Redacted Version

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Venancio Aguasanta Arias, *et al.*, Plaintiffs, v. DynCorp, *et al.* Defendants.	Case Number: 1:01cv01908 (RWR-DAR)
Nestor Ermogenes Arroyo Quinteros, *et al.*, Plaintiffs, v. DynCorp, *et al.* Defendants.	Case Number: 1:07cv01042 (RWR-DAR) (Cases Consolidated for Case Management and Discovery)

DEFENDANTS' OPPOSITION TO THE PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S OCTOBER 14, 2009 ORDER ON PLAINTIFFS' SECOND MOTION TO COMPEL DISCOVERABLE INFORMATION

The defendants in the above-captioned cases (the "DynCorp defendants") hereby oppose the plaintiffs' Objections filed in response to Magistrate Judge Robinson's October 14, 2009 Order denying plaintiffs' motion to compel production of documents disclosing pilot names and the flight paths of spray planes during periods when they were not spraying herbicide. Plaintiffs' practice of repetitive objections to the Magistrate Judge's discovery rulings (to date, plaintiffs have filed objections to every one of the Magistrate Judge's substantive rulings) is directly contrary to the purposes served by Magistrate Judges in improving court efficiency and demonstrates a disregard for the deference to which the Magistrate Judge's rulings are entitled.

The Magistrate Judge's October 14, 2009 Order denying plaintiffs' motion to compel was neither clearly erroneous nor contrary to law and should be affirmed.

As DynCorp explained in its briefing and in oral argument before the Magistrate Judge, the U.S. Department of State ("DOS") – pursuant to the terms of its 1998 and 2005 contracts with DynCorp – expressly directed DynCorp not to produce pilot names or non-spray flight paths because of the significant danger that such production could result in the deaths or injuries of contractor, DOS and Colombian personnel involved in the fight against international narco-traffickers who produce and sell cocaine and heroin. (DOS's grounds for refusing authorization to DynCorp to provide the requested information are set forth in a September 4, 2009 letter that was submitted to the Magistrate Judge and is also attached hereto as Ex. A).

In addition, in opposing plaintiffs' motion to compel, DynCorp specifically rebutted the factual arguments raised by plaintiffs as to the alleged relevancy of the requested information. DynCorp argued that plaintiffs' motion should be denied because plaintiffs had not provided "a particularized need for pilot names and non-spray locations which should trump the DOS security concerns."[1]

In their Objections, the plaintiffs notably abandon the factual arguments and documents that they raised before the Magistrate Judge to support their claims of the relevancy of pilot names and non-spray flight paths – because DynCorp demonstrated that they were without basis. Plaintiffs now rely instead on new arguments and new documents. These newly proposed bases for plaintiffs' motion to compel are also without merit and, in any event, should have been presented by plaintiffs to the Magistrate Judge in the first instance. Plaintiffs cannot demonstrate

[1] Defendants' Opposition to Plaintiffs' Second Motion to Compel, filed on September 4, 2009), at 2 ("Defs.' 9/4/09 Opp.") (ECF No. 137 in *Arias*; ECF No. 99 in *Quinteros*).

that the Magistrate Judge committed clear error in her discovery ruling by presenting the District Court with different arguments to support their same discovery motion.

INTRODUCTION AND BACKGROUND FACTS

I. The Standard for Review of a Magistrate Judge's Ruling

Magistrate Judge Robinson's October 14, 2009 Order denying plaintiffs' motion to compel is a nondispositive ruling, governed by Fed. R. Civ. P. 72(a) and LCvR 72.2(c) (both permitting Magistrate orders to be modified only if "clearly erroneous or contrary to law"). "[T]he magistrate judge's decision is entitled to great deference unless it is clearly erroneous or contrary to law, that is, if on the entire evidence, the court is left with the definite and firm conviction that a mistake has been committed." *Page v. Pension Benefit Guar. Corp.*, 498 F. Supp. 2d 223, 225 (D.D.C. 2007) (Roberts, J.) (internal citations omitted); *see also Gluck v. Ansett Australia Ltd.*, 204 F.R.D. 217, 218 (D.D.C. 2001) (Roberts, J.) (same).

In light of this stringent standard, the Court has made clear that "[p]arties must take before the magistrate, not only their best shot, but all of their shots." *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 84, 94-95 (D.D.C. 2009). As the Court has explained:

> The purpose of the Federal Magistrate's Act is to relieve courts of unnecessary work. It would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate. Common sense and efficient judicial administration dictate that a party should not be encouraged to make a partial presentation before the magistrate on a major motion, and then make another attempt entirely when the district judge reviews objections to an adverse recommendation issued by a magistrate.

