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February 22, 2010

BY FACSIMILE AND EMAIL

Honorable Alvin K. Hellerstein  
United States District Court  
Southern District of New York  
United States Courthouse  
500 Pearl Street, Room 1050  
New York, NY 10007

Re: In re: September 11th Litigation, 21 MC 101

Dear Judge Hellerstein:

We write to you as directed in your order of September 20, 2010 setting a status conference on February 4, 2011, “to plan expert witness discovery, succeeding proceedings leading to trial, and relevant details concerning the mechanics of trial,” and directing that “counsel’s recommendations shall be filed three days before the conference, with appropriate preliminary exchange dates as counsel agree on.” (9-20-10 Order Setting Status Conference.) By order of February 2, 2011, the status conference was adjourned to February 25, 2011. Counsel’s recommendations thus are due on February 22, 2011.

Defendants’ recommendations concerning expert witness discovery and the schedule between now and trial are set out in our February 7 letter to plaintiff’s counsel (attached). We discuss those recommendations below. Unfortunately, plaintiff has not responded to our February 7 letter. As a result, it is not possible to submit today a joint set of recommendations.

Defendants’ recommendations about the detailed mechanics of the trial are set out in the our February 21, 2011 letter to plaintiff’s counsel (attached). That letter also proposed that a meet-and-confer be held this week. Mr. Migliori agreed, and so the parties are meeting at 1:00 pm this Thursday afternoon to discuss issues raised in our letters, including completion of discovery, a pretrial schedule, and trial-related matters.

We report below on the status of the case.

Liability fact discovery. The defendants have completed all of their liability fact discovery.

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We believe plaintiff has just one more witness to depose, United employee Julie Ashley. Her attorney is out of the country until mid-March, so her deposition will have to be scheduled for a day in the last two weeks of March.

Agreed Factual Submission. We sent defendants' objections and counter-proposals to plaintiff on February 15. We have suggested to plaintiff that we meet and confer to discuss the Agreed Factual Submission and to start negotiating factual stipulations separate from the Agreed Factual Submission, in order to streamline the trial and make additional liability depositions unnecessary.

Damages Discovery. Plaintiff has stonewalled defendants on her answers to damages interrogatories. For example, she objected to and provided no information in response to interrogatories seeking to learn what elements of damages plaintiff is seeking and what amounts she seeks to recover. In addition, we have requested dates from plaintiff for depositions of her 13 "first string" damages witness (ignoring her 20 backup witnesses), but have not heard back from her. We also have requested service addresses for those damages witnesses from plaintiff, as plaintiff has been ordered to do by the Court in its September 20, 2010 Order, but there has been no response. Plaintiff's non-responses are interfering with defendants' efforts to complete discovery and to prepare for trial. We may need the assistance of the Court yet again.

SSI Issues. The defendants met last Wednesday with the Government to discuss SSI clearances for expert witnesses and the handling of SSI evidence at trial, and later that week produced to the Government lists of SSI documents that defendants believe they may need to use at trial. Those lists will change as plaintiff's claims become better defined, expert depositions are taken, and trial preparation advances. We do not know whether plaintiff has submitted any such list to the Government.

We have learned that the SSI clearance of experts by the Government may be an extended process. That could have a cascading or compressing effect on all other pretrial activities.

The creation and implementation of protocols and procedures for the handling of SSI at trial promises to be a very important, challenging and time-consuming part of the pretrial process.

Pretrial Schedule. Our February 7 letter to plaintiff proposed a schedule for expert discovery (March 4-May 16); the filing of dispositive motions (no later than April 30); and the submission of pretrial materials (April 15-June 6). Further details are set out in that letter, which is attached.

We propose that that expert discovery be sequenced as set out in that letter; that is customary and it allows defendants to ensure that their expert submissions are responsive to plaintiff's claims and her experts' opinions.

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We expect that the dispositive motions will include a motion to determine the standard of care as well as motions for summary judgment. The trial cannot even start without a ruling on the standard of care and rulings on proposed jury instructions, and the summary judgment motions could make a trial unnecessary or at least remove some defendants.

The submission of the usual pretrial materials must take place in an orderly way or the trial could require more than the six weeks the Court has mentioned.

