

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE SEPTEMBER 11 LITIGATION	:	21 MC 101 (AKH)
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**THE AVIATION DEFENDANTS' MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' RENEWED MOTION TO SET ASIDE
THE DEFENDANTS' DESIGNATIONS OF CONFIDENTIALITY**

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PRELIMINARY STATEMENT

The Aviation Defendants¹ respectfully submit this memorandum of law, together with the accompanying Declaration of Desmond T. Barry, Jr. dated February 27, 2009 and the exhibits thereto (the “Barry Decl.”) in opposition to Plaintiffs’ renewed motions to set aside the Aviation Defendants’ confidentiality designations.² Plaintiffs’ motions are extraordinary in the relief that they seek, in their failure to follow proper agreed-upon procedures, and in their timing — even before discovery has been completed and the cases have been tried, they seek blanket removal of all “confidential” designations made by the Aviation Defendants pursuant to the governing March 30, 2004 Confidentiality Protective Order, without abiding by the terms of that Order. *See Confidentiality Protective Order, In re Sept. 11 Litig.*, 21 MC 97 (AKH) (S.D.N.Y. Mar. 30, 2004) (the “Confidentiality Protective Order”) (attached as Ex. A to the Barry Decl.).³

This motion should be denied because Plaintiffs have not established a compelling reason or the type of extraordinary circumstance that must be shown in order to modify or rescind the Confidentiality Protective Order at this stage of the litigation when it has been reasonably relied

¹ The “Aviation Defendants” joining in this Memorandum of Law in Opposition to Plaintiffs’ Renewed Motion are: American Airlines, Inc.; AMR Corporation; United Air Lines, Inc.; UAL Corporation; US Airways Group, Inc.; US Airways Inc.; Delta Airlines, Inc.; Continental Airlines, Inc.; Colgan Air, Inc.; Globe Aviation Services Corporation; Globe Airport Securities Services, Inc.; Huntleigh USA Corp.; ICTS International NV; The Boeing Company; the Massachusetts Port Authority; and Argenbright Security, Inc. US Airways, Inc. and US Airways Group, Inc. join in this motion solely with respect to the PI/WD, PD/BL and WTCP claimants who have signed the stipulation entered in their bankruptcy cases. The Plan Injunction remains in effect for any and all remaining claims. Continental Airlines, Inc. is a property defendant in the American Airlines Flight 11 Wrongful Death/Personal Injury Litigation only. Delta Air Lines, Inc. is participating in regard to those claims not stayed, enjoined or discharged pursuant to Delta Air Lines, Inc.’s bankruptcy proceedings.

² Although the PI/WD, PD/BL and WTCP Plaintiffs’ have filed three separate Motions to Set Aside the Aviation Defendants’ Confidentiality Designations, the PD/BL and WTCP Plaintiffs adopted and incorporated the motion of the PI/WD Plaintiffs and did not submit additional briefs. Accordingly, all references to “Plaintiffs renewed motion” refers to all three motions, as represented by the PI/WD Plaintiffs’ brief. The PD/BL and WTCP Plaintiffs also adopted and incorporated the News Organizations’ Motion to Intervene and Set Aside Confidentiality Designations, which is addressed separately in the Aviation Defendants’ Memorandum of Law in Opposition to the News Organizations’ Motion for Leave to Intervene and to Set Aside Defendants’ Designations of Confidentiality.

³ *See also Order, In re Sept. 11 Prop. Damage and Bus. Loss Litig.*, 21 MC 101 (AKH) (S.D.N.Y. Aug. 19, 2005) (extending the terms of the Confidentiality Protective Order in 21 MC 97 to the *Property Damage and Business Loss Litigation*, 21 MC 101) (attached as Ex. B to the Barry Decl.).

upon by a party. Contrary to Plaintiffs' assertion, the Aviation Defendants' reliance was reasonable because the Confidentiality Protective Order is not limited or temporary in nature, nor are its terms inappropriately broad. Under the terms of the Confidentiality Protective Order, the designating party is *not* relieved of the burden to establish confidentiality. Rather, that burden is merely deferred until after the objecting party fulfills its initial burden of providing all parties with written notice of the objection, "specifically identifying each document that the objecting party in good faith believes should not be designated as Confidential Information, and providing a brief statement of the grounds for such belief," within 120-days of service of the document(s). *See* Ex. A, Confidentiality Protective Order ¶ 5.1. Under the terms of the Confidentiality Protective Order, the designating party then would bear the burden of "proving that the document, information or other material is Confidential Information pursuant to subparagraph 2.1 of this Confidentiality Protective Order" if the parties are unable to resolve their dispute without the court's intervention. *Id.*

However, the motion currently before the Court does not seek to enforce the March 30, 2004 Confidentiality Protective Order, the terms of which were negotiated and agreed to by Plaintiffs.⁴ In the almost five years since the Court entered the Confidentiality Protective Order, Plaintiffs never have submitted to the Aviation Defendants any request under the Order to remove the "confidential" designation from a specific document or deposition passage. Plaintiffs chose not to exercise the rights reserved to them under the Confidentiality Protective Order;

⁴ In Plaintiffs' Supplemental Memorandum of Law in Support of their Initial Motion to Set Aside Defendants' Confidentiality Designations, counsel for the PI/WD Plaintiffs claimed that they "were never involved in the drafting of and did not sign the confidentiality order." Pls.' Supplemental Mem. Supp. Initial Confidentiality Mot. at 7-8. Counsel for the PI/WD Plaintiffs moved for admission *pro hac vice* in June 2003, long before the Confidentiality Protective Order was entered. Aviation Defendants' Liaison Counsel negotiated the terms of the Confidentiality Protective Order with Plaintiffs' Liaison Counsel, and rightfully believed that Plaintiffs' Liaison Counsel was doing so on behalf of all of Plaintiffs, including the PI/WD Plaintiffs. Whatever concerns PI/WD Plaintiffs' counsel may have about the terms that Plaintiffs' Liaison Counsel agreed to on their behalf does not affect the PI/WD Plaintiffs are bound by the terms of the Confidentiality Protective Order.

