IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BOEING COMPANY	:	Civil Action
DERIVATIVE LITIGATION	:	No. 2019-0907-MTZ

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Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, February 23, 2022
1:30 p.m.

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BEFORE: HON. MORGAN T. ZURN, Vice Chancellor.

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SETTLEMENT HEARING AND RULING OF THE COURT

CHANCERY COURT REPORTERS
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THE COURT: Good afternoon. Before we do introductions, a brief note on masks. If you are speaking, you may remove it. If you are not speaking, please leave it on covering your nose. I will do the same.

With that, introductions, beginning with counsel for the plaintiffs.

ATTORNEY FRIEDLANDER: Good afternoon, Your Honor. Joel Friedlander from Friedlander & Gorris on behalf of Thomas DiNapoli, comptroller of the State of New York, as administrative head of the New York state and local retirement system and as trustee for the New York State Common Retirement Fund, all of which we refer to as "NYSCRF," and also on behalf of the Fire and Police Pension Fund Association of Colorado, which we refer to as "FPPA." I am joined by my partner Christopher Foulds.

From Lieff Cabraser Heimann & Bernstein is Katherine Benson, who was just admitted *pro hac vice*, and Nicholas Diamand and Sean Petterson. And from NYSCRF we have Andrew Neidhardt and Caitlin Heim. And from FPPA, investment counsel, Steven Miller.

THE COURT: Thank you.

And counsel for the individual defendants.

ATTORNEY ABRAMS: Good afternoon, Your Honor. Kevin Abrams of Abrams & Bayliss. I'm pleased to introduce Sharon Nelles from Sullivan & Cromwell and her partner David Rein.

THE COURT: Thank you. Good afternoon.

Counsel for the nominal defendant.

ATTORNEY ROHRBACHER: Your Honor, Blake Rohrbacher from Richards Layton & Finger for the nominal defendant The Boeing Company. And we have Matthew Perri from my office too.

THE COURT: Thank you.

And counsel for objecting stockholders.

ATTORNEY WILLIFORD: Evan Williford of The Williford Firm for objector Walter E. Ryan. With me is Clinton Krislov of Krislov & Associates. Your Honor granted his *pro hac vice* application yesterday.

With Your Honor's permission, he will speak for Mr. Ryan today.

THE COURT: Thank you.

Sir, if you could stand and state your

name.

JUSTIN DIDEON: I am Justin Dideon. I got a notice in the mail about this hearing. I believe I am here by accident.

THE COURT: Do you want to stay?

ATTORNEY KRISLOV: Your Honor, I spoke with the gentleman as he was sitting here. Apparently, he's from Washington State. He received -- his father had shares of Boeing. His father died, unfortunately, at age 55, recently, and the shares had not been transferred. He came here thinking that this is where he had to go to get the shares transferred.

And it's not a part of this hearing, but I feel badly because, now that I've known him for 30 seconds, to have come so long a way on something that probably he'll just have to go back home and get that taken care of at home ...

THE COURT: I understand.

Mr. Dideon, is all of that your understanding as well?

JUSTIN DIDEON: Yes, correct.

THE COURT: I am sorry for the loss of your father, and I'm sorry that -- we do our best in

all of these proceedings to have the paperwork that goes out be as clear as possible. So I'm sorry that there was confusion there.

The point of this hearing is to see if there are any stockholders who object to a settlement between some other stockholders and the Boeing directors. You are welcome to stay as a member of the public and as a potential Boeing stockholder. But unless you have an objection, perhaps it would make more sense for you to sit in the back, if that's all right with you.

JUSTIN DIDEON: All right.

THE COURT: Thank you very much.

With that, Mr. Friedlander.

ATTORNEY FRIEDLANDER: Good afternoon, Your Honor.

I guess we're here to consider -- the first thing I was going to mention was the sufficiency of the notice, along with the fairness as a settlement and the fee application, including the incentive award request by FPPA.

As to notice, I just want to note we filed a declaration of publication by Al Lambert, a declaration of distribution by Phillip Barone, a

declaration of Sean Petterson respecting the establishment of the website about the litigation. I'd just like to note there are 587 million Boeing shares. Market caps, $116 billion as of a couple hours ago. It's a very widely held stock. And the objectors who are here today obviously represent one or two, if you can count the second letter that's attached to our reply papers.