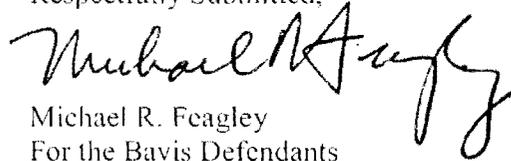
The Structure of the Trial. We expect that the structure of the trial will be driven by what claims are to be tried, which defendants remain in the case, what the standard of care is, who has the burden of proof, what the SSI protocols are, what the parties are able to stipulate to, and other considerations. Developments in the case may affect the Court's final decision whether to hold a timed trial. Since such a trial structure could cause severe prejudice to a party who ran out of time to present evidence it needs, the parties and the Court would need to address the "trial mechanics" issues that we raised in our February 21 letter to plaintiff (attached). Such a trial would make it all the more important that SSI and other evidentiary and legal issues be briefed and ruled on before trial, further congesting the 100-day period leading up to trial. Special procedures to compress and expedite the presentation of trial evidence – e.g., the use of some deposition summaries and the liberal use of FRE 1006 summaries – could be valuable. And as we discuss in our February 21 letter to plaintiff, such a trial would have to include some special procedures for keeping track of time used and for handling evidence, especially SSI evidence.

The trial date and plaintiff's conduct. Defendants are working hard to be ready for the June 13 trial date and we remain ready to discuss our ideas on the pretrial process and on how to structure the trial. However, plaintiff has not behaved as if she were committed to the June 13 trial date. We are hopeful that Thursday's meet-and-confer will help break the logjam, but we are concerned that that session will not be nearly enough to make up for plaintiff's conduct over the past few weeks. Her objections and non-responsive answers to nearly all of defendants' damages interrogatories; her failure to respond to our communications about an expert discovery and pretrial schedule; her refusal to comply with the Court's orders (and defense requests) that she shorten her still overly long trial witness list, including her listing of 33 damages witnesses, and provide information about those witnesses and their testimony; her failure to respond to our request to set dates for depositions of her 13 "first string" damages witnesses and her failure to provide service addresses for those damages witnesses; and her failure to respond to our request for a meet-and-confer concerning the parties' proposals for an Agreed Factual Submission until this week, all make defendants' trial preparations unnecessarily difficult and threaten to derail that trial date.

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We will report any progress (or lack of progress) made at the meet-and-confer by letter or at Friday's court conference.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael R. Feagley". The signature is written in a cursive, flowing style with a large, prominent "F" at the end.

Michael R. Feagley  
For the Bavis Defendants

cc: Bavis Defense Counsel  
Bavis Plaintiff's Counsel  
Defendants' Liaison Counsel  
Government Counsel

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February 21, 2011

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Mary F. Schiavo, Esq.  
Mottley Rice LLC  
28 Bridgeside Blvd  
Mt. Pleasant, SC 29464

Re: Bavis v. United et al.

Dear Donald and Mary:

We write to raise important "trial mechanics" issues with you, and to propose that the parties meet and confer later this week to discuss those issues and the case management and scheduling issues we raised in our February 7 letter, in this letter, and in other recent letters. Your failure to respond to our letters and proposals threatens to prevent us from arriving at an appropriate sequenced pretrial schedule that would enable rather than interfere with the parties' ability to get ready for trial, and your silence threatens the June 13 trial date.

We should discuss at our meeting all important pretrial events and trial-related issues to try to generate joint recommendations to the Court. The proposals we have made in our letters to you include:

- A specific schedule for expert discovery that assumes prompt Government SSI clearance of the parties' experts, requires expert reports to be submitted and depositions to be taken from early March to mid-May, and sequences that activity with plaintiff's expert reports

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first, then defendants' expert reports, then depositions of plaintiffs' experts, followed by depositions of defense experts. We proposed such a schedule in our February 7 letter. We have not heard back from you.

- Plaintiff's blatant and continued refusal to comply with the Court's December 16, 2010 Order concerning plaintiff's trial witness list. That list still needs to be shortened and witness contact information and information about their expected testimony be provided, per that Order.
- Discussion of the parties' competing proposed Factual Narratives. We need to set dates for plaintiff to respond to Defendant's counterproposal and for the parties to submit disagreements to the Court.
- A deadline by which to submit dispositive motions. We expect those motions to include a motion to determine the applicable standard of care as well as motions for summary judgment. Our February 7 letter suggested no later than April 30, 2011, with briefing to be completed within 30 days.
- A specific schedule for the submission of proposed jury charges, a jury charge conference, submission of motions in limine, submission of deposition designations, submission of trial exhibit lists, submission of objections to deposition designations, submission of counter designations, submission of objections to exhibits and additional exhibits, and submission of trial briefs. We refer you to the April 15-June 6 schedule proposed in our February 7 letter.

