IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. HERRING, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 03-5500 (LDD)
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant United States of America hereby moves to dismiss the above-captioned action for failure to state a claim upon which relief can be granted.

The grounds for defendant's motion are set forth in the accompanying Brief in Support of Defendant's Motion To Dismiss, dated January 23, 2004. For the reasons appearing therein, plaintiffs' claim for relief from judgment by reason of fraud on the court should be dismissed, with prejudice. A proposed form of order is attached.

Dated: January 23, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

PATRICK L. MEEHAN
United States Attorney

VINCENT M. GARVEY
Deputy Branch Director

JAMES J. GILLIGAN
Senior Trial Counsel
U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 514-3358

Counsel for Defendant United States
of America

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Dated: January 23, 2004

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U.S. Department of Justice
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P.O. Box 883
Washington, D.C. 20044
(202) 514-3358

Counsel for Defendant United States of America

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INTRODUCTION

The plaintiffs in this case include parties, and living heirs to the parties, to litigation that the Supreme Court decided more than 50 years ago. In United States v. Reynolds, 345 U.S. 1 (1953), the Court recognized for the first time in its modern jurisprudence the state secrets privilege -- the government's privilege against disclosures of information that could be harmful to national security. On remand from that decision, the plaintiffs there settled their claims against the government, and the case was dismissed, with prejudice, in August 1953.[1/] Now, 50 years later, plaintiffs ask this Court to re-open that judgment, and permit them to re-litigate the government's claim of privilege, asserting that the government committed a fraud on the courts. For the reasons appearing herein, that request must be denied.

In 1949, plaintiffs brought a wrongful death action against the United States in this Court, after their husbands died in the crash of a military aircraft. In February 1951, this Court entered a default judgment against the United States, in the amount of $225,000, after the Air Force refused to produce its accident investigation report, and related documents, asserting privilege on grounds of protecting the integrity of air crash investigations, and national security. Ultimately, the Supreme Court reversed, focusing on the military secrets privilege. The Court held that the government's assertion of that privilege was subject to judicial scrutiny, but that the courts could not look behind the government's claim without a greater demonstration of need

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[1/] For ease of reference, defendant refers interchangeably to the plaintiffs in Reynolds and the plaintiffs in this action.

for the documents than had so far been made by the plaintiffs. The Court then remanded the matter to this Court, to provide plaintiffs the opportunity to make the demonstration required. Reynolds, 345 U.S. at 6-12. Instead of pursuing that opportunity, plaintiffs settled their claims against the government for $170,000, and the case was dismissed, with prejudice, in August 1953. Having recently obtained copies of the documents the government withheld in Reynolds (now de-classified), plaintiffs have concluded for themselves that disclosure of these documents would not have jeopardized national security because, in their view, the documents contain no secret or sensitive information. Plaintiffs thus seek to re-open the August 1953 judgment on the ground that government officials committed perjury in asserting the military secrets privilege.

Of course, plaintiffs lack the informed expertise of Executive Branch officials who are responsible for determining what information should or should not be withheld in the interests of national security. They are not in a position to understand how seemingly trivial information contained in these documents may have provided valuable intelligence to the nation's enemies -- all the more so considering that the events in question took place over 50 years ago. But while plaintiffs cannot be faulted for their lack of understanding, it is also no basis for alleging that Air Force officials committed perjury when they attested before this Court that disclosing these documents would be contrary to the public interest, and harmful to national security.

Quite apart, however, from the fact that plaintiffs' allegations lack foundation, they are insufficient, as a matter of law, to establish a fraud on the court. Fraud on the court involves

only the most egregious misconduct, such as the subornation of perjury by an officer of the court, the bribery of judges, or other unconscionable schemes to subvert a court's impartiality. It is well-established that perjury, standing alone, does not rise to that level. Perjury must be and is condemned by the courts, of course, and the remedies available to those who are the victims of perjury are many. They do not include, however, a right of action to set aside judgments so long ago taken as the judgment assailed here.

Plaintiffs were given an opportunity to contest the government's assertion of privilege on remand in Reynolds. They did not do so, but instead bargained for and obtained the bulk of what they had previously been awarded in satisfaction of their claims, while avoiding the further expense and uncertainty of litigation. They may find it difficult to understand why the government asserted the military secrets privilege in Reynolds, but they cannot now return, in law or equity, to litigate the matters they willingly laid to rest some 50 years ago.

