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## INTRODUCTION

The time has come to strike the confidentiality designations the Aviation Defendants made under the March 30, 2004 “Confidentiality Protective Order,” so that the public can see the evidence developed during discovery in this case of extraordinary public and historical interest. Failure to do so would throw a permanent veil of secrecy over information vital to our nation’s interests and deprive the September 11<sup>th</sup> families, the public, and history of the ability to learn from that information about what caused the aviation security breakdowns that wrought massive death and destruction on September 11, 2001.

Over a year ago, the Personal Injury and Wrongful Death Plaintiffs (“Plaintiffs”) moved the Court to set aside the Aviation Defendants’ designations of confidentiality over nearly all discovery documents. 21 MC 97 Doc. Nos. 1252, 1253, 1254 (Oct. 29, 2007)(“Motion,” supporting Memorandum, Haefele Declaration and Exhibits) and 21 MC 97 Doc. Nos. 1415, 1416 (Feb. 29, 2008)(supplemental Memorandum and Migliori Declaration). Plaintiffs demonstrated that the Aviation Defendants could not have reasonably relied upon their unilateral designations of near-blanket confidentiality to shield discovery documents from the public forever – especially as they never showed good cause why *any* document was entitled to confidentiality. 21 MC 97 Doc. No. 1415 at pp. 8-9.

The Aviation Defendants’ responded that “Plaintiffs’ motion is premised on the wrong legal standard;” in their view, the Aviation Defendants do not have the burden to show good cause that a document is confidential because they say the *Martindell* standard governs whereby the Court may not lift confidentiality designations absent a showing of “some extraordinary circumstance or compelling need.” 21 MC 97 Doc. No. 1406 at pp. 3-7. (Feb. 22, 2008).

In a good faith effort to try to resolve this important dispute among themselves, all parties including amicus agreed that the Motion should be withdrawn *without prejudice*, and the Court so ordered. 21 MC 97 Doc. No. 1445 (March 19, 2008). To no avail. Yet another year has past and this dispute drags on. So Plaintiffs renew and re-file the Motion now.<sup>1</sup>

The truth remains that under *either* the “good cause” or “extraordinary circumstances” standard the confidentiality designations should be struck. The Aviation Defendants never showed good cause that these discovery documents should be hidden from the public. And in light of the extraordinary public and historical interest in this case, the Court should exercise its discretion to strike the confidentiality designations now. *See In Re Pet’n of National Security Archive, et al.*, 08 Civ. 6599 (AKH)(S.D.N.Y. 2008), Summary Order at p. 2 (Aug. 26, 2008)(releasing sealed Rosenberg grand jury testimony to public in case “of substantial historical importance”).

## **ARGUMENT**

### **I. The Court has the power to set aside the confidentiality designations.**

“It is undisputed that a district court retains the power to modify or lift protective orders that it has entered.” *Gambale v. Deutsche Bank AG*, 337 F.3d 133, 141 (2d Cir. 2004)(quoting *In re Agent Orange Prod. Liab. Litig.* (“Agent Orange”), 821 F.2d 139, 145 (2d Cir. 1987)).

In *Gambale*, the Second Circuit reasoned that “[a] protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order,” and that “[t]his retained power in the court to alter its own ongoing directives provides a *safety value for public interest concerns*, changed circumstances or any other basis that may

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<sup>1</sup> More specifically, Plaintiffs renew, re-file and incorporate by reference their Motion and supporting memoranda of law, Declarations, and Exhibits, filed at 21 MC 97 Docket Nos. 1252, 1253 & 1254 (Oct. 29, 2007) and 21 MC 97 Docket Nos. 1415 & 1416 (Feb. 29, 2008). Plaintiffs also respectfully refer the Court to the persuasive *amicus* briefs filed in support of Plaintiffs’ Motion by The Reporters Committee for Freedom of the Press at 21 MC 97 Docket Nos. 1384 (Jan 4, 2008) & 1421 (March 3, 2008).

reasonably be offered for later adjustment.” *Gambale*, 337 F.3d at 141 (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1<sup>st</sup> Cir. 1993)(emphasis added)).