Aikens v. Shalala, 956 F. Supp. 14 (D.D.C. 1997) (citations and internal quotation marks omitted); *see also Students against Genocide v. Department of State*, 257 F.3d 828, 834 n.10 (D.C. Cir. 2001) ("Issues raised for the first time in objections to the magistrate judge's recommendations are deemed waived.") (citation omitted)). Where arguments "*could have* been

presented earlier to the Magistrate Judge" they "are an improper basis for [an] objection." *Klayman*, 628 F. Supp. 2d at 95.[2]

II. DynCorp's Production of Documents to Plaintiffs

The DynCorp defendants have produced to the plaintiffs in these cases nearly 400,000 pages of responsive documents, thousands of computerized graphic files, and 31 video files, following close communications and coordination with the DOS and specific approval from DOS to produce those materials, as set out in detail in prior filings made to this Court. *See e.g.*, Defendants' Motion for Enlargement of Discovery Deadlines, filed on June 11, 2009 (ECF No. 111 in *Arias*; ECF No. 73 in *Quinteros*) at 7-8, 11-12, 16-17 (outlining the central roles of the DOS in all phases of discovery in these cases). The involvement of the DOS has been essential because DOS specifies all of the work that its contractor DynCorp will perform in the Republic of Colombia and closely supervises that work while it is underway, requiring constant reports from DynCorp about its work. Further, under the terms of the operative 1998 and 2005 contracts with the DOS, all documents generated or received by DynCorp must be considered as "U.S. government records" and may not be released to any third party without the express approval of

[2] *See also, e.g., Campbell v. Cal. Dept. Corr. and Rehab.*, No. Civ. 07-1419, 2009 WL 2394364, at *1 (E.D. Cal. Aug. 4, 2009) ("Motions for reconsideration and objections to a Magistrate Judge's order are not the place for a party to make new arguments and raise facts not addressed in his original brief.") (citation omitted); *Weston v. Weston*, No. 08-CV-0365, 2009 WL 1010662, at *5 (N.D. Okla. April 13, 2009) ("A party may not treat objections to a magistrate judge's report and recommendation as an opportunity to raise new arguments that could have been presented to the magistrate judge."); *Jones v. Sweeney*, No. 1:04-CV-6214, 2008 WL 3892111, at *2 (E.D. Cal. Aug. 21, 2008) ("Because Plaintiff did not make any of the contentions found in the objections to the Magistrate Judge and these contentions could have been raised before the Magistrate Judge ruled on the motion to compel, the objections do not provide a basis for reconsideration of the Magistrate Judge's discovery order."); *Peebles v. Four Winds Int'l*, No. 6:07cv00001, 2008 WL 901550, at *6 (W.D. Va. March 31, 2008) (a party "cannot submit new arguments in her objections to the Magistrate Judge's ruling that were not previously presented before the Magistrate Judge.").

the DOS. *See* 1998 contract at Sec. C.2.8.B.4, Sec. H-12 and Sec. H-19 and the 2005 contract at Sections H.13 and H.14 (excerpts attached at Ex. B).[3]

As authorized by the Department of State, the DynCorp defendants have provided plaintiffs with voluminous documentation regarding the Plan Colombia spraying operations within 50 kilometers of the Colombia-Ecuador border, including, *inter alia*:

- Electronic files that visually portray the exact date and location of every computer-recorded spray event (*i.e.*, "spray lines") within 50-kilometers of the Colombia/Ecuador border from 1999 to 2008, along with accompanying data regarding, *e.g.*, the job number, the amount of herbicide sprayed, the height and speed of the aircraft, and other pertinent information;[4]

- Daily flight and daily spray reports that can be linked by job number to the individual spray event electronic data, as well as weekly and monthly spray reports of many kinds containing volumes of information about each spray mission from 1999 to 2008; and

- Written evaluations of DynCorp's work from 1999 to 2008 prepared by DOS supervisors, setting forth DOS findings as to DynCorp's compliance with its contractual obligations on all issues relating to the aerial eradication program based upon DOS's evaluation of all information relating to the spray flights.

This documentation provides plaintiffs with more than ample opportunity to explore whether there is any factual basis for their speculations about cross-border spraying of herbicide into Ecuador.