BACKGROUND

On October 6, 1948, a United States Air Force B-29 aircraft took off from Warner Robins Air Force Base in Georgia, on a mission to conduct experimental testing of secret electronic equipment. On board were nine Air Force crew members, together with four civilian engineers who had come aboard to observe and test the operation of the secret equipment that had been installed. In mid-flight, fire broke out in one of the bomber's engines. The craft went into a spin, and crashed outside Waycross, Georgia. Three crew members and one of the

civilian engineers survived, but the remaining nine men on board all perished. Complaint, ¶¶ 8-9; see Reynolds, 345 U.S. at 3; Reynolds v. United States, 192 F.2d 987, 989 (3d Cir. 1951).

In 1949, the widows of the three civilian engineers who died in the crash filed suit against the United States in this Court, seeking damages for wrongful death under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-78. Reynolds v. United States, Civil Action No. 10142 (E.D. Pa.); Brauner v. United States, Civil Action No. 9793 (E.D. Pa.). Complaint, ¶ 10. Following consolidation of the cases, plaintiffs served written interrogatories on the United States, asking whether the government had conducted an investigation into the crash, and whether it had obtained any statements concerning either the events leading up to, or the cause of, the crash. Plaintiffs also requested production of any report of investigation prepared, and any written statements obtained. The government acknowledged in response to plaintiffs' interrogatories that the Air Force had prepared an accident investigation report, and identified the individuals -- including the three surviving crew members -- from whom Air Force investigators had obtained statements. The United States refused, however, to make these documents available. Complaint, Exh. K at 1-2, 7-8 (interrogatory nos. 1, 5, and 6, and answers thereto); see also Reynolds, 192 F.2d at 989-90.

Thereafter, the plaintiffs brought a motion to compel production of both the accident investigation report and the statements of the three surviving crew members, which the government opposed on grounds of privilege. Brauner v. United States, 10 F.R.D. 468, 469-

70 (E.D. Pa. 1950). Rejecting the claim of privilege, the Court first observed that the government was not asserting the "well recognized common law privilege protecting state secrets . . .." Id. at 471-72. Instead, the government argued, based on § 161 of the Revised Statutes, 5 U.S.C. § 22 (Supp. 1950), that "the proceedings of boards of the armed services should be privileged, in order to allow free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline." Id. at 472.[2/] The Court concluded that no such privilege then existed, however, and ordered the government to produce the accident investigation report and the statements of the three surviving crew members. Id.; Complaint, ¶¶ 11-12.[3/]

The government requested re-consideration of the Court's ruling, at which time it submitted a formal Claim of Privilege by the Secretary of the Air Force. Complaint, ¶ 13 & Exh. C. The Secretary again stressed that, pursuant to regulations issued under R.S. § 161, the crew members' statements had been obtained in confidence, and the report prepared for "interdepartmental use only," to insure the full and frank disclosure of all facts and

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[2/] Section 161 authorized government agencies to establish rules governing the use and custody of their records. Pursuant to this authority, Air Force regulations prohibited the dissemination of accident investigation reports "outside the authorized chain of command" except as specifically approved by the Secretary. See Reynolds, 345 U.S. at 3-4 & n. 4.

[3/] Courts have since recognized a privilege for crash investigation reports and other documents reflecting confidential statements made to air crash safety investigators. Machin v. Zukert, 316 F.2d 336, 339 (D.C.Cir.1963). See also United States v. Weber Aircraft Corp., 465 U.S. 797-98 (1984).

circumstances that may have contributed to the crash, so that every possible precaution might be taken against the occurrence of future accidents. Disclosure of these documents would inhibit the candor required for future inquiries of this kind. Id., Exh. C at 1-2. In addition, the Secretary also explained that production of the requested documents would not be in the public interest "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department," and "[would be] inconsistent with national security." Id., ¶ 14 & Exh. C at 2, 5.

The Secretary's claim of privilege was accompanied by an affidavit of the Judge Advocate General of the Air Force, Major General Reginald Harmon, which identified the three surviving crew members, and offered to make them available for examination at the plaintiffs' convenience, and the government's expense. Complaint, ¶¶ 13, 15 & Exh. D at 1. General Harmon stated that the witnesses would be permitted to testify as to all matters not classified, and, in addition, to refresh their memories by reference to any statements they had given, and to other pertinent material. Id., Exh. D at 1-2. He also attested that the disclosure of statements made by witnesses before an accident investigation board "would have a deterrent effect upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings," and that the accident investigation report and survivors' statements could

not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." Id., Exh. D at 2. See also Reynolds, 345 U.S. at 4-5; Reynolds, 192 F.2d at 990.