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- Plaintiff's improper and unresponsive answers to defendants' damages interrogatories. You made spurious objections to all questions about the elements and amount of plaintiff's damages claims and provided no information on those topics. We have sent a separate letter to you requesting that plaintiff provide prompt supplemental answers to those damages interrogatories so that defendants can prepare to take depositions of plaintiff's damages witnesses.
- Plaintiff's failure to provide dates for depositions of her 13 "first-string" damages witnesses and her failure to provide addresses at which those damages witnesses can be served; and
- Plaintiff's failure to respond to our requests for a meet-and-confer.

In addition, we need to discuss other important trial preparation and trial issues, including:

1. SSI Evidence Issues. It will be crucial for the Government and the Court to establish before trial a protocol for ruling on requests to use SSI evidence at trial and a procedure for using such evidence at trial. Regardless of whether the Court uses a timed trial, we should discuss suggestions to make to the Government and the Court, to minimize the use of trial time on such issues and to reduce the risk of prejudice to the parties.

2. Stipulations. Prompted by our work on the agreed Factual Statement, we should try to reach separate agreement on a whole series of stipulations about non-controverted facts

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(e.g., purchase of weapons, weapons left behind, and so on) and evidence, in order to make more depositions unnecessary and to streamline the trial. We stand ready to engage with you (and the Government) at any time.

3. Shape of the Trial. We expect that the structure of the trial ultimately will be driven by what claims remain to be tried, which defendants remain in the case, who has the burden of proof, what the SSI arrangements are, and what the parties are able to stipulate to. Whether the court holds a timed trial, as stated in his September 20, 2010 Order, remains to be seen. Since such a trial structure could cause severe prejudice to any party unable to present its case in full, resolving as many evidentiary and legal issues as possible before trial would be crucial in order to minimize the use of trial time on such activities. We proposed a pretrial schedule of April 15-June 6 in our February 7 letter. In addition, the implications of a timed trial for the pretrial period could include squeezing into that already cramped 100-day period rulings on witnesses, exhibits and deposition designations; providing for the use of some deposition summaries and rulings on objections to them; providing for liberal use of FRE 1006 and rulings on objections to such summary exhibits; rulings on objections to expert testimony; use of a jury questionnaire for voir dire; and other activities as well.

A timed trial would also require special procedures at trial. We need to discuss what those "special trial procedures" might be - for example, defendants' allocating defense time among themselves; what activities would count against a party's time (opening statement and closing argument, direct and redirect of the witnesses called by that party, cross of other parties' witnesses?); and the keeping and daily reporting of time by the clerk. Other aspects of the trial

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that could apply regardless of its structure could be even more important in a timed trial -- for example, electronic access to and display of exhibits; the use of jury notebooks, arrangements for an overflow room; and other issues.<sup>1</sup>

I look forward to hearing from you.

Sincerely,



Michael R. Feagley

MRF:dmc

cc: Bavis Defense Counsel  
Government Counsel  
Defendants' Liaison Counsel

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<sup>1</sup> We believe that limiting the four defendants to only half the trial time would be unfair. The defendants, and more importantly, their defenses, are not necessarily duplicative of each other. For example, United has to defend against claims that Huntleigh does not, and there is no overlap between the alleged wrongdoing of Massport and any other defendant. A 60/40 split in favor of the defendants will still give plaintiff far more time than any single defendant.

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VIA E-MAIL AND U.S. MAIL

February 7, 2011

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321 South Main St.  
Providence, RI 02903

Mary Schiavo  
Motley Rice LLC  
28 Bridgeside Blvd.  
Mt. Pleasant, SC 29464

Re: In re: September 11th Litigation---*Bavis v. United Air Lines, Inc., et al*, Case No. 02 Civ. 7154

Dear Don and Mary:

We write to raise a number of issues with you which we believe should be addressed by the parties in advance of the status hearing now scheduled in the above-referenced matter for February 25, 2011. In the event that we are unable to come to an agreement, we are prepared to raise these issues with the Judge but believe that it is best for both sides if we are prepared at the February 25<sup>th</sup> status hearing to jointly suggest how best to get this case ready for trial.

