

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

IN RE THE BOEING COMPANY :  
DERIVATIVE LITIGATION : Consol. C.A. No. 2019-0907-MTZ

**CO-LEAD PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT  
OF SETTLEMENT, APPLICATION FOR AWARD OF  
ATTORNEYS' FEES AND EXPENSES, AND  
INCENTIVE AWARD FOR CO-LEAD PLAINTIFF FPPA**

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Dated: February 11, 2022

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## **PRELIMINARY STATEMENT**

Boeing is a widely held stock, with a market capitalization in excess of \$120 billion. After notice was disseminated in paper form to over ninety-six thousand Boeing stockholders, published in a national newspaper, and the Settlement<sup>1</sup> was reported on extensively in the national and legal press, just two stockholder objections have been filed. They are meritless.

Only Walter E. Ryan Jr. complied with the procedures for filing an objection (the “Ryan Objection”).<sup>2</sup> The Ryan Objection, attached hereto as Exhibit A, is three pages long, and it suggests that the Court impose three conditions on approval of the Settlement:

Mr. Ryan proposes that you require the settlement to (i) disclose the sourced insurance policy limits, (ii) require some meaningful contribution or statement from the individual defendant directors, and (iii) require the settlement agreement’s governance terms to require an actual licensed pilot, certified to fly the Company’s most advanced plane product, to actually sit on the board[.]

Ryan Obj. at 3. Co-Lead Plaintiffs discuss the insurance policy limits below. The Ryan Objection’s other proposed conditions—that the Settlement have different terms—are misguided and do not impact the fairness of the Settlement.

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<sup>1</sup> Capitalized terms and abbreviations retain their meanings from the opening brief.

<sup>2</sup> Objectors must provide “documentation evidencing such Person’s status as a current record or beneficial stockholder of Boeing.” Scheduling Order, ¶ 7 (Nov. 24, 2021).

Michael J. Leahey filed a one-page letter (the “Leahey Letter”), attached hereto as Exhibit B, that consists of two criticisms, without any supporting explanations. He writes:

- A. The proposed settlement ... disproportionately impacts small individual stockholders, and fails to hold the Defendants accountable for their fiduciary responsibilities.
- B. The overwhelming majority of individual stockholders were excluded from the previous “arms-length” negotiations conducted between the parties.

The Leahey Letter reflects a misunderstanding of how derivative actions and derivative settlements work, and it ignores the substantial monetary recovery and governance reforms delivered by the Settlement.

The fact that only two objections or letters were filed with the Court is itself indicative of the adequacy of the Settlement. *See Rome v. Archer*, 197 A.2d 49, 58 (Del. 1964) (“In addition, the settlement agreement was ratified by a very large majority of the shareholders and was opposed only by these objectants.”).

## **ARGUMENT**

### **I. The Ryan Objection Is Meritless.**

#### **A. Boeing’s Director & Officer Insurance Policy Limits.**

The Ryan Objection seeks information about the total D&O insurance policy limits. Boeing has authorized Co-Lead Plaintiffs to describe Boeing’s D&O insurance as follows:

Boeing's directors and officers liability insurance program provides \$280 million in Side A, B, and C coverage<sup>3</sup> and an additional \$270 million in excess Side A Difference in Conditions ("DIC") coverage<sup>4</sup> for a total of \$550 million. These limits are subject to the terms and conditions of the relevant policies, including self-insured retentions, sublimits, and additional extensions of coverage.

As discussed in the opening brief, in the absence of the Settlement, the available D&O coverage could have been significantly eroded by defense costs and other litigation, or a Special Litigation Committee could have negotiated for a smaller amount than the \$237.5 million obtained in the Settlement. Br. at 16-19. The monetary portion of the Settlement resulted from numerous mediation sessions between sophisticated counsel and a leading national mediator, is a significant portion of the total insurance available, and is the most ever obtained in a *Caremark* claim in this court. This is further reason to approve the Settlement.

**B. Requiring Individual Contributions Is Unwarranted.**

Delaware courts look to the "the adequacy of the settlement consideration." *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1062-63 (Del. Ch. 2015). The Ryan Objection does not contend that the Settlement's consideration is inadequate. Instead, it asserts that the Settlement should give "the perception" of

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<sup>3</sup> "Side A" refers generally to coverage for unindemnified losses incurred by individual insureds. "Side B" refers generally to coverage for the covered entity's indemnification obligations to its insured individuals. "Side C" refers generally to coverage for losses incurred directly by the insured entity.

<sup>4</sup> DIC coverage provides expanded coverage for certain categories of losses not covered by the terms of the underlying Side A, B, and C coverage.

“real contrition” by the “defendants for the harm they have caused,” which could only be achieved through individual contributions. Ryan Objection at 2.