Turning to the settlement. When this stockholder litigation began, I argued before Chancellor Bouchard that it was important that NYSCRF, FPPA, and Lieff Cabraser and our firm lead the litigation. We thought we were best suited to do so in part because of the gravity of the case. It arises out of a generational corporate governance scandal, I think it's fair to say, with one of the country's most powerful companies having built a fleet of airplanes that were not airworthy. We alleged that two passenger planes had crashed due to the absence of a board-supervised safety-engineering culture at Boeing. And given the stakes, we thought we were best suited, with co-lead plaintiffs, to oversee and litigate and ultimately, whatever the resolution may be, to see it through to the conclusion of the litigation.

NYSCRF is the third-largest public pension fund in the country. It oversees approximately $280 billion in assets. At the outset of the litigation, it owned 1,186,627 shares in Boeing. The office of the state comptroller's division of legal services includes two assistant counsel, who are here today, who worked on the matter. They are supervised by the Fund's general counsel, Joyce Abernethy, and the comptroller's counsel, Nelson Sheingold. And they approved the strategy and participated in the mediation negotiations and the ultimate settlement decision.

The office of the state comptroller also employees nine full-time professionals in its bureau of corporate governance, several of whom worked closely with co-lead counsel in formulating the corporate governance reforms that are part of the proposed settlement.

FPPA is a nearly $8 billion fund. Its current executive director is Kevin Lindahl. Throughout the course of litigation, he was the general counsel of FPPA, and he's also a past president of the National Association of Public Pension Attorneys. He and Mr. Miller attended the

September 12th mediation session in New York and participated in all of the mediation sessions and the negotiations.

And I note this background because of the clients' involvement in the litigation and the mediation and because they have endorsed the proposed settlement.

In a joint press release, New York State Comptroller DiNapoli stated, "We sued Boeing's board because they failed in their fiduciary responsibility to monitor safety and protect the company, its shareholders and its customers from unsafe business practices and admitted illegal conduct. It is our hope, moving forward, that the reforms agreed to in this settlement will help safeguard Boeing and the flying public against future tragedy and begin to restore the company's reputation. This settlement will send an important message that directors cannot shortchange public safety and other mission-critical risks."

In the same joint press release, Mr. Lindahl of FPPA stated, "The 737 MAX crashes were catastrophic tragedies. As shareholders, we sued Boeing's Board of Directors to ensure the safety of

its aircraft and to hold the directors accountable for their failure to uphold their fiduciary duties. In addition to the monetary recovery obtained we are extremely proud of the mandatory safety reporting and increased focus on safety metrics that have been established as a part of the settlement, including a robust [ombudsman] oversight program. This renewed priority on safety will further drive Boeing to regain its reputation and maintain shareholder value."

And I quote those statements because I think that they better say what I could say about why we believe the settlement should be approved by the Court.

I will not recite the history of the litigation since the litigation phase culminated in a 102-page opinion written by Your Honor. Critically, our complaint alleged that a majority of the board at the time of the filing of the complaint faced a substantial likelihood of liability for Boeing's losses based on a complete failure to establish a reporting system for airplane safety and for turning a blind eye to a red flag representing airplane safety problems. Notably, the Court held that it was reasonable to infer scienter and also held that the

difficult scienter element is directly met by the board's own words, as pled in the complaint.

In particular, the Court held that plaintiffs supported the allegation that the board was aware or should have been aware that its response to the Lion Air crash fell short.

Turning to the value of the claims. There are several important points I'd like to make. Basically eight points.

The first is I'd like to dilate on the Court's holding respecting the response to the Lion Air crash because it reflects how most of the Court's analysis deals with events after the Lion Air crash. We believe that aspect of the *Caremark* claim was the strongest as compared to -- or the stronger as compared to the pre-Lion Air crash *Caremark* claim.

We believed it would be very difficult to prove to the satisfaction of the Court that any of the director defendants would be held liable for a bad faith failure to oversee the establishment of an airplane safety oversight system that would have sufficiently in time -- in advance of the Lion Air crash such that the fleet of 737 MAX would not have been manufactured as it was or would not have been

marketed with the defect in it such that the Lion Air crash would not have occurred, the grounding would not have occurred, and there never would have been a defective fleet of aircraft. So we think that would have been, I submit, a very difficult claim.

The stronger claim was that after the Lion Air crash, but before the Ethiopian Airlines crash, one or more director defendants should have recognized the need for greater safety oversight and the need to incur what still would have been massive costs to the -- that would be associated with grounding the airplane and fixing the 737 MAX.