In light of the government's claims on re-hearing, the Court amended its order directing production of the withheld documents, and instead instructed the government to submit the report of investigation and survivors' statements "for examination by this court," so the Court could determine whether their production "would violate the Government's privilege against disclosure of matters involving the national or public interest." Complaint, ¶ 16 & Exh. E. The government declined to produce the documents *in camera*, however, on the ground that doing so would vitiate the privilege it had asserted. The Court therefore held the United States in default, and entered an order conclusively establishing, for purposes of the consolidated actions, that the crash and resulting deaths of the three civilian engineers were caused solely and exclusively by the negligent acts and omissions of the government. Id., ¶ 17 & Exh. F. On February 27, 1951, following a trial on damages, the Court entered judgments for the plaintiffs totaling $225,000, representing the full value of the working lives of the deceased engineers. Id., ¶ 18 & Exh. H. See also Reynolds, 345 U.S. at 5; Reynolds, 192 F.2d at 990-91.

On appeal, the Third Circuit affirmed. With respect to the government's principal claim of privilege, based on R.S. § 161, the Court of Appeals held that the Air Force was not entitled to an "absolute 'housekeeping' privilege" against disclosure of accident investigation reports.

Reynolds, 192 F.2d at 995. Turning then to the government's invocation of national security, the Court of Appeals concluded that the interests against the disclosure of information implicating military secrets would be adequately protected by *in camera* inspection of the documents, as this Court had ordered, and so rejected the government's contention that it lay "within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents." Id. at 996-97; see Complaint, ¶ 19.

Upon the government's petition for writ of certiorari, the Supreme Court reversed and remanded. Reynolds, 345 U.S. at 2; see also Complaint, ¶¶ 20-21. The United States argued, without regard to the particular documents at issue, that Executive Branch agencies have inherent authority, protected by the Constitution's separation of powers, "to withhold any documents . . . from judicial view if they deem it to be in the public interest." 345 U.S. at 6 & n. 9. The Supreme Court, however, chose "a narrower ground for decision." Id. at 6. The Court noted that the Secretary of the Air Force had also attempted to invoke "the privilege against revealing military secrets, a privilege which is well established in the law of evidence." Id. at 6-7. The Court concluded that the judiciary and not Executive Branchs official asserting the privilege "must determine whether the circumstances are appropriate for the claim of the privilege," id. at 8, but nevertheless "w[ould] not go so far as to say that [a] court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." Id. at 10. Instead, it held that a court should allow the government an

opportunity to demonstrate, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," without insisting upon *in camera* review. Id.

Turning to the case before it, the Court did not then decide whether the privilege was available with respect to the documents at issue, but laid down principles for the proper resolution of the privilege claim on remand. Taking judicial notice of the Cold War context in which the case had arisen, the Court concluded, inasmuch as "this accident occurred to a military plane which had gone aloft to test secret electronic equipment," that there was "a reasonable danger that the accident investigation report would contain references to the secret electronic equipment that was the primary concern of the mission." 345 U.S. at 10. Under these circumstances, the Court held that the government had made "a sufficient showing of privilege to cut off further demand for the documents *on the showing of necessity for [their] compulsion that [the plaintiffs had] made.*" Id. at 10-11 (emphasis added).

Elaborating on the question of necessity, the Court explained that:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori*, where necessity is dubious a formal claim of privilege . . . will have to prevail.

Id. at 11. Thereupon, the Court observed that plaintiffs' need for the accident investigation report and witness statements "was greatly minimized" by the government's formal offer to make the surviving crew members available for examination. Id. If the plaintiffs pursued that alternative, "it should be possible for [them] to adduce the essential facts . . . without resort to material touching upon military secrets." Id. Remarking that "[w]e think [the government's] offer should have been accepted," the Court "remanded [the case] to the District Court for further proceedings consistent with the views expressed in th[e] opinion." Id. at 11, 12.

On remand, the plaintiffs did not avail themselves of the government's offer to examine the surviving crew members, or attempt, on the basis of such an examination, to demonstrate greater need for their witness statements, or the accident investigation report. Instead, approximately two months after the Supreme Court's mandate, plaintiffs elected to settle their claims for a total of $170,000, approximately 75 percent of the amount they had been awarded under the default judgments previously entered by this Court. Complaint, ¶ 22 & Exh. A at 2, Exh. B at 2 (docket sheets in Reynolds and Brauner noting Supreme Court mandate filed on April 13, 1953, settlement agreement filed on June 22, 1953). The cases were dismissed, with prejudice, by order of this Court on August 5, 1953. Id.

In early 2000, plaintiff Judith Palya Loether obtained copies of the accident investigation report and witness statements at issue in Reynolds, which by then had been de-classified and made publicly available by the government. Complaint, ¶¶ 24-25 & Exhs. I, J.