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[3] For example, Section H.13 of the 2005 contract provides: "All documents and records (including photographs) generated during the performance of work under this contract shall be for the sole use of and become the exclusive property of the U.S. Government." Section H.14 provides: "All material generated by the Contractor under this contract, including printouts and analytical reports in whatever form, *e.g.*, computer tapes, audio, video, is the property of the Government." *See* Ex. B. Moreover, the great majority of all responsive documents reside on DOS computer terminals and DOS computer servers located on DOS leased facilities in Florida and Bogota, Colombia. In addition, all of the DynCorp employees who perform relevant work on the "Plan Colombia" contracts use DOS-owned computers (desktop and/or laptop) and a DOS email system.

[4] This category includes spray data as it existed prior to the "quality control" ("Q.C.") process performed by the DynCorp defendants under their contract as well as the post-Q.C. spray line data.

The plaintiffs in these cases have known since January 2009 that the DOS would require redactions to otherwise responsive documents based on sensitive foreign policy issues and the need to protect the personnel from the DOS, the Republic of Colombia and the contractors who carry out the anti-narcotics work that is the subject of DynCorp's contracts with DOS. Two of those redaction instructions – relating to pilot names and non-spray flight lines – are now challenged by the plaintiffs *although plaintiffs have not attempted to get the same information directly from the DOS and accordingly plaintiffs have not caused the DOS to appear before this Court to address and defend its instructions issued to the DynCorp defendants.* Nonetheless, as described below, the DynCorp defendants attached the views of the DOS about the issues raised in plaintiffs' second motion to compel here in their opposition to plaintiffs motion and offer them for the Court's consideration here as well, as DOS has requested the defendants to do. *See* Ex. A.

In order to explain the position of DOS relative to these issues, DOS Assistant Legal Adviser Dennis Gallagher sent a letter dated September 4, 2009, to DynCorp counsel (Ex. A), which also attaches copies of three prior DOS letters pertinent to this litigation. In the September 4, 2009 letter, DOS again asserts its authority under the contracts to direct DynCorp as to whether the requested Plan Colombia documents may be released, but explains that DOS is striving to do so in a manner that balances the plaintiffs' right to discovery in this litigation with the overarching need to protect the safety of the personnel, equipment and programs in Colombia. *See* Ex. A at 2. DOS reiterates that it issued redaction instructions to DynCorp to protect the safety of personnel and equipment in Colombia and also required the issuance of a Protective Order before permitting documents to be released – both of which DOS continues to believe are necessary to protect the personnel, equipment and programs in Colombia. *Id.* at 2-4.

And DOS addresses the specific demands made by the plaintiffs about disclosing pilot names (*id.* at 3) and non-spray flight-lines (*id.* at 6), explaining why disclosure of this information, even subject to the Protective Order, would place the lives of contractor, DOS, and Republic of Colombia personnel at risk.

III. The Arguments Made Before The Magistrate Judge on Plaintiffs' Motion to Compel

In their initial motion to compel and argument before the Magistrate Judge, plaintiffs relied primarily upon two principal factual arguments to support their claims of the relevance of pilot names and non-spray flight lines, *neither of which is mentioned in the plaintiffs' Objections.*

First, with respect to pilot names, plaintiffs argued that without disclosure of this identifying information, they would be unable to determine whether different spray flights of interest near the border were flown by the same or different spray pilots. *See* Pls.' 8/24/09 Mot., at 4 (ECF No. 133 in *Arias*; ECF No. 95 in *Quinteros*). In response, however, DynCorp explained that the information provided to plaintiffs in the electronic spray information and written daily flight summaries includes coded identification of each spray pilot. While this coded information does not disclose the *names* of the pilots (and thus does not give rise to security concerns), it does allow plaintiffs to identify and track individual pilots who were involved in spraying operations at the border across different spray flights. *See* Defs.' 9/4/09 Opp. at 8-9. DynCorp also reiterated its long-standing offer to work with plaintiffs in approaching DOS if plaintiffs identify specific documents or spray flights for which they believe pilot-identifying information is relevant or necessary, *see id.* at 8. In its September 4, 2009 letter, DOS in turn raised the possibility of a compromise whereby pilots of interest could be deposed without disclosure of their identities. Ex. A at 5-6.

