

**EXHIBIT A**

Redacted Version of Court's 3/28/12  
Memorandum Opinion to be posted to the public docket.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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VENANCIO AGUASANTA ARIAS,	)	
<u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 01-1908 (RWR)
v.	)	
	)	Consolidated with Civil Action
DYNCORP, <u>et al.</u> ,	)	No. 07-1042 (RWR) for case
	)	management and discovery
Defendants.	)	purposes
	)	
	)	UNDER SEAL
	)	

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MEMORANDUM OPINION

Plaintiffs, citizens and domiciliaries of Ecuador, brought an action against the defendants due to injuries allegedly arising from defendants' contract with the U.S. government to eradicate cocaine and heroin farms by spraying pesticides over Colombia. The DynCorp defendants have moved for reconsideration of the Order compelling production of non-spray flight line data or, alternatively, for certification of an interlocutory appeal, arguing that the security risks of releasing the data outweigh the data's relevance to the plaintiffs' case. The plaintiffs oppose the motion, asserting that Dyncorp failed to show that justice requires reconsideration or that certification of an interlocutory appeal is warranted. Because justice does not require reconsideration, and the defendants have not identified substantial grounds for a difference of opinion on any

controlling question of law providing a basis to certify an appeal, the defendants' motion will be denied.

#### BACKGROUND

Under an initiative known as "Plan Colombia," DOS hired the defendants to "assist[] in illicit drug crop eradication by spraying fumigants from airplanes onto cocaine and heroin poppy plantations in Colombia." Arias v. DynCorp ("Arias I"), 517 F. Supp. 2d 221, 223 (D.D.C. 2007). The plaintiffs claim that despite targeting Colombia, the aerial spraying unleashed one "fumigant that is harmful to humans, animals, and plants other than cocaine and opium poppies" onto the plaintiffs' homes and lands in Ecuador. Arias I, 517 F. Supp. 2d at 223-24. Those residing in the affected areas allegedly were forced to flee, id. at 224, after the fumigations severely damaged them, their "livestock, vegetation, and water[,]". Arias v. DynCorp (Arias II"), 738 F. Supp. 2d 46, 49 (D.D.C. 2010). The plaintiffs, approximately 3,200 citizens and residents of Ecuador, brought claims against the defendants under the Alien Tort Claims Act and for various international and domestic common law torts. Arias II, 738 F. Supp. 2d at 49.

The plaintiffs moved under Federal Rule of Civil Procedure 37 to compel production of, among other things, flight location data of "operations [conducted] near the Ecuadorian border." (Pls.' Second Mot. to Compel Discoverable Information ("Pls.'

Mot.") at 1, 10.) They argued that such data would corroborate eyewitness accounts of "Plan Colombia spray planes entering Ecuador" and of "spraying along the border in instances where DynCorp's data reflects no spraying." (Id. at 11-12.) They also expected the flight line data to show "that DynCorp violated Ecuadorian airspace[] in violation of international law[,]"" thereby "preclud[ing] DynCorp's government contractor defense." (Id.)

The defendants opposed the motion to compel on several grounds. First, they reported having already "produced thousands of [documents] . . . disclos[ing] information about every spray flight in Southern Colombia between 1999 and 2008[,] including latitude and longitude data, the amount of herbicide sprayed, any problems encountered, and other pertinent facts regarding the spray application." (Defs.' Opp'n to Pls.' Mot. ("Defs.' Opp'n") at 9.) The opposition also reflected DOS's instruction "not to produce the non-spray flight-line information" in light of the "very real" "dangers to pilots in flight from and to the forward operating bases[.]" (Id. at 10.) Finally, the defendants argued that the requested flight lines "would be wholly unrelated to the plaintiffs' legal claims against the DynCorp defendants - which turn instead on the location of the spraying of herbicide that allegedly injured plaintiffs and/or damaged their property." (Id. at 12 (emphasis removed).) The defendants concluded that,

at best, "such flight data . . . would directly contradict . . . eyewitness accounts [by] demonstrat[ing] that while some witnesses may have occasionally seen planes over Ecuador, the planes were not in fact spraying herbicide." (Id. at 11.)