I. Expert Discovery. We suggest that a schedule like the one below will be necessary if we are to keep the June 13 trial date:

- March 3: Plaintiff's expert reports due;
- April 4: Defendants' expert reports due;
- April 11-25: Plaintiff's experts deposed;
- May 2-16: Defendants' experts deposed.

We assume that the Government can grant SSI clearances to the parties' experts quickly enough to allow this schedule. If not, these dates may need to be modified, leaving the June 13 trial date in peril.

2. Liability Factual Depositions. As you are aware, the deadline for taking these depositions expired on January 31, 2011. Before that date, the parties identified eight more people to be deposed, including physical fitness trainers, Richard Surma, Diane Surma, Joseph Morris, Naouar Bioud, Yosri Fouda and FBI Agents Thomas J. Kneir and Timothy S. Gossfield. We suggest that we set February 25, 2011 as the deadline by

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which these depositions must be completed. In this regard, we also believe that the foregoing list can be narrowed considerably by several straightforward stipulations. Given the time remaining before trial, we recommend and are willing to discuss such stipulations with you in the next several days or at your earliest convenience.

Please be aware, however, that as stated in Defendants' December 10, 2010 Response to Plaintiff's May Call Witness List, you have withdrawn your aircraft security feature claims against The Boeing Company, resulting in Boeing's dismissal from this proceeding, and we have requested that you similarly withdraw these claims as against United. To the extent that you refuse to do so, the above proposal is made without prejudice for United to seek additional discovery and/or take additional depositions, if necessary.

Further, United currently has pending a motion to prohibit the deposition of United employee Julie Ashley. As we have made clear, United believes that there is no good faith basis for seeking this deposition or the assertions that have been made as to your basis for doing so, and that this is a baseless fishing expedition that should not be allowed. If, however, the Court denies this motion and the government denies United's related discovery requests for FBI records and testimony, United may need to pursue an appeal of that denial. The proposal above is made without prejudice for United to pursue such a course as necessary.

3. Plaintiff's Revised May Call Witness List. We have serious concerns regarding the "revised" witness list that you submitted on January 4, 2011. In his December 16, 2010 Order Regulating Procedure on Defendants' Motion, Judge Hellerstein ordered you to submit a revised witness list of "not more than 20 potential witnesses, along with a summary of each witness's expected testimony." Further, the Order plainly states that "[i]f a limitation to 20 is considered unreasonable, Plaintiff *shall* show cause why additional specific witnesses are necessary. Plaintiff *shall* set forth the expected testimony of any additional witnesses and further explain why no witness within its original group of 20 cannot testify as to the additional information." (emphasis added). Your "revised" witness list does not appear to comply with these instructions.

You have identified by name more than 100 witnesses. In addition to the twenty-one (21) witnesses you've indicated that you intend to call "live" at trial, you've listed an additional sixty-two (62) individuals as witnesses to be called by deposition "in lieu of live testimony." You also have identified three subject matters for which you claim additional witnesses may be required (i.e. communication from hijacked planes, authentication/identification of Defendants' and Government documents, and cockpit door keys) and an additional twenty (20) "back-up" damages witnesses that you intend to call "if time and the court permits in the future or if for some unforeseen reason one of the above damages witnesses becomes available." This back-up identification, as you know, is in addition to the thirteen damages witnesses that Plaintiffs apparently intend to

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call as a “first-string,” resulting in the identification of an incredible thirty-three (33) damages witnesses in total. Not only does this list seem entirely inconsistent with the Court’s instruction to identify “not more than 20 potential witnesses,” it also seems to disregard the Court’s instruction to “show cause why additional witnesses [beyond that twenty] are necessary.”

You’ve also failed to identify the business addresses (or any other form of contact information) for any of your damages witnesses. *See* Paragraph 4 of the Court’s September 20, 2010 Order Setting Status Conference. In an attempt to work around this deficiency, on January 14, 2011, we issued notices for depositions of the thirteen “first-string” damages witnesses and asked you to identify those witnesses who would not be voluntarily produced for deposition along with the addresses on which Defendants could serve subpoenas, and proposed deposition dates for the rest of your proffered damages witnesses. To date, however, you have not responded to our request nor provided any contact information or deposition dates for your damages witnesses.

