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

PATRICIA J. HERRING, individually, JUDITH PALYA LOETHER, WILLIAM PALYA, ROBERT PALYA, individually and as living heirs of Elizabeth Palya (deceased), SUSAN BRAUNER and CATHERINE BRAUNER, individually and as living heirs of Phyllis Brauner (deceased),	
Plaintiffs,	Civil Action No. 03-5500 (LDD)
-v.-	
UNITED STATES OF AMERICA,	
Defendant.	JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Patricia Reynolds, Elizabeth Palya, and Phyllis Brauner what was most dear to them in October, 1948, when a United States Air Force B-29 veered out of control and plunged to earth near Waycross, Georgia. Their husbands, civilian engineers who had been aboard the flight to assist in testing certain experimental equipment, died in the crash. In 1949, the three widows filed wrongful death suits against the United States in this Court. The widows demanded that the government produce the accident investigation report and certain witness statements the Air Force had prepared concerning the incident. The Air Force refused, claiming an "investigative privilege." The widows moved to compel, and the trial judge, the former Chief Judge of this Court, William H. Kirkpatrick, overruled the government's objections and ordered the government to produce the requested documents. *Brauner v. United States*, 10 F.R.D. 468, 471-72 (E.D. Pa. 1950).

At this juncture, in order to avoid this production the Air Force told this Court a lie. Two high-ranking Air Force officials, both lawyers, filed affidavits claiming that the accident report and witness statements contained "state secrets" about the confidential mission of the plane and the classified experiments the engineers were conducting, information that could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." These affidavits were false. The accident report and witness statements contained no such secrets.

The Air Force's lie became the foundation of subsequent proceedings in each of three federal courts. Judge Kirkpatrick, in order to evaluate the Air Force's belated privilege claim, ordered the Air Force to produce the documents for his *in camera* review. The Air Force persisted in its lie and refused to comply. After Judge Kirkpatrick defaulted the Air Force on

liability, assessed damages, and awarded the widows judgments totaling $225,000, the government appealed and made the Air Force's lie the centerpiece of its attack in the Third Circuit. After the Court of Appeals rebuffed the government and affirmed the widows' judgments, *Reynolds v. United States,* 192 F.2d 987 (3d Cir. 1951), the government sought certiorari, and made the Air Force's lie the basis of its petition. And, in the Supreme Court, the Air Force's lie worked: The Supreme Court held that the Air Force was within its rights to withhold the documents even from a federal court, because the Air Force's affidavits, which of course the Court credited, established "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953).

On remand, with their judgments vacated and without access to the accident report or the witness statements, the widows settled their cases for an aggregate of $170,000, $55,000 less than the judgments they had originally obtained. They had no idea that their settlements were the product of a fraud practiced by the government upon the federal judiciary. They could not have known – the Air Force kept the documents classified for nearly 50 years.

Elizabeth Palya died without knowing the truth. Phyllis Brauner had only a brief glimpse of it before she passed away in late 2000. But Patricia Reynolds (now Patricia J. Herring) was a young bride in 1948 when Robert Reynolds was killed. In this action, Ms. Herring returns to this Court along with the living heirs of Ms. Palya and Ms. Brauner to tell the Court what happened and to secure, pursuant to Federal Rule of Civil Procedure 60(b) and this Court's inherent power to remedy fraud on the court, the justice she and the Palya and Brauner families were wrongly denied by the government a half-century ago.

The United States has responded to plaintiffs' claim with a motion to dismiss under Rule 12(b)(6). The government's motion represents yet another unfounded effort to avoid a proper reckoning with the families. None of the government's arguments for dismissal has merit.

- The government contends, chiefly, that the fraud described in plaintiffs' Complaint – a fraud by Air Force officials specifically directed at avoiding and later upsetting the orders and judgments *of this Court* – somehow is not a "fraud on the court" within the meaning of federal law. This argument misstates and misapplies governing legal standards. Moreover, it rests on the specious premises that the Secretary and the Judge Advocate General of the Air Force, when they falsely swore to the privileged nature of report and witness statements, were merely "witnesses" giving false testimony and were not officers of the court. This case presents precisely the sort of "egregious conduct, involving a corruption of the judicial process itself" that even the government acknowledges marks a "fraud on the court" actionable under the savings clause of Rule 60(b). Moreover, the government's alleged misconduct worked a grave miscarriage of justice upon the plaintiffs. Even if that misconduct were not actionable as a "fraud on the court," it would support an independent action for relief under Rule 60(b)(6).

- The government also argues that the Complaint fails adequately to allege fraud because plaintiffs' claim that the accident report and witness statements contain no state secrets is based on "nothing but the plaintiffs' own reading and understanding of these documents." Gov't Br. at 17. This is not quite right: Plaintiffs have attached the documents in question and invite the Court and anyone else who cares to do so to read the documents for themselves; they, like plaintiffs, will find *nothing* which describes or even hints at the secrets

(the nature of the "confidential mission" and the "highly technical and secret military equipment") that the Air Force swore were there. This is sufficient to state a claim. At bottom, the government is quarreling with the facts pleaded in the Complaint and reasonable inferences from those facts, which is wholly inappropriate on a Rule 12(b)(6) motion.