Magistrate Judge Robinson denied the plaintiffs' motion to compel flight line data for lack of relevance at a hearing held on October 8, 2009.<sup>1</sup> (Mot. Hr'g Tr., Oct. 8, 2009 a.m. at 34:23-25) ("[T]he Court finds that the plaintiffs have not demonstrated that the information which is sought is relevant.") She "largely" based her determination (id. at 34:20-22) upon the defendants' oral and written representations that "[w]here these planes fly really is not relevant at all[;] [i]t's only where they spray" (id. at 26:23-25). At the hearing, the defendants disputed having removed unintentional spray events from the spray data it disclosed to the plaintiffs,<sup>2</sup> and

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<sup>1</sup> On October 14, 2009, Magistrate Judge Robinson entered a minute order denying the plaintiffs' motion to compel "[f]or the reasons set forth on the record at the [October 8, 2009] hearing[.]"

<sup>2</sup> The plaintiffs argued that the aerial spraying reports omit events that injured them by excluding missions during which the spraying mechanism malfunctioned. (Mot. Hr'g Tr., Oct. 8, 2009 a.m. at 5:13-18, 6:19-21.) For example, the plaintiffs cited the so-called "Lehr memorandum," a document stating that the defendants' quality control ("QC") process involves removing from spray reports "events such as stuck spray switch events, sprayed chemical dumps, high altitude test spray events, spray events that do not conform to spray jobs or paths, and any spray sputter events less than 10 meters in length with zero flow rate . . . to ensure that" only "intentional viable target spray events" are reported. (Id. at 7:4-11; see also id. at 23:13-15.)

reiterated that DOS owns the records and opposes their disclosure for security reasons.<sup>3</sup> (See, e.g., id. at 19:9-15, 19:19-21, 25:22-25, 26:1-7.) The defendants asserted, for example, that Plan Colombia "pilots are in constant danger" (id. at 21:11-12), and that the flight line data reveal pilots' "maneuvering" to evade detection of lines of ingress and egress. (Id. at 26:4; see also id. at 25:25, 26:2-9.)

The plaintiffs filed objections to Magistrate Judge Robinson's ruling, describing two ways in which the records are relevant. (Pls.' Obj'ns to the Magistrate Judge's Order on Pls.' Mot. ("Pls.' Obj'ns") at 6.) First, [REDACTED]

[REDACTED] (Id.)

Further, they argued that the flight data would demonstrate DynCorps's violation of Ecuadorian airspace and therefore of international law. (Id.)

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The defendants countered that they had "produced raw spray data before QC'ing, and post-QC spray data" (id. at 24:24-25, 23:20-23), and that it is impossible to excise such data until after it has been collected. (Id. at 24:5-8.)

<sup>3</sup> During the hearing, the defendants' counsel stated that the defendants' contract with DOS governs the release of flight line records. (Mot. Hr'g Tr., Oct. 8, 2009 a.m. at 30:5-10.) Magistrate Judge Robinson then stated that "the Court has no authority to direct the State Department to do anything in this litigation[.]" (Id. at 32:3-6.)

The defendants responded, arguing again that the flight lines are irrelevant. (Defs.' Opp'n to the Pls.' Obj'ns ("Defs.' Response") at 14 ("[T]here is no nexus between their claims of improper non-spray border crossings and their allegations of damage caused by herbicide spraying and thus no nexus between the requested non-spray flight lines and the legal claims or defenses asserted in this case.")) The defendants also repeated that DOS must expressly approve releasing the data but had barred its production to avoid risking pilots' "deaths or injuries[.]" (Id. at 2.) And again, the defendants cited the security risks attendant to releasing the data. (Id. at 15.) However, [REDACTED]

[REDACTED] (id. at 12), and newly argued that the protective order was insufficient to protect the data. (Id. at 7.)