Second, with respect to non-spray flight line data, plaintiffs relied on [redacted] Plaintiffs argued that the defendants' flight line data was accordingly the only source for the missing data. *See* Plfs.' 8/24/09 Mot. at 11. During the hearing before the Magistrate Judge, plaintiffs' counsel relied upon this document as the centerpiece of their argument both for the flight line data and the pilot names. *See* Hr'g. Tr. 6:12-16, Oct. 08, 2009 ("10/08/09 Hr'g Tr."). ("it is that document that we reference on page 11 of our brief that causes us to now need not only the names of the pilots for deposition, but we want – the second issue on our motion is the flight data …").[5] Again, however, DynCorp established that plaintiffs' relevancy argument was without merit. As DynCorp explained both in its opposition brief and at the hearing, [redacted] *See* Defs.' 9/4/09 Opp. at 11; 10/08/09 Hr'g. Tr. 22-24. DynCorp further explained that it had identified Mr. Lehr in his initial disclosures as an individual with knowledge regarding plaintiffs' allegations and noted that plaintiffs can question Mr. Lehr directly [redacted] in deposition should they wish. *Id.* at 24, 25.

After hearing the parties' arguments and reviewing the parties' briefing, the Magistrate Judge properly denied plaintiffs' motion to compel "largely for the reasons offered by

[5] *See also id.* at 7 (reading from document and stating "Now that's our case, Your Honor"); *id.* at 9 ("we now know from this Document 11, we don't have this information"); *id.* at 11 ("this

defendants, both orally and in writing," holding in particular that "the Court finds that the plaintiffs have not demonstrated that the information which is sought is relevant." 10/08/09 Hr'g. Tr. 34:20-25.

ARGUMENT

I. Plaintiffs Have Not Demonstrated That the Magistrate Judge Clearly Erred in Denying Their Motion to Compel Disclosure of Pilot Names.

In their Objections to the October 14, 2009 Order denying their motion to compel production of pilot names, plaintiffs abandon both of the factual relevancy arguments that they presented to the Magistrate Judge, *i.e.*, that they otherwise could not track pilots across different spraying operations and that pilot names were somehow relevant because of [redacted] Instead, plaintiffs improperly ask the Court to find that the Magistrate clearly erred based upon a newly-identified relevancy argument built upon [redacted]

DynCorp sharply contests plaintiffs' proposed interpretation of these emails, but for present

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document that I've read to you makes crystal clear ..."). Excerpts of the 10/08/09 transcript cited herein are attached as Ex. C.

6 [redacted]

purposes, the key points ignored by plaintiffs are that: (1) the documents were not written by pilots and (2) the names of authors and recipients of the cited documents are not redacted. Accordingly, the DOS-required redaction of pilot names from DynCorp's document production in no way limits plaintiffs' ability to obtain discovery relating to these documents. If plaintiffs want to understand the actual facts relating to these emails, they have ample opportunity to obtain such information through depositions of the email authors and recipients.

As the Magistrate Judge correctly recognized, plaintiffs' general assertions that they need discovery from spray pilots are speculative and, in any event, do not support their request for the wholesale disclosure of the name of every pilot involved in the Plan Colombia spraying operations. *See* 10/08/09 Hr'g. Tr. 6-8, 34. This is particularly true given that such disclosure would put the lives and safety of those pilots at imminent risk. As explained in the DOS letters and in numerous previous filings made by the DynCorp defendants in this litigation, the pilots who fly aerial eradication missions in Colombia are in constant danger. DynCorp personnel in Colombia have been targeted for death or kidnapping threats to themselves and their families based on the anti-narcotics work that they perform. *See* the Sept. 4 DOS letter (Ex. A) at 4-5 and the earlier DOS letter dated January 26, 2009 (Attachment 2 to Ex. A at 4). In addition, news reports from and about Ecuador and Colombia also regularly report that the terrorists from Southern Colombia who support the illegal narcotics cultivation and production often travel over the border into Northern Ecuador and have developed contacts and relations with individuals living in the same towns as the plaintiffs in this litigation. *See, e.g.*, the copies of news articles included at Ex. E. Clearly, care must be taken to protect the identities of the pilots who participate in aerial eradication missions from getting into the hands of the narcotics terrorists on both sides of the border between Colombia and Ecuador.

As DOS explains, the terrorist organizations involved in the coca production are not limited in their reach to Colombia alone, and the security concerns fully extend to both current and former pilots, including those who may have relocated to other countries. DOS thus flatly rejects the *Arias/Quinteros* plaintiffs' previously asserted argument (Pls.' 8/24/09 Mot. at 6) that security concerns would not apply to *former* pilots:

> Contrary to the assertions now made by the *Arias/Quinteros* plaintiffs' counsel, DOS does not agree that these dangers dissolve when pilots leave the contract or leave the Republic of Colombia. Two of the terrorists groups operating in Colombia, the FARC and the ELN, are on this country's list of the most dangerous international terrorist organizations in the world, and DOS believes strongly that it would be irresponsible to expose the identities of the spray pilots with such terrorist groups actively opposing the work of DOS and DynCorp in Colombia.

