.

13 **E. Insufficient explanation of how release could cause substantial**
14 **competitive harm**

15 Here, Boeing has not shown a "particularized explanation of how disclosure
16 of the particular document would damage the interest protected by the claimed
17 exemption."²⁴ "The burden of the proof that the request may be properly denied
18 because of an exemption rests with the agency."²⁵

19 For Boeing to present a cognizable trade secret argument, it must overcome
20 the facts (1) that the records are already public, (2) that performance data is not
21 proprietary, (3) that the records are not afforded any broad protection for having
22 been "voluntarily produced," and (4) persuade the court that it was not telling the
23 truth in its contemporaneously issued press release.

24
25 ²³ **D** Donaldson Aff. Ex. 21 Bates 114.

26 ²⁴ Weiner v. F.B.I., 943 F.2d 972, 977-78 (9th Cir. 1991).

27 ²⁵ Hayden v. NSA, 608 F.2d 1381, 1390 (D.C. Cir. 1979), cert. denied, 446 US
28 937 (1980).

1 Thus, Boeing failed to particularly identify what information is withheld, or
2 adequately describe the "commercial or financial" nature of the withheld data with
3 sufficient specificity to adjudicate the claim.²⁶ "Conclusory and generalized
4 allegations of substantial competitive harm, of course, are unacceptable and cannot
5 support an agency's decision to withhold requested documents."²⁷

6 Lastly, Boeing cites Public Citizen Health Research Group v. Food & Drug
7 Admin., 704 F.2d 1280, 1286 (D.C. Cir. 1983) for its position that "[i]f the
8 requested documents constitute 'trade secrets' they are exempt from disclosure, and
9 no further inquiry is necessary." This is incorrect, as discussed below.

10 **IV. FOIA'S BALANCING TEST MANDATES DISCLOSURE**

11 In 1989 the Supreme Court recited the FOIA's purpose, to shed light "on an
12 agency's performance of its statutory duties;"²⁸ that its "central purpose is to ensure
13 that the Government's activities be opened to the sharp eye of public scrutiny."²⁹
14 Disclosure herein will benefit the public by "bringing the government into
15 compliance with the Act and by securing for society the benefits assumed to flow
16 from the disclosure of government information."³⁰

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19 ²⁶ Favish v. OIC, 217 F.3d 1168 (9th Cir. 2000): "To fulfill its purpose, a
20 Vaughn index must... [provide] a particularized explanation of how
21 disclosure of the particular document would damage the interest protected
22 by the claimed exemption;" Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991),
23 rejecting "boilerplate" explanations not tailored to specific records withheld.

24
25 ²⁷ Public Citizen Health Research Group v. Food and Drug Admin., 704F.2d
26 1280, 1291 (D.C. Cir 1983).

27
28 ²⁸ United Sates Department of Justice v. Reporters Committee For Freedom Of
29 The Press, 489 U.S. 749, 772-73 (1989).

30
²⁹ Id. at 774.

³⁰ Crooker v. United States Parole Commission, 776 F. 2d 366, 367 (1st Cir.
1985).

1 Under the FOIA, should the Court find in any interest sought to be protected
2 by a FOIA exemption, it must then balance the harm release would cause to
3 defendants against the public's interest in disclosure.

4 Plaintiff shows tremendous public interest in disclosure. Flight 800 remains
5 the most controversial air disaster in aviation history. Millions of Americans
6 believe the Flight 800 zoom-climb hypothesis is a farce, and thousands know it is.

7 Plaintiff makes his proffer on the Court's balancing test to show (1) the
8 untrustworthiness of NTSB's official conclusions, (2) its pattern and practice of
9 bad faith and (3) the public interest and ongoing debate. Plaintiff shows the
10 breadth of the controversy. He does not ask the Court to adjudicate the cause of
11 Flight 800's demise.³¹ Plaintiff shows the genesis and breadth of the controversy,
12 as well as the NTSB's bad faith in the underlying activities that generated the
13 records at issue.³² "[W]here it appears that the motives or truthfulness of the
14 investigator are in doubt, the public need for supervision and disclosure is

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21 ³¹ Fed. R. Ev. 105. Limited Admissibility: "When evidence which is
22 admissible as to one party or for one purpose but not admissible as to
23 another party or for another purpose is admitted, the court, upon request,
24 shall restrict the evidence to its proper scope..."