Finally, despite the fact that Globe Aviation Services (“Globe”) was dismissed from the *Bavis* matter as of December 22, 2010, your “revised” witness list identifies nineteen current and former Globe employees as witnesses to testify about “weapons at Logan or the security process specific to Logan airport.” We believe that your inclusion of these individuals is highly inappropriate and prejudicial. First and foremost, the testimony that these witnesses can offer is entirely irrelevant under FRE 401 and 402 to the matters at issue in the *Bavis* case. None of these witnesses worked for or on behalf of Huntleigh or United. These witnesses neither worked at the checkpoint through which the passengers on United Flight 175 passed, nor screened any of the United Flight 175 terrorists or any other United passenger at Logan on September 11, 2001.<sup>1</sup> Even if these witnesses could be considered relevant, the topics on which they might testify are unduly cumulative under FRE 403 to testimony that would come from the Huntleigh screeners that you’ve indicated you intend to call as witnesses. The testimony you apparently seek of the Globe witnesses would not only be confusing to a jury and waste the limited trial time allotted by the court by requiring the defendants to explain the differences between Globe and Huntleigh, American and United, but more importantly, would be unfairly prejudicial to the *Bavis* defendants and to Globe and American in the cases that remain pending against them.

Accordingly, in an effort to resolve these issues, we propose you again revise your witness list to comply with the Court’s very clear instructions, limiting the number of

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<sup>1</sup> In fact, the court has already dismissed Globe from the case for essentially this reason. *In re Sept. 11 Litig.*, 594 F. Supp. 2d 374, 377 (S.D.N.Y. 2009) (“...Globe, having played no part in the screening or transporting of passengers with respect to United Airlines flight 175, had no duty to United’s passengers or other victims of the United crash”).

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witnesses identified to twenty (20), regardless of by what means that you intend to call them at trial, excluding any Globe witnesses, and providing the additional witness-specific information required by the Court's December 16, 2010 Order. We propose that the parties exchange revised, and appropriately reduced, witness lists prior on or before February 15<sup>th</sup> and be prepared to submit the final list to the Court shortly thereafter. We also suggest that we agree to complete the depositions of any damages witness identified in Plaintiff's re-revised witness list by March 31, 2011.

4. Agreed Factual Statement. We are in receipt of the Revised Factual Narrative that you submitted on January 4, 2011. Although we have concerns with the argumentative passages, discussions of law and factual inaccuracies that we believe to be set forth therein, we are hopeful that we may be able to work together to arrive at a narrative acceptable to all parties. We expect to send you our response by February 14, 2011.
5. Dispositive Motions. We suggest that we agree that any dispositive motions be filed no later than April 30, 2011, with briefing to be completed thirty days later (20 days for the opposing brief and 10 days for the reply).
6. Pretrial Submissions. We suggest that at the February 25 status hearing, the Court set a schedule for the submission of pretrial materials. We suggest that the following series of deadlines is appropriate:
  - April 15: Submit proposed jury charges;
  - April 29: Jury charge conference;
  - May 6: Submit motions in limine;
  - May 20: Respond to motions in limine;
  - May 27: Submit deposition designations;
  - May 30: Submit exhibit lists;
  - June 3: Submit objections to deposition designations and submit counter-designations;
  - June 6: Submit objections to exhibits, additional exhibits, and trial briefs.

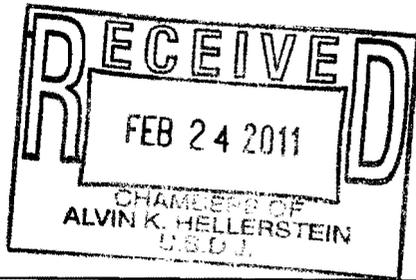
While the schedule proposed above is very cramped and compressed, we believe that compliance with the suggested deadlines is necessary to allowing the *Bavis* trial to go forward on June 13, 2011 as currently scheduled. We look forward to your response to this proposal.