rather, they ignored their obligations and now ask the Court to similarly overlook the explicit terms agreed to by the parties.⁵ Accordingly, under *Martindell v. Int'l Tel. & Tel. Corp.*, Plaintiffs bear the burden of “showing . . . improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need” in order to justify vacating or modifying the terms of the Confidentiality Protective Order. *Martindell*, 594 F.2d 291, 297 (2d Cir. 1979).

Plaintiffs also argue that the Court should strike the Aviation Defendants’ confidentiality designations now “in light of the extraordinary historical and public interest in this case.” However, “historical interest” alone is an insufficient and inappropriate ground to allow public disclosure and dissemination of discovery materials that do not qualify as “judicial documents.” Although the Aviation Defendants’ position is that any objection to the terms of the Confidentiality Protective Order should have been made when the Order was negotiated five years ago, the time to address Plaintiffs’ claimed interest in the “historical record” is after the conclusion of this litigation, not in the months before trial. Granting Plaintiffs the relief they seek now would accomplish nothing constructive but rather result in incomplete disclosures that would taint the jury pool, expose trade secrets and proprietary information, and violate witnesses’ privacy rights.

⁵ This motion is Plaintiffs’ second attempt to persuade the Court to rescind or modify the Confidentiality Protective Order; their initial motion, filed in October 2007, was fully briefed but withdrawn without prejudice in March 2008. The Aviation Defendants hereby incorporate by reference the Memorandum of Law in Opposition to Plaintiffs’ Motion to Set Aside the Aviation Defendants’ Designations of Confidentiality filed on February 22, 2008 (“Aviation Defs.’ Mem. Opp’n Initial Confidentiality Mot.”), and The Boeing Company’s Supplemental Brief in Opposition to Plaintiffs’ Motion to Set Aside Confidentiality Designations filed on January 21, 2008 (“Boeing’s Supplemental Br. Opp’n Initial Confidentiality Mot.”). Following the withdrawal of Plaintiffs’ initial motion, the Aviation Defendants agreed to re-review their confidentiality designations of deposition exhibits and transcripts. In July 2008, the Aviation Defendants provided Plaintiffs with their list of deposition exhibits and transcripts for which designations were maintained, proposing that the designations for the remaining materials be removed. The Aviation Defendants’ removal of many of those designations was to no avail, however, as it did not prompt the PI/WD Plaintiffs to drop that aspect of the dispute or even to submit a specific objection as to the designations maintained by the Aviation Defendants on these materials. Similarly, the Aviation Defendants’ attempt to negotiate an agreement whereby their confidentiality designations would be reviewed and disputes would be resolved in an orderly manner after the conclusion of this litigation were unsuccessful.

ARGUMENT

The applicable Second Circuit case law is clear: given the Aviation Defendants' reasonable reliance on the Confidentiality Protective Order, Plaintiffs must establish a compelling need or extraordinary circumstance to justify rescinding or modifying it. Plaintiffs' professed "historical interest" in the events of September 11, 2001 is insufficient to meet this burden, given the tremendous risks that would result from removing the Aviation Defendants' confidentiality designations at this stage of the litigation.

Plaintiffs continue to assert that the Aviation Defendants must bear the burden of establishing a good cause basis for each and every individual confidentiality designation. In their renewed motion, Plaintiffs rely on *Schiller v. City of New York* to support their position. *See* Pls.' Mem. Supp. Renewed Confidentiality Mot. at 4-5 (citing *Schiller*, No. 04 Civ. 7922 KMF JCF, 04 Civ. 7921 KMF JCF, 2007 WL 136149 (S.D.N.Y. Jan. 19, 2007) (attached as Exhibit C to the Barry Decl.)). However, as explained below, *Schiller* is inapplicable. Plaintiffs must establish a compelling need to rescind or substantially modify the Confidentiality Protective Order.

Even if Plaintiffs were correct that the Aviation Defendants were obligated to make a good cause showing, denial of Plaintiffs' renewed motion is still warranted because the Aviation Defendants' designations are justified by a general showing of good cause as well as more specific interests, such as privacy, proprietary information, and the risk of tainting a potential jury pool. In light of these interests, continued protection of the Aviation Defendants' designations is warranted.

I. PLAINTIFFS CANNOT MEET THEIR BURDEN OF ESTABLISHING A COMPELLING NEED TO RESCIND OR MODIFY THE CONFIDENTIALITY PROTECTIVE ORDER.