25 ³² See Jones v. FBI, 41 F.3d 238 (6th Cir. 1994): "[E]ven where there is no
26 evidence that the agency acted in bad faith with regard to the FOIA action
27 itself, there may be evidence of bad faith or illegality with regard to the
28 underlying activities which generated the documents at issue. Where such
evidence is strong, it would be an abdication of the court's responsibility to
treat the case in the standard way and grant summary judgment on the basis
of Vaughn affidavits alone."

1 necessarily heightened."³³ Plaintiff's entire offer of proof of bad faith is relevant
2 should the Court find any merit in defendants' claims of exemptions. It is too
3 voluminous to be fully addressed within the confines of this pleading's page limit.

4 **A. Trade secrets**

5 Boeing's assertion that "[i]f the requested documents constitute 'trade secrets'
6 they are exempt from disclosure, and no further inquiry is necessary"³⁴ ignores the
7 FOIA's balancing test. (The NTSB posits that the balancing test applies only to
8 the two privacy exemptions. Privacy issues are by far the most litigated issue
9 under the FOIA.) The DC Circuit employed the balancing test to a (b)4 proprietary
10 information claim, first assessing whether the harm caused by disclosure of
11 proprietary information was "minor," or "significant," then balancing the
12 impairment that disclosure would cause against the public interest in disclosure:

13 A minor impairment cannot overcome the disclosure mandate
14 of FOIA. Rather, the question must be whether the impairment
15 is significant enough to justify withholding the information....

16 This inquiry necessarily involves a rough balancing test of the

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20 ³³ Castaneda v. United States, 757 F.2d 1010. (9th Cir. 1995); See also Favish
21 v. OIC, 217 F.3d 1168, 1172-73 (9th Cir. 2000) ("Favish's request focuses
22 on how the OIC conducted its investigation... in complete conformity with
23 the statutory purpose... showing that he has knowledge of misfeasance by
24 the agency... at times... has been referred to as enhancing the urgency of the
25 request. See Hunt v. FBI, 972 F.2d 286, 289 (9th Cir.1992);" Stern v. FBI,
26 737 F.2d 84, 90 (D.C. Cir. 1984) ("the public may have an interest in
27 knowing that a government investigating itself is comprehensive, that the
28 report of an investigation released publicly is accurate.")

³⁴ Citing Public Citizen Health Research Group v. Food & Drug Admin., 704
F.2d 1280, 1286 (D.C. Cir. 1983).

1 extent of impairment and the importance of the information
2 against the public interest in disclosure.³⁵

3 **B. Party Process violations**

4 The party process is codified in 49 USC § 1131, *General Authority*, ¶ (a)(3),
5 ending:

6 The Board and other departments, agencies, and instrumentalities
7 shall ensure that appropriate information developed about the accident
8 is exchanged in a timely manner.

9 The *International Association of Machinist and Aerospace Workers'*
10 submission to the NTSB's final report reflects its outrage at party process
11 violations, relating that "[w]e feel that our expertise was unwelcome and not
12 wanted by the FBI. Threats made during the first two weeks of the investigation
13 were unwarranted and unforgettable."³⁶

14 **1. Eyewitnesses**

15 During the first 17 months of the NTSB's four-year probe, the FBI
16 controlled it, in violation of the NTSB's enabling statute mandating that the NTSB
17 exercise primary jurisdiction.³⁷ The FBI's immediate takeover of the probe
18 coincided with its concealing of eyewitness' accounts, also in violation of the US

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20 ³⁵ Washington Post Co. v. Department of Health and Human Services, 690
21 F.2d 252, 268 (D.C. Cir. 1982), after remand, 795 F.2d 205 (D.C. Cir.
22 1986), subsequent opinion, 865 F.2d 320 (D.C. Cir. 1989).

23 ³⁶ X Lahr Aff. Ex. 10, IAMAW submission Bates 365.