According to the Complaint, "[t]hese newly-uncovered documents reveal[ ] that the decision of the Supreme Court in [Reynolds], the settlement, and the dismissal of the Reynolds and Brauner cases were procured by a fraud on the courts." Allegedly, "not one of the documents" at issue in those proceedings "contain any secret or privileged information." Id., ¶ 26; see also id. at 2 (preliminary statement). Following their discovery of the these documents, plaintiffs brought this action to obtain relief from the August 1953 judgment.[4/]

Plaintiffs assert as the basis for that relief a single claim of a "fraud on the courts," Complaint at 11, relying on the allegation that, "[c]ontrary to the claim of privilege and sworn Affidavits submitted by Secretary Finletter and Judge Advocate General Harmon, the Accident Report and witness statements . . . contain no military secrets or other information implicating national security interests." Id., ¶ 32. According to plaintiffs, the falsity of these statements "is apparent upon reading the documents that were the subject of this Court's orders and the claims of privilege." Id., ¶ 38. See also id., ¶ 33 ("[t]here is not one mention [in the accident report] of anything remotely approaching a military secret"); ¶ 34 ("[l]ikewise, the surviving witnesses' statements . . . make no mention whatsoever of 'secret' equipment, the aircraft's mission, or any other information implicating military secrets or national security concerns").

[4/] Plaintiffs initially sought relief in the Supreme Court by way of a Petition for a Writ of Error *Coram Nobis* to Remedy Fraud Upon the Court. The Supreme Court denied them leave to file their petition by order dated June 23, 2003. Complaint, ¶¶ 28-30.

Plaintiffs also assert that the accident investigation report and witnesses' statements "show that the Air Force lied" in its sworn response to the plaintiffs' interrogatory no. 31. Id., ¶ 35.

Plaintiffs maintain that, by this conduct, "the government practiced a fraud on this Court and other federal courts," id., ¶ 41, thus denying the decedents' widows and their children the benefit of their default judgments, and forcing them, after a series of appeals, to settle for less than they had been awarded. Id., ¶¶ 42-43. Plaintiffs claim in excess of $1 million as the "proper measure of their damages," representing the difference between the amounts the plaintiffs were entitled to under the default judgments, less the amounts paid to them pursuant to the settlement, increased to present value at a market rate of interest since February 27, 1951 (the date the default judgments were entered). Id., ¶ 44 and prayer for relief.

ARGUMENT

This case must be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Plaintiffs can prove "no set of facts" entitling them to the truly extraordinary relief they have asked of this Court. Mariana v. Fisher, 338 F.3d 189, 195(3d Cir. 2003); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). They seek to be relieved from the August 5, 1953 judgment that dismissed their claims, with prejudice, more than a half-century ago, and assert as justification for this request an alleged fraud on the court. Complaint at 1; id., ¶¶ 41-45. As defendant demonstrates below, plaintiffs' claims of fraud lack foundation, and they have in any event failed to plead a "fraud on the court"

as that term of art is understood and applied in well-established precedent. Plaintiffs' request for relief from judgment must therefore be rejected.

I. LEGAL STANDARDS FOR OBTAINING RELIEF FROM JUDGMENT.

Rule 60(b) of the Federal Rules of Civil Procedure provides that, "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding" for any one of six enumerated grounds, including "(3) fraud . . . misrepresentation, or other misconduct of an adverse party." The rule requires that a motion thereunder "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." By its express terms, however, the "rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding . . . or to set aside a judgment for fraud upon the court." This so-called "savings clause" is not an affirmative grant of power to the courts, but merely "preserves judicial power to grant relief in an independent action 'insofar as established doctrine permits.'" Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 (1st Cir. 1995), quoting Fed. R. Civ. P. 60(b) advisory committee notes to 1946 amendment; see Greiner v. City of Champlin, 152 F.3d 787, 789 (8th Cir. 1998); 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2868 at 396 (3d ed. 1995).

To prevail on a motion for relief from judgment under Rule 60(b)(3), "the movant must establish [1] that the adverse party engaged in fraud or other misconduct, and [2] that this

conduct prevented the moving party from fully and fairly presenting his case." Stridiron v. Stridiron, 698 F.2d 204, 206-07 (3d Cir. 1983); see also Bandai America Inc. v. Bally Midway Mfg. Co., 775 F.2d 70, 73-75 (3d Cir. 1985). As noted above, the motion must also be made within one year of the judgment that the movant wishes to set aside, United States v. Ins. Co. of N. Am., No. 98-449, 1999 WL 305514, *2 (E.D. Pa. May 12, 1999); Cavalier Clothes, Inc. v. Major Coat Co., No. 89-3325, 1995 WL 314511, *3 (E.D. Pa. May 18, 1995), undoubtedly explaining why plaintiffs have not pursued this avenue of relief.