The Confidentiality Protective Order is precisely the type of umbrella protective order that courts have recognized as necessary in modern complex litigation, when an initial document-by-document, line-by-line confidentiality assessment is often impractical, if not impossible. It is widely recognized that “[i]n large, complex cases, courts often enter ‘umbrella’ protective orders, which permit parties to designate in advance a large volume of discovery materials as confidential.” *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 416 (E.D.N.Y. 2007) (Weinstein, J.).⁶

The Second Circuit has long held that where a party has reasonably relied on a confidentiality protective order, a party seeking to modify or rescind that order must make a “showing of...some extraordinary circumstance or compelling need.” *S.E.C. v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (citing *Martindell*, 594 F.2d at 296); *see also Iridium India Telecom Ltd. v. Motorola, Inc.*, 165 F.2d 878, 880-81 (2d Cir. 2005). As the Second Circuit emphasized, without the ability to restrict public dissemination of certain discovery materials, litigants would be subject to needless “annoyance, embarrassment, oppression, or undue burden or expense. And if previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders

⁶ *See generally id.* at 413-14 (“As civil discovery rules became more expansive over the course of the last century, the role of courts in protecting producing parties from undue invasions of privacy has correspondingly increased. . . . Protective orders serve essential functions in civil adjudications, including the protection of the parties’ privacy and property rights. . . . Much of the material produced in discovery is neither incorporated in motions made to the court nor admissible at trial. In order to mitigate the substantial risk to litigants’ privacy and other rights posed by the expansive scope of pretrial discovery, courts are given broad discretion in Rule 26(c) to craft sealing orders which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”) (internal quotation marks and citations omitted).

would readily be set aside in the future.” *TheStreet.com*, 273 F.3d at 229 (internal quotation marks and citation omitted).

Only three exceptions allow an existing confidentiality protective order to be modified without a showing of compelling need or extraordinary circumstance. The Second Circuit has held that the terms of a protective order may be altered only if: “(1) it was improvidently granted; (2) it relates to judicial documents; or (3) it is temporary or limited and does not justify reliance by the parties.” *TheStreet.com*, 273 F.3d at 229. In this case, Plaintiffs themselves have acknowledged that “it was appropriate for this Court to enter a protective order years ago at the outset of discovery.” Pls.’ Mem. Supp. Initial Confidentiality Mot. at 7-8. Moreover, there can be no debate that the materials at issue in Plaintiffs’ renewed motion are not “judicial documents,” but rather voluminous, general discovery.⁷ Finally, the Confidentiality Protective Order is neither temporary or limited. Rather, the Order is expressly intended to be permanent. *See* Ex. A, Confidentiality Protective Order ¶ 8 (“This Confidentiality Order shall survive the

⁷ Accordingly, Plaintiffs’ attempt to avoid the heavy burden of establishing a compelling need or extraordinary circumstance by relying on cases such as *In re Agent Orange* and *Schiller* is misguided. As the Aviation Defendants showed in their previous briefing, cases addressing the presumption of public access to “judicial documents” are not controlling in this instance, because deposition transcripts and the discovery documents produced by the Aviation Defendants do not constitute “judicial documents” to which the public is presumptively entitled to access. *See* Aviation Defs.’ Mem. Opp’n Initial Confidentiality Mot. at 3-7; *see also, e.g., In re Agent Orange*, 104 F.R.D. 559, 566, 567 (E.D.N.Y. 1985) (Weinstein, J.) (“After *Seattle Times Co. v. Rhinehart*, there can be no question that the First Amendment does not require open access to discovery materials. . . . The common law right of access to judicial records appears to be limited to those documents actually relied upon by a court in reaching a determination.) (internal citation omitted). Indeed, in *Schiller*, the court took care to note the significant body of case law supporting the rule that the presumption of public access does not apply to discovery documents, explaining that: “It is somewhat misleading to refer, as courts sometimes do, to a ‘presumptive right of public access’ to pretrial discovery. While materials produced in discovery may be disclosed by the receiving party in the absence of a protective order, the public does not have a *right* of access to those materials. The presumption of public access to judicial documents is inapplicable to ‘[d]ocuments that play no role in the performance of Article III functions, such as those passed between the parties in discovery.’” *Schiller*, 2007 WL 136149, at *2 n.2. (citing *U.S. v. Amodio*, 71 F.3d 1044, 1048 (2d Cir. 1995) (internal citations omitted)).

final conclusion of the action and the Court shall have jurisdiction to enforce this Order beyond the conclusion of this action.”).

Since none of these exceptions exist here, Plaintiffs must establish a compelling need or extraordinary circumstance to justify rescission or modification of the Confidentiality Protective Order, to overcome the Aviation Defendants’ reliance on it. However, Plaintiffs fail to do so. Further, under the applicable legal standard, the Aviation Defendants are not required to make good cause showings for individual confidentiality designations at this time.

A. The Aviation Defendants Reasonably Relied on the Confidentiality Protective Order.

The Aviation Defendants unquestionably relied on the Confidentiality Protective Order in this case. *See TheStreet.com*, 273 F.3d at 229-230 (citations omitted) (noting the court’s hesitancy to permit modifications in cases where protective order acted as incentive for deponents to testify, parties to settle, or was the reason litigants had been afforded access to certain documents); *Allen v. City of New York*, 420 F. Supp. 2d 295, 300 (S.D.N.Y. 2006) (“The Second Circuit has stated broadly that it is ‘presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied.’”) (citing *A.T. & T. Corp. v. Sprint Corp.*, 407 F.3d 222, 230 (2d Cir. 2001)).

As the Court is well aware, discovery in this case has been an ongoing process during which Plaintiffs have propounded hundreds of document requests and deposed more than 100 witnesses. Throughout this process, the Aviation Defendants have consistently relied on the existence of the Confidentiality Protective Order. The parties have held countless meet and confer sessions regarding Plaintiffs’ many discovery requests. Throughout these sessions, the Confidentiality Protective Order served as an important backdrop to the Aviation Defendants’ negotiations with Plaintiffs about their various requests and the documents that would be

produced in response thereto. Further, the Aviation Defendants relied on the Confidentiality Protective Order in the actual production of documents. Notably, the production of documents in this case was delayed until the parties negotiated a protective order that was acceptable to all of the parties and the Court. Finally, with respect to depositions, the Aviation Defendants also have produced numerous witnesses with the understanding that their personal information and confidential information from deposition transcripts and exhibits would remain confidential.