This court considered all of the above arguments before sustaining the plaintiffs' objections to the magistrate judge's ruling at a hearing held on April 30, 2010. The court stated that

the flight location records could tend to corroborate or dispute accounts from the pilots or accounts from the victims or accounts from potential eyewitnesses about the spraying that's alleged here. So, I do find that the information sought is relevant, and the objection then is sustained and the motion to compel those items that are the subject of the objection is granted. . . . [P]roduction [will] take place in accord with

the terms of the protective order as might be needed. That order is in place in part to keep disclosure limited and to protect against DynCorp's expressed fear in its papers of sensitive information[] . . . being produced to narco-terrorists.

(Hr'g Tr., Apr. 30, 2010 a.m. at 7:4-15.)

The defendants now move for reconsideration of this court's oral ruling compelling production of flight line data or, in the alternative, petition for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). (Defs.' Mot. for Reconsideration ("Defs.' Mot.") at 1.) The defendants argue that the court clearly erred by not requiring the plaintiffs to make the enhanced showing of relevance described in Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984) ("[C]ertain delineated categories of documents may contain sensitive data which warrants a more considered and cautious treatment.") (emphasis added), a FOIA case. (Def.'s Mot. at 6, 8.) To support the claim that the Protective Order does not adequately shield the flight line data from disclosure, the defendants cite a DOS official who said [REDACTED]

[REDACTED] (Defs.' Mot., Ex. A, Decl. of Paul O'Sullivan ("O'Sullivan Decl.") at 10.) The defendants' motion for reconsideration otherwise recapitulates some of the same arguments previously presented to the magistrate judge and this



court. (See, e.g., id. at 2, 5, 9-12; compare, e.g., Defs.' Opp'n at 10, 12; Mot. Hr'g Tr., Oct. 8, 2009 a.m. at 19:19-21, 21:11-12, 25:22-25; Defs.' Response at 2-3, 7, 14-15.)

The plaintiffs opposed the motion as identifying no new law, new evidence, or clear error that would justify disturbing the court's ruling. (Pls.' Opp'n to Defs.' Mot. ("Pls.' Opp'n") at 4-5.) They maintain that the data are relevant (id. at 7-8), dispute that the newly-raised Friedman theory is apposite (id. at 5-6), and challenge as inadequate the defendants' request for an interlocutory appeal (id. at 16-21).

#### DISCUSSION

##### I. RECONSIDERATION

Courts may reconsider any interlocutory decision such as a discovery ruling, see, e.g., Abdulmalik v. Obama, 802 F. Supp. 2d 1, 5-6 (D.D.C. 2011) (denying motion to reconsider order denying leave to obtain additional discovery), "at any time before the entry of a judgment adjudicating . . . all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). See also DL v. D.C., 274 F.R.D. 320, 328 (D.D.C. 2011) (denying motion to reconsider discovery ruling under Rule 54(b)); Husayn v. Gates, 588 F. Supp. 2d 7 (D.D.C. 2008) (granting motion to reconsider discovery ruling under Rule 54(b)). "[R]elief upon reconsideration . . . is available 'as justice requires.'" Johnson-Parks v. D.C. Chartered Health Plan, 806 F. Supp. 2d 267, 268 (D.D.C. 2011)