24 ³⁷ 49 U.S.C. § 1131 ¶ (a)(2), *General Authority*
25 (2) An investigation by the Board under paragraph (1)(A)-(D) or (F) of
26 this subsection has priority over any investigation by another
27 department, agency, or instrumentality of the United States
28 Government. The Board shall provide for appropriate participation by
other departments, agencies, or instrumentalities may not participate
in the decision of the Board about the probable cause of the accident.

1 Code.³⁸ Although ostensibly, and legally, an NTSB probe, from its inception, the
2 FBI forbade all the parties, or groups, including the NTSB Witness Group,³⁹ from
3 interviewing any eyewitnesses. FBI agents interviewed the eyewitnesses – which,
4 in and of itself, was "unprecedented."⁴⁰

5 **2. Zoom-climb records at issue**

6 The NTSB excluded among its 18 groups any trajectory group or flight path
7 group, removing the calculations at issue in this case from party process peer
8 review, a fundamental principle of all NTSB probes, until this probe. Boeing too
9 was excluded.

10 One man, the NTSB's Dennis Crider, wrote both the trajectory and flight
11 path flight path studies,⁴¹ ran all time-step computer simulations, provided all data
12 used to produce the animations, but failed to include or release the underlying data.
13 Crider was the NTSB's sole participant in all its flight path trajectory reports,
14 performing all studies including all simulations. He used his own invention; the
15 unidentified time-step computer simulation program, still secret. It would appear
16 that Crider tweaked his data for second animation released after the aviation
17 community, including Boeing, disavowed the 3,200-foot climb conclusion.
18 Crider's program "is intuitive to" him.⁴² He explains, "the description of the
19

20 ³⁸ 49 USC § 1131, *General Authority*, ¶ (a)(3), ending: "The Board and other
21 departments, agencies, and instrumentalities shall ensure that appropriate
22 information developed about the accident is exchanged in a timely manner."

23 ³⁹ **O** Meyer Aff. ¶5d, Bates 193, relating that the FBI "forbade" NTSB
24 Witness Group Chairman Weidermier from contacting Meyer.

25 ⁴⁰ **Q** Grose Aff. ¶ 4 Bates 211: "[I]t's unprecedented because, by a mandate of
26 the Congress, there is one body, the National Transportation Safety Board,
27 that is entirely charged with the investigation of any transportation
28 accident."

⁴¹ Vaughn index Bates 440-510.

⁴² Vaughn index Crider declaration Bates 428 ¶ 8.

1 program has been written in non-engineering terms, which includes even the name
2 of the program. (There are several programs referred to in the public record.⁴³)

3 The *Air Line Pilots Association's* protested the party process violation of the
4 secrecy of Mr. Crider's calculations, the records at issue here, in ALPA's
5 submission to the NTSB's final report:

6 Furthermore, although ALPA does not doubt the technical capability
7 of the NTSB, we are concerned that this analysis [Component
8 Trajectory Study] was essentially accomplished by only one
9 individual at the Board, with little or no party input or participation.
10 As cited in the previous section, the trajectory study utilized several
11 and uncertain or erroneous component recovery locations... Had this
12 study been conducted as a group activity... necessary cross-checking
13 and party consensus building..."⁴⁴

14 As ALPA 15-year safety representative plaintiff Captain Lahr observes, the
15 withholding of the aircraft's performance data from any party to any NTSB probe
16 is unprecedented.⁴⁵

17 3. Public safety

18 Experts agree that the NTSB violated the party process in its probe,
19 including in generating the records at issue, and release would serve the interests of

22 ⁴³ X Lahr Aff. Ex. 15 Bates 387-390: NTSB Exhibit 22A p. 4 (BREAKUP
23 Program), NTSB Exhibit 22A, p.13 (BALLISTIC Program), NTSB Vaughn
24 index Exhibit 22C, p. 6, Bates 463 (re LONGITUDINAL MOTION
25 SIMULATION CODE WITH AND WITHOUT MODIFICATION FOR
26 BANK AND ROLL.)

26 ⁴⁴ X Lahr Aff. Ex. 5 ALPA submission Bates 329.

27 ⁴⁵ Id. ¶ 119 Bates 287: "I also participated in [seven] major NTSB
28 accident investigations. Never in this experience were the parties to an
NTSB investigation refused information about the performance of the
aircraft involved."