Sincerely,



Michael R. Feagley

cc: (via e-mail)  
*Bavis* Defense Counsel



U.S. Department of Justice

United States Attorney  
Southern District of New York

86 Chambers Street  
New York, New York 10007

February 24, 2011

**BY ELECTRONIC MAIL**

Honorable Alvin K. Hellerstein  
United States District Court  
Southern District of New York  
United States Courthouse  
500 Pearl Street, Room 1050  
New York, N.Y. 10007

Re: In re September 11 Litigation, 21 MC 101 (AKH)  
Bavis v. United Air Lines, Inc. et al., 02-CV-7154 (AKH)

Dear Judge Hellerstein:

TSA writes in advance of this Friday's pretrial conference in the case of *Bavis v. United Air Lines*, and in response to the February 22, 2011 letter submitted by the *Bavis* Defendants ("February 22 Letter"). With the trial date in *Bavis* fast approaching, TSA's primary concern is to ensure that the parties have the evidence they need to try the case, while at the same time protecting information that, if publicly disclosed at trial, would compromise the security of the transportation system. Accordingly, as outlined in greater detail below, TSA requests that the Court enter a pretrial schedule that will permit sufficient time for the significant pretrial work that will be required to protect SSI from public disclosure at trial.

The Court granted the United States' motion to intervene in these consolidated cases more than eight years ago, for the purpose of ensuring that TSA could enforce federal statutory and regulatory non-disclosure requirements governing aviation-related SSI. SSI is defined as "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would . . . (3) be detrimental to the security of transportation." 49 C.F.R. § 1520.5(a)(3); *see also* 49 U.S.C. § 114(r). Examples of SSI include, among other things, aircraft operator and airport operator security programs; security directives; information circulars; performance specifications for devices used for the detection of weapons; descriptions of test objects or test procedures for such detection devices; vulnerability assessments; threat information; security screener tests and scores; procedures for screening persons and their property; investigations of alleged violations of aviation security requirements; and aviation security training materials. *See* 49 C.F.R. § 1520.5(b).

Since intervening in this litigation, TSA has reviewed hundreds of thousands of pages of discovery exchanged by the parties to this litigation, as well as documents obtained from third parties, for the purpose of identifying and protecting SSI in those records. TSA security specialists have also attended more than one hundred depositions in this case to ensure that witnesses did not improperly disclose SSI in the course of their testimony.

Moreover, pursuant to Section 525(d) of the Department of Homeland Security Appropriations Act, 2007, Public Law No. 109-295, § 525(d), 120 Stat. 1382 (Oct. 4, 2006), as reenacted by Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 522, 121 Stat. 2069 (Dec. 26, 2007); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 510, 122 Stat. 3682 (Sept. 30, 2008); and the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Title V, § 510, 123 Stat. 2170 (Oct. 28, 2009), TSA and the parties entered into the Stipulated Protective Order Governing Access to, Handling Of, and Disposition of Potential Sensitive Security Information (the "Discovery-Related SSI Protective Order"), which governed the parties' access to SSI during the discovery phase of litigation. Specifically, the Discovery-Related SSI Protective Order (i) permitted a limited number of counsel for each party to obtain clearances for access to SSI after the successful completion of a criminal history records check and terrorist threat assessment; (ii) allowed cleared attorneys and cleared expert witnesses to review unredacted records containing SSI in an SSI Reading Room maintained by the United States Attorney's Office; (iii) permitted cleared attorneys to have access to a limited number of records containing SSI outside of the SSI Reading Room, subject to stringent document control requirements; and (iv) established stringent security protocols governing the use of SSI in depositions.

There is, however, currently no protocol in place for the handling of SSI at a trial in this action. Because the public disclosure of SSI, by definition, would be detrimental to transportation security, any trial protocol must contain provisions that protect against the public disclosure of SSI. TSA is, however, cognizant of the public importance of this trial and is committed to working cooperatively with the parties and the Court to attempt to devise workable solutions to the parties' respective evidentiary needs.

To this end, in October 2010, TSA initiated discussions with the parties to the *Bavis* litigation regarding how SSI issues would be handled at trial. At a November 3 meeting attended by counsel for the parties, we explained that, given sufficient time, there were steps that TSA could take that might serve to minimize the SSI at issue at trial. For example, we indicated that TSA could undertake limited re-reviews of documents to determine if, given the passage of time and the evolving security environment, any of the information should no longer be categorized as SSI. We also indicated that TSA might be able to prepare substitutes or propose stipulations that would satisfy the parties' evidentiary needs while shielding SSI from public disclosure at trial.