The public interest in the aviation security failures on September 11<sup>th</sup> is beyond dispute. *United States v. Marquez*, 410 F.3d 612, 618 (9<sup>th</sup> Cir. 2005)(“It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destruction from air terrorism is horrifically enormous.”).

So in light of the extraordinary public interest in this case, it is well within this Court’s discretion to strike the near-blanket confidentiality designations the Aviation Defendants made under the Confidentiality Protective Order. Regardless of whether issuance of the Confidentiality Protective Order was warranted at the outset of discovery four long years ago, the Aviation Defendants’ interest in *continued* confidentiality of evidence developed in this litigation – including discovery documents and deposition transcripts – must now bow to the public’s interest in learning for themselves what led to the deadliest aviation security breakdown in our nation’s history.

**II. The Aviation Defendants seeking to shield their designated documents from the public must show good cause for continued confidentiality.**

“When a private party asserts a public interest in order to gain access to information, the burden is on the party seeking to maintain the protective order” – here, the Aviation Defendants – “to show that there is ‘good cause’ for continued confidentiality.” *Daniels v. City of New York*, 200 F.R.D. 205, 207 (S.D.N.Y. 2001); *see also, Agent Orange*, 821 F.2d at 142, 148 (“The party seeking to prevent dissemination had the burden of showing that good cause existed for continuation of the order with respect to the discovery material in question.... [T]he district

court was well within its discretion to lift the protective orders at issue, subject to a showing, on an individualized basis, of good cause for continued protection.”)

The Aviation Defendants disagree that the “good cause” standard found in the plain text of Rule 26(c) and in *Agent Orange* applies here, and argue instead that “[w]here there has been reasonable reliance by a party” on a protective order, then the high *Martindell* standard applies such that Plaintiffs seeking to lift confidentiality designations under a protective order bear the burden of showing “some extraordinary circumstance or compelling need.” 21 MC 97 Doc. No. 1406 at p. 7 (citing *SEC v. TheStreet.com*, 273 F.3d. 222, 229 (2<sup>nd</sup> Cir. 2001)(quoting *Martindell v. Int’l Telephone & Telegraph Corp.*, 594 F.2d 291, 296 (2<sup>nd</sup> Cir. 1979)).

But the Aviation Defendants are mistaken.

Reconciling the *Agent Orange* and *Martindell* standards in a recent case challenging blanket confidentiality designations under a protective order for discovery materials involving the 2004 Republican National Convention protests, *Schiller* reasoned that whether *Martindell*’s heightened standard applies hinges on the terms of the protective order itself. *Schiller v. City of New York*, 2007 WL 136149 at \*\*3-4 (Jan. 19, 2007). *Schiller* found that where, as here, a protective order permits a party to designate discovery materials as “Confidential” without a showing of good cause, then when challenged the burden remains on that designating party to justify the confidentiality of each document. *Id.* (citing, *inter alia*, *Fournier v. McCann Erickson*, 242 F. Supp.2d 318, 342 (S.D.N.Y. 2003)(noting that “heightened ‘extraordinary circumstances’ burden for unsealing documents[] contemplates the court having already considered each document in the first instance according to a ‘good cause’ standard”)). *Schiller* reasoned:

This approach makes sense, because in cases involving protective orders like the one at issue here [permitting blanket designations of discovery documents as

“Confidential” without a showing of good cause], adoption of [defendant’s] theory would permit ‘each party [to] circumvent the ‘good cause’ standard for protection and, simultaneously, shift the burden to his adversary to unseal a document while benefiting from the more rigorous [*Martindell*] ‘extraordinary circumstances’ standard that would apply merely by unilaterally designating any given document as protected.’

*Schiller*, 2007 WL 136149 at \* 4 (citing *Fournier*, 242 F. Supp.2d at 342.).