Plaintiffs point to *Schiller* to dispute that the Aviation Defendants' reliance on the Confidentiality Protective Order was reasonable. *See* Pls.' Mem. Supp. Renewed Confidentiality Mot. at 5. Plaintiffs assert that the *Schiller* court held that defendants' reliance on a protective order was unreasonable where the protective order permitted plaintiffs to challenge confidentiality designations and where such challenge triggered an obligation on the part of defendants to show good cause. *Id.* However, the factual differences between *Schiller* and the present case are fundamental. In *Schiller*, the protective order did not include a list of specific documents or types of documents contemplated for protection. *See Schiller*, 2007 WL 136149 at *5. Rather, the protective order allowed a party to designate any document it wished as confidential. *See id.* More importantly, the *Schiller* protective order included a provision which allowed a party to raise challenges to confidentiality designations with the designating party (or the court if need be), but did not specify a time frame during which such a challenge needed to be raised. *See id.* at *1. Given the ability of the parties to unilaterally designate documents of *any type* as confidential and to challenge designations *at any time*, the *Schiller* court concluded that "[r]eliance upon the protection of such an order when producing discovery materials or witnesses for deposition is unreasonable." *Id.* at *5.

The instant case is much different. Here, the parties agreed to a specific list of categories of documents that could be given confidential protection and allowed designation of documents based on a good faith belief that they fell into one of these categories. *See* Ex. A, Confidentiality Protective Order ¶ 2.1. Further, the parties agreed and the Confidentiality Protective Order specifically provides that any objection to a confidentiality designation must be raised within 120 days from the date the document was produced. *See id.* ¶ 5.1. The purpose of that time limit was to allow parties to respond promptly to any objection that an opponent may have about their designations, rather than have to be concerned that such objections could be raised years later.

The Aviation Defendants began producing documents in this case on a rolling basis in the spring of 2004, relying on the 120-day objection period. Since Plaintiffs failed to object to any of the Aviation Defendants' confidentiality designations, the Aviation Defendants believed Plaintiffs did not object to them. However, as it turns out, Plaintiffs apparently either failed to review the Aviation Defendants' document productions for potential objections to confidentiality designations or opted to sit on their objections for years. Now, Plaintiffs complain about the volume and "abuse" of the Aviation Defendants' designations when it was their obligation under the Confidentiality Protective Order to raise whatever concerns they had shortly after each production was made. Plaintiffs never invoked the provisions of the Confidentiality Protective Order to object to the Aviation Defendants' designations and certainly did not do so within the requisite 120 days of production. Accordingly, the Aviation Defendants' reliance on the Confidentiality Protective Order under these circumstances was reasonable; they made good faith designations based on the categories set out in the Confidentiality Protective Order. On the other hand, Plaintiffs allowed repeated periods for objection to expire and thus waived any objections to the Aviation Defendants' designations.

B. Plaintiffs' Renewed Motion Does Not Require the Aviation Defendants to Make Good Cause Showings for Their Confidentiality Designations.

Plaintiffs also incorrectly rely on *Schiller* for the proposition that because the Confidentiality Protective Order in this case allows the Aviation Defendants to make good faith “confidential” designations, the Aviation Defendants bear the burden of making a good cause showing for each individual designation. *See* Pls.’ Mem. Supp. Renewed Confidentiality Mot. at 4. However, a close reading of *Schiller* reveals that its holding is limited to cases in which the terms of a protective order are being enforced. *See Schiller*, 2007 WL 136149 at *3. It expressly does not apply to instances in which a party is seeking to rescind or modify a protective order. *Id.* The *Schiller* court found that in bringing their motion challenging the designation of certain videotapes and documents produced during discovery, the plaintiffs were exercising a right reserved to them under the terms of a protective order that “allow[ed] a party that ‘disagrees with the designation of particular materials as Confidential’ to raise the matter with the Court if the parties cannot resolve the disagreement.” *Id.* (citing Protective Order #1, ¶ 6). Accordingly, the defendants in that case were required to make a good cause showing for the specific designations challenged by the plaintiffs. *Id.*

Here, in an attempt to fit their motion into the *Schiller* framework, Plaintiffs assert that by challenging all of the Aviation Defendants’ confidentiality designations, they are merely seeking to enforce the Confidentiality Protective Order. However, the relief that Plaintiffs are seeking goes far beyond seeking to enforce the terms of the Order and is clearly an attempt to rescind, or at least substantially modify, its terms. To be clear, Plaintiffs are seeking the removal of *all* of the Aviation Defendants’ confidentiality designations, even those that are proper by Plaintiffs’ own admission, and, as explained in Section I.A above, are seeking to do so despite having blatantly disregarded every single element of the objection procedure set out in the Order. *See*

Pls.' Mem. Supp. Renewed Confidentiality Mot. at 3; Ex. A, Confidentiality Protective Order ¶ 2.1. Further, it is clear that Plaintiffs' motion is not attempting to act pursuant to the terms of the Order; Plaintiffs do not cite a single provision of the Confidentiality Protective Order in their renewed motion, except to support their request for the Court to establish a procedure for the *in camera* review of sensitive security information ("SSI").