1 public safety.⁴⁶ The entry of only the publicly known data into a time-step analysis
2 program "renders any climb calculations meaningless."⁴⁷

3 **C. Genesis and chronology of zoom-climb hypothesis**

4 **● December 30, 1996 – CIA idea**

5 "On the 30th of December 1996," a CIA briefing transcript shows, a CIA
6 analyst had the idea central to this suit – "you can explain what the eyewitnesses
7 are seeing with only the burning aircraft." The analyst "immediately alerted" the
8 FBI because "we wanted them to be aware,"⁴⁸ obviously to direct probe to its
9 preordained probable cause conclusion. This zoom-climb creation, hatched 18
10 weeks after the disaster, is the central issue in this case.

11 **● November 17, 1997 – broadcast of CIA-produced
12 animation**

13 On November 17, 1997, fifty weeks after the CIA Analyst had his idea,
14 network news broadcast it, in animation form, to millions of Americans.⁴⁹ It
15 depicts the forward one-third of the jetliner breaking away and falling, followed by
16 the remaining portion of the aircraft's performing a steady, steep, and flaming,
17 3,200-foot zoom-climb. The animation's narrator stated that "this may have looked
18 like a missile attacking an aircraft" – claiming that the streak of light reported by
19 eyewitnesses was actually the plane itself, climbing sharply due to a weight
20 imbalance from its nose having separated from the fuselage.

21
22 ⁴⁶ **A** Hoffstadt Aff. ¶¶ 12-13 Bates 36: "The aerospace community benefits
23 from such publications... [The] analysis of TWA800 flight performance is
24 eminently appropriate for public disclosure and peer review;" **E** Stalcup
25 Aff. ¶ 17 Bates 121: "Disclosure and subsequent peer review of the NTSB's
26 climb calculations would help determine Flight 800's actual crash sequence,
which would significantly improve the airline community's understanding of
that crash."

27 ⁴⁷ **B** Hambley Aff. ¶ 1 Bates 40.

28 ⁴⁸ **X** Lahr Aff. Ex. 1, CIA-NTSB conference transcript, Bates 304-305.

⁴⁹ **D** Donaldson Aff. Ex. 19, CIA-video transcript, Bates 111-112. Lodged
videotape # 4 Animations.

1 Simultaneously with the NTSB's November 17 release and broadcast of the
2 CIA-produced animation, the FBI withdrew from the probe.

3 ● **November 17, 1997 – Boeing's contemporaneous press release**

4 As noted *supra* p. 20, Boeing issued a press release the same day as the
5 release of the CIA-produced 3,200-foot-climb animation, stating that it "was not
6 involved in the production of the video shown today,' it did not "understand the
7 data used," that it "provided basic aerodynamic information" and was "not aware of
8 the data that was used."⁵⁰

9 ● **December 8, 1997 – release of NTSB-produced animations**

10 The first NTSB public "Sunshine Hearing"⁵¹ took place on Baltimore from
11 December 8 through the 12, 1997, during which time it released two video
12 animations of the zoom climb.⁵² These animations depict about a 1,700-foot zoom
13 climb, *half of the CIA-produced version.*

14 This 50% difference works in favor of disclosure.

15 ● **December 8, 1997 – release of NTSB Exhibit 4-A;
16 not in public docket**

17 NTSB's Exhibit 4A, dated October 16, 1997, is its 12-page *Witness Group*
18 *Factual Report*. This Report was distributed at the Baltimore "Sunshine" hearing.
19 The NTSB withholds this report from its public docket. It counts 94 FBI 302s of
20 eyewitnesses having seen the streak of light rise from the surface⁵³ out of the 458
21 eyewitness 302's the FBI let the NTSB review).

22 (On August 23, 2000, two-and-a-half years after the Baltimore hearing, the
23 NTSB held its second and final Flight 800 Sunshine Hearing in Washington D.C.,

24
25 ⁵⁰ D Donaldson Aff. Ex. 21 Bates 114.

26 ⁵¹ X Lahr Aff. ¶ 24 Ex. 2 & 3 Bates 306-311: FBI to NTSB letter objecting
27 to use of eyewitnesses materials or testimony at Hearing, and return letter
28 complying.