- Finally, the government maintains that plaintiffs cannot now complain of the fraud the government practiced because, after remand in 1953, the widows supposedly eschewed the opportunity to take depositions the government had offered and instead elected to settle their claims. According to the government, if the widows had just taken discovery of the surviving crew members, they might have learned the government's claims of privilege were illegitimate. Gov't Br. at 23. The widows, however, should never have been put in the position of having to take *any* discovery on remand: The Supreme Court's 1953 decision and ensuing remand *were procured by fraud.* Moreover, the premise of the government's contention – that the widows eschewed discovery – is false: The widows in fact noticed (and ultimately took) the depositions they were offered prior to settling. Finally, the notion that the widows, through depositions of the crash survivors, would have been able to divine that Air Force officials had defrauded the courts is absurd; those survivors did not even know the chief cause of the accident, much less the contents of the Air Force's classified reports. For all of these reasons, as more fully detailed below, the government's motion should be denied.

FACTS

The facts alleged in the Complaint, which must be taken as true for purposes of the present motion, are as follows:

On October 6, 1948, a United States Air Force B-29 Superfortress Bomber crashed near Waycross, Georgia. Nine of the thirteen men on board were killed. Three of the deceased, Robert Reynolds, Albert H. Palya and William H. Brauner, were civilian engineers working for the Radio Corporation of America in Camden, New Jersey and the Franklin Institute of Technology in Philadelphia, Pennsylvania. They were assisting military personnel with certain electronic equipment that was being tested on the flight. Complaint, ¶¶ 8-9.

In 1949, the widows of Reynolds, Palya and Brauner filed suit against the United States in this Court. Their complaints under the Federal Tort Claims Act charged the Air Force with negligence in the conduct of the flight. The widows' cases stalled, however, when the Air Force refused to turn over its accident investigation reports, as well as several statements of surviving witnesses, which the Air Force claimed were "privileged." Complaint, ¶¶ 10-11. The cases were assigned to the Honorable William H. Kirkpatrick.

When first called upon to defend this claim, the United States did not pretend that the accident reports and statements contained "state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security." *Brauner v. United States*, 10 F.R.D. 468, 472 (E.D. Pa. 1950). Rather, the government insisted only that "proceedings of boards of investigation of the armed services should be privileged in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper

discipline." *Id.* Judge Kirkpatrick, in an extensive opinion, held no such privilege existed and ordered the Air Force to produce the materials. *Id.* at 471-72. *See also* Complaint, ¶¶ 11-12.

It was in a motion for rehearing of this order that the United States first invoked "state secrets" protection. It supported this claim with two affidavits, a formal "Claim of Privilege" and accompanying affidavit signed by then Secretary of the Air Force, Thomas K. Finletter, and an affidavit by then Judge Advocate General of the Air Force, Major General Reginald C. Harmon. *See* Complaint, ¶¶ 13-15 & Exs. C and D. Secretary Finletter stated that the accident reports and statements should not be produced because:

> 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 not be in the public interest.

Complaint, Ex. C (Claim of Privilege of Thomas K. Finletter). He described the documents as "reports of Boards of Investigation and statements of witnesses which are concerned with secret and confidential missions and equipment of the Air Force." *Id.* Major General Harmon, for his part, swore that the "information and findings of the Accident Investigation Board and statements which have been demanded by the plaintiffs cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." Complaint, Ex. D (Affidavit of Reginald C. Harmon).

The Court, on rehearing, agreed to review the accident reports and three specified witness statements *in camera* to assess the government's privilege assertions. It therefore ordered the government to produce these materials for the court's personal inspection in chambers on October 4, 1950. Complaint, Ex. E (Amended Order re: Production of

Documents, dated September 21, 1950).[1] The United States refused to comply with this order. On October 12, 1950, after Judge Kirkpatrick was satisfied that the government would not produce the documents even to the court in chambers, held the Air Force in default and deemed its liability to the widows established. Complaint, ¶ 17 & Ex. F (Opinion dated October 12, 1950).

The Court subsequently held a hearing on damages and awarded $65,000 to Mrs. Reynolds, $80,000 to Mrs. Palya, and $80,000 to Mrs. Brauner. Complaint, ¶ 18. In making these awards, the Court specifically found that these amounts represented the full value of the lives of the deceased, reduced to present value. *Id.* & Ex. H (Opinion dated February 20, 1951). It entered judgments in the widows' favor on February 27, 1951. *Id.*

On appeal, the Third Circuit accepted the Air Force's affidavits at face value, understanding them to assert that "the documents sought to be produced contain state secrets of a military character." *Reynolds v. United States*, 192 F.2d 987, 996-97 (3d Cir. 1951). The Court of Appeals agreed with the district court, however, that it was within the competence of the federal courts to review such claims of privilege in camera in order to evaluate their validity and proper scope, and therefore affirmed. *Id. See also* Complaint, ¶ 19.

The United States successfully petitioned for certiorari, 343 U.S. 918 (1952), and urged the Supreme Court to reverse the widows' judgments. Complaint, ¶ 20. In its petition and its briefs, the government advanced an even more expansive claim of privilege than it had

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[1] The September 21, 1950 Order specifically directed production in chambers of "(a) The report and findings of the official investigation of the crash of defendant's B-29 type of aircraft near Waycross, Georgia on October 6, 1948. (b) The statement with reference to such crash of Captain Herbert W. Moore, 1279A. (c) The statement with reference to such crash of (continued...)

in the courts below, insisting that the executive branch might lawfully withhold any document from judicial scrutiny if it deemed secrecy in the public interest. *United States v. Reynolds*, 345 U.S. 1, 6 (1953).