Granting Plaintiffs' motion would render the most significant portions of the Confidentiality Protective Order meaningless. Most significantly, the definition of "Confidential Information" would be severely altered since even those designations that are proper by Plaintiffs' own admission (for example, trade secret and proprietary information) would be removed. *See id.* Further, the objection procedure essentially would be eviscerated. Despite having agreed to the terms of the Order, Plaintiffs have flagrantly disregarded the 120-day period for lodging objections, offer no excuse for having done so, and have refused to identify or distinguish in any way those documents for which they are contesting the Aviation Defendants' designations and those which they believe are proper—instead they just seek to have all confidentiality designations removed. If Plaintiffs' renewed motion were granted, these terms would be rendered meaningless and in fact it is not clear what, if any portion, of the Confidentiality Protective Order would remain effective. Accordingly, the true relief sought by Plaintiffs is either a rescission, or at the very least a substantial modification, of the Confidentiality Protective Order—not an attempt to operate under or enforce its terms. Thus, *Schiller* does not apply.

C. Plaintiffs Have Not Established a Compelling Need to Modify the Confidentiality Protective Order at This Time.

Under *Martindell v. Int'l Tel. & Tel. Corp.*, Plaintiffs must establish that a compelling reason or extraordinary circumstances exist that justify rescission or modification of the

Confidentiality Protective Order. *See Martindell*, 594 F.2d at 296. In their memorandum of law in support of their renewed motion, Plaintiffs cite an “extraordinary public and historical interest” in the events of September 11, 2001. *See* Pls.’ Mem. Supp. Renewed Confidentiality Mot. at 10.

In light of the motion to intervene that has been filed by the News Organizations in response to Plaintiffs’ renewed motion, it seems likely that this professed interest is more accurately a current interest by the media. However, merely asserting such an interest does not create a sufficiently compelling reason to rescind or modify the Confidentiality Protective Order at this stage of the litigation. *See, e.g., U.S. v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995) (“Courts have long declined to allow public access simply to cater to a morbid craving to what is sensational and impure. As the Supreme Court noted in *Nixon v. Warner Comm’ns, Inc.*, courts have the power to insure that their records are not ‘used to gratify private spite or promote public scandal,’ and have ‘refused to permit their files to serve as reservoirs of libelous statements for press consumption.’”) (citing *Nixon*, 435 U.S. 589, 598, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978)) (internal citation omitted).

1. Public Interest in This Litigation Is Not Enough.

It is clear that “public interest in particular litigation does not generate a public right of access to all discovery materials.” *In re Terrorist Attacks on Sept. 11, 2001*, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006) (citing *U.S. v. Amodeo*, 71 F.3d at 1050). Unable to point to any case law dealing with the modification of an existing protective order to dispute this point, Plaintiffs instead rely on a series of inapplicable cases involving sealed grand jury materials to assert that historical or public interest in this litigation is a sufficiently compelling reason to justify the relief they seek. *See* Pls.’ Mem. Supp. Renewed Confidentiality Mot. at 10-12.

In particular, Plaintiffs highlight the Second Circuit's language in *In re Petition of Craig* that historical interest, on its own, can justify the release of grand jury materials in an appropriate case. See Pls.' Mem. Supp. Renewed Confidentiality Mot. at 10-11 (citing *Craig*, 131 F.3d 99, 105 (2d Cir. 1997)). However, the remainder of the court's opinion in *Craig*, as well as the other grand jury cases cited by Plaintiffs, "make[] clear that merely asserting a public and/or historical interest in grand jury materials will not suffice." *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 284 (S.D.N.Y. 1999); *Craig*, 131 F.3d at 105-106 (offering a "non-exhaustive list of factors that a trial Court might want to consider when confronted with these highly discretionary and fact-sensitive 'special circumstances' motions").

In *Craig*, the Second Circuit affirmed the lower court's determination that public interest in a 50-year-old grand jury proceeding regarding potential World War II spy activity was insufficient to justify disclosure given that some of the grand jury witnesses were still alive, the Government opposed disclosure, no litigation had resulted from the grand jury proceeding and there had not been extensive prior disclosure of the grand jury proceedings. See *Craig*, 131 F.3d at 107.

Conversely, in *American Historical Association*, Judge Leisure concluded that in light of the historical interest, certain materials from the Alger Hiss grand jury proceeding could appropriately be disclosed because all of the judicial proceedings arising out of the grand jury investigations were resolved, the witnesses' involvement with the grand jury was already public knowledge, and most of the witnesses had died during the five decades following the conclusion of the grand jury proceedings. See *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 291-293. Similarly, in *In re Petition of National Security Archive*, this Court released certain testimony from the Julius and Ethel Rosenberg grand jury proceeding and noted that the witnesses at issue

were either deceased, likely deceased, or had consented to disclosure. *See* Summary Order, *In re Petition of National Security Archive*, 08 Civ. 6599 (AKH) (S.D.N.Y. Aug. 26, 2008) (attached as Ex. D to the Barry Decl.).

Unlike the grand jury proceedings in *Craig*, *American Historical Association*, or *National Security Archive*, the proceedings here are not decades old. Rather, they are still ongoing and only in the pretrial stages. Further, the witnesses deposed and/or identified in the documents produced in this litigation are still living and, in many cases, still employed in similar capacities as they were on September 11, 2001. These factors weigh heavily against disclosure and override the “historical interest” asserted by Plaintiffs.⁸ Plaintiffs’ motive in seeking the public release of the Aviation Defendants’ discovery materials now rather than waiting for the conclusion of the litigation is highly suspect.