⁵² Lodged videotape # 4 Animations.

⁵³ D Donaldson Aff. Ex. 16 NTSB Ex. 4A, Oct. 16, 1997, *Witness Group*
Factual Report, Bates 100, 102.

1 where it precluded eyewitnesses from testifying, again, grossly under-reported the
2 number of eyewitness accounts conflicting with the zoom-climb, again, and
3 misrepresented their accounts, again.)

4 **D. NTSB bad faith fuels controversy & publicity**

5 Under the FOIA, the more publicity, the higher the scrutiny. One case held
6 proper an agency's "Glomarized" request for records concerning alleged
7 wrongdoing by two named employees as there was no public interest because there
8 was no evidence of wrongdoing or widespread publicity of the investigation.⁵⁴ We
9 are at the other extreme.⁵⁵ TWA Flight 800 is the most publicized, and most
10 controversial, disaster in aviation history. The NTSB's Flight 800 probe is a study
11 in bad faith. This evidence is too voluminous to cover in depth in this pleading.

12 As noted above, "[w]here it appears that the motives or truthfulness of the
13 investigator are in doubt, the public need for supervision and disclosure is
14 necessarily heightened."⁵⁶

15 **1. Party members smuggled out evidence necessitated 16 by illegal FBI takeover and party process violations**

17 Officials inside the probe were so frustrated that they smuggled out physical
18 evidence, debris field database,⁵⁷ and radar evidence.⁵⁸

19 **2. NTSB deleted data**

20 Probably the starkest evidence of bad faith is the government's *deleting data*
21 prior to its public release, including radar⁵⁹ and the Flight Data Recorder.⁶⁰

23 ⁵⁴ Beck v. Department of Justice, 997 F.2d 1489, 1492-94 (D.C. Cir 1993).

24 ⁵⁵ See, e.g., Hardy v. FBI, No. 95-883, slip op at 21 (D. Ariz. July 29, 1997)
25 (release names of supervisory FBI agents publicly associated with Waco);
26 Weiner v. FBI, No. 83-1720, slip op. at 7 (C.D. Cal. Dec. 6, 1995) (public
27 interest dictated the release of names and addresses of agents involved in
supervision of FBI's publicized probe into John Lennon's death).

28 ⁵⁶ Castaneda v. United States, 757 F.2d 1010 (9th Cir. 1985).

⁵⁷ **K** Sanders Aff. ¶¶ 6, 8 Bates 175.

⁵⁸ **J** Holtsclaw Aff. ¶¶ 2-3 Bates 173; **M** Russell Aff. ¶ 8 Bates 189.

1 **3. Zoom-climb did not happen**

2 The *International Association of Machinist and Aerospace Workers*, a party
3 to the probe, unequivocally rejected defendant's probable cause finding of a center-
4 wing-tank explosion in its submission to the NTSB's final report.⁶¹

5 Eastwind Airlines Captain David McClaine had been watching Flight 800's
6 outboard lights for several minutes right up to the moment of the explosion. He
7 was staring right at it, and immediately alerted Air Traffic Control:

8 0031:50 [Eastwind Airlines 507]: We **just saw an explosion** out here
9 stinger bee five oh seven

10 031:57 [Boston ATC]: "...did you say something else?"

11
12 ⁵⁹ E Stalcup Supp. Aff. ¶ 4 Bates 126, Lodged Video # 1: "The last sweep of
13 the river head radar shows the four dot points deleted in a – right where
14 Flight 800 was, and that's where any missile would have been that was
15 going to hit it, now that data has been completely deleted... this isn't, that's
16 not something that just happened by itself."

17 ⁶⁰ See plaintiff's Aug. 7 1993 *motion for Vaughn index*, Ex. I, Aff. Glen
18 Schulze, ¶¶ 3, 5, Bates 38-39: "I have devoted between 1200 and 1500
19 hours reviewing the entire collection of... Flight 800 Cockpit Voice
20 Recorder (CVR) and the Flight Data Recorder (FDR) Accident Tapes....
21 Detailed analysis performed by me in conjunction with my peers... of the
22 FDR tape revealed a clear and glaring omission of the last three to four
23 seconds of the FDR tape data... presented the results... in person to the
24 Niberts and Chairman Jim Hall and his FDR specialists, Cash, Grossi and
25 Ellingstad. At the end of this meeting Mr. Nibert formally requested the
26 original FDR tape be temporarily made available to me for an independent
27 analysis... Mr. Hall and the NTSB refused this request and immediately
28 terminated all correspondence with me about the FDR tape thereby leaving
my serious claim of missing FDR data unanswered."

