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

PATRICIA J. HERRING, et al., Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 03-CV-5500-LDD
UNITED STATES OF AMERICA, Defendant.	:	

MEMORANDUM AND ORDER

LEGROME D. DAVIS, J. SEPTEMBER 10th, 2004

I. INTRODUCTION

Presently before this Court is the Motion to Dismiss filed by the United States of America ("Government") on January 23, 2004 (Doc. No. 6, "D's Mot."), the Memorandum in Opposition to Defendant's Motion to Dismiss filed by Plaintiffs on February 24, 2004 (Doc. No. 9, "Pl's Opp."), and the Reply Brief in Support of Defendant's Motion to Dismiss filed by the Government on March 19, 2004 (Doc. No. 10, "Reply"). This Court heard argument on this matter on May 11, 2004. (Doc. No. 15, "Hrg. Tr.").

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case revisits three consolidated actions originally brought in 1949 under the Federal Tort Claims Act by widows of civilians killed in a crash of an Air Force plane, that culminated in the Supreme Court decision United States v. Reynolds, 345 U.S. 1 (1953). In Reynolds, the Court recognized the military secrets privilege that, upon adequate showing, allows the government to withhold evidence the disclosure of which would compromise national security.

Reynolds, 345 U.S. at 11. This Court adopts, in pertinent part, the factual background set out in Reynolds:

> "These suits under the Tort Claims Act arise from the death of three civilians in the crash of a B–29 aircraft at Waycross, Georgia, on October 6, 1948. Because an important question of the Government's privilege to resist discovery is involved, [the Supreme Court] granted certiorari.
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> The aircraft had taken flight for the purpose of testing secret electronic equipment, with four civilian observers aboard. While aloft, fire broke out in one of the bomber's engines. Six of the nine crew members, and three of the four civilian observes were killed in the crash. The widows of the three deceased civilian observers brought consolidated suits against the United States. In the pretrial stages the plaintiffs moved, under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force's official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation. The Government moved to quash the motion, claiming that these matters were privileged against disclosure pursuant to Air Force regulations promulgated under R.S. § 161. The District Judge sustained plaintiffs' motion, holding that good cause for production had been shown. The claim of privilege under R.S. § 161 was rejected on the premise that the Tort Claims Act, in making the Government liable 'in the same manner' as a private individual had waived any privilege based upon executive control over governmental documents.
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> Shortly after this decision, the District Court received a letter from the Secretary of the Air Force, stating that 'it has been determined that it would not be in the public interest to furnish this report.' The court allowed a rehearing on its earlier order, and at the rehearing the Secretary of the Air Force filed a formal 'Claim of Privilege.' This document repeated the prior claim based generally on R.S. § 161, and then stated that the Government further objected to production of the documents '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.' An affidavit of the Judge Advocate General, United States Air Force, was also filed with the court, which asserted 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.' The same affidavit offered to produce the three surviving crew members, without cost, for examination by the plaintiffs. The witnesses would be allowed to refresh their memories from any statement made by them to the Air Force, and authorized to testify as to all matters except those of a 'classified nature.'
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> The District Court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. The Government declined, so the court entered an order, under Rule 37(b)(2)(i), that the facts on the issue of negligence would be taken as established in

> plaintiffs' favor. After a hearing to determine damages, final judgment was entered for the plaintiffs. The Court of Appeals affirmed, both as to the showing of good cause for production of the documents, and as to the ultimate disposition of the case as a consequence of the Government's refusal to produce the documents."

Reynolds, 345 U.S. at 2-5. The Supreme Court formally recognized a military secrets privilege and held that:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It 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. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

Id. at 7-8 (citations omitted). The Court reversed the decision of the Court of Appeals and remanded the case to the District Court for proceedings consistent with its opinion. On remand from the Reynolds decision, the parties conducted limited discovery, settled their claims for approximately seventy-five percent of the original judgment. The District Court dismissed the case with prejudice in August of 1953.