2. The Requested Relief Would Violate Individuals’ Privacy Rights.

Striking the Aviation Defendants’ confidentiality designations would raise significant privacy concerns because the witnesses and individuals involved in this litigation are still living. For these witnesses and individuals, their involvement with the events of September 11, 2001 (or Plaintiffs’ version of those events) generally is not public knowledge.⁹ The sensitive nature of

⁸ Moreover, the grand jury cases do not support Plaintiffs’ conclusion that “since this Court has discretion in cases of substantial historical or public interest to release *sealed grand jury materials* – presumptively entitled to continued secrecy by statute and deep tradition – this Court certainly has discretion to release to the public *civil discovery* documents and testimony that were unilaterally designated as ‘Confidential’ by defendants who never showed good cause in the first place.” Pls.’ Mem. Supp. Renewed Confidentiality Mot. at 7-8. Grand jury materials are a prime example of “judicial documents,” as “[t]he detention of criminal defendants pending trial is a quintessential exercise of a court’s Article III judicial power, and the public has a legitimate interest in monitoring a court’s use of that power.” *U.S. v. Graham*, 257 F.3d 143, 154 (2d Cir. 2001). As discussed above, Plaintiffs’ are not asking the Court to release sealed judicial documents, but to set aside each and every one of the Aviation Defendants’ confidentiality designations—effectively vacating the Confidentiality Protective Order.

⁹ While Plaintiffs point to *The 9/11 Commission Report* as a source revealing the identity of these witnesses and individuals, *The 9/11 Commission Report* reveals the identity of very few of the individuals who have been deposed in this case or identified by the documents produced, and provides virtually no personal information about those individuals who are identified. *See* The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (W.W. Norton & Co. 2004).

these individuals' identities is highlighted by the fact that the Government initially considered the names of the Aviation Defendants' employees included on documents produced in this litigation to be so sensitive as to require redaction under the then-governing SSI regulations. *See* E-mail from Sarah Normand to Liaison Counsel (Oct. 26, 2006) (attached as Ex. E to the Barry Decl.). Removal of the Aviation Defendants' confidentiality designations would mean not only the release of these individuals' names, but also the release of personal information that the Aviation Defendants have been forced to provide through discovery in this case. For example, deposition witnesses regularly have been asked to provide home addresses, phone numbers, information about family members, current employment information and/or compensation information. Likewise, the Aviation Defendants have been forced to produce personnel files for employees that include similar materials as well as performance evaluations and other personal information.

The privacy interest in such information is fundamental.¹⁰ As the Second Circuit recently confirmed in shielding the personal, identifying information of a Guantanamo detainee and his family members from disclosure:

[T]he Supreme Court has explained that such privacy interests include "the individual interest in avoiding disclosure of personal matters" as well as "the

¹⁰ The privacy interests of affected employees in maintaining the confidentiality of their personal information are protected by various federal and state statutes and by case law. For example, the Americans with Disabilities Act prohibits disclosure of information concerning the medical condition or history of a job applicant (with exceptions not here relevant). *See* 42 U.S.C. §§ 12112(d)(3), 12112(d)(4)(C). A Maine statute concerning the licensing of security companies requires the collection of various items of personal information, which are deemed confidential and which "may not be made available for public inspection or copying." 32 M.R.S.A. § 9418. A Massachusetts Right to Privacy statute (M.G.L.A. 214 § 1B) "protects people from 'disclosure of facts . . . that are of a highly personal or intimate nature when there exists no legitimate, countervailing interest.'" *Dasey v. Anderson*, 304 F.3d 148, 153-154 (1st Cir. 2002) (citations omitted). While disclosure of such protected confidential information to the litigants and their attorneys may be permissible when necessary for focused discovery in a federal action, provided that the information disclosed is subject to a confidentiality order prohibiting its dissemination to the general public, a generalized public interest in the facts concerning the September 11 attacks should not override the privacy rights of individuals protected by specific federal and state law provisions.

interest in independence in making certain kinds of important decisions....” It further explained that “both the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person,” and thus that there is a recognized “privacy interest in keeping personal facts away from the public eye.”

Associated Press v. U.S. Dep’t of Def., Docket No. 06-53532-cv, 2009 WL 18727, at *12 (2d Cir. Jan. 5, 2009) (citing *U.S. Dep’t of Justice v. Reporters’ Comm.*, 489 U.S. 749, 762-3, 768 (1989)) (attached as Ex. F to the Barry Decl.). The personal privacy rights of the employees of the Aviation Defendants deserve at least as much consideration because removal of the Aviation Defendants’ confidentiality designations would mean that significant amounts of such personal factual information would be made available to the public. Plaintiffs’ assertion of a “historical interest” in this litigation cannot override the privacy interests inherent in such personal information.

3. The Requested Relief Would Create an Incomplete and Misleading Public Record.

Plaintiffs’ motive in seeking to remove the confidentiality designations from the Aviation Defendants’ documents at this stage of the litigation is suspicious because they have been crystal clear about their plans to release the discovery materials to the media and public to show “what went so terribly wrong with aviation security on September 11, 2001.” Pls.’ Mem. Supp. Renewed Confidentiality Mot. at 13. Plaintiffs must perceive that this threat will give them some tactical advantage, perhaps in seeking settlements of the remaining wrongful death cases.

The materials to which Plaintiffs are seeking access risk telling an incomplete and misleading picture of the events of September 11, 2001. First and foremost, Plaintiffs are seeking to remove the Aviation Defendants’ confidentiality designations, but have not sought similar relief with respect to designations made by third parties, nor have the PD/BL Plaintiffs or the WTCP Plaintiffs offered to remove the confidentiality designations from their voluminous

document productions. More significantly, however, even if the Aviation Defendants' designations were removed, the public release of those documents that the Government has determined contain SSI would still be precluded.