Ex. A at 5.

As DynCorp and DOS have repeatedly offered, *see* Defs.' 9/4/09 Opp. at 8, Ex. A at 5-6, in the event that plaintiffs subsequently can show the need for specific pilot testimony (*e.g.*, through tracking of a pilot's spraying activities at the border by use of the coded pilot identifiers, reference to a particular document or set of documents, or deposition discovery), the parties and the DOS can and should address the issue on an individual basis. The Magistrate Judge's denial of plaintiffs' request for the wholesale disclosure of pilot names was not clearly in error and should be affirmed.

II. Plaintiffs Have Not Demonstrated That the Magistrate Judge Clearly Erred in Denying Their Motion to Compel Disclosure of the Locations of Spray Planes When Not Spraying Herbicide.

Plaintiffs' allegations of personal injury and property damage rely on the first instance on their claims that herbicide was sprayed during aerial eradication operations either in Ecuador or so close to the border and under such circumstances as to allow the herbicide to drift into Ecuador. As set forth above, the DynCorp defendants have provided plaintiffs with extensive

information to address this allegation, including, *inter alia*, the location, date, amount of spray released, etc. regarding every instance in which herbicide was sprayed from spray planes within 50-kilometers of the Colombia-Ecuador border between 1999 and 2008. This production includes not only the quality-controlled ("QC") final spray data reflecting the actual release of herbicide spray that hits the ground and kills coca, but also the pre-QC spray lines reflecting incorrectly reported spray events that periodically arise, *e.g.*, from glitches in the Del-Norte or SatLoc GPS systems on the spray planes. *See* Defs.' 9/4/09 Opp. at 3-4. In addition to the shape-file data about where spray planes applied their herbicide, the DynCorp defendants have also produced thousands of written daily reports, weekly reports, monthly reports, etc., which disclose 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. *Id.*

It is important to note that Plaintiffs' motion to compel did not seek information regarding where DynCorp sprayed herbicide but rather the location of spray planes when they were *not* spraying herbicide. In their original motion and argument to the Magistrate Judge, plaintiffs argued that they needed this non-spray flight data because DynCorp had withheld data regarding the location of some spraying events in its quality control process. However – in response to DynCorp's showing in its opposition that (1) DynCorp had in fact produced the pre-QC'd data that plaintiffs claimed had been withheld and (2) that the non-spray flight line data does not in any event include the pre-QC'd spray line data – plaintiffs have abandoned that argument in their Objections. Plaintiffs instead now make a speculative leap from a handful of discrepancies in the Del Norte system [redacted] that DynCorp's spray data – which is reviewed by the U.S.

State Department, other U.S. government agencies, international organizations, and the Colombian government, and which forms the basis for DynCorp's compensation under its DOS contract – "is simply unreliable." Pls.' 10/28/09 Obj. at 6. Moreover, none of these new documents suggest that the Del Norte system improperly identifies the locations where spraying occurred,[7] and plaintiffs offer no explanation how the identified discrepancies support their claim of relevance of the non-spray flight lines (which are likewise recorded by the same Del Norte system).

The DynCorp defendants can understand why plaintiffs are seeking to avoid the voluminous relevant data that the defendants have produced regarding the Plan Colombia spraying operations, as it demonstrates that the alleged spraying in Ecuador simply did not occur. Indeed, it may be that plaintiffs' recognition of this fact is the reason that they moved to compel production of the non-spray flight lines many *months* after DynCorp advised plaintiffs that DOS had instructed DynCorp not to produce this data. But as the Magistrate Judge properly recognized, the plaintiffs' desire to engage in a fishing expedition in the speculative hope that the non-spray flight lines could somehow fill the factual hole in their case does not demonstrate relevance.[8]

The Magistrate Judge likewise did not commit clear error in rejecting plaintiffs' arguments that non-spray flight line data is relevant to plaintiffs' allegations of international law

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[7] [redacted]

[8] Plaintiffs' speculation that non-spray flight lines could somehow corroborate eye-witness statements of spraying along the border is in any event exactly backwards. At most, such flight data (combined with the spray data) would directly contradict these eyewitness accounts because it would demonstrate that the planes were *not* spraying herbicide at the times in question.