In 2000, the daughter of one of the deceased civil engineers obtained the newly declassified accident report from an internet service provider. Pl's Opp. at 9. Because the report lacked a detailed description of the "secret mission," "newly developing electronic devices," or "secret electronic equipment," Plaintiffs sought leave to file a petition for a writ of *error coram nobis* before the Supreme Court; the Court denied the motion in a one line order on June 23, 2003. In re Herring, 539 U.S. 940 (2003). On October 1, 2003, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the parties and their living heirs filed this action seeking to set aside the settlement agreement reached fifty years earlier on the grounds that the settlement was

procured by the Air Force's claim of privilege, through which it committed a fraud on the Court actionable under Rule 60(b)'s savings clause. Fed. R. Civ. P. 60(b)(6). Plaintiffs request the difference between the amount for which they settled the claims and the default judgment originally entered by the District Judge. Compl. at ¶ 45. On January 23, 2004, the Government filed a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This Court heard argument on the Motion on May 11, 2004.

III. STANDARD OF REVIEW

A. Legal Standard for Motion to Dismiss Under Rule 12(b)(6)

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts in support of the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A court may consider only the pleadings, exhibits thereto, any document appended to and referenced in the complaint on which plaintiff's claim is predicated, and matters of public record. See Fed. R. Civ. P. 10(c); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1426 (3d Cir. 1997); In re Westinghouse Sec. Litig., 90 F.3d 696, 707 (3d Cir. 1996). A court, however, need not credit conclusory allegations or legal conclusions in deciding a motion to dismiss. See Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 333 (3d Cir. 2001); Morse v. Lower Merion Sch. Dist., 132 F.3d

902, 906 (3d Cir. 1997); L.S.T., Inc. v. Crow, 49 F.3d 679, 683-84 (11th Cir. 1995). A claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

B. Legal Standard for "Fraud Upon the Court" Under Rule 60(b)

Rule 60(b) reads as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion 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. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. 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 grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed. R. Civ. P. 60(b). Though the Third Circuit has not expressly addressed the standard for fraud upon the court, other courts have characterized it as an unconscionable plan or scheme to improperly influence the court or interfere with the judicial machinery performing a task of impartial adjudication, as by preventing an opposing party from fairly presenting his case or

defense. See e.g., In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180 (8th Cir. 1976); Hrg. Tr. at 27, 37. A finding of fraud upon the court is justified only by the most egregious misconduct directed to the court itself such as bribery of a judge or jury or fabrication of evidence by counsel. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180; see also Gleason v. Jandrucko, 860 F.2d 556, 558-59 (2d Cir.1988) ("[T]he type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion' under Rule 60(b)(3) for fraud on an adverse party... '[F]raud upon the court as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication.'"). It must be supported by clear, unequivocal, and convincing evidence. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180; see also England v. Doyle, 281 F.2d 304 (9th Cir. 1960) (holding that a motion to set aside the action of the court on this ground is addressed to the sound discretion of the trial court and the burden is on the moving party to establish fraud by clear and convincing evidence).

Though Rule 60(b) generally imposes a one year limitation, a court's power to set aside a prior judgment, fraud upon the court, as alleged here, is not subject to that limitation. King v. First Am. Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002) (citing Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir.1995) ("Fraud upon the court should embrace 'only that species of fraud which does or attempts to, defile 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.'")). In order to sustain an independent action pursuant to Rule 60(b), however, a claimant must adequately allege a grave miscarriage of justice. United States

v. Beggerly, 524 U.S. 38, 46-47 (1998) ("Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata.") (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944)). Under Rule 60(b), the propriety of granting relief from judgment is committed to the district court's broad discretion. Fed. R. Civ. P. 60(b); see e.g., Schultz v. Commerce First Financial, 24 F.3d 1023 (8th Cir. 1994) (noting that while the determination is within the court's discretion, Rule 60(b) does "not give courts unlimited authority to fashion relief as they deem appropriate" (citing Doe v. Zimmerman, 869 F.2d 1126, 1128 (8th Cir.1989)), but that the rule "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances" (citing United States v. Young, 806 F.2d 805, 806 (8th Cir.1986) (per curiam), cert. denied, 484 U.S. 836 (1987))).