(internal quotation marks and citation omitted). Under this standard, the court considers "whether [it] patently misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred." Negley v. FBI, Civil Action No. 03-2126 (GK), 2011 WL 3836461, at \*2 (D.D.C. Aug. 31, 2011) (internal quotation marks and citation omitted). "However, in order to promote finality, predictability, and economy of judicial resources, as a rule [a] court should be loathe to [revisit its own prior decisions] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." Pueschel v. Nat'l Air Traffic Controllers' Ass'n, 606 F. Supp. 2d 82, 85 (D.D.C. 2009) (alteration in original) (internal quotation marks and citation omitted). Nor is a motion for reconsideration to be used as an opportunity to rehash arguments previously made and rejected. Michilin Prosperity Co. v. Fellowes Mfg. Co., Civil Action No. 04-1025 (RWR), 2006 WL 3208668, at \*1 n.1 (D.D.C. Nov. 7, 2006) (stating that the plaintiff's "rehashed arguments . . . provide no justification for reconsidering [an earlier] [o]pinion"). "[W]here litigants have once battled for the court's decision, they should [not] be . . . permitted[ ] to battle for it again." Pueschel, 606 F. Supp. 2d at 85

(alterations in original) (internal quotation marks and citation omitted).

The defendants have not shown that the April 30, 2010 ruling resulted from any misunderstanding, or exceeded the scope of the parties' arguments, or failed to consider information presented. See Negley, 2011 WL 3836461, at \*2. To the contrary, the transcript reflects the court's consideration of the relevance of the flight line data and the security risks the defendants have repeatedly articulated and rehash here.<sup>4</sup> (Hr'g Tr., Apr. 30, 2010 a.m. at 6:19-25, 7:1-15; see also Defs.' Opp'n at 10; Defs.' Response at 2, 15; Mot. Hr'g Tr., Oct. 8, 2009 a.m. at 19:9-15, 26:1-7.) In light of these risks, the ruling ordered production but required that it comply with the Protective Order. (Hr'g Tr., Apr. 30, 2010 a.m. at 7:11-12.) See also Friedman, 738 F.2d at 1344 ("No great outcry has arisen that information thus restricted has been leaked, or put to improper uses, by attorneys who are sworn officers of the court. The potential harm to the government is minimal when appropriate precautions are taken.") (internal quotation marks and citation omitted).<sup>5</sup> The court

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<sup>4</sup> The defendants' insistence that the non-spray flight line data is irrelevant since it would only contradict eyewitness testimony that spraying occurred misses the point. The data could show that spray planes were in locations the eyewitnesses described. Whom to believe regarding whether spraying occurred is a quintessential jury question.

<sup>5</sup> It bears noting that the plaintiffs have offered to supplement the protective order by complying with additional

evaluated and balanced the competing interests before reaching its conclusion.

The defendants' motion nonetheless reargues the risks posed by producing the data. There is no dispute that groups like FARC pose serious dangers to pilots in the eradication spraying program. But the shortcoming of the motion lies beyond that. The motion begins and ends with the assumption that FARC and narco-terrorists will receive disclosed non-spray flight line data. The only support offered for the assumption is pure speculation -- e.g., one sentence of one paragraph of a DOS official's declaration that [REDACTED]

[REDACTED]

(O'Sullivan Decl. at 10); one sentence of a letter from another DOS official that dissemination of flight line data could aid the cause of international terrorist organizations (Defs.' Mot., Ex. B at 8); one sentence of one paragraph of a pilot's declaration that he believes that releasing the data will increase the risk of enemies getting the data (Defs.' Reply, Ex. A ¶ 11). This speculation does nothing to undermine the court's earlier assessments.

Neither have the defendants identified any "controlling or significant" legal changes warranting reconsideration, Negley,

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security measures to prevent release of the data to unintended parties. (See Pls.' Opp'n at 9-10.)