A majority of the Supreme Court, however, chose to rely on Secretary Finletter's and Major General Harmon's affidavits:

> Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. *Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.*

345 U.S. at 10 (emphasis added). Indeed, the Secretary had attested that the documents "concerned ... secret and confidential missions and equipment of the Air Force," and their disclosure "would be prejudicial to this Department." Similarly, the Judge Advocate General had sworn that furnishing the reports and witness statements would compromise "national security." *Id.* at 4-5. In the majority's view, these representations that the documents contained "military secrets" were sufficient to forestall disclosure even to the district judge, absent a more compelling necessity:

> [W]hen the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made

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(..continued)
Staff Sergeant Walter J. Peny, AF 698025. (d) The statement with reference to such crash of Technical Sergeant Earl W. Murrhee ...." Complaint, ¶ 16 & Ex. E.

345 U.S. at 10-11. On this basis, then, the Court reversed.

After remand, the widows had little choice but to settle their cases with the government. On June 22, 1953, they received a total of $170,000. The cases were discontinued on August 5, 1953. Complaint, ¶ 22. The widows had no clue that they and the Supreme Court had been defrauded.

In early 2000, Palya's daughter, Judith, learned through internet research that previously-classified Air Force documents regarding military aircraft accidents had been declassified and were now publicly available. Curious about the "secret mission" that had occupied her father on the day of his death, she ordered a copy of documents relating to her father's accident, including all of the documents the government had withheld in *United States v. Reynolds*. She soon saw what the government had fought so hard to keep her mother and a federal district judge from seeing. Complaint, ¶¶ 23-25.[2]

Contrary to the Air Force's sworn testimony, the accident reports and witnesses statements contain no military or national security secrets. The materials nowhere describe any part of the "secret mission" in which Reynolds, Palya and Brauner were involved. They do not refer to any "newly developing electronic devices" or "secret electronic equipment" aboard the plane or elsewhere. They make no mention of anything that was or should have been "confidential." Indeed, they record nothing beyond the events surrounding the crash

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[2] The documents Judith Palya Loether obtained included all of the materials identified in the district court's September 21, 1950 order. *See* fn. 1, *supra.* These documents are collected and attached to the Complaint as Exhibit I, and they are transcribed in typewritten format as Exhibit J.

and the likely reasons for its occurrence, none of which had anything to do with the purported "secret mission" of the flight. Complaint, ¶¶ 26, 32-34 & Exs. I and J.

The Air Force presumably sought to protect these materials to avoid the embarrassment and public scrutiny their production would have generated.[3] The reports identify the main cause of the accident as the Air Force's failure to comply with Technical Orders 01-20EJ-177 and 01-20EJ-178, which mandated certain "changes in the exhaust manifold assemblies for the purposes of eliminating a definite fire hazard." Complaint, ¶ 33 & Exs. I and J at p. 4 ¶g. These technical orders required the installation of heat deflector shields to avoid overheating; without them "[t]he aircraft is not considered to have been safe for flight." *Id.*, Exs. I and J at p. 8, ¶16a. The reports reveal that heat deflector shields were not installed on this B-29 prior to flight. As a result, the No. 1 engine on the plane caught fire, the fire could not be contained, and the plane plummeted to the ground. *See generally,* Exs I and J, and the conclusions drawn by the Air Force investigation.

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[3] The Air Force had become a separate branch of the armed services in September, 1947, and was still seeking to establish itself. Although larger jet-propelled bombers were coming on line, the propeller-driven B-29 remained a mainstay of the new service's operations.

The B-29 had been one of the Army Air Force's most effective weapons in World War II. But, the B-29 was plagued with technical and mechanical problems. One of the worst was the tendency of its engines to catch fire. Geoffrey Perret, *Winged Victory: The Army Air Forces in World War II*, 448 (Random House 1993). That problem had occupied Congressional committees as early as 1943. Wilbur H. Morrison, *Point of No Return: The Story of the 20th Air Force* 19 (Times Books 1979). *See also id.* at 180 (in wartime, the Air Force command understood that "the bulk of [B-29] losses were due to mechanical failures rather than Japanese resistance"); Curtis E. LeMay and Bill Yenne, *Superfortress: The B-29 and American Air Power* 61-64, 70-71, 78 (McGraw-Hill 1988) (describing mechanical and design problems with B-29s that impacted war operations).

This revelation directly contradicts the Air Force's sworn discovery responses, filed months prior to the battle over production of the reports:

> Q: 31. (a) Have any modifications been prescribed by defendant for the engines in its B-29 type aircraft to prevent overheating of the engines and/or to reduce the fire hazard in the engines? (b) If so, when were such modifications prescribed? (c) If so, had any such modifications been carried out on the engines of the particular B-29 type aircraft involved in the instant case? Give details.
>
> A: 31. No.

Complaint, ¶35 & Ex. K (Answers to Interrogatories filed January 5, 1950). Even before the fight over the accident reports, in other words, the government was not telling the truth on the central issue in the case, despite its own conclusions.