Co-Lead Plaintiffs sought to maximize the size of the monetary component of the Settlement. As explained in the opening brief, “Boeing’s D&O insurance policies provided the only realistic source of large-scale recovery in this derivative action.” Br. at 19. Ryan’s Objection incorrectly presupposes that the Director Defendants would have agreed to personally contribute despite their D&O insurance coverage, and that the D&O insurers would have been willing to participate in such a settlement. The existence of D&O coverage is a major feature of Delaware corporate law,<sup>5</sup> and Co-Lead Plaintiffs bargained hard to recover as much as possible from that source.

The Ryan Objection identified “precedent for individual contributions, even if they may be small when compared to the corporate or insurance contribution[.]” Ryan Obj. at 2, n.2. None of its examples is a Court of Chancery derivative settlement. In this case, insisting on personal contributions of some undetermined amount was a roadblock to maximizing the size of a settlement, or even perhaps the availability of a settlement.

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<sup>5</sup> See *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 900 (Del. 2021) (enactment of 8 Del. C. § 145 is “evidence of Delaware’s recognition that minimizing the downside risks of serving as a director or officer through D&O insurance will enhance the ability of Delaware corporations to attract talented people to fill those roles”).

**C. Requiring That the Settlement Provide for a Certified Pilot on the Board of Boeing Is Inappropriate.**

Co-Lead Plaintiffs recognized the need for corporate governance measures that included the requirements that: (i) the Board have at least three directors with “knowledge, experience, and/or expertise with aviation/aerospace, engineering, and/or product safety oversight” and (ii) the Aerospace Safety Committee include three directors with “experience and/or expertise in aviation/aerospace, engineering, safety systems oversight, and/or safe product design, development, manufacture, production, operations, maintenance, and delivery.” Settlement Agmt., Ex. A, §§ III, VI. The purpose of the measures is to enhance the Board’s oversight of airplane safety generally. Relevant director experience is not limited to flying a Boeing plane; it includes engineering and/or product safety experience. The language of the Settlement is meant to give Boeing and its Board the flexibility to recruit additional directors that might have experience in several areas that bear on airplane safety. And Boeing currently has a pilot on its Board: Lieutenant General Stayce D. Harris, appointed in 2021, is an “experienced Boeing 747 pilot, with other 10,000 flight hours safely transporting passengers and cargo worldwide.”<sup>6</sup>

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<sup>6</sup> See Boeing, Stayce D. Harris, <https://www.boeing.com/company/bios/stayce-d-harris-bio.page>.



The Court must “determine whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept.” *Activision*, 124 A.3d at 1064 (internal quotation omitted). The Ryan Objection acknowledges that the Corporate Governance Measures are “certainly an improvement” at Boeing. Ryan Objection at 3. That he would mandate pilot experience over other expertise is not a reason to reject the Settlement.

## **II. The Leahey Letter Is Meritless.**

The Leahey Letter arises from a fundamental misunderstanding of the Action and the Settlement. Chancellor Bouchard appointed Co-Lead Plaintiffs and granted Co-Lead Counsel the “sole power and authority to speak for plaintiffs in the Consolidated Action concerning pre-trial procedures, trial, and settlement.” Friedlander Decl. Ex. D, ¶ 8. The Settlement has the same impact on all Boeing stockholders. The monetary component of the Settlement, net of attorney’s fees, will be paid to Boeing. The Corporate Governance Measures will benefit the Company as a whole. Leahey’s concern that the Settlement does not hold the directors “accountable for their fiduciary responsibilities” ignores the impact of the denial of the Director Defendants’ motion to dismiss and the benefits provided by the Settlement.

## **CONCLUSION**

For the foregoing reasons and those stated in the opening brief, Co-Lead Plaintiffs respectfully request that the Court approve the Settlement, the application for an award of attorneys' fees and expenses, and an incentive award for Co-Lead Plaintiff FPPA.

FRIEDLANDER & GORRIS, P.A.

/s/ Joel Friedlander

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Words: 1,381

*Co-Lead Counsel*

DATED: February 11, 2022

## **CERTIFICATE OF SERVICE**

I hereby certify that on February 11, 2022, I caused a true and correct copy of the foregoing **Co-Lead Plaintiffs' Reply Brief in Further Support of Settlement, Application for Award of Attorneys' Fees and Expenses, and Incentive Award for Co-Lead Plaintiff FPPA** to be served upon the following counsel of record via File & Serve*Xpress*:

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# **EXHIBIT A**

## THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE THE BOEING COMPANY:  
DERIVATIVE LITIGATION

: Consol. C.A. No. 2019-0907-MTZ

### **Shareholder Walter E Ryan Jr. Notice of intention to Appear Objection to Derivative Settlement Provisions**

Walter E Ryan Jr. by his undersigned counsel, wishes to bring to the court's attention the following questions and issues with respect to the proposed settlement; noting that these defects can and should be corrected.