Plaintiffs' request in their renewed motion for the establishment of an "orderly procedure whereby the parties may ask the Court to review *in camera* whether the Government appropriately and accurately designated certain discovery materials as SSI" highlights the fact that significant portions of the record are not now (and may never be) available for public review, regardless of the status of the Aviation Defendants' confidentiality designations. *See* Pls.' Mem. Supp. Renewed Confidentiality Mot. at 14. Furthermore, the type of information that is currently categorized as SSI is that which is likely most relevant to the public's alleged interest in the alleged "breakdowns in aviation security." Removing the Aviation Defendants' confidentiality designations while maintaining the Government's SSI designations will not provide an accurate depiction of aviation security prior to or post-9/11. Thus, the record that Plaintiffs seek to make available to the public will be incomplete, misleading, and potentially inaccurate.

4. The Requested Relief Would Taint the Jury Pool.

The ability of the general public, including members of the potential jury pool, to access the record that would result if Plaintiffs' renewed motion were granted creates an unacceptable risk of tainting any jury that is ultimately seated in this case. Given the incomplete record that would be created by removing the Aviation Defendants' confidentiality designations (and the media's professed interest in these materials), the effect of the relief that Plaintiffs are seeking would be a one-sided, inaccurate story, which would likely be played out in the press during the

pretrial stage of this litigation. The effect of such activity on a potential jury pool in this case could be highly prejudicial to the parties' rights to a fair trial.

5. The Requested Relief Should Be Addressed, If At All, Only After This Litigation Is Concluded.

Plaintiffs have not articulated any compelling reason why the “historical interest” they assert compels disclosure *at this time*, rather than at the conclusion of this litigation.¹¹ In addition to the risks identified above, the time and effort that the Aviation Defendants and the Court would need to devote to review each confidentiality designation at this point in the litigation would distract and divert the attention of the Court and counsel from more important pretrial issues. Such diversion risks substantially slowing or even halting the progress of this litigation.

After this litigation is concluded, the “historical interest” professed by Plaintiffs will still exist, but, comparatively, the risks that warrant against disclosure now will be reduced. The trial itself will generate a complete and accurate historical record in the form of trial testimony and exhibits to which the public has a presumptive right. Further, tainting the jury pool would no longer be a risk once the trial has taken place. The threat to privacy interests also may be reduced with the passage of time as it becomes clear which witnesses are actually relevant to the

¹¹ The timing of Plaintiffs' renewed motion is also questionable given that they certainly must have been aware of the “historical interest” on which they rely when they initially agreed to the terms of the Confidentiality Protective Order. As the court in *Brookdale Univ. Hospital and Medical Center, Inc. v. Health Ins. Plan of Greater New York* explained:

[B]ased on their Complaint, plaintiffs alleged from the beginning that defendants engaged in conduct that violated New York public health laws, and thus, plaintiffs knew that documents produced in this litigation could be of interest to public and private regulators in the health care industry. Yet, plaintiffs still agreed to the stipulated Protective Order to facilitate discovery—and plaintiffs cannot now renege on their agreement based on what was a foreseeable and, indeed, an expected result.

No. 07-CV-1471(RRM)(LB), 2008 WL 4541014, at *3 (E.D.N.Y. Oct. 7, 2008) (attached as Ex. G to the Barry Decl.). Similarly, Plaintiffs here should not now be permitted to renege on their agreement to abide by the terms of the Confidentiality Protective Order.

parties' claims, as witnesses age and become unavailable, and as some of the personal information contained in the record becomes outdated. Finally, after the conclusion of this litigation, the time and energy that counsel will need to spend on re-reviewing confidentiality designations will not detract from efforts to reach a timely adjudication of Plaintiffs' claims. At this pre-trial stage in the litigation, however, these risks remain serious and override the "historical interest" that Plaintiffs assert. As such, Plaintiffs have failed to establish a sufficient compelling need to justify modification or rescission of the Confidentiality Protective Order at this time.

II. EVEN IF THE AVIATION DEFENDANTS BORE THE BURDEN OF SHOWING GOOD CAUSE, PLAINTIFFS' RENEWED MOTION SHOULD BE DENIED.

A. Plaintiffs' Own Refusal to Adhere to the Terms of the Confidentiality Protective Order Warrants Denial of Their Renewed Motion.

Even if the Aviation Defendants were required to make a good cause showing for their designations, denial of Plaintiffs' renewed motion is still warranted. As explained above, the Aviation Defendants only bear the burden of making a good cause showing in response to Plaintiffs' renewed motion if Plaintiffs are attempting to enforce the terms of the Confidentiality Protective Order. However, Plaintiffs themselves have flagrantly disregarded the terms of the Confidentiality Protective Order. As explained above, Plaintiffs ignored the Order's 120-day period for objecting to designations, and refused to specifically identify the designations they believe are improper.

B. The Impracticality and Undue Burden of a Good Cause Showing Warrants Denial of Plaintiffs' Renewed Motion.

The impracticality of the good cause showing that Plaintiffs assert is required also warrants denial of Plaintiffs' renewed motion at this time. As this Court is aware, the volume of documents produced and depositions taken in this litigation has been immense and, accordingly,

the parties have made a considerable number of confidentiality designations. Plaintiffs assert that the allegedly necessary good cause showing must be made on a document-by-document, transcript line-by-transcript line basis.¹² To now make the individualized showing of good cause in response to Plaintiffs' global and non-specific challenge is entirely impractical and overly burdensome both on the Aviation Defendants and the Court, which would have to review the voluminous submissions that would result. Further, as mentioned above, the time and effort that the Aviation Defendants would need to devote to this task at this point in the litigation would be tremendous, and substantially slow or even halt the progress of this litigation.