*Schiller* further reasoned that a designating party’s “reliance upon the protection of such an order when producing discovery materials or witnesses for deposition is unreasonable.” *Schiller*, 2007 WL 136149 at \*5 (citing, *inter alia*, *Allen v. City of New York*, 420 F. Supp.2d 295, 300-01, (S.D.N.Y. 2006)(reliance by defendants unreasonable where protective order permitted plaintiffs to challenge defendants’ confidentiality designations, and where such challenge triggered obligation on the part of defendants to show good cause); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986)(protective order “extending broad protection to all documents ... without a showing of good cause for confidentiality as to any individual documents” was “by nature overinclusive and [], therefore, peculiarly subject to later modification”). And it matters that it is *unreasonable* for defendants to rely on continued confidentiality under such a protective order because *Martindell*’s heightened standard applies *only* “[w]here there has been reasonable reliance on the order.” *TheStreet.com*, 273 F.3d. at 229 So, as defendants cannot reasonably expect that confidentiality designations made without showing good cause will forever cloak such documents from the public, *Martindell*’s heightened standard does not apply to a challenge to such designations. *Schiller* at \*5.

*Schiller* accords well with the recent decision penned by Judge Jack Weinstein in the case *In re Zyprexa Prod. Liab. Litig.*, 253 F.R.D. 69 (E.D.N.Y. 2008). In granting plaintiffs’ motion permitting publication of documents previously designated as confidential, Judge Weinstein

reasoned that defendant's "legitimate interest in confidentiality does not outweigh the public interest in disclosure at this stage of the litigation." *Id.* at 208. As elegantly put by the Court:

Public access is now advisable because this litigation involves issues of great public interest, the health of thousands of people, fundamental questions about our system of approval and monitoring of pharmaceutical products, and the funding for many health and insurance benefit plans. Public and private agencies and organizations have a right to be informed. At this stage public disclosure, congruent with our long tradition of open courts is desirable....

Plaintiffs' plan to post these documents and the unredacted pleadings on a website is appropriate since this method will make them available at the least possible cost to those most likely to be interested. The public and interested parties should know the evidence upon which the parties relied in view of the significance of the case.

*In re Zyprexa Prod. Liab. Litig.*, 253 F.R.D. at 208-209 (citing *Agent Orange*, 104 F.R.D. 559, 571, 573 (E.D.N.Y. 1985)(lifting protective order to allow public disclosure of "confidential" discovery documents where "the need for disclosure outweighs the need for further protection.... [T]he greater the public's interest in the case the less acceptable are restraints on the public's access....") *aff'd* 821 F.2d at 146 (affirming public access to discovery materials, Second Circuit noting such "access is particularly appropriate when the subject matter of the litigation is of especial public interest, which certainly is true of the Agent Orange litigation")); *see also, Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6<sup>th</sup> Cir. 1983)(subject matter of litigation weighs heavily in favor of disclosure in case "involv[ing] the health of citizens who have an interest in knowing the accurate 'tar' and nicotine content of the various brands of cigarettes on the market").

Of course, "good cause" for continuance of a protective order only exists "when a party shows that disclosure will result in clearly defined, specific and serious injury." *In Re Terrorist Attacks on September 11, 2001*, 454 F. Supp.2d 220, 222 (S.D.N.Y. 2006). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c)

test.” *Cipollone*, 785 F.2d at 1121; *see also*, *Allen*, 420 F. Supp.2d at 302 (“generalized and unsupported claims of harm that might result from disclosure” do not constitute good cause).

The Aviation Defendants have never even tried to meet that standard.

**III. The Aviation Defendants have never shown good cause that their designated documents are “Confidential,” much less entitled to continued protection now.**

To this day, the Aviation Defendants have *still* never addressed why they abused the Confidentiality Protective Order by designating as “Confidential” the vast majority of discovery materials produced in this litigation – in utter disregard of the Confidentiality Order’s requirement to exercise “good faith” in making designations. 21 MC 97 Docket No. 1415 at pp. 3-5 (Feb. 29, 2008)(Plaintiffs showing that the Aviation Defendants over-designated as confidential more than 99.8% of the documents produced). Yet they still insist they are entitled to continued protection without ever having shown good cause in the first place that any document is worthy of confidentiality. This will not do.