2011 WL 3836461, at \*2, as their lead case, Friedman, was decided years ago in 1984. A motion to reconsider is not "a vehicle for presenting theories or arguments that could have been advanced earlier." Clay v. D.C., Civil Action No. 03-466 (SBC), 2005 WL 1378768, at \*1 (D.D.C. June 6, 2005). Here, the defendants' belated assertion of the plaintiffs' failure to meet a heightened standard of relevance could -- and should -- have been squarely presented to the court before.<sup>6</sup> (Compare Defs.' Reply at 2 n.1

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<sup>6</sup> Even if the argument were timely, it is not clear that Friedman requires an enhanced showing here. To begin with, the Friedman court distinguished between FOIA cases and discovery disputes. It observed that "information unavailable under the FOIA is not necessarily unavailable through discovery. . . . [T]he district court may consider [a FOIA exemption] as congressional underscoring of the government's interest in protecting sensitive investigatory information." Friedman, 738 F.2d at 1344-45 (emphasis added). Friedman added:

In the FOIA context, the requesting party's need for the information is irrelevant; the most urgent need will not overcome an applicable FOIA exemption. In the discovery context, when qualified privilege is properly raised, the litigant's need is a key factor. Whether the information is disclosed depends on the relative weight of the claimant's need and the government's interest in confidentiality.

Id. at 1344. Given these differences, even "information in government documents [subject to FOIA] exempt[ions is] . . . not automatically . . . privileged within the meaning of Rule 26(b)(1) and thus not discoverable in civil litigation." Id. The Friedman court therefore concluded that "[i]t is unsound to equate the FOIA exemptions and similar discovery privileges." Id. Further, though statutory privileges "may have some application to discovery[.]" id., the defendants have not asserted any such privilege here. In any event, none of the defendants' citations to FOIA caselaw constitutes new law; rather, each is merely newly advanced. (See Defs.' Mot. at 8-9.) The same is true of various DOS employees' declarations which,

(citing the defendants' earlier arguments in favor of only a "particularized" showing of relevance, and DOS's earlier letter implying that one need show only a "particular or substantial need" for the data to "justify the dangers inherent in the production of these materials".) Accordingly, no error infected the decision to compel the production of flight line data on the basis of a satisfactory showing of relevance, and no manifest injustice will result from compliance. (See Defs.' Mot., Ex. B, Att. 2 at 2 (reflecting DOS vow to limit what it asks DynCorp to redact, including information that is irrelevant to this litigation).) The defendants have not established that justice requires reconsideration.

## II. INTERLOCUTORY APPEAL

The defendants request that any order denying reconsideration be stayed and that the issue of "how courts should balance . . . national security concerns against judicial rules of discovery" be certified under 28 U.S.C. § 1292(b) for interlocutory review. (Defs.' Mot. at 15.) Such relief is granted rarely and only under "exceptional circumstances." Al Magaleh v. Gates, 620 F. Supp. 2d 51, 54 (D.D.C. 2009). The petitioner "must meet a high standard to overcome the strong

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as newly advanced rather than newly available evidence, are not proper bases for reconsideration. (See, e.g., Defs.' Mot., Ex. C, Benita Williams Decl.; Defs.' Notice of Filing of Supp'l Decl., Ex. A, Margaret Grafeld Decl.)

congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." Graham v. Mukasey, 608 F. Supp. 2d 56, 57 (D.D.C. 2009) (internal quotation marks and citation omitted). To grant interlocutory review, the "district court must certify that the order [at issue] involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co., 597 F. Supp. 2d 120, 121 (D.D.C. 2009) (internal quotation marks and citation omitted). A "question of law is an abstract legal issue or what might be called one of 'pure' law, matters the court of appeals can decide quickly and cleanly without having to study the record." Elkins v. D.C., 685 F. Supp. 2d 1, 8 n.2 (D.D.C. 2010) (some internal quotation marks and citation omitted). In turn, a controlling question of law "would require reversal if decided incorrectly or . . . could materially affect the course of litigation with resulting savings of the court's or the parties' resources." Feinman v. FBI, Civil Action No. 09-2047 (ESH), 2010 WL 962188, at \*1 (D.D.C. Mar. 15, 2010). The defendants must "do more than show continued [or even vehement] disagreement with the trial court's decision." Graham, 608 F. Supp. 2d at 57 (citation omitted). They must articulate "an

exceptional circumstance . . . which warrants an interlocutory appeal." Fed. Election Comm'n v. Club for Growth, Inc., Civil Action No. 05-1851 (RMU), 2006 WL 2919004, at \*3 (D.D.C. Oct. 10, 2006).