A court's inherent power to set aside a prior judgment for fraud on the court is not subject to Rule 60(b)'s one-year limitation, King v. First Am. Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002), but fraud on the court does not encompass all allegations of deceit or misconduct that might be sufficient to bring a motion under Rule 60(b)(3). Fraud on the court "is limited to that species of fraud which does or attempts to subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." United States v. Zinner, No. 95-0048, 1998 WL 57522, *2-*3 (E.D. Pa. Feb. 9, 1998), quoting Cavalier Clothes, 1995 WL 314511,*7 (citation omitted). See also United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002) (fraud on the court is a fraud "where the impartial functions of the court have been directly corrupted"); Fierro v. Johnson, 197 F.3d 147, 154 (5th Cir. 1999) ("an unconscionable plan or scheme which is designed to improperly

influence the court in its discretion"); Simon v. Navon, 116 F.3d 1, 6 (1st Cir. 1997) (an unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter); SEC v. ESM Group, Inc., 835 F.2d 270, (11th Cir. 1988); In re Whitney-Forbes, Inc., 770 F.2d 692, 698 (7th Cir. 1985).

Courts have thus found fraud upon the court "only where there has been the most egregious conduct, involving a corruption of the judicial process itself," such as "bribery of judges, employment of counsel to 'influence' the court, bribery of the jury, and involvement of an attorney (an officer of the court) in the perpetration of the fraud." Zinner, 1998 WL 57522, *3, quoting Cavalier Clothes, 1995 WL 314511,*7; Lacy v. Gen. Elec. Co., No. 81-2958, 1993 WL 53570, *1 (E.D. Pa. Mar. 3, 1993) (fraud on the court occurs, for example, "when an adverse party bribes the court or court officials"). See also Buck, 281 F.3d at 1342; Fierro, 197 F.3d at 154; Greiner, 152 F.3d at 789 ("egegious misconduct directed to the court itself, such as bribery of a judge or jury or fabrication of evidence by counsel"); Baltia Airlines, Inc. v. Transaction Management, Inc., 98 F.3d 640, 643 (D.C. Cir. 1996); Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987) (involvement of an attorney, as an officer of the court, in a scheme to suborn perjury); In re Whitney Forbes, 770 F.2d at 698 (bribery of a judge or improper influence on the court).

"Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." Buck,

281 F.3d at 1342; Fierro, 197 F.3d at 154. Thus, an allegation of perjury, "absent allegation of involvement by an officer of the court . . . has never been sufficient." Simon, 116 F.3d at 6 (internal quotation marks and citation omitted); Baltia Airlines, 98 F.3d at 642 (fraud on the court does not include fraudulent documents, false statements or perjury); ESM Group, 835 F.2d at 273 (perjury does not constitute fraud upon the court); Travelers Indemnity Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985) (same); Great Coastal Express, Inc. v. Int'l B'hood of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982) ("courts confronting the issue have consistently held that perjury or fabricated evidence are not grounds for relief as 'fraud on the court'"); Cavalier Clothes, 1995 WL 314511, *7 (plaintiff's alleged concealment of illegal payoffs to government officials did not amount to fraud on the court); Lacy, 1993 WL 53570, *3 ("[i]t is well-settled that a witness' perjured testimony does not constitute fraud upon the court"). "Nor do allegations of nondisclosure during pretrial discovery constitute grounds for an independent action for fraud upon the court . . .." Bailey v. IRS, 188 F.R.D. 346, 356 (D. Ariz. 1999); Petry v. Gen. Motors Corp., 62 F.R.D. 357, 359-61 (E.D. Pa. 1974) (false or misleading interrogatory answers do not rise to the level of fraud on the court); see also Simon, 116 F.3d at 2, 6 (same, regarding alleged withholding of documents during discovery).[5/]

[5/] Under the authority preserved by Rule 60(b)'s savings clause, courts also recognize that, short of invoking a court's inherent power to set aside a judgment for fraud on the court, a party may also bring an independent action in equity for fraud perpetrated upon a party. Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A., 117 F.3d 655, 661 (2d Cir. 1997);

(continued...)