The reports and statements outline a number of other negligent acts that the Air Force sought to shield from view. They disclose, for instance, that none of the civilian engineers were briefed prior to the flight on emergency and aircraft evacuation procedures, as required by Air Force regulations. *See* Complaint, Exs. I and J at pp. 6 ¶¶14x, 14y; 8 ¶16c. It also happens that the aircraft commander, copilot and engineer had never flown together as a crew prior to the flight. *Id.*, Exs I and J at p. 6 ¶14w. Finally, when the fire broke out in the No. 1 engine, the pilot inadvertently "feathered" the No. 4 engine before the co-pilot attempted to correct his mistake. After the crash, the propellers of both the No. 1 and the No. 4 engines were found in feathered position, evidencing that pilot error led to a second disabled engine in the final moments of flight. *See* Complaint, ¶¶ 33-34 & Exs. I and J at pp. 5 ¶14q, 6 ¶15a.

Thus, the affidavits offered by Secretary Finletter and Major General Harmon in support of the Air Force's claim of privilege were proffered in order to cover-up and suppress conclusive evidence that the Air Force's negligence had caused the deaths of Reynolds, Palya

and Brauner. The affidavits, moreover, were submitted with a view toward fabricating a "test case" for a favorable judicial ruling on claims of an executive or "state secrets" privilege – a case built on the fraudulent premise that the documents in question contained "secret" military or national security information. Complaint, ¶¶ 37-38. The affidavits were intentionally false when made or were made in reckless disregard of whether the statements they contained were true or false. Indeed, the falsity of the Air Force's sworn submissions is apparent upon reading the accident report and witness statements themselves. They purport to describe only the Air Force's negligence that led to the accident and do not mention anything that could be construed as a military secret. *Id.*, ¶ 39. In sum, the Air Force intended that the federal courts should rely upon its false testimony to deny the widows evidence to which they were entitled and, later, to reverse the judgments rendered in the widows' favor. And, ultimately the Supreme Court and this Court, in enforcing the Supreme Court's mandate, *did* rely on the Air Force's falsehoods. Thus, the government practiced a fraud on the courts and worked a gross miscarriage of justice. *Id.*, ¶¶ 36-42.

ARGUMENT

I.

STANDARDS GOVERNING RULE 12(b)(6) MOTIONS.

In seeking a dismissal for failure to state a claim pursuant to Rule 12(b)(6), the United States bears a heavy burden. The Court must accept as true all well-pleaded factual allegations of plaintiffs' Complaint, and view those allegations in the light most favorable to the plaintiffs. *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985); *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). Moreover, the Court may

dismiss the Complaint only where it is certain, based upon such a review, that the plaintiffs are not entitled to relief under any set of facts that they might prove. *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (citation omitted).

In deciding a motion to dismiss, the Court is permitted to consider only the pleadings, the exhibits thereto, and matters of public record. 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1357 (1990) ("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account."). *See also Mir v. Little Co. of Mary Hospital*, 844 F.2d 646, 649 (9th Cir. 1988). If matters outside the pleading and the public record are presented in support of the motion, Rule 12(b)(6) relief is inappropriate; rather, the motion must be denied, or alternatively "treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

II.

PLAINTIFFS HAVE ALLEGED A "FRAUD UPON THE COURT" ACTIONABLE UNDER RULE 60(b)'S SAVINGS CLAUSE.

A. Legal Standards Governing Claims for "Fraud Upon the Court."

Rule 60 of the Federal Rule of Civil Procedure governs relief from judgments rendered by the federal district courts. The rule supplants a number of common law bills, writs and supplemental rules courts had developed to address post-judgment relief. *See* Fed

R. Civ. P. 60(b), Advisory Committee's Note. The rule, however, specifically preserves one avenue of attacking a judgment historically recognized in law and equity:

> This 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.

Fed. R. Civ. P. 60(b). The rule's "savings clause" thus upholds the district court's inherent power "when fraud has been perpetrated upon it, to give relief." *Id.*, Advisory Committee's Note, *citing Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944).

What is a "fraud upon the court"? Professor Moore writes that

> Fraud on the court is limited to fraud that does, or at least attempts to, "defile the court itself," or that is perpetrated by officers of the court "so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases."

12 Moore's Federal Practice 3d ¶ 60.21[4][a] (3d ed. 2003). Thus, a "fraud on the court" is a fraud designed not simply to cheat an opposing litigant, but to "corrupt the judicial process" or "subvert the integrity of the court." *Oxxford Clothes XX, Inc. v. Expeditors Int'l, Inc.*, 127 F.3d 574, 578 (7th Cir. 1997); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995) (citation omitted); *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460 (2d Cir. 1994). It is marked by an "unconscionable plan or scheme which is designed to improperly influence the court in its decisions," *Dixon v. Commissioner,* No. 00-70858, 2003 U.S. App. LEXIS 4831, at *11-12 (9th Cir. Mar. 18, 2003), *amending* 316 F.3d 1041 (9th Cir. 2003), or by "egregious misconduct directed to the court itself." *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998) (citation omitted). "Proof of the scheme, and of its complete success up to date, is conclusive." *Hazel-Atlas,* 322 U.S. at 246.