violations in support of their ATS claims or plaintiffs' allegations of contractual violations in opposition to DynCorp's government contractor defense. DynCorp sharply disputes plaintiffs' assertions and notes, by way of response, that these accusations fly in the face of DOS's extensive supervision and approval of the DynCorp spraying operations, as reflected, *e.g.*, in the DOS's comprehensive tri-annual contract evaluations of DynCorp which have been produced to plaintiffs in this litigation.[9] But plaintiffs' relevancy argument fails for the more fundamental reason that there 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.[10]

Once again, the Magistrate Judge's discovery ruling also must be considered in light of the significant security concerns identified by the State Department in instructing DynCorp not

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[9] DynCorp further notes that plaintiffs do not – because they cannot – cite any authority for the proposition that the alleged non-spray border crossings would constitute the type of universally recognized violation of plenary international law required to state a cause of action under the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14, 724-25 (2004) (limiting actionable claims to those few subjects that were contemplated by Congress in the 1780's or to modern-day violations of the same nature as those 18th century paradigms such as piracy). To the contrary, in the *Sosa* case, the Ninth Circuit held that even the cross-border abduction of a Mexican national in Mexico and forced transport back (by plane) into the United States by U.S. government personnel did not constitute an actionable violation of international law, a holding that was not challenged on appeal to the Supreme Court. *See Sosa*, 542 U.S. at 735; *Alvarez-Machain v. United States*, 331 F.3d 604, 619-20 (9th Cir. 2003).

[10] As to plaintiffs' ATS claims, *see Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 677-678 (S.D.N.Y. 2006) (ATS claims dismissed, *inter alia*, because plaintiffs could not demonstrate that alleged violations of international law were causally linked to their alleged injuries), *aff'd*, 582 F.3d 244 (2d Cir. 2009). As to the government contractor defense, *see Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir. 1989) ("Only the detailed, quantitative specifications [in the government contract at issue] . . . are relevant to the government contractor defense" – not other "[g]eneral qualitative specifications" that do not aid in determining whether the defense applies); *Askir v. Brown & Root Serv. Corp.*, No. 95 Civ. 11008, 1997 WL 598587, at * 7 (S.D.N.Y. 1997) (denying plaintiff's request for discovery into incidental contract requirements like "progress reports" that did not relate to the central inquiry of whether Brown & Root's government contractor defense was correct based on all of its relevant actions being directed by the U.S. Army or the U.N.).

to produce the non-spray flight lines. The pilots and accompanying personnel engaged in spray operations are in constant danger from hostile fire from narco-terrorist organizations on the ground. As DOS explains in its September 4, 2009 letter, "[f]rom 1999 through 31 July 2009, our aircraft conducting spray operations received 2,069 hits from hostile ground fire, and during that period, we had five aerial spray fatalities and many other pilots were injured from the bullets or shrapnel caused by the bullets." Ex. A at 4-5. Radio intercepts in Colombia indicate that the drug traffickers have offered "a $200,000 bounty for every eradication plane or helicopter shot down." *Id.* at 5. Moreover, the narco-terrorist organization FARC has been secretly recorded "seeking to purchase a large stash of anti-aircraft weapons to shoot down American aircraft over Colombia, including 700-800 surface-to-air missiles, 5,000 AK47 rifles, night vision goggles, and 'ultralight' airplanes that could be equipped with grenade launchers and missiles." *Id.* at 7.

In response to these threats, it is vital that the flight paths taken by spray planes and accompanying aircraft to and from spraying events be maintained in utmost secrecy, both to prevent targeting of spray planes at locations where the planes pass on route and to conceal the evasive maneuvering and flight patterns used by pilots to avoid detection and targeting. DOS has determined that:

> [D]isclosure of this "flight-line" data – including information as to the course taken by spray planes in traveling to and from forward operating location airbases to the spray zone as well as the operations and methods used by the pilots in selecting their flight paths so as to maximize their security – would place the lives of spray pilots and other accompanying DOS-contractor and Colombian government personnel directly at risk and would jeopardize the Plan Colombia aerial eradication operations.

Id. at 6-7. The Magistrate Judge's denial of plaintiffs' request for production of non-spray flight data was not clearly in error and should be affirmed.

CONCLUSION

For all of the foregoing reasons, the DynCorp defendants request that the plaintiffs' Objections to the Magistrate Judge's October 14, 2009 Order be rejected in their entirety.

Dated: November 09, 2009

Respectfully submitted:

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