The defendants have not identified any "split in this district or this circuit regarding any controlling issue of law in this case[.]" Graham, 608 F. Supp. 2d at 57; see also Nat'l Cmty., 597 F. Supp. 2d at 122. (Compare Defs.' Mot. at 8 with Pls.' Opp'n at 19.) Such a split might reflect substantial ground for a difference of opinion concerning balancing a party's interest in relevant discovery with the government's interest in confidentiality. The defendants' argument that appealing the ruling denying reconsideration "may materially advance the ultimate termination of the litigation" is similarly unavailing. (See Defs.' Mot. at 15-16.) Any appeal will almost certainly prolong both the discovery period and the resolution of the litigation. (See Pls.' Opp'n at 20-21.) See also Chennareddy v. Dodaro, Civil Action No. 87-3538 (EGS), 2010 WL 3025164, at \*2 (D.D.C. July 22, 2010) ("Allowing immediate appeal . . . would not materially advance the ultimate termination of the litigation. In fact, the opposite is more likely true: allowing an immediate appeal of this discovery issue would likely only cause further delay to this case that has already been pending for over twenty years.") "[T]hough interesting, the



[defendants'] arguments do not satisfy the[ir] heavy burden" to demonstrate exceptional circumstances warranting immediate appeal. Fed. Election Comm'n, 2006 WL 2919004, at \*3.

### III. SUMMARY JUDGMENT

"The D.C. Circuit has stated that 'decision by summary judgment is disfavored when additional development of facts might illuminate the issues of law requiring decision.'" Bynum v. D.C., 215 F.R.D. 1, 2 (D.D.C. 2003) (quoting Nixon v. Freeman, 670 F.2d 346, 362 (D.C. Cir. 1982)). For example, in McWay v. LaHood, 269 F.R.D. 35, 36 (D.D.C. 2010), the court denied without prejudice the defendant's motion for summary judgment, and denied as moot the plaintiffs' request to strike certain exhibits filed in support of the motion, before "discovery [wa]s complete, and because the . . . plaintiff [wa]s entitled to obtain [outstanding] discovery." It would be improper to entertain prematurely any motion for summary judgment to which undisclosed discovery applies. See Breen v. Peters, 474 F. Supp. 2d 1, 7 (D.D.C. 2007) ("Often, summary judgment motions are premature until all discovery has been completed.") (internal quotation marks, alteration, and citation omitted). Here, as in McWay, certain discovery is yet to be disclosed.

Further, "[i]t is well established that district courts enjoy broad discretion when deciding [matters of] case management[.]" Florida v. United States, Civil Action No.

11-1428 (CKK-MG-ESH), 2011 WL 5114811, at \*3 (D.D.C. Oct. 28, 2011) (citing In re Vitamins Antitrust Class Actions, 327 F.3d 1207, 1210 (D.C. Cir. 2003)); accord Mica Saint-Jean v. D.C. Pub. Sch. Div. of Transp., Civil Action No. 08-1769 (D.D.C. May 11, 2009) (order) ("A district court has wide discretion over its case-management decisions[.]").) Since the defendants' pending dispositive motions all seek summary judgment on some or all of the plaintiffs' claims, the motions will be construed as an omnibus motion for summary judgment spread on the docket, and all except the earliest-filed will be administratively closed.

CONCLUSION

The defendants have failed to demonstrate that justice requires reconsideration of the April 30, 2010 Order or that an interlocutory appeal is warranted. A separate order accompanies this memorandum opinion.

SIGNED this 28<sup>th</sup> day of March, 2012.



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RICHARD W. ROBERTS  
United States District Judge