Back in February 2008, the Migliori Declaration established that the Aviation Defendants already had multiple opportunities to explain their need for near-blanket confidentiality: first, when they originally produced the documents with the designations; next, during meet-and-confer sessions regarding this Motion; next, they always could have re-designated specific documents with explanation about why those documents are “Confidential.” 21 MC 97 Docket No. 1416, Declaration at ¶5 (Feb. 29, 2008). They never did so then. And now after yet another year has past, they still never did so.

Indeed, since March 2004 when the Confidentiality Protective Order was first entered, the Aviation Defendants have always over-designated and abused its protections to shield from public view discovery documents and deposition transcripts related to the worst aviation security breakdown in our nation’s history. Enough is enough.

And their argument that they “unquestionably relied” on their confidentiality designations to shield these documents from the public forever has not improved with age. 21 MC 97 Doc. No. 1406 at p 7., n. 2 (Feb. 22, 2008). The Aviation Defendants never explained how such “reliance” was reasonable – it was not then and it is not now. They could not have reasonably relied upon their confidentiality designations when they produced the documents to shield those documents forever, because they knew under the plain text of the Confidentiality Protective Order that Plaintiffs could challenge any designation, and so any protection afforded might be temporary. Confidentiality Protective Order ¶5.1 (“Objections to Designations”); *see also, Schiller*, 2007 WL 136149 at \*5, *supra* (reliance unreasonable where protective order permitted plaintiffs to challenge defendants’ confidentiality designations, and where such challenge triggered obligation on the part of defendants to show good cause).

And any claim that the Aviation Defendants reasonably “relied” on the confidentiality designations in settling cases is belied by the Migliori Declaration, which establishes that during settlement negotiations and before settlements were consummated, Plaintiffs’ counsel advised defense counsel that Plaintiffs intended to move to set aside the confidentiality designations. 21 MC 97 No. 1416 at ¶4 (Feb. 29, 2008). We did so.

Clearly, the *procedure* whereby they made their blanket confidentiality designations under the Confidentiality Protective Order did not mislead the Aviation Defendants to “unquestionably rel[y]” that these documents would remain secret from the public forever, because here:

- The Aviation Defendants under the Confidentiality Protective Order never were required to show good cause for shielding their designated documents from public view;

- Nor did the Aviation Defendants ever show good cause that a single document was “Confidential,” much less that *all* of the hundreds of thousands of documents so designated contained trade secret or proprietary information;
- Nor did the Aviation Defendants show good cause on an individualized document-by-document basis that disclosure of these documents to the public would result in clearly defined, specific and serious injury;
- Nor did the Aviation Defendants show good cause that documents relating to the breakdown of aviation security on September 11<sup>th</sup> should remain hidden from the public;
- Nor did the Aviation Defendants show good cause that their interests in confidentiality outweigh the extraordinary public interest in disclosure of evidence involving the worst aviation security breakdown in our nation’s history.

By stamping nearly all documents as “Confidential” under such a framework, the Aviation Defendants could not have reasonably expected that they would never be required to show good cause why the designated documents are worthy of continued confidentiality. *Schiller*, 2007 WL 136149 at \*5, *supra*.

And as the Aviation Defendants have never shown good cause for continued protection, it is now time to strike down their confidentiality designations.

In fairness to the Aviation Defendants, they were laboring under the misbegotten notion that it was not their burden to show good cause for confidentiality, and that the burden is on Plaintiffs under *Martindell* to show “some extraordinary circumstance” warrants public disclosure of these discovery documents involving aviation security failures on September 11, 2001. As explained above, *they* applied the wrong standard.

But even assuming *arguendo* the “extraordinary circumstances” standard does apply, the Court would be well within its discretion to strike the confidentiality designations now in this case of extraordinary public and historical interest.

**IV. The public should be allowed to see the evidence developed during discovery in this case of extraordinary public & historical interest.**

The Second Circuit has made clear that even in the case of sealed grand jury materials entitled to secrecy both by statute and by “a tradition that is ‘older than our Nation itself,’” a district court has discretion to lift that veil of secrecy to allow the public to see such documents in cases of “extraordinary circumstances” of historical or public interest:

Lest there be any doubt in the matter, ... we today hold that there is nothing in [the] “special circumstances” test ... that prohibits historical interest, on its own, from justifying release of grand jury material in an appropriate case.....