At the November 3 meeting, TSA requested that each of the parties promptly submit to TSA, confidentially, a preliminary list of the documents containing SSI, as well as the SSI that

would be elicited through testimony, that each of the parties potentially would seek to introduce as evidence at trial. The parties agreed at the November 3 meeting that they were prepared to work with TSA on these trial issues, and committed to submitting preliminary lists to TSA by the end of November. This agreed deadline unfortunately was not observed by either plaintiff or defendants. Indeed, despite repeated requests by TSA in the following months, TSA did not receive the *Bavis* Defendants' preliminary lists of SSI documents until last week, and we have been advised that plaintiff's list will be forthcoming within the next week. \*

Once in possession of this basic information regarding the breadth and scope of the SSI evidence that the parties deem relevant to their respective cases, TSA intends to work with the parties to develop a protocol, with Court approval, for the handling of SSI-related issues at trial. Thus, although we are not in a position to offer a specific protocol at this time, we will endeavor to submit a proposed protocol as soon as possible after receipt and review of all of the parties' respective preliminary SSI document and deposition testimony lists.

We note that the *Bavis* Defendants seek a pretrial order that sets deadlines of May 27 for the designation of deposition testimony and May 30 for the submission of final exhibit lists. To the extent the designated exhibits and deposition testimony contain SSI, however, these proposed deadlines provide far too little time for TSA to conduct potential re-reviews, propose appropriate substitutes or stipulations, or otherwise engage in any necessary pretrial consultation regarding the use of such evidence prior to the scheduled trial date. Accordingly, we request that the Court establish a separate deadline of April 25, 2011, for the parties' submission of their final lists of SSI exhibits and SSI deposition designations. \*

Finally, on a separate but related issue, we are constrained to respond to the *Bavis* defendants' statement in their February 22 Letter that "we have learned that the SSI clearance of experts by the Government may be an extended process." Defendants do not explain what they mean by this remark. The parties have been on notice for a number of years that, to the extent they intend their expert witnesses to review SSI in this case, the expert witnesses must obtain a clearance. *See* Discovery-Related SSI Protective Order ¶ 5.3. Indeed, TSA has been processing requests for expert witness clearances since 2009. Moreover, TSA has always promptly processed all requests for SSI clearances that it has received, both for counsel and for expert witnesses. As the parties are well aware, clearances in this case have usually been processed within four weeks from the time that TSA receives a completed application, although processing time can be slightly shorter or longer, depending upon the FBI's completion of the criminal history check, and the Terrorist Screening Center's completion of the terrorist threat assessment. While it is true that both sides have recently identified expert witnesses whose completed clearance applications have not yet been submitted to TSA for processing, TSA is making every effort to assist the parties in completing their clearance applications (*e.g.*, by making arrangements for experts to be fingerprinted in other cities). TSA does not anticipate, however, that once it receives those completed applications for expert witness clearances, its processing of those requests will be "extended" or delayed in any way.

2.10.1  
2.10.2  
Clearance

We respectfully thank the Court for its consideration of this request.

Sincerely,

PREET BHARARA  
United States Attorney for the  
Southern District of New York

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February 25, 2011

BY ELECTRONIC MAIL & FACSIMILE

Honorable Alvin K. Hellerstein  
United States District Court  
Southern District of New York  
United States Courthouse  
500 Pearl Street, Room 1050  
New York, New York 10007

Re: In re September 11 Litigation, 21 MC 101 (AKH)  
Bavis v. United Air Lines, Inc., et al., 02-CV-7154 (AKH)

Dear Judge Hellerstein:

I write on behalf of the Bavis parties, plaintiff and defendants, to report on the parties' meet-and-confer meeting held yesterday, and to respond the Court's order issued later that day.

That meet-and-confer was framed by several letters sent by defendants to plaintiffs up to and including February 22 and by four letters sent in response by plaintiff on February 23 and 24. That meeting was amiable and quite productive. But a great deal remains to be done. Accordingly, the parties scheduled another meet-and-confer for March 7-8.

We believe that our meeting addressed and this letter addresses the nine topics that the court's February 24 order states that it wishes to discuss with the parties on February 24 and 28.

1. Agreed statement of introductory facts. The parties have exchanged competing drafts. Defendants have provided their objections to plaintiff's draft. Plaintiff has not yet provided her objections to defendants' draft, but in a February 24 letter to defendants, plaintiff says that she believes that based on defendant's extensive objections to plaintiff's proposal it will not be possible to come to an agreement, and suggests that the two competing proposals "should be submitted to the court." Nonetheless, the parties agreed yesterday to meet on March 7-8 to discuss whether there is room for an agreement on basic introductory facts and whether some of the material proposed by the parties could be made into separate stipulations that would not be read by the court at the start of the case.