IV. DISCUSSION

A. Plaintiffs Have Not Adequately Pled Fraud on the Court Under Rule 60(b)(3)'s Savings Clause

1. Complaint, Exhibits, and Declassified Documents, Do Not Suggest Air Force Intent to Deliberately Misrepresent Truth or Commit Fraud

Despite Plaintiffs' allegations, a review of the complaint and the exhibits attached thereto, including the declassified documents, does not suggest that the Air Force intended to deliberately misrepresent the truth or commit a fraud on the court. Because a determination of what information should be kept confidential in the interest of national security involves predictive judgments about the potential future harm of premature disclosure, informed expertise and even intuition "must often control in the absence of hard evidence." Kaluse v. Blake, 428 F. Supp. 37,

38 (D.D.C. 1976). In all likelihood, fifty years ago the government had a more accurate understanding "on the prospect of danger to [national security] from the disclosure of secret or sensitive information" than lay persons could appreciate or than hindsight now allows. Halperin v. NSC, 452 F. Supp. 47 (D.D.C. 1978), aff'd 612 F.2d 586 (D.C. Cir. 1980). Plaintiffs take aim at the factual foundation of the military secret privilege, suggesting that concealing this accident investigation report constituted an unconscionable plan or scheme to improperly influence the Court such that the privilege resulted from an undeserving test case. But, 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), it is proper to defer on some level 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 v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978). "Even the most apparently innocuous [information] can yield valuable intelligence." Knight v. CIA, 872 F.2d 660, 663 (5th Cir. 1989).

Plaintiffs argue that nothing in the accident investigation report constitutes a military secret such that the claim of privilege was proper.[1] Instead, Plaintiffs surmise that the Air Force engaged in conscious-shocking fraud on the courts by misrepresenting the contents of the accident investigation report with the intent to deliberately trade on the trust with which the Court imbued the military in order to obtain a broad-sweeping military secrets privilege at the

[1] Plaintiffs, convinced that nothing in the accident investigation report would compromise the public interest, conjectured that this Court would be hard-pressed to find national security secrets lurking somewhere in the accident investigation report. Hrg. Tr. at 29.

dawn of the Cold War and insulate all manner of documents from judicial and public scrutiny. Hrg. Tr. at 26. In response, the Government submits that the apparent dearth of sensitive information in the accident investigation report and witness statements is not probative of whether its 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.159, 178 (1985), or whether the Air Force, operating on the basis of information and expertise that Plaintiffs and the Court lack, could have correctly reached that conclusion. D's Mot. at 20.

Specifically, the affidavit and claim of privilege by Secretary of the Air Force, Thomas K. Finletter, states that:

> the aircraft in question, together with the personnel on board, were engaged in a confidential 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.

Compl. at ¶ 14, Ex. C. From this, Plaintiffs deduce that only the mission and electronic equipment were confidential, but a broader reading of the affidavit suggests that beyond the mission itself, disclosure of technical details of the B-29 bomber, its operation, or performance would also compromise national security. The Secretary's claim of privilege also indicates that the purpose of such accident investigation reports is to ensure continued efforts at flying safety.[2]

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[2] "The report of investigation, together with all the statements of the witnesses, was prepared under regulations which are designed to insure the disclosure of all pertinent factors which may have caused, or which may have a bearing on, the accident in order that every possible safeguard may be developed so that precautions may be taken for the prevention of future accidents and for the purpose of promoting the highest degree of flying safety. These statements are obtained in confidence, and these reports are prepared for intra-departmental use only, with the view of correcting deficiencies found to have existed and with the view of taking necessary corrective measures or additional precautions based on the opinions and conclusions of the Board of Officers convened to investigate the accident. The disclosure of statements made by

Similarly, the affidavit taken by Judge General of the Air Force, Major General Reginald C. Harmon, characterizes the confidential nature of the accident investigation report more expansively. Major General Harmon's affidavit indicates that furnishing the requested documents would seriously hamper "national security, flying safety and the development of highly technical and secret military equipment." Compl. at ¶ 15, Ex. D.

Review of the accident investigation report indicates that though it offers no thorough exploration of the secret mission, it does describe the mission in question as an "electronics project" and an "authorized research and development mission." Compl. at Ex. I. Specifically, the report states that "[t]he projects which the 3150th Electronics Squadron were conducting require aircraft capable of dropping bombs and operating at altitudes of 20,000 feet and above." Id. It also provides a detailed account of the technical requirements imposed by the Air Force to remedy engine and mechanical difficulties. Id. The accident investigation report makes specific reference to Air Force technical orders geared to improving the functionality of the B-29 bombers, implementing "changes to the exhaust manifold assemblies for the purpose of eliminating a definite fire hazard" including installation of heat deflector shields "to prevent excessive heat from entering the accessory section," and making the aircraft safe for flight. Compl. at ¶ 33, Ex. I and J. These affidavits, reports, and orders implicate far more than the particulars of the secret equipment aboard that flight; they also suggest the need to preserve engineering technology, mechanical and operational data, and equipment usage for the safety and