II. PLAINTIFFS HAVE NOT PLEADED A FRAUD UPON THE COURT.

Under these well-established legal standards, plaintiffs have not pleaded a fraud upon the courts. Indeed, they have given this Court no reason in their pleadings to believe that a fraud was perpetrated at all. Plaintiffs' allegation of fraud -- that the Air Force perjuriously asserted a claim of privilege in order to prevent disclosure of the accident investigation report, and the surviving crew members' statements -- rests entirely on the allegation that neither the report, nor the crew members' statements, contain any secret or privileged information that implicates national security. Complaint, ¶¶ 26, 32-34. That assertion is based, in turn, on nothing but the plaintiffs' own reading and understanding of these documents. See id., ¶ 26 ("[t]hese newly-uncovered documents reveal[ ]" defendant's fraud); id., ¶ 38 (the falsity of

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[5/](...continued)
Reintjes, 71 F.3d at 48. While the Third Circuit, in Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1022-23 (3d Cir. 1987), held that "the elements of a cause of action for [relief from judgment] in an independent action are not different from those elements in a Rule 60(b)(3) motion," the Supreme Court held otherwise in United States v. Beggerly, 524 U.S. 38 (1998), concluding that, to avoid setting the one-year time limit on Rule 60(b)(3) motions "at naught," independent actions must be reserved for "injustices . . . deemed sufficiently gross to demand a departure from strict adherence to . . . res judicata." In other words, "an independent action should be available only to prevent a grave miscarriage of justice." Id. at 46-47. Courts thus require something more than allegations of perjury, or other claims amounting to "ordinary fraud," in order to maintain an independent action, Reintjes, 71 F.3d at 48; Porter v. Chicago Sch. Reform Bd. of Tr., 187 F.R.D. 563, 566 (N.D. Ill. 1999), and generally hold that parties bringing such actions must establish that "their own fault, neglect, or carelessness did not create the situation for which they seek equitable relief." Campaniello, 117 F.3d at 662. See also Buck, 281 F.3d at 1341-42; ESM Group, 835 F.2d at 273; Great Coastal Express, 675 F.2d at 1357-58; Chewning v. Ford Motor Co., 35 F. Supp. 2d 487, 491(D.S.C. 1998).

defendant's sworn statements "is apparent upon reading the documents"); see also id. at 2 (preliminary statement) (upon reading the report, Ms. Loether "was astonished to find that [it] contains nothing approaching a 'military secret'").[6/]

As noted above, Secretary Finletter and General Harmon explained that the aircraft and its personnel "were engaged in a highly secret mission" involving "confidential equipment," that "any disclosure of its mission or information concerning its operation or performance would be prejudicial to [the Air Force]" and, therefore, that disclosure of the accident report and witness statements would be contrary to the public interest, and "inconsistent with national security." Complaint, Exh. C at 5, Exh. D at 2. Plaintiffs' failure, fifty years after the fact, to understand why that was so is not the least bit indicative of a fraud. Determinations of what information is and is not appropriately protected in the interests of national security involve predictive judgments about the potential future harm of pre-mature disclosure, where informed expertise and even intuition "must often control in the absence of hard evidence." Klaus v. Blake, 428 F. Supp. 37, 38 (D.D.C. 1976); see Halperin v. CIA, 629 F.2d 144, 149 (D.C.

[6/] Plaintiffs maintain that there is "not one mention" in the accident report or the witness statements "of the secret mission or the secret equipment that had occupied these men on the day of the crash." Complaint at 1-2; see id., ¶¶ 33, 34. That is not so, see id., Exh. I, but even though the documents may contain no express or detailed reference to the nature of the mission or the equipment, neither Secretary Finletter's claim of privilege, nor General Harmon's affidavit, makes any specific representation concerning the contents of these documents. They stated only that their disclosure would be contrary to the public interest and harmful to national security. Complaint, Exhs. C, D.

Cir. 1980). The Executive Branch's familiarity with matters of national security means that it has unmatched expertise and insight when it comes to "what adverse [e]ffects might occur as a result of public disclosure" of information in the government's hands. Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982); see Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988).

For these reasons, the courts give utmost deference to the government's judgments about the harm that could result to national security from such disclosures. See Center for National Security Studies, et al. v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003); Krikorian v. Dep't of State, 984 F.2d 461, 464 (D.C. Cir. 1993); McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983). By the same token, because of the government's much "broader understanding" of what may harm the national interest, Snepp v. United States, 444 U.S. 507, 512 (1980), little weight, if any, is given to the opinions of litigants, such as plaintiffs here, who purport to differ with responsible government officials "on the prospect of danger to [the national defense] from the disclosure" of secret or sensitive information. Halperin v. NSC, 452 F. Supp. 47 (D.D.C. 1978), aff'd 612 F.2d 586 (D.C. Cir. 1980).

In evaluating the government's determinations that disclosing requested information could be harmful to national security, the courts have also long recognized that "even the most apparently innocuous [information] can yield valuable intelligence." Knight v. CIA, 872 F.2d 660, 663 (5th Cir. 1989). As the Supreme Court has explained:

> Foreign intelligence services have both the capacity to gather and analyze any information that is in the public domain [and] substantial expertise in deducing [intelligence information] from seemingly unimportant details. [Indeed], the very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data "may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." Thus, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."