Common examples of "fraud upon the court" include the "fabrication of evidence by counsel," *Greiner*, 152 F.3d at 789, and the "insert[ion of] bogus documents into the record." *Oxxford Clothes*, 127 F.3d at 578. But, "[b]ecause corrupt intent knows no stylistic boundaries, fraud on the court can take many forms," *Aoude v. Mobile Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989), and courts take each case on its facts. *See Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 137 (2d Cir. 1956).

As Professor Moore observes, "fraud upon the court" may take the form of a scheme or plan by a litigant, wholly without the involvement of counsel, that is intended to corrupt the court's decision-making. *See Toscano v. Commissioner,* 441 F.2d 930, 934-36 (9th Cir. 1971) (finding fraud upon the court by a husband in a tax case where husband forged what appeared to be his wife's signature on a joint tax return); *Derzack v. County of Allegheny*, 173 F.R.D. 400 (W.D. Pa. 1996) (finding fraud upon the court on the basis that fabricated documents were submitted by a party, without counsel's complicity, to litigation opponents, lies were told under oath at depositions, and schemes were concocted to cover-up the falsehoods), *aff'd mem.,* 118 F.3d 1575 (3d Cir. 1997). Or, *alternatively*, "fraud upon the court" may entail unlawful conduct by "officers of the court" that undermines the ordinary judicial process. The term "officer of the court" is not rigidly defined, *see, e.g.*, *Toscano,* 441 F.2d at 933-34, and is not limited to attorneys of record and court personnel. Rather, it may include non-attorney parties or non-appearing attorneys who occupy a special relationship to a particular judicial proceeding. *See, e.g., In re Tri-Cran, Inc.*, 98 B.R. 609, 617 (Bankr. D. Mass. 1989) (non-attorney parties may be guilty of fraud on the court by colluding with attorneys *or* by occupying some special relationship to the court and the proceeding, like a debtor-in-possession in a bankruptcy); *Pumphrey*, 62 F.3d at 1130-31 (participation of non-appearing

general counsel and vice president of a party in discovery was sufficient to render him an "officer of the court" answerable for fraud upon the court); *In re Temtechco, Inc.,* Bankruptcy No. 95-00596, 1998 Bankr. LEXIS 1612 at*48 (D. Del. December 18, 1998).[4]

B. Plaintiffs Have Alleged A "Fraud Upon the Court."

The government, in its motion, maintains that plaintiffs' Complaint, while it may allege fraud, does not allege "fraud upon the court." According to the government, the plaintiffs' claim "begins and ends with the assertion that 'the Air Force lied' when it asserted the military secrets privilege over the accident report and the [witness] statements;" the plaintiffs have thus alleged only "a witness' perjured testimony" and not a subversion of the court; and, in fact, the plaintiffs have failed to allege any involvement by an "officer of the court" in the misconduct charged, which the government pretends the law requires. Gov't Br.

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[4] The government's account of the legal standards governing actions for "fraud on the court," Gov't Br. at 13-16, relies chiefly on cases in which the plaintiffs not only failed to plead a fraud on the court, but failed to plead any fraud at all. *E.g., United States v. Buck,* 281 F.3d 1336 (10th Cir. 2002) (plaintiff's claim of fraudulent nondisclosure of evidence belied by proof that evidence produced in discovery); *Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A.*, 117 F.3d 655, 663 (2d Cir. 1997) (plaintiff's allegations of fraud "fail[ed] to meet the pleading requirements for even common law fraud, let alone the more stringent criteria for the type of fraud necessary to sustain an independent action under the 'savings clause' in Rule 60(b)"); *In re Whitney-Forbes, Inc.,* 770 F.2d 692 (7th Cir. 1985); *Porter v. Chicago School Reform Bd. of Trustees*, 187 F.R.D. 563 (N.D. Ill. 1999) (one allegation of common law fraud was insufficient to show "grave miscarriage of justice"); *United States v. Zinner*, No. 95-0048, 1998 U.S. Dist. LEXIS 1393, at *39 (E.D. Pa. Feb. 6, 1998) (finding alleged newly discovered evidence was not newly discovered and was based primarily on "conjecture, speculation, and reinterpretation of old evidence" to deny relief); *Cavalier Clothes, Inc. v. Major Coat Co.*, No. 89-3325, 1995 WL 314511, at *15 (E.D. Pa. May 18, 1995) (finding no direct evidence of fraud). In other cases the government cites, the plaintiffs pleaded a fraud, but failed to show that it was material to the ultimate decision of the case. *E.g., Greiner,* 152 F.3d at 789 (alleged fraudulently withheld evidence would not have changed result, because evidence was irrelevant and inadmissible); *Baltia Air Lines, Inc. v. Transaction Mgmt., Inc.*, 98 F.3d 640, 643 (D.C. Cir. 1996) (alleged misrepresentations "not relevant to the [district court's] decision").

at 21-22. These contentions not only mischaracterize plaintiffs' claims but they entirely misstate the law.