⁶¹ X Lahr Aff. Ex. 10, IAMAW submission, Bates 371: "The center wing
fuel tank did explode. We find that this explosion was as the result of the
aircraft breakup. The initial event caused a structural failure in the area of
Flight Station 854 to 860, lower left side of the aircraft. A high-pressure
event breached the fuselage and the fuselage unzipped due to the event. The
explosion was the result of this event."

1 0032:01 [Eastwind Airlines 507]: Ah we just saw an explosion up
2 ahead of us here *(??somewhere's about) sixteen thousand feet
3 or something like that **it just went down** – in the water

4 [Omitted next 45 seconds, 0032:02 through 33:47]

5 0033.48 [Eastwind Airlines 507]: And center for stinger bee ah five
6 oh seven we are directly over the site with that airplane or
7 whatever **it was just exploded and sent into the water**⁶²

8 Had Flight 800 zoom-climbed it would have done so right through Captain
9 McClaine's altitude. Amazingly, he was the only civilian ever to be interviewed by
10 the NTSB Witness Group, and a year after the adoption of zoom-climb hypothesis.

11 The accounts of experienced, airborne, witnesses, like McClaine's, deserve
12 great weight. Major Fritz Meyer earned the Distinguished Flying Cross for his
13 combat in the most heavily defended airspace in the history of warfare, Vietnam's
14 golden triangle. He too was airborne, staring directly at the "streak of light"
15 "moving very rapidly." Flight 800 "was going down, from the first moment of the
16 first explosion, it was going down. It never climbed."⁶³

17 Two eyewitnesses featured in the CIA video were active duty US Navy
18 Master-Chief Dwight Brumley (an airborne witness) and Vietnam veteran Mike
19 Wire. Brumley's affidavit states the animation "wasn't even close to being an
20 accurate representation" of what he had seen,⁶⁴ and Wire "assumed that they have

24 ⁶² **T** Captain McClaine, Ex. 3, *Transcript of Air Traffic Control*, Bates
25 242-244. See also *id.* Ex. 1, *March 1999 interview transcript excerpts*,
26 Bates 224-240, & Ex. 2 July 18 *Report of Captain McClaine* Bates 241.

27 ⁶³ **O** Meyer Aff. ¶ 5(b) Bates 193. Lodged Video # 2.

28 ⁶⁴ **P** Brumley Supp. Aff. ¶ 1 Bates 210. Lodged Video # 2.

1 used it just to... pacify the general public, because it didn't represent" what he had
2 seen.⁶⁵

3 After the November 1997 video-animation's release, both Lisa Perry⁶⁶ and
4 Paul Angelides⁶⁷ called the FBI, angry.

5 Virtually every piece of relevant eyewitness and physical evidence in this
6 case is irreconcilable with the NTSB's zoom-climb theory, and not one eyewitness
7 relates seeing what the government's animations depict.

8 **4. Zoom-climb could not happen**

9 The tragedy occurred within range of several radars, at least three of which
10 picked up Flight 800's path after the on-board loss of power to the transponder, and
11 Radar shows that aircraft did not slow. Thus, it did not climb.

12 The law of conservation energy says, that you use kinetic energy and
13 that's the speed you have already and you convert that to altitude but
14 there is a price, the price that you pay is that you slow down. It is like
15 when you ride a bike up a hill, at the top of the hill you're going pretty
16 slow, you know, you use your energy up. Well the radar data showed
17 the plane did now slow down. If it didn't slow down, it didn't climb.

18 If the witnesses didn't see the plane climb, they saw something else.⁶⁸

19 So, here, we have summary reports on the government's conclusion defying
20 the laws of physics, and the government's refusal to produce any data upon which
21 such hypothesis is allegedly based. More examples of the NTSB's defying the
22 immutable laws of physics follow.