CIA v. Sims, 471 U.S. 159, 178 (1985) (quoting Halperin , 629 F.2d at 150, and Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978)). Accordingly, because "each individual piece of intelligence information, like a piece of [a] jigsaw puzzle, may aid in piecing together bits of information even when the individual piece is not of obvious importance itself," Fitzgibbons v. CIA, 911 F.2d 755, 763 (D.C. Cir. 1990), the courts defer to governmental claims of privilege even for "information that standing alone may seem harmless, but that together with other information poses a reasonable danger of divulging too much to a 'sophisticated intelligence analyst.'" In re United States, 872 F.2d 472, 475 (D.C. Cir. 1989) (quoting Halkin, 598 F.2d at 10); see Ellsberg v. Mitchell, 709 F.2d 51, 59 (D.C. Cir. 1983).

In short, the mere fact that the information contained in the accident investigation report and witness statements may strike the plaintiffs today as innocuous, trivial, or unimportant, is simply not probative of whether their disclosure may have been "of great moment" to "sophisticated intelligence analyst[s]" having "a broad view of the scene" in 1950, CIA v. Sims, 471 U.S. at 178; Halkin, 598 F.2d at 9-10, or whether Air Force officials in 1950, operating

on the basis of information and expertise that plaintiffs lack, see Snepp, 444 U.S. at 512, could have or in fact did come to that judgment. Plaintiffs have alleged no facts or circumstances, aside from their own post hoc and necessarily uninformed opinion concerning the significance of these documents, to support a claim that they are devoid of secret or sensitive information, or that Secretary Finletter and General Harmon testified with fraudulent intent when they avowed that disclosing these documents would be contrary to national security.

Fundamentally, however, even if plaintiffs had a sound basis for leveling charges of fraud, plaintiffs have not alleged a fraud on the court -- a subversion of the courts' impartiality -- that justifies relief from a judgment entered more than 50 years ago. Their claim for relief begins and ends with the assertion that "the Air Force lied" when it asserted the military secrets privilege over the accident investigation report, and the statements of the surviving crew members. Complaint at 3 (preliminary statement). They ask the Court to set aside its prior judgment based solely on an allegation that Secretary Finletter and General Harmon committed perjury when they submitted statements to the Court that disclosing these documents would be harmful to national security. Id., ¶¶ 26, 32, 38.

As this Court and others have recognized, "[i]t is well settled that a witness' perjured testimony does not constitute fraud upon the court." Lacy, 1993 WL 53570, *3. See supra at 16, citing Baltia Airlines, 98 F.3d at 642; ESM Group, 835 F.2d at 273; Travelers Indemnity, 761 F.2d at 1551; Great Coastal, 675 F.2d at 1357. Plaintiffs have made no allegation that the

government's counsel in Reynolds, as officers of this Court, the Third Circuit, or the Supreme Court, either suborned or otherwise knowingly participated in the submission of perjured testimony, as might give rise to a fraud on the court. See Simon, 116 F.3d at 6; Cleveland Demolition, 827 F.2d at 986; Zinner, 1998 WL 57522, *3. Nor have they have alleged bribery of court officials, or any other actions calculated to undermine or corrupt the courts' impartiality when adjudicating the claims asserted in Reynolds and Brauner. See Buck, 281 F.3d at 1342; Fierro, 197 F.3d at 154; Zinner, 1998 WL 57522, *3.

In short, plaintiffs' allegations not only rest on the thinnest of grounds, they also fail to rise above the kind of "deceit and fraud by a party" that is insufficient to establish a fraud on the court. Simon, 116 F.3d at 6.[7/] Where perjury is alleged, courts hold that it "can and should be exposed at trial," and litigants are expected "to root [it] out as early as possible." Great Coastal Express, 675 F.2d at 1357; see Reintjes, 71 F.3d at 49 (the possibility of perjury is a common hazard of the adversary process which litigants are equipped to deal with through discovery); Gleason v. Jandrucko, 860 F.2d 556, 559-60 (2d Cir. 1988); ESM Group, 835 F.2d at 273-74 (perjury "is the type of fraud which litigants should discover; it does not prevent a party from gaining access to an impartial system of justice"); Bailey, 188

[7/] Plaintiffs' passing (and unexplained) allegation that "the Air Force lied" in sworn interrogatory responses, Complaint, ¶ 35, also fails as a matter of law to establish a fraud on the court. Bailey, 188 F.R.D. at 356; Petry, 62 F.R.D. at 359-61; see also Simon, 116 F.3d at 6.

F.R.D. at 356. Plaintiffs did not do so here, and cannot now rely on allegations of fraud by the government as grounds for re-opening claims that have long since been determined.