It is true that plaintiffs' claims begin with the assertion that "the Air Force lied." But they do not end there. The Air Force lied *to this Court,* in a specially filed Claim of Privilege accompanied by sworn affidavits, offered to support what was, in fact, a bogus claim of "state secrets" protection for documents the Court had previously ordered should be produced. The purpose of this lie was to "improperly influence the court in its decision" regarding production of the report and statements – one touchstone of a "fraud upon the court." Gov't Br. at 14, citing *Fierro v. Johnson*, 197 F.3d 147, 154 (5th Cir. 1999). The Air Force thereafter lied *to the Court of Appeals* and *to the Supreme Court*, attempting to overturn the judgments the widows had won on the ground that this Court had erred in failing to respect its unfounded claim of privilege. The purpose of these lies was not simply to influence the courts, but to subvert the judicial process. The Air Force was seeking from the appellate courts a sweeping right to withhold "state secrets" from the entire judiciary based upon an utterly false pretense.

This is the epitome of a "fraud upon the court." Finletter and Harmon were not, as the government maintains, simply witnesses seeking to mislead the widows. They were high government officials seeking to mislead *the courts* to avoid enforcement of an outstanding court order compelling discovery. This alone distinguishes this case from the cases the government cites for the proposition that mere "witness perjury" is not a fraud upon the court. *See* Gov't Br. at 21-22. The government's cases, additionally, all involve situations where a witness's fraud might have been exposed through cross-examination or other discovery. *See In re Levander,* 180 F.3d 1114, 1120 (9th Cir. 1999) ("The reason why the courts in these

cases did not treat perjury or non-disclosure alone as fraud on the court was that the plaintiff already had the opportunity to challenge the alleged perjured testimony or non-disclosure"). That was not true here: Neither the widows nor the courts knew or could have known that the accident report and witness statements actually contained no military secrets. Indeed, the widows had no right to cross-examine the affiants on the point and had no reason to question the veracity of the affiants at any time prior to declassification of the materials and their appearance on the internet, some 50 years after the fact.

There is likewise no merit to the government's claim that plaintiffs' Complaint should be dismissed because no "officer of the court" has been implicated in the alleged fraud. In the first place, the government is simply wrong in arguing that a "fraud upon the court" is actionable only if it involves an officer of the court. *See* pp. 15-16, *supra*, and cases cited therein. Moreover, "officers of the court" clearly were involved in the scheme alleged, because Finletter and Harmon were acting as officers of the court in asserting executive privilege on behalf of the Air Force.

As noted above, in "fraud upon the court" actions non-attorneys and in-house counsel are regarded as officers of the court where they stand in a fiduciary or other special relationship to the court given the nature of the proceedings. *Pumphrey,* 62 F.3d at 1130-31; *Tri-Cran,* 98 B.R. at 617; *In re Temtechco,* 1998 Bankr. LEXIS 1612 at *48. Both Secretary Finletter and Judge Advocate General Harmon qualify. Not only were they both attorneys (Harmon was, in fact, the Air Force's chief legal officer); in the context of asserting the military and national security interests of this country as grounds for protecting materials from disclosure, both were in a special relationship with the federal courts in this case. As Finletter's affidavit notes, only he, as head of the department or agency, could advance the

Air Force's claim of executive privilege before the courts. Complaint, Ex. C (advancing the claim of privilege "pursuant to the authority vested in me as the head of the Department of the Air Force."). This procedure was to assure that the claim being made was one in which the court could place its trust and confidence. *See United States v. Reynolds,* 345 U.S. at 7-8 (the privilege "is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."). Finletter and Harmon were, in this context, "officers of the court" – and if the involvement of such officers were required to make out a claim for "fraud upon the court" (which it is not), that requirement is met here.[5]

III.

PLAINTIFFS' COMPLAINT ALSO STATES A CLAIM FOR RELIEF UNDER RULE 60(b)(6).

Even if the fraud alleged in the Complaint were not a "fraud upon the court" actionable under Rule 60(b)'s savings clause, the Court may nevertheless afford plaintiffs relief. Rule 60(b)(6) authorizes the Court to grant post-judgment remedies for "any other reason justifying relief from the operation of the judgment." The Supreme Court and the Third Circuit have recognized that Rule 60(b)(6) permits an independent action for fraud

[5] It is unknown at this time whether the government attorneys involved in the *Reynolds* case were knowing participants in the fraud. Plaintiffs assume that since the accident reports and witness statements were purportedly too sensitive to disclose to a federal district judge, they were too sensitive to disclose to the attorneys handling the case, and that the attorneys represented their client in ignorance of the fact that they were furthering a fraud. In any event, for reasons noted above, whether the attorneys were complicit in the plot is not determinative. The fraud is actionable with or without their involvement.

perpetrated by one party upon another where necessary "to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 46-47 (1998); *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016, 1022-23 (3d Cir. 1987).