23 "When the nose was blown off of TWA 800, the center of gravity moved aft
24 of the center of lift. Now you've got the center of lift going up. That would rotate

25
26 ⁶⁵ R Wire Aff. ¶ 4 Bates 214. Lodged Video # 3.

27 ⁶⁶ U Perry Aff. ¶ 504 Bates 253. Lodged Video # 3.

28 ⁶⁷ S Aff. Angelides ¶ 33 Bates 221: video animation "didn't resemble it in
any way." Lodged Video # 3.

⁶⁸ E Stalcup Supp. Aff. ¶ 3 Bates 126 Video # 1 Lodged.

1 the aircraft through complete stall in less than two seconds, and the most the
2 aircraft could have climbed would be about 200 feet."⁶⁹

3 The center-wing-tank explosion being the official initiating event is also
4 impossible. The fuel, as volatile as kerosene, is a combustible, as opposed to a
5 flammable, liquid. A combustible liquid "simply cannot" give off "flammable
6 vapors."⁷⁰ All cars have fuel pumps inside their gas tanks, carrying a flammable
7 liquid. Not one has ever exploded. No 747-100 pumps were replaced after the
8 disaster. Flight 800's center-wing-tank was empty, the residual from the previous
9 flight having been drained by sump-pump.⁷¹

10 Moreover, the center-wing-tank explosion is self-defeating because "the
11 front of the support frame for the aircraft wings" would have been destroyed (as
12 the NTSB admits), resulting in loss of the wings.⁷²

13 CONCLUSION

14 The records at issue were conceived and tailored to explain away the
15 eyewitnesses. The NTSB's science is junk. Its secret time-step simulations were
16 made by dishonest entry of formula and data. The NTSB and the CIA both deny
17 being the "initiating agency" of the simulation upon which the 3,200-foot-zoom-
18 climb was based.

19 Defendants have met not a single of their burdens of production for entry of
20 summary judgment. Plaintiff cannot even respond to defendants' claims of privacy
21 under 5 U.S.C. § 552(b)(6) without a full accounting of the records at issue.

24 ⁶⁹ X Lahr Aff. ¶ 92 Bates 284. Video # 1 lodged.

25 ⁷⁰ H Harrison Aff. ¶¶ 7-9.

26 ⁷¹ C Hill Aff. ¶ 4 Bates 50-51 "...Captain Mundo... used that sump pump to
27 take out any residual jet fuel... because... they didn't need it... that tank was
28 empty... a thimble-full of kerosene, or the equivalent, vapor... [in] a huge
tank... And there's no way that you can ignite a thimble-full of kerosene and
blow off the left wing of the strongest airplane ever built."

⁷² W Rivero Aff. ¶ 10 Bates 264. Lodged Video 4a.

1 For the reasons of inadequate identification, inapplicability of exemptions,
2 and, alternatively, the public interest in disclosure, plaintiff opposes defendants'
3 motions for summary judgment under rule 56 of the Federal Rules of Civil
4 Procedure, on the grounds that there are genuine issues of fact and that defendants
5 are not entitled to entry of judgment as a matter of law.

6 Plaintiff asks that Case No. 03-08023 CBM (CTx) be consolidated with this
7 case, and that defendants be ordered to resubmit the Vaughn index, identifying and
8 responding with identification of all records, as mandated under the FOIA by
9 October 8, 2003 FOIA Requests. These 145 requests are substantively no different
10 from the requests currently at issue before the Court. They merely require the
11 NTSB to identify and respond to the zoom-climb records, the same obligation it
12 has under plaintiff's initial complaint.

13
14
15
16 Respectfully submitted,

17
18 Captain H. Ray Lahr
19 By Counsel

20
21 _____
22 John H. Clarke
23
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27
28

1 **DECLARATION OF JOHN H. CLARKE**

2 1. I am a member in good standing of the Bar of the District of Columbia
3 and the State Bars of Virginia and Maryland, and federal district courts therein, and
4 I am admitted pro hac vice in this action. I submit this declaration in support of
5 plaintiff's opposition to defendants' motions for summary judgment. I have
6 personal knowledge of the following:

7 2. Attached hereto as Exhibit A is a true and correct copy of the
8 Affidavit of Brett Hoffstadt.