Fifty years ago, the Supreme Court remanded the Reynolds case with an admonition to the plaintiffs to accept the government's offer, and interrogate the surviving crew members whom the government had undertaken to make available for examination. Had plaintiffs done so, they may well have adduced the facts essential to their case, as the Supreme Court anticipated. Reynolds, 345 U.S. at 11. Even if the facts eluded them, they would nevertheless have been better positioned to make a greater demonstration of need for the report and witness statements that the government had withheld. In so doing, they could have brought about closer judicial scrutiny of the merits of the government's claim of privilege. See id.

As it was, on remand the plaintiffs eschewed the government's offer, and the Supreme Court's pointed advice, choosing instead to settle their claims on reasonably generous terms -- 75 percent of the full value of their claims, see supra at 10 -- that spared them the cost of further litigation. Equity will not allow them to return to this Court some 50 years after making that considered choice, and, based solely on ill-founded assertions of perjury, attempt to litigate the very question that the Supreme Court left open for them on remand in 1953 -- the legitimacy of the government's claim of privilege. See Gleason, 860 F.2d at 559-60 (plaintiff could have deposed the eyewitnesses before agreeing to dismiss the suit, and his failure to do so should not be grounds for setting aside a final judgment, notwithstanding defendants'

misconduct); Cleveland Demolition, 827 F.2d at 987 (having failed to depose the witness before trial, plaintiff cannot avoid the verdict by leveling a charge against defendant of fraud on the court); Petry, 62 F.R.D. at 361 (perjury is always a risk in the judicial process, but there are safeguards against it, and a party should not be permitted to question the credibility of a witness it declined to cross-examine at trial under guise of fraud on the court).

"Respect for the finality of judgments is deeply engrained in our legal system." Great Coastal Express, 675 F.2d at 1354-55. See Nevada v. United States, 463 U.S. 110, 129 (1983) (res judicata ensures the very object for which civil courts have been established . . . to secure the peace and repose of society by the settlement of matters capable of judicial determination."); Montana v. United States, 440 U.S. 147, 153 (1979) (same); see also Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (res judicata "serves vital public interests beyond . . . the equities in a particular case"). Rule 60(b) represents an effort to balance the courts' respect for finality with competing considerations of equity, a balance that favors equity within one year after judgment, but which tilts toward finality thereafter. Great Coastal Express, 675 F.2d at 1354-55; Reintjes, 71 F.3d at 49; Petry, 62 F.R.D. at 361.

In this instance, plaintiffs seek to contest matters that they were given the wherewithal and opportunity to contest in 1953, but did not. As a result, the evidence and recollection of the facts, and judgments, giving rise to the government's assertion of privilege now lie beneath the sands of 50 years' time. If respect for the finality of judgments means anything, the balance

on this occasion must tilt decisively toward finality, see Patterson v. Mobil Oil Corp., 206 F.R.D. 591, 593 (E.D. Tex. 2002), and plaintiffs' request to re-open the judgments in Reynolds and Brauner must be denied.

CONCLUSION

For the foregoing reason, plaintiffs' independent action for relief from judgment to remedy fraud on the court should be dismissed, with prejudice.

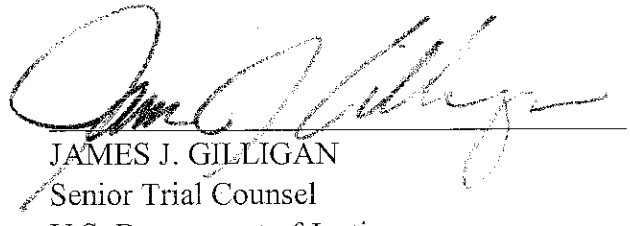
Dated: January 23, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

PATRICK L. MEEHAN
United States Attorney

VINCENT M. GARVEY
Deputy Branch Director



JAMES J. GILLIGAN
Senior Trial Counsel
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
(202) 514-3358

Counsel for Defendant United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. HERRING, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 03-5500 (LDD)
UNITED STATES OF AMERICA,	)	
Defendant.	)	

[PROPOSED] ORDER

This case is before the Court upon defendant's Motion To Dismiss, filed January 23, 2004. The Court having considered the parties' respective submissions in support of and in opposition to defendant's motion, the relevant facts, and applicable law,

IT IS HEREBY ORDERED THAT:

1. Defendant's motion is hereby GRANTED.

2. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, plaintiffs' claim for relief from judgment to remedy a fraud on the court, and this action, are hereby DISMISSED, with prejudice, for failure to state a claim upon which relief can be granted.

So ORDERED this _____ day of _____, 2004

_____

HON. LEGROMME D. DAVIS
UNITED STATES DISTRICT JUDGE