In this Circuit, the elements of a such an independent action "are not different from those elements in a Rule 60(b)(3) motion [relating to fraud, misrepresentation or other misconduct of a party]." *Averbach*, 809 F.2d at 1023. Thus, such an action may be based on fraudulent conduct by a litigant that falls short of "fraud on the court," but is nonetheless sufficiently egregious to warrant extraordinary relief. *Id.* at 1021 ("Neither the text of Rule 60(b) nor its legislative history permits a construction which would limit an independent action for relief from a judgment to 'fraud on the court' as distinguished from fraud of some other sort"). *See also Beggerly*, 524 U.S. at 46-47 (independent actions permitted for "'injustices ... deemed sufficiently gross to demand a departure' from strict adherence to ... res judicata") (citation omitted). Such an independent action under Rule 60(b)(6) is not subject to the one year time limit applicable to a more typical case of fraud by one party on another. *See Averbach,* 809 F.2d at 1019-20 (false answer to interrogatory); *Crowley v. Cooperstein*, No. 95-CV-194, 1995 U.S. Dist. LEXIS 9382, at *5-6 (E.D. Pa. July 6, 1995) (non-disclosure of material facts and newly discovered evidence); *Derzack,* 173 F.R.D. at 411-12 (finding that abusive litigation tactics, such as the manufacturing of evidence and lying under oath by a party, may constitute fraud on the court "for tampering with the administration of justice to such an extraordinary degree").

Here, even if the facts alleged do not make out a claim for "fraud upon the court," they fully support a Rule 60(b)(6) independent action. The government sought, from the moment it filed its false affidavits, to defraud the widows, and ultimately succeeded. The widows had

no reason to disbelieve the Air Force's claims of "state secrets" and no meaningful opportunity to test those claims, before or after they were deprived of the judgments the district court had awarded them. The Air Force's fraud – lies told by its highest ranking officials, repeated throughout the course of four years of baseless proceedings, and then covered up for 50 years – worked a gross miscarriage of justice. No doctrine of "finality" binds the Court's hands in these circumstances. It has the power to do justice under Rule 60(b)(6).[6]

IV.

THE COMPLAINT SUFFICIENTLY ALLEGES THE FALSITY OF THE AIR FORCE'S AFFIDAVITS.

The government's brief contains repeated suggestions that plaintiffs' claim of fraud is faulty because it rests on "nothing but plaintiff's own reading and understanding of the [accident report and witness statements]." Gov't Br. at 17. The government, in patronizing terms, advises that plaintiffs "are not in a position to understand how seemingly trivial

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[6] This power, it is worth remembering, is inherent in the judicial function, and derives from "firmly established ... English practice long before the foundation of our Republic." *Hazel-Atlas*, 322 U.S. at 244.

> Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices.

Id. at 248. Although the law favors finality of judgments, and thus "courts of equity have been cautious in exercising their power over such judgments[,] ... where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' they have wielded the power." *Id.* at 244-45 (citations omitted).

information contained in these documents may have provided valuable intelligence to the nation's enemies," *id.* at 2, and offers a review of case law emphasizing the deference due the government on matters of national security. *Id.* at 18-21. All of this is to hint that there may be some unappreciated "state secrets" lurking somewhere in the accident report and witness statements, and that it is not for plaintiffs to dare to presume otherwise.

But, all of this hinting and innuendo does not present any viable legal challenge to the sufficiency of the Complaint. The plaintiffs have alleged the documents contain no "state secrets," and their expertise on such matters is informed enough to make that charge: They, like the Court and anyone else who cares to, can read the documents start-to-end and see that they contain nothing that begins to describe the "secret mission" of the flight or the "highly technical and secret military equipment" aboard. Yet, that is precisely what Air Force officials swore to this Court, the Third Circuit and the Supreme Court that they contained.[7]

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[7] The government makes the astonishing assertion that "neither Secretary Finletter's claim of privilege, nor General Harmon's affidavit, makes any specific representation concerning the contents of the documents." Gov't Br. at 18 n.6. Both Finletter and Harmon were addressing a court order that required production of specific documents. *See* fn. 1, *supra.* Finletter described the documents as "reports of Boards of Investigation and statements of witness *that are concerned with secret and confidential missions and equipment of the Air Force.*" Complaint, Ex. C (emphasis added). That is a specific representation concerning the contents of the documents. Harmon swore that the "information and findings of the Accident Investigation Board and statements which have been demanded cannot be furnished without seriously hampering national security, flying safety, and the development of highly technical and secret military equipment." Complaint, Ex. D. That, too, is in context a representation concerning the contents of the documents. One cannot read the affidavits, in the setting in which they were submitted, any other way. *See Reynolds*, 192 F.2d at 996-97 (reading the affidavits to claim "the documents sought to be produced contain state secrets of a military character"), 345 U.S. at 4-5 (reading affidavits to assert that "the demanded material could not be furnished 'without seriously hampering national security, flying safety, and the development of highly technical and secret military equipment.'").

This is a sufficient allegation to support a claim of fraud. The government's smug hints that there may be hidden "secrets" within the materials are not competent to rebut this allegation.[8] They represent, in any event, a factual quarrel with what plaintiffs have alleged which is entirely impermissible on a Rule 12(b)(6) motion. *See* pp. 12-13, *supra.*

V.

THE GOVERNMENT'S CONTENTION THAT THE WIDOWS SHOULD HAVE UNCOVERED ITS FRAUD THROUGH POST-REMAND DISCOVERY IS BASELESS.