**Mr. Ryan's shareholder interest.** Individually and by his investment company Ryan Asset Management, a Nevada Corporation, and family trust, together, Mr. Ryan owns or controls a total of 30,830 shares of Boeing Inc. common stock, dating from his initial investment purchase of 700 shares on September 23, 2016, continuously held, with additional purchases totaling now 30,830 shares.

**Defects in the Settlement.** We wish to point out aspects in which the settlement, or its presentation, appear to be deficient, and which the Court should require correction before approving the Settlement.

**1. No Disclosure of available Insurance Policy amounts.** Although the \$237.5 million cash from insurance coverage is indeed a substantial amount, neither the settlements nor the settling parties' brief disclose how much insurance was actually available. Without knowing what the total policy amounts were, the court cannot meaningfully evaluate the fairness of the actual cash settlement amount, especially in light of the fact that the damage done to Boeing by the defendants' alleged actions has been certainly in the tens of billions of dollars; quantified as

totalling \$21 billion direct damages to the Company.<sup>1</sup>

**2. The lack of *any* contribution or statements by *any* of the defendants despite the tens of millions of dollars of remuneration enjoyed by them, especially directors who are former CEOs, is a concern as well.** While we understand the co-lead plaintiffs counsel's view, in their supporting brief at 19 that "Boeing's D&O insurance policies provided the only realistic source of large-scale recovery in this derivative action", a number of individual defendants with eight- or nine-figure compensation packages could easily have contributed amounts that, although small compared to the insurance recovery, would have significantly improved the perception that there is no real contrition by any of the defendants for the harm they have caused.<sup>2</sup>

At approximately the same time as the settlement was announced, Peter Robison's book "Flying Blind – – the 737 Max tragedy and the fall of Boeing", was published (Doubleday New York 2021), laying out in substantial detail how Boeing's CEO transition to financial manager CEOs showered millions in compensation to those CEOs, while the Company was essentially

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<sup>1</sup> From Robison, Peter, Flying Blind-The 737 Max Tragedy and the Fall of Boeing, (Doubleday New York) released November 30, 2021, at p.260, and fn.at 308 "The direct cost".

<sup>2</sup> Indeed, there is precedent for individual contributions, even if they may be small when compared to the corporate or insurance contribution; such as in the Chicago Tribune bankruptcy (<https://www.dandodiary.com/2019/06/articles/director-and-officer-liability/tribune-execs-must-contribute-personal-assets-to-200-million-settlement/>) ; and the Enron and WorldCom scandals ([https://www.shearman.com/~media/Files/NewsInsights/Publications/2005/01/The-WorldCom-and-Enron-Directors-Settlements/Files/View-Full-Text/FileAttachment/LIT\\_012005.pdf](https://www.shearman.com/~media/Files/NewsInsights/Publications/2005/01/The-WorldCom-and-Enron-Directors-Settlements/Files/View-Full-Text/FileAttachment/LIT_012005.pdf)); and see also In re DVI Securities Lit., 2015 U.S. Dist. LEXIS 184354 (E.D. Pa. June 24, 2015) (insurance proceeds consumed by defense costs; six settlements over a decade with substantial personal contributions from board members and officers); while the general lack of potential liability for directors leaves them, in contrast with the ultimate victims here, with little deterrent concern except for their tarnished reputations. Black, Cheffins and Klausner, "Outside Director Liability, 58 Stanford L. Rev. 1055 (February 2006).

transitioned from a focus on developing and producing engineering marvel planes to a company milking its cash cow products and emphasizing shareholder value above airplane advances in safety, which have come full circle, to damage the Company and diminish the Company's reputation and value.

**3. The Governance provisions should require the addition of a certified pilot to the Board.** While the Settlement's governance provisions, requiring the addition to the board of directors of at least three directors with knowledge, experience, and/or expertise with aviation/aerospace, engineering, and/or product safety oversight is certainly an improvement, as is the ombudsperson provision, the missing link of the Board to the cockpit still needs to be corrected.

The Robison book, which we commend to the Court, shows a lack of connection between the Board and pilots who fly the planes and actually experience how the Company's products work in the real world themselves, and can thus be counted on, as a voice or source, to bring such problems to the Board's attention.

**Accordingly,** Mr. Ryan proposes that you require the settlement to (i) disclose the sourced insurance policy limits, (ii) require some meaningful contribution or statement from the individual defendant directors, and (iii) require the settlement agreement's governance terms to require an actual licensed pilot, certified to fly the Company's most advanced plane product, to actually sit on the board; providing the necessary connection between the Board and those pilots who actually fly the planes and experience the problems, as described in Mr. Robison's book, that appear to be the cause of both the Lion Air and Ethiopian Air crashes, which have been the unfortunate result of such disconnects.