The impracticality and burden of this task is exacerbated by Plaintiffs having failed to distinguish between those designations over which they have a legitimate disagreement and those that they concede are proper under the Confidentiality Protective Order. Plaintiffs argue that it would be too burdensome for them to review the Aviation Defendants' designations to determine which specific documents they believe have been improperly designated. However, they voluntarily agreed to this burden under the terms of the Confidentiality Protective Order and they should not be permitted to circumvent that agreement now. Plaintiffs, themselves, also exacerbated this burden by failing to raise objections as documents were produced to them and as deposition transcripts were delivered, as the Order requires. Even when the Aviation Defendants revised their designations of deposition transcripts and exhibits this past summer, Plaintiffs still refused to follow the procedures they agreed to for objecting to designations in even this limited set of materials. Further, it is unfathomable how Plaintiffs could in good faith

¹² Amazingly, even when Boeing submitted a supplemental brief in response to Plaintiffs' initial motion making a good cause showing for the categories of documents it had designated as confidential, Plaintiffs complained that "Boeing has never made a separate 'good cause' showing for each of its documents." Pls.' Supplemental Mem. Supp. Initial Confidentiality Mot. at 3. Under Plaintiffs' theory, the Aviation Defendants are even obligated to make a good cause showing for those designations which Plaintiffs themselves concede are proper under the Confidentiality Protective Order. It is difficult to imagine a more pointless activity.

object to every single one of the Aviation Defendants' "confidential" designations if they did not perform the document-by-document and line-by-line review that they now argue would be "too burdensome." Regardless, the Aviation Defendants' designations are sufficiently supported by good cause to maintain their designations at this time.

C. The Aviation Defendants' Designations Are Supported by a General Showing of Good Cause.

As a general matter, there is obvious good cause for the Aviation Defendants' confidentiality designations. In granting the defendants' motion for an umbrella protective order in the September 11 terrorist litigation, the late Judge Richard Casey noted that in "cases of unusual scope and complexity . . . broad protection during the pretrial stages of litigation may be warranted without a highly particularized finding of good cause." *In re Terrorist Attacks on Sept. 11, 2001*, 454 F. Supp. 2d at 222. In particular, Judge Casey noted that the various defendants:

[W]ill be asked to turn over a vast array of private and confidential information during discovery, much of which will have little or no bearing on the resolution of these actions but will be subject to widespread public scrutiny with prejudicial effects in the absence of a protective order.

Id. at 223 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35, 104 S.Ct. 2199 (1984) (noting that "[i]t is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse," and that such abuse "may seriously implicate privacy interests of litigants and third parties")). In response to the plaintiffs' assertion that the public's interest in the events of September 11, 2001 favored disclosure of discovery documents and the defendants' contention "that plaintiffs have already demonstrated their desire to try their case in the press" and therefore disclosure "would irreparably prejudice defendants' ability to defend themselves at trial," Judge Casey found that:

[T]his multi-district litigation amounts to one of the largest private lawsuits in United States history. Defendant-by-Defendant good cause determinations for individual protective orders at this juncture in this case, much less document-by-document confidentiality determinations where no protective order has issued, would impose an enormous burden upon the Court and severely hinder its progress toward resolution of pretrial matters. For this reason, the Court finds that the unusual scope and complexity of the instant litigation warrants broad protection during the pretrial stages of litigation based upon only a general finding of good cause.

Id. at 223. Given the obvious similarities between this case and the litigation then-pending before Judge Casey, the same considerations weigh in favor of a generalized finding of good cause to justify continued protection of the Aviation Defendants' discovery materials at this pretrial litigation stage.

D. The Aviation Defendants' Designations Also Are Supported By Specific Showings of Good Cause.

More specific good cause justifications also support the Aviation Defendants' confidentiality designations. For example, Plaintiffs have sought the production of various contract and aircraft design documents, including documents related to changes made to aircraft and security features post-9/11. As explained in Boeing's supplemental memorandum in opposition to Plaintiffs' initial motion as well as Boeing's supplemental memorandum in opposition to Plaintiffs' renewed motion, these and other similar documents produced by Boeing and the other Aviation Defendants contain proprietary and/or trade secret information. *See* Boeing Supplemental Br. Opp'n Renewed Confidentiality Mot. at 5-11. The public release of these documents would result in competitive harm to Boeing and certain other Aviation Defendants. *See id.* Further, as described in Section I.C.2 above, maintaining the confidentiality designation of many of the Aviation Defendants' materials is justified by the privacy concerns implicated. Finally, the risk of tainting the potential jury pool and sidetracking the parties and

the Court from the discovery and motion practice that needs to be completed to progress to trial also justifies maintaining the Aviation Defendants' confidentiality designations at this time.

It is clear that if there is ever an appropriate time for the relief that Plaintiffs are seeking, it is after the conclusion of this litigation when these risks will be significantly lessened altogether and an accurate, complete record will have been generated by trial. Until then, Plaintiffs have not established the compelling reason or extraordinary circumstances required to remove the Aviation Defendants' confidentiality designations.

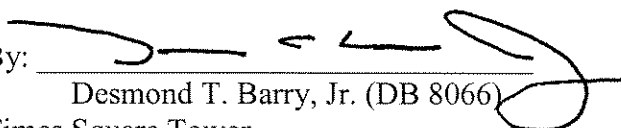
CONCLUSION

For the foregoing reasons as well as those set forth in the Aviation Defendants' Memorandum of Law in Opposition to Plaintiffs' Initial Motion to Set Aside the Aviation Defendants' Designations of Confidentiality, Plaintiffs' pending motions to set aside the Aviation Defendants' designations of confidentiality should be denied in their entirety.

Dated: New York, New York
February 27, 2009

Respectfully Submitted,

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