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witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety." Compl. at Ex. C.

development of the Air Force fleet. Details of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security. For all these reasons, that the accident investigation report itself does not make plain the substance of those intelligence concerns does not suffice to support a conclusion that disclosure at that time would not have harmed national security or that in so asserting the privilege, the Air Force sought to defraud the Courts.[3]

2. The Accident Investigation Report Need Not Reveal Details of Secret Mission or Equipment to Constitute Military Secret

Even if, as Plaintiffs suggest, the accident investigation report contained no concrete data that would expose Air Force intelligence, hamper national security, or affect the public interest, sufficient cause for the Air Force's assertion of the military secrets privilege may have existed. To better amplify the contention that the Air Force sought to disguise its negligence, Plaintiffs cite a number of secondary sources that speak to the chronic mechanical and technical deficiencies of the B-29 bomber, catalog its role in World War II, and place the Air Force's

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[3] The Government argues that the Secretary of the Air Force and the Judge Advocate General of the Air Force were not officers of the Court, and did not owe integrity and impartiality to the Court as fiduciaries, but rather were mere affiants. D's Mot. at 5-6; Hrg. Tr. at 11. In response, Plaintiffs contend that the affiants were high-ranking officials, not merely witnesses, who owed an obligation to the Court to speak with veracity. Pl's Opp at 17; Hrg. Tr. at 18, 19. Adopting the Government's position would directly contravene the role contemplated in United States v. Reynolds for military officers; the military secrets privilege standard demands that only the head of the department with control over the matter lodge the formal claim of privilege following her/his personal consideration. Reynolds, 345 U.S. at 8. The Court depends on the experience, expertise, and truthfulness of the official lodging the military secrets privilege claim, such that the official must speak truthfully. In the instant case, the Court finds the affiants satisfy this burden.

developing technology within a historical framework.[4] In so doing, Plaintiffs place these matters of public record squarely at issue. To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and *matters of public record*. Churchill v. Star Enterprises, 183 F.3d 184, 190 (3d Cir. 1999) (emphasis added) (citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir.1993)); Rose v. Bartle, 871 F.2d 331, 339 n.3 (3d Cir.1989). See also 5A Charles A. Wright & 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.").

Despite the plain language of Rule 12(b), which requires conversion of a Rule 12(b) motion to a Rule 56 motion whenever a district court considers materials outside the pleadings, the Third Circuit and other appellate courts have held that certain narrowly defined types of material may be considered by the trial court without converting the motion to dismiss. See In re Rockefeller Ctr. Prop., Inc. Secs. Litig., 184 F.3d 280, 287 (3d Cir.1999) (citing In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir.1997) (A court can consider a "'document integral to or explicitly relied upon in the complaint." (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir.1996))). See also PBGC v. White Consol. Indus. 998 F.2d 1192, 1196

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[4] In addition to the accident investigation report, the affidavits, the District Court's orders, witness statements, and attorney-client correspondence, Plaintiffs also cite to Geoffrey Perret, Winged Victory: The Army Air Forces in World War II, 448 (1993) ("Winged Victory"); Wilbur H. Morrison, Point of No Return: The Story of the 20th Air Force 19 (1979) ("Point of No Return"); and Curtis E. LeMay and Bill Yenne, Superfortress: The B-29 and American Air Power 61-64, 70-71, 78 (1988) ("Superfortress").

(3d Cir. 1993) (A district court may examine an "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."). As the Third Circuit stated in In re Rockefeller, "the rationale for these exceptions is that 'the primary problem raised by looking to documents outside the complaint–lack of notice to the plaintiff–is dissipated '[w]here plaintiff has actual notice ... and has relied upon these documents in framing the complaint.'" 184 F.3d at 287. (citations omitted). Many other courts have considered matters of public record in ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) without converting the motion to one for summary judgment. See, e.g. In re Colonial Mortgage Bankers Corp., 324 F.3d 12 (1st Cir. 2003) (stating that while court generally may not consider material beyond the four corners of complaint when ruling on motion to dismiss without thereby converting the motion into one for summary judgment, narrow exception exists for documents whose authenticity is not disputed by parties, for official public records, for documents central to plaintiff's claim, and for documents sufficiently referred to in the complaint); Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999) (concluding that the court may consider, in addition to the pleadings, materials "embraced by the pleadings" and materials that are part of the public record); Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221 (D.C. Cir. 1993) (stating that matters of public record are fair game in adjudicating motions to dismiss for failure to state a claim, and that the court's reference to such matters does not convert motion to dismiss into motion for summary