At the conclusion of its brief, the government urges this case should be dismissed because "plaintiffs seek to contest matters that they were given the wherewithal and opportunity to contest in 1953, but did not." Gov't Br. at 24. The government's theory is that after remand, the widows had the opportunity to depose surviving crew members, depositions that "could have brought about closer judicial scrutiny of the merits of the government's privilege claim." But, the government says, the widows "eschewed the government's offer" and "chose instead to settle their claims." *Id* at 23. By making this decision, the government maintains that the widows forfeited their right to bring this action. *Id.*

The first problem with this "defense" is that it assumes that the widows were properly put to the tasks of taking discovery and settling or trying the case. They were not. Both the Supreme Court's decision and the ensuing remand *were procured by fraud.* The widows

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[8] If indeed the government believes that there are "secrets" lurking in the documents appended to the Complaint, it should identify them. After all, by its own account, it is in the best position to explain why these documents merited protection, even today, because it alone possesses "informed expertise" on such matters. Tellingly, the government identifies *nothing* that was or is protectable information in either the report or the statements.

should never have had to face the prospect of taking *any* further discovery in the trial court. They should have seen their original judgments affirmed.

A second problem with the government's argument is that its entire premise is false. The docket reveals that the widows noticed the depositions of each of the surviving crew members. Complaint, Ex. A. Thus, the record shows no "eschewing" of the opportunity for discovery. And, in fact, the widows took this discovery. Why the government alleges otherwise is a mystery.[9]

A third problem with this "defense" is that it assumes that any discovery done would have focused on the legitimacy of the government's "state secrets" claims. The widows, however, had no reason to doubt those claims: The plane was on a secret mission and did have secret equipment aboard, after all. The widows were not seeking to compel the production of such secrets; they had asked only for those portions of the documents relating to the causes of the accident that could be produced without disclosing confidential information. They lost this battle, and on remand their task was not to revisit the privilege claim, but to find out what, if anything, they could without these key documents.

Finally, and most fundamentally, it is absurd for the government to suggest that discovery from the Air Force personnel who survived the crash would have allowed the widows to uncover the Air Force's plot to deceive the Courts. The statements of the

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[9] Although not set out in the Complaint, correspondence from Charles J. Biddle, Esquire, of Drinker Biddle & Reath, the widow's counsel, to his clients reveals that he did, in fact, take the noticed depositions prior to settling. The government was advised of this fact in briefing before the Supreme Court. Complaint, ¶¶ 27-30; Petitioners' Reply in Support of their Motion to File Petition for a Writ of Error Coram Nobis, at p. 11 n.7, *In re Herring,* No. 02-M76 (U.S. Sup. Ct., June 12, 2003). Plaintiffs do not have copies of any transcripts of these depositions; under the circumstances it is likely they were never ordered transcribed.

servicemen survivors are attached to the Complaint. *See* Exs. I and J. These servicemen had nothing to do with preparing the accident report. It is not even clear that they ever saw their post-flight statements transcribed. They could not know whether the report or their statements did or did not contain "state secrets." And, even if they had such knowledge, it is inconceivable that an interrogator would find out what they knew on that score, since any question asked would be met with an objection based on the *Reynolds* case, with an admonition to stick to the facts of the accident. As for the accident, the survivors had only limited information: Their now declassified statements show that they knew nothing about the core cause of the crash, the failure to install mandatory heat deflector shields; they knew only that the plane had plummeted suddenly to earth, after engine failures that *they could not explain.*[10]

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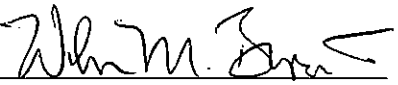
[10] The Air Force's offer of depositions of certain crash survivors as a substitute for the production of the accident report and witness statements was the most cynical part of the Air Force's scheme. The Air Force knew that if the widows took this discovery they would not learn the root causes of the accident, because none of the proffered witnesses knew what the causes of the accident were. The causes were known only to the Air Force experts who reviewed the maintenance records, the wreckage of the plane, and eyewitness statements, and then determined what went tragically wrong and prepared the accident report. Those experts, of course, were never identified to the widows or the courts, and their conclusions were kept secret for decades.

CONCLUSION

The United States has advanced no valid reason to dismiss this case. It is long past time that issue should be joined and justice done. For all of these reasons, the government's motion to dismiss should be denied.

Respectfully submitted,

DATE: February 24, 2004



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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2004, I caused a true and correct copy of the foregoing Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss to be served upon counsel for defendant United States of America by United States First-Class Mail, postage prepaid, addressed as follows:

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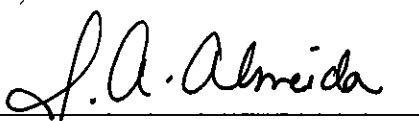

Jeff A. Almeida

Dated: February 24, 2004

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

PATRICIA J. HERRING, individually, JUDITH PALYA LOETHER, WILLIAM PALYA, ROBERT PALYA, individually and as living heirs of Elizabeth Palya (deceased), SUSAN BRAUNER and CATHERINE BRAUNER, individually and as living heirs of Phyllis Brauner (deceased),	
Plaintiffs,	Civil Action No. 03-5500 (LDD)
-v.-	
UNITED STATES OF AMERICA,	
Defendant.	JURY TRIAL DEMANDED

ORDER

AND NOW, this ____ day of _____, 2004, upon consideration of the Defendant's Motion to Dismiss, filed January 23, 2004, and plaintiffs' opposition thereto, filed February 24, 2004, and the parties' respective submissions, it is hereby ORDERED that said motion is DENIED. Defendant shall serve its answer to the Complaint in this action within ten (10) days of the date of this Order.

Legrome D. Davis
United States District Judge