9 3. Attached hereto as Exhibit B is a true and correct copy of the
10 Affidavit of Darryl Hambley.

11 4. Attached hereto as Exhibit C is a true and correct copy of the
12 Affidavits of Rear Admiral Clarence A. Hill, Jr., USN (Ret).

13 5. Attached hereto as Exhibit D is a true and correct copy of the
14 Affidavit of Robert Donaldson.

15 6. Attached hereto as Exhibit E is a true and correct copy of the
16 Affidavits of Thomas Stalcup, Ph.D.

17 7. Attached hereto as Exhibit F is a true and correct copy of the Affidavit
18 of David Neal.

19 8. Attached hereto as Exhibit G is a true and correct copy of the
20 Affidavit of Marge Krugar.

21 9. Attached hereto as Exhibit H is a true and correct copy of the
22 Affidavit of Gregory A. Harrison, Ph.D., P.E..

23 10. Attached hereto as Exhibit I is a true and correct copy of the Affidavit
24 of Michael Hull, Ph.D.

25 11. Attached hereto as Exhibit J is a true and correct copy of the Affidavit
26 of James A. Holtsclaw.

27 12. Attached hereto as Exhibit K is a true and correct copy of the
28 Affidavits of James D. Sanders.

13. Attached hereto as Exhibit L is a true and correct copy of the

1 Affidavit of James Speer.

2 14. Attached hereto as Exhibit M is a true and correct copy of the
3 Affidavit of Captain Richard Russell.

4 15. Attached hereto as Exhibit N is a true and correct copy of the
5 Affidavit of Vincent Fuschetti.

6 16. Attached hereto as Exhibit O is a true and correct copy of the
7 Affidavit of Major Fred Meyer.

8 17. Attached hereto as Exhibit P is a true and correct copy of the
9 Affidavits of Dwight Brumley.

10 18. Attached hereto as Exhibit Q is a true and correct copy of the Affidavit
11 of Dr. Vernon Gross.

12 19. Attached hereto as Exhibit R is a true and correct copy of the
13 Affidavit of Mike Wire.

14 20. Attached hereto as Exhibit S is a true and correct copy of the Affidavit
15 of Paul Angelides.

16 21. Attached hereto as Exhibit T is a true and correct copy of portions of
17 Captain David McClaine's transcript of NTSB interview, Captain McLean's
18 Report, and the transcript of Air Traffic Control with Captain McClaine.

19 22. Attached hereto as Exhibit U is a true and correct copy of the
20 Affidavit of Lisa Perry.

21 23. Attached hereto as Exhibit V is a true and correct copy of the
22 Affidavit of Colonel Lawrence Pence USAF (Ret).

23 24. Attached hereto as Exhibit W is a true and correct copy of the
24 Affidavit of Michael Rivero.

25 25. Attached hereto as Exhibit X is a true and correct copy of the
26 Affidavit of Captain H. Ray Lahr.

27 November 12, 2003: I declare under penalty of perjury that the foregoing is true.

28

John H. Clarke

1 **PROOF OF SERVICE – BY HAND**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3
4 I am and was at all times herein mentioned a resident of the State of California,
5 over the age of 18 years. My address is 18254 Coastline Drive, Malibu, CA
6 90265-5702.

7 On November 14, 2003, I served a true copy of **PLAINTIFF'S OPPOSITION**
8 **TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT:**
9 **MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION**
10 **OF JOHN H. CLARKE AND LODGED VIDEOTAPES IN SUPPORT**
11 **THEREOF** on the interested parties in this action by hand delivery in envelopes
12 addressed and delivered to defendants' attorneys:

13 Jan L. Luymes, Esquire
14 Assistant United States Attorney
15 300 North Los Angeles Street, Room 7516
16 Los Angeles, California 90012

17 Jay S. Brown, Esquire
18 PERKINS COIE, LLP
19 1620 26th Street, Sixth Floor
20 Santa Monica, California 90404

21 I declare under penalty of perjury that the foregoing is correct and that this
22 Proof of Service was executed on November 14, 2003.

23
24 _____
25 H. Ray Lahr
26
27
28