judgment).[5] Naturally, Plaintiffs' challenge to the veracity of fifty-year-old military privilege claims requires some reliance on contemporary intelligence. Because Plaintiffs turn to numerous documents outside the four corners of the complaint in order to bring matters of public record to this Court's attention, the Court may consider those public documents and the factual considerations they bring to bear on the motion before it. To determine whether the Plaintiffs in this case have established fraud on the court, this Court will examine those facts that, in addition to averments in the complaint, exhibits, and the accident investigation report, the public record now unearths.

Among the facts now widely known about the Boeing B-29 bomber are the many mechanical and technical problems that plagued the propeller-driven plane, specifically its notoriously unreliable engines, which were famed for catching fire. See, supra, n.4. The accident investigation report concludes that engine failure caused the crash on October 6, 1948; the report also indicates that had the plane complied with the technical orders dated May 1, 1947, the accident might have been avoided. Compl. at Ex. I. It does not, as Plaintiffs point out, refer to any newly developed electronic devices or secret electronic equipment. Compl. ¶¶ 26, 32-34 & Exs. I & J. Yet, Plaintiffs exclude from their historical recitation that four years before the accident, in 1944, after bombing missions against Japanese targets, three American B-29 bombers were forced to land in Vladivostok, Russia, a town in the then Soviet Union. See

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[5] For a more complete analysis of those materials courts have considered on 12(b)(6) motions, see Kurtis A. Kemper, Annotation, *What Matters Not Contained in the Pleadings May Be Considered in Ruling on a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or Motion for Judgment on the Pleadings Under Rule 12(c) Without Conversion to Motion for Summary Judgment,* 138 A.L.R. Fed. 393, 1997 WL 475158 (1997).

Superfortress, supra at 166-168 (outlining the details of the emergency landing, detention of Air Force personnel, and confiscation of the planes); see also Point of No Return, supra at 85 (summarizing that in addition to these lost planes, three B-29's were shot down over Yawata, 10 others were lost, 95 airmen were dead or missing, and one crew bailed out near Khabarovsk); Von Hardesty, Made in the U.S.S.R., Air & Space Magazine, February/March 2001, available at http://www.airspacemag.com/ASM/Mag/Index/2001/FM/TU-4.html. (summarizing events in Vladivastok); Associated Press, How Soviets Copied America's Best Bomber During WWII (Jan. 25, 2001), available at http://www.cnn.com/2001/US/01/25/smithsonian.cold.war/ (same). The Soviet government released the crews but kept the planes and, between 1945 and 1947, used reverse engineering to build a copy of the B-29–the Tu-4 designed by Andrei Tupolev.[6] Point of No Return, supra, at 85-86. See also Made in the U.S.S.R, supra, at 2 (noting that this technology transfer gave the Soviets "an intercontinental bomber capable of striking New York City and the industrial heartland of the United States" in a fraction of the time needed to develop their own design). The replicas copied the B-29 almost exactly, including the fire-prone engines. Superfortress, supra, at 167 ("The Tu-4 was outwardly identical to the B-29...so faithful to the originals that the Soviets had many of the same technical problems."); Made in U.S.S.R., supra, at 12 ("Operational deployment of the Tu-4 brought a series of breakdowns and near disasters as the airplane encountered teething problems such as engine overheating, a glitch that mirrored the U.S. experience with the first generation of B-29's."). As a result, though "World War II began

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[6] The Smithsonian's accounts of the Tu-4 development are based largely on the writings of Leonid Kerber, who worked with Tupolev and specialized in radios and navigation instruments. His unofficial biography about Tupolev, Tupolev's Prison Workshop, is reprinted by the Smithsonian Institution Press as Stalin's Aviation Gulag (1996).

with the catastrophic failure of U.S. air defenses over Pearl Harbor and in the Philippines," the atomic attacks on Hiroshima and Nagasaki contributed to the war's end and were supposed to "usher in a time when a U.S. nuclear monopoly would restore America's strategic invulnerability;" that dominance was short-lived. Lester W. Grau & Jacob W. Kipp, Maintaining Friendly Skies: Rediscovering Theater Aerospace Defense, AEROSPACE POWER J. 3448 (July 1, 2002). Following the construction if its nuclear capable Tu-4, the U.S.S.R. used the B-29 reproduction to detonate its first atomic bomb in 1949. Id.