Respectfully Submitted,  
Walter E. Ryan, Jr.

By: /s/ **ClintKrislov**<sup>3</sup>

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*Attorney for Mr. Ryan*

**Attachment:** Documentation of Mr. Ryan's status as a current and continuous stockholder of Boeing during the appropriate period

**Certification of Service:**

Per the Settlement Long Form Notice, Clinton A. Krislov certifies that This Objection has been issued by email, facsimile or overnight mail sent this 3d day of January 2022 to the following:

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<sup>3</sup> While not required by the Settlement Notice, attorney Krislov (admitted to practice in Illinois and Michigan) will submit a motion for leave to appear pro hac vice.



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WALTER E RYAN JR AS CUST FOR

**Redacted**

Statement for Account # 422-  
01/01/22 - 01/31/22

Description	Current	Year to Date
Qualified Dividends	Redacted	Redacted
IDA Interest		

\*This section displays current and year to date totals for this account. The year to date totals will accurately reflect your cumulative amount for the year. Year-end tax reporting income amounts may differ from what is reflected on monthly statements versus your tax documents. Please reference your official tax document(s) for tax reporting.

Investment Description	Symbol/ CUSIP	Quantity	Current Price	Market Value	Purchase Date	Cost Basis	Average Cost	Unrealized Gain(Loss)	Estimated Income	Yield
Stocks - Cash										

Redacted

BOEING CO COM	BA	130	200.24	26,031.20	09/23/16	18,809.06	144.69	7,222.14	-	-
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Redacted



RYAN ASSET MANAGEMENT LLC  
ATTN: WALTER E RYAN JR MANAGER

Redacted

Statement for Account # 426  
01/01/22 - 01/31/22

Current		Year To Date
Description		
DEBITS		
Electronic Transfer		
Subtotal		
TOTAL		

Redacted		Redacted
Current		Redacted
Description		
Interest Income Credit Balance		
Foreign Dividend Tax Withheld		
Qualified Dividends		

\*This section displays current and year to date totals for this account. The year to date totals will accurately reflect your cumulative amount for the year. Year-end tax reporting income amounts may differ from what is reflected on monthly statements versus your tax documents. Please reference your official tax document(s) for tax reporting.

Investment Description	Symbol/ CUSIP	Quantity	Current Price	Market Value	Purchase Date	Cost Basis	Average Cost	Unrealized Gain(Loss)	Estimated Income	Yield
Stocks - Margin										

BOEING CO COM	BA	700	200.24	140,168.00	09/23/16	153,790.72	219.70	(13,622.72)	-	-
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Redacted



WALTER E RYAN JR TRUSTEE FBO WALTER E  
RYAN JR REVOCABLE  
TRUST U/A 02/09/2012

**Redacted**

Statement for Account # 426  
01/01/22 - 01/31/22

Description	Current	Year To Date
<b>CREDITS</b>		
Electronic Transfer		
<b>Subtotal</b>		
<b>DEBITS</b>		
Electronic Transfer		
<b>Subtotal</b>		
<b>TOTAL</b>		

Description	Current	Year to Date
Margin Interest Charged		
Qualified Dividends		

\*This section displays current and year to date totals for this account. The year to date totals will accurately reflect your cumulative amount for the year. Year-end tax reporting income amounts may differ from what is reflected on monthly statements versus your tax documents. Please reference your official tax document(s) for tax reporting.

Investment Description	Symbol/ CUSIP	Quantity	Current Price	Market Value	Purchase Date	Cost Basis	Average Cost	Unrealized Gain(Loss)	Estimated Income	Yield
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Stocks - Margin

BOEING CO COM	BA	30,000	200.24	6,007,200.00	12/23/19	6,723,685.70	224.12	(716,485.70)	-	-
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## **EXHIBIT B**



**Michael J. Leahey**  
**9852 Mercerwood Drive**  
**Mercer Island, WA 98040**  
**206- 236-7099**

January 31, 2022

Court of Chancery of the State of Delaware  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, Delaware 19801

Reference: Transaction ID 67132819- Case No. 2019-0907-MTZ. E-Filed December 1, 2021

Dear Sir,

Per the reference, I respectfully request that the Court of Chancery of the State of Delaware categorically reject the proposed Settlement of the derivative action captioned *In re The Boeing Company Derivative Litigation*, currently pending in the Court for hearing on February 23, 2022.

I make this request for the following reasons:

- A. The proposed settlement, as outlined in the reference, disproportionately impacts small individual stockholders, and fails to hold the Defendants accountable for their fiduciary responsibilities.
- B. The overwhelming majority of individual stockholders were excluded from the previous "arms-length" negotiations conducted between the parties.

The Court's consideration of this request would be sincerely appreciated.

  
Michael J. Leahey

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