It is, therefore, entirely conceivable that in some situations historical or public interest alone could justify the release of grand jury information. To the extent that the John Wilkes Booth or Aaron Burr conspiracies, for example, led to grand jury investigations, historical interest might by now overwhelm any continued need for secrecy....

Thus, far from being impermissible, an argument that significant historical interest militates in favor of release is totally appropriate and even weighty.

*In re Pet’n of Bruce Craig*, 131 F.3d 99, 105-106 (2<sup>nd</sup> Cir. 1997); *see also*, *In re Pet’n of Am. Historical Ass’n, et al.*, 49 F. Supp.2d 274, 284-288 (S.D.N.Y. 1999)(applying *In re Craig* and holding historical interest warrants disclosure of grand jury testimony relating to Alger Hiss spy case: “The Government further contends that even if the ‘special circumstances’ exception is viable, historical interest cannot constitute a ‘special circumstance.’ There is no reason to tarry as to this argument.”)(quoting *In re Pet’n of Bruce Craig*, 131 F.3d at 105, *supra*, and rejecting Government’s argument).

Indeed, this year this Court released to the public sealed grand jury testimony from the Julius and Ethel Rosenberg espionage case because “the proceedings are ... of substantial historical importance.” *In re Pet’n of National Security Archive, et al.*, Summary Order at p. 2, 08 Civ. 6599 (AKH)(S.D.N.Y. Aug. 26, 2008)(citing *In re Pet’n of Bruce Craig* and *In re Pet’n of Am. Historical Ass’n, supra*); see also, *id.*, Order (AKH)(S.D.N.Y. Oct. 29, 2008)(“[T]he Government has indicated that it has chosen not to appeal my order of August 26, 2008. Accordingly, the remaining grand jury records shall be released in accordance with that order.”).<sup>2</sup>

And 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.

Indeed, *Agent Orange* itself explained that the court in *Krause v. Rhodes* (involving the notorious killings of students at Kent State University) acted well within its discretion by “continu[ing] to protect that information protected by statute, namely, grand jury material [yet] order[ing] the remainder of the discovery material disclosed to public” because of “the historic nature of the events portrayed in the materials concerned.” *Agent Orange*, 104 F.R.D. at 573 (citing *Krause v. Rhodes*, 671 F.2d 212, 217 (6<sup>th</sup> Cir. 1982)).

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<sup>2</sup> See also, The National Security Archive press release, July 22, 2008, “Court Agrees To Release of Most Rosenberg Grand Jury Materials,” <http://www.gwu.edu/~nsarchiv/news/20080722/index.htm> (“After hearing arguments today, a federal court in New York decided that the government must release most of the sealed grand jury records from the 1951 indictment of alleged Soviet spies Julius and Ethel Rosenberg.... [T]he government conceded in a June filing that the Rosenberg case is of ‘significant historical importance’.... On the basis of the government’s concession, Judge Alvin K. Hellerstein ... said today that he will order release of the testimony of 36 witnesses. Judge Hellerstein reserved ruling on three additional witnesses that appear to be deceased and four witnesses that the government said it could not locate....”).

And so the *Agent Orange* district court ordered public disclosure of discovery documents previously shielded under a protective order because “[t]he subject matter of this litigation certainly has a broader public interest element than the Kent State killings. The risks and dangers to which American soldiers were exposed during the most controversial war of this century is a matter of overwhelming public concern.” *Agent Orange*, 104 F.R.D. at 574. Next, “assuming without deciding” that *Martindell*’s “extraordinary circumstances” standard applied, the Second Circuit in *Agent Orange* affirmed that public disclosure of discovery documents because plaintiff “has demonstrated both that [defendants] could not have relied on the protective orders and that extraordinary circumstances warrant modification.” *Agent Orange*, 821 F.2d at 148 (citing *Martindell*, 594 F.2d at 295). As put by the Second Circuit:

We conclude that the exceptionally pervasive protection granted [defendants] during the pretrial stages of this litigation, coupled with the fact that appellants never were required to show good cause as mandated by Rule 26(c), amounts to the type of *extraordinary circumstances* contemplated in our prior decisions.... Any inconvenience to which [defendants] are subjected certainly is outweighed by the enormous public interest in the Agent Orange litigation....