These facts might seem harmless decades after the Cold War began, but in Reynolds, the Supreme Court determined that as a matter of law, "[t]he occasion for the privilege is appropriate" if the court is satisfied, "from all 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." Reynolds, 345 U.S. 1, 10 (1953). The Court in Reynolds also took "judicial notice that this [was] a time of vigorous preparation for national defense." Id. at 11. In 1948, amid Communist paranoia, it is hardly shocking to contemplate an Air Force eager to protect from public view the accident investigation report that mentions modifications needed for the B-29, and by extension the Tu-4. By no means, will this Court draw firm conclusions as to military intelligence concerns in existence some fifty years ago. Rather, we will examine the events contemporaneous to the accident only in order to shed light on factors surrounding the Air Force's assertion of military privilege. It is at least conceivable that were the accident investigation report released, it might have alerted the otherwise unaware Soviets to a technical problem in the Tu-4 that the May 1, 1947 technical

order sought to remedy in the B-29.[7] Though the Plaintiffs argue that the Air Force deliberately hid its obvious negligence behind fraudulent affidavits, disclosure of this now seemingly innocuous report would reveal far more than the negligence Plaintiffs read; it may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike.[8] Pl's Opp. at 12. Viewed against this political and technical backdrop, it seems that the accident investigation report may have reasonably contained sufficient intelligence, if not about the secret equipment or mission, then about ongoing developments in Air Force technical engineering, to warrant an assertion of the military secrets privilege.

B. Plaintiffs Have Not Sufficiently Established a Claim Under Rule 60(b)(6)

Rule 60(b)(6) authorizes courts to grant post-judgment remedies for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). Both the Supreme Court and the Third Circuit have recognized that Rule 60(b)(6) permits an independent action for fraud 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) (holding that in an action to set aside a settlement between the claimants and the government, the alleged failure by the government to make full disclosures failed to satisfy the requirements of an independent action for relief from the judgment). "If relief may be obtained through an independent

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[7] Coincidentally, though the accident investigation report mentions little detail of the secret mission and electronic equipment on that flight, the Court notes that the B-29 also saw military service two years later. From 1950 to1953 in Korea, electronic weapons, or radio controlled bombs known as Razons, were dropped against bridges. Boeing World Headquarters, Post-War Developments: 1946-1956, at http://www.boeing.com/history/boeing/postwar.html.

[8] The War Department also asked returning airmen interned in the Soviet Union to keep silent about their time there due to the emerging friction between the Soviets and the Allies. Made in the U.S.S.R., supra, at 3.

action...where the most that may be charged against the Government is failure to furnish relevant information that would *at best* form the basis for a Rule 60(b)(3) motion, the strict 1-year time limit on such motions would be set at naught." Id. at 46 (emphasis added). In the complaint, Plaintiffs do not assert an independent action on the basis of fraud by one party upon another under Rule 60(b)(6). Pl's Opp. at 19-21; Reply at 6. Not until the Memorandum in Opposition to the Government's Motion to Dismiss do Plaintiffs submit that the government sought to defraud the widows by claiming the military secrets privilege. Plaintiffs fail to set forth allegations in the complaint amounting to gross injustice to warrant relief. Reply at 7 (citing, for example Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A., 117 F.3d 655, 663 (2d Cir. 1997) (holding that plaintiff who neither adequately established fraud nor escaped responsibility for a voluntary agreement could not obtain relief from the judgment); George P. Reintjes Co. v. Riley Soker Corp., 71 F.3d 44, 48-49 (1st Cir. 1995) ("[W]hile the notion that it would be 'against conscience' to let a particular judgment stand may in some instances serve to tip what would otherwise be ordinary fraud into the special category that can invoke a court's inherent powers to breach finality, [the plaintiff] has failed to so move us here (citing Marshall v. Holmes, 141 U.S. 589, 595 (1891), Hazel-Atlas Glass, 322 U.S. at 244-45, 64)). But, because the independent action under Rule 60(b)(3) fails, leaving Plaintiffs with no viable claim against the Government, the Court will entertain a discussion of the merits of Plaintiffs' Rule 60(b)(6) arguments out of an abundance of caution.