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2. Plaintiff's fact witnesses. In her February 23 letters to defense counsel, plaintiff's counsel offered to stipulate to enclosed summaries of testimony of seven damages witnesses, reduced the number of live damages witnesses to ten (if those stipulations are agreed to), and provided service addresses the three witnesses who are not members of Mark's family. Defendants agreed to review those proposed stipulations promptly and to send to plaintiff proposed deposition dates for those ten witnesses. Plaintiffs also agreed to remove all Globe employees from their trial witness list, and to disclose which of their "by deposition" witnesses they intend to use. The sole remaining liability fact witness, Julie Ashley, will be deposed on a date to be selected in late March.

3. Expert witnesses. At our February 24 meet-and-confer, the parties agreed on an expert witness disclosure/discovery schedule, as follows:

April 1: Plaintiff's expert reports due. (That date was selected to allow time for SSI clearance of the parties' experts.)

April 22: Defendants' expert reports due.

April 25-May 18: Expert depositions. We will discuss at our next meeting (March 7) whether or not to sequence plaintiff's experts first and whether there should be provision for supplemental reports to accommodate late expert SSI clearances.

The parties did not discuss expert witness testimony summaries or Daubert proceedings, but will add those topics to their next meet-and-confer.

4. Exhibits. At the February 24 meet-and-confer, the parties agreed to a pretrial schedule that included dates for listing exhibits and to objecting to same:

April 15: Submit jury charges.

April 29: Jury charge conference.

May 6: Submit motions-in-limine.

May 27: Submit deposition designations.

May 30: Submit exhibit lists.

June 3: Submit objections to deposition objections and counterdesignations.

June 6: Submit objections to exhibits, additional exhibits, and trial briefs.

The parties agreed to work together on stipulations with respect to exhibit authenticity and admissibility.

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5. and 7. Issues of law and Eliminating unneeded defendants. At the meet-and-confer, the parties agreed that early dates should be set for briefing and ruling on the applicable standard of care and the applicable damages law. All parties regard prompt decisions on those legal issues as extremely important to trial preparation and motion practice. We also agreed on an April 30 deadline for the filing of summary judgment motions. We did not discuss the possibility of voluntary dismissals of some remaining defendants, but will add that to our agenda for our March 7-8 meetings.

6. Pretrial submissions. The parties' agreed pretrial schedule provides for the submission of jury instructions, motions in limine, and other pretrial materials. Proposed jury voir dire could be added to one of those dates.

8. Timed trial. Defendants' February 21 letter to plaintiff and our February 24 letter to the court made several suggestions for timed trial procedures to compress and expedite the presentation of trial evidence, including pretrial rulings on objections to deposition testimony and trial exhibits, liberal use of FRE 1006 summaries, the use of stipulated summaries of some witness testimony, the clerk's keeping of time and reporting daily to the parties, the defendants' allocating their share of the time among themselves, and others. Plaintiffs' February 24 letter suggested that the objector be charged with the time devoted to argument of an objection. This proposal will be discussed at the parties' next meet-and-confer.

9. Other Issues.

a. The parties agreed to discuss whether plaintiff intends to offer evidence about Greg McAleer, the United Pilot-For-A-Day Program, and Julie Ashley, and if she decides to do so, a possible stipulation with respect to the results of the FBI investigations into those topics.

b. Written damages discovery. The Plaintiff's February 23 letters agreed to provide signed authorizations for the decedent's income tax and medical records. At our meet-and-confer, plaintiff agreed to further consider supplementing plaintiff's damages interrogatory answers and document production. Defendants then will decide whether to file a motion about the remainder of plaintiff's objections to defendants' damages interrogatories and document requests.

c. Stipulations. Plaintiff's February 24 letter agreed that the parties should stipulate to uncontroverted facts, deposition testimony and witnesses "on bare non-controverted facts," and at Thursday's meet-and-confer the parties agreed to start work on such stipulations at the March 7-8 meet-and-confer.

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d. Aircraft design claim. Defendants reiterated their previous request that plaintiff drop her design claim against United, inasmuch as she has dropped that claim against Boeing. That will be addressed that parties' next meet-and-confer.

e. SSI issues. We are prepared to continue discussions with the Government concerning a protocol for the use of SSI exhibits at trial.

Respectfully,

/s/ Michael R. Feagley  
Michael R. Feagley

cc: Bavis Defense Counsel  
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