*Id.* (emphasis added).

Likewise here, the substantial public and historical interest in *In Re September 11 Litigation* overwhelms any continued need for secrecy for documents the Aviation Defendants designated as “Confidential” without showing good cause. The public ought to know about the breakdowns in aviation security that allowed four commercial planes to become weapons of mass destruction on September 11, 2001. *See United States v. Albarado*, 495 F.2d 799, 804-05 (2d Cir. 1974) (“Depriving a hijacker of his weapon is critical, because by means of a weapon like a pistol or even a knife the hijacker may literally turn the plane itself into a weapon, threatening not only those within it, but those on the ground as well. In short, the plane may

become a weapon of mass destruction that no ordinary person would have any way of obtaining except through a hijacking.”).

In truth, the public *must* see in the documents and testimony generated in discovery here what went so terribly wrong with aviation security on September 11, 2001.

In deed, the public’s *vital* interest in learning such information was proved that very day: for it was precisely by being empowered by shared information about the aviation security breakdowns that United Flight 93 passengers were able to *take action themselves* and stop Flight 93 from striking the Capitol or the White House.

And that public interest in learning from the documents and testimony developed in this case about the aviation security breakdowns our enemies exploited does indeed overwhelm the Aviation Defendants’ “proprietary” interest in continued secrecy.

To be sure, the Aviation Defendants interpret differently what that evidence says about the aviation security breakdowns on September 11, 2001. But our tradition trusts that the public today and of future generations will be best able to discover the truth of the September 11<sup>th</sup> aviation security breakdowns if they are afforded access to more information (rather than less) by reading the *In Re September 11 Litigation* discovery documents and testimony themselves.

Given the extraordinary circumstances here, the Court should exercise its broad discretion to strike the confidentiality designations so that the public can see those documents in this historic case.

**V. Now is also the appropriate time to establish a procedure to review whether certain discovery materials were properly designated as SSI; if they were not, such materials should be released to the public along with all *non*-SSI discovery materials**

As Plaintiffs made clear at the outset of our opening papers, “[t]his Motion does not seek the public release of any Sensitive Security Information [“SSI”].” 21 MC 97 Doc. No. 1252 at p. 1, n. 2 (Oct. 29, 2007). By definition, the Confidentiality Protective Order “shall not affect the handling and disclosure requirements concerning documents that constitute or contain Sensitive Security Information [as] so designated by the provisions of 49 C.F.R. Part 1520 and the United States Government....” Confidentiality Protective Order ¶16 (“Sensitive Security Information”). So as the Confidentiality Protective Order does not affect SSI, it logically follows that this Motion challenging merely the Aviation Defendants’ confidentiality designations under that Confidentiality Protective Order does not apply to discovery materials appropriately and accurately designated by the Government as SSI.

That said, the Confidentiality Protective Order also made clear that “[a]t an appropriate future time, a separate protective order may be entered concerning the handling, *disclosure and review* of Sensitive Security Information.” Confidentiality Protective Order ¶16 (emphasis added). Given the extraordinary public and historical interest in this case, now is the appropriate time for the Court to establish 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. Under that procedure, if the Court found certain discovery materials were properly designated as SSI, then those materials would not be publicly released. But if the Court found that certain discovery materials were *not* properly designated as SSI, Plaintiffs would then request those discovery materials be released to the public, as Plaintiffs do now for all *non*-SSI discovery materials produced by the Aviation Defendants.

## CONCLUSION

The Court should grant Plaintiffs' renewed Motion to strike the Aviation Defendants' confidentiality designations. By shining the light of public disclosure on the evidence developed in this historic case, the enduring legacy of *In Re September 11 Litigation* would be to advance our nation's best traditions of openness, unity, and truth. *Lux et Veritas*.

Dated: January 14, 2009  
Mount Pleasant, SC

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