1. Settlement Agreement Did Not Constitute a Grave Miscarriage of Justice In Support of A Claim for Relief Under Rule 60(b)(6)

The Government correctly argues that the Plaintiffs cannot undo the careful and prudent decision to settle their claims and relitigate issues they voluntarily put to rest more than fifty years ago. In Bandai Am. Inc. v. Bally Midway Mfg. Co., 775 F.2d 70 (3d Cir 1985), the Third Circuit recognized that under Rule 60(b)(3), an attorney's deliberate attempt to mislead the court may suffice to reopen the judgment. Bandai, 775 F.2d at 73 (citing Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 245-46 (1944), questioned on other grounds, Standard Oil Co. of Cal. v. United States, 429 U.S. 17 (1976)). But, the Court of Appeals also noted that alleged misconduct or perjury does not prevent the moving party from "fully and fairly presenting [its] case" unless the "misrepresentations relied up on were clearly material to the outcome of the litigation." Id. (citing Publicker v. Shallcross, 106 F.2d 949 (3d Cir 1939), cert. denied, 308 U.S. 624, Schum v. Bailey, 578 F.2d 493, 499 (3d Cir. 1978); Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir.1983). "The judicial system's interest in finality and in efficient administration dictates that, absent extraordinary circumstances, litigants should not be permitted to relitigate issues that they have already had a fair opportunity to contest." Skretvedt v. E.I. DuPont De Nemours, 372 F.3d 193, 204 (3d Cir.) (citations omitted). Settlement, as the Government rightly concludes, is a pragmatic decision made daily by civil litigants after a measured evaluation of the merits of their claims notwithstanding foreseeable obstacles. Hrg. Tr. at 14. See United States v. Bank of N.Y., 14 F.3d 756 (2nd Cir.1994) (noting that when party makes the deliberate, strategic choice to settle, she cannot be relieved of such choice merely because of her own incorrect assessment); Schultz, 24 F.3d at 1024 ("When a party voluntarily

accepted the earlier decision, its burden 'is perhaps even more formidable than if it had litigated the claim and lost.'" (citing United States v. Fort Smith, 760 F.2d 231, 234 (8th Cir.1985)). Altogether absent from the pleadings in this case is a sufficient showing of egregious conduct by any Air Force representatives. As such, this Court cannot, in good conscience, find a gross miscarriage of justice or grant Plaintiffs the relief from judgment they seek.

2. The Supreme Court Contemplated Other Discovery Options For Plaintiffs

It is undisputed that in Reynolds, the Supreme Court left other avenues of discovery open to Plaintiffs, including examination of the surviving crew members and the right to challenge the claim of military privilege by an adequate showing of necessity. Reynolds, 345 U.S. 1, 12 (1953). More generally, the Federal Rules of Civil Procedure provide, in pertinent part, that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). It is widely recognized that the federal rules allow broad and liberal discovery. Pacitti v. Macy's, 193 F.3d 766, 777-78 (3d Cir.1999) (citations omitted). In his affidavit, the Judge Advocate General offered the testimony of Air Force military personnel who survived the crash, provided at the Government's expense. Compl. at Ex. D. Those witnesses could "testify regarding all matters pertaining to the cause of the accident, except as to facts and matters of a classified nature." Id. In order to refresh their memories, the witnesses were free to rely on those confidential Air Force records, including the statements witnesses made to the Aircraft Accident Investigating Board. Id. And, though Plaintiffs argue that they should not

have been required to conduct discovery independent of the accident report, this argument is contingent upon a finding of fraud which is absent here. Moreover, as Plaintiffs concede, they only partially followed the Supreme Court's guidance by deposing the surviving witnesses. Reynolds, 345 U.S. at 11-12; Hrg. Tr. at 21. They did not, as suggested, revisit the question of military secrets privilege by offering the requisite showing of necessity, but instead, made the calculated choice to settle their claims. Id. The litigation reached its close by virtue of a strategic decision by Plaintiffs that should not now be revisited.

V. CONCLUSION

For all these reasons, it is hereby ORDERED that the Motion to Dismiss (Doc. No. 6) is GRANTED. The Clerk of Court is instructed to statistically close this matter.

BY THE COURT:

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Legrome D. Davis, J.