So in that hypothetical scenario, in which the aircraft is grounded -- the fleet of aircraft are grounded after the Lion Air crash, the damages would have been significant, but they would have been far smaller than the 20 billion-plus dollars in economic harm that Boeing attributes to the grounding of the fleet arising out of the defects in the 737 MAX.

For instance, there would be the costs associated with the Ethiopian Airlines crash itself, the mass tort liability as a result of the deaths on that plane, and perhaps other costs associated with

the duration of the grounding and the trouble the company got in with the FAA and the government generally and the need for the grounding to last as long as it did -- that those costs could plausibly be associated with the fact that the aircraft had not been grounded sooner and that the safety oversight had not been undertaken in a more aggressive fashion after the Lion Air crash. So the damages would be far smaller than what we could plausibly allege in the complaint, that there were 20 billion-plus damages of economic harm associated with the 737 MAX.

The second point is that even those damages associated with the post-Lion Air oversight failures would have likely exceeded the amount of the available D&O coverage.

So the D&O coverage is $550 million. That's not a secret. If anybody asked, we were prepared to answer it, make sure it got answered. Mr. Ryan could have propounded that request months ago in discovery. But the simple fact is, which we always were well aware of, that there's $550 million of available D&O coverage, 280 of which -- for which Boeing is also an insured. So there's one tower of 270 in which the directors and officers are the only

insureds. There's an additional 280 for which the directors and officers plus Boeing is an insured, which means that claims against Boeing could be covered under the policy, such as, say, federal securities claims against Boeing could be covered by that insurance.

So that brings me to point three, which is that the size of the coverage, the scale of it, which is obviously a significant number, is greater than the personal resources of the most plausible liable defendants.

So if we're looking at who would fund a resolution of the claim in any fashion or who would fund a judgment, that -- compared to $550 million in D&O coverage -- you know, if you start to think about who are the most plausible defendants from a liability perspective and what their wealth is, it's not going to be at that scale such that -- you know, there's not some deep-pocket corporate defendant. We're talking about individuals. And therefore, the most obvious place to look for recovery was from the D&O policies.

The fourth point is -- I don't think I'm breaching any mediation privilege, but I'll keep it at a pretty high level. But it was very apparent

to us that in the structure of any settlement, if it was going to happen, was -- it was either going to involve D&O coverage or it wasn't. And if we were going to insist on individual coverage, there wouldn't be -- there wouldn't be a settlement contemplating D&O coverage. That was not a plausible structure for a settlement.

At a very basic level, all the defendants are insureds. And it's a bedrock principle of Delaware law, it's a bedrock to the insurance that directors and officers have insurance, there is that insurance. It's there to cover situations such as this litigation -- or this type of litigation. And seeking some symbolic amount from some individual director, or even a nonsymbolic amount, was not going to be consistent with a settlement in which the defendants and their insurers would fund it through D&O coverage.

So given that practical reality, we thought the way to maximize the recovery was to get as much as possible from the D&O insurance.

Which brings me to point five. In looking at the monetary component, we're looking to negotiate for as much as possible of that insurance.

So our posture was -- you know, we were willing to participate in the mediation. We were very, very pleased that the mediator -- available mediator was Layn Phillips, former U.S. District Judge, who is perhaps the most deeply experienced and the most accomplished in complex insurance negotiations. So we were glad to be involved with him.

And the second aspect of the mediation was we were not going to slow down any aspect of the litigation. Either the litigation was going forward -- the mediation may or may not be successful, but we're not going to interrupt the progress of the litigation in favor of mediation. And indeed we thought that the prospect of a ruling on the motion to dismiss and the fact of the ruling on the motion to dismiss were all points that we could use to negotiate for as much as possible, and then see if whether that amount is agreeable to our clients and whether the settlement should go forward.

Indeed, as I mentioned at the outset, NYSCRF and FPPA and their counsel and their leadership were deeply involved in all of the negotiation sessions and throughout the protracted negotiations that led to the ultimate settlement.

So there's a lengthy process of negotiating the monetary component. We understood that the defendants and all of the carriers that make up each of the layers of those towers of insurance had to agree to every price move and, therefore, this took a while to ultimately reach a resolution at the number we did. And that's one track of the mediation.

On a parallel, separate track were the negotiations with -- principally with the Boeing personnel, inside and outside counsel to Boeing itself, about the governance measures. And that was also a protracted series of negotiations, a lot of complexities in those issues. And that was a priority for co-lead plaintiffs, especially, if I may add, in light of the practical cap on the monetary component. It was important that on the governance side we can negotiate for governance measures that have a company-wide impact, you know, that affect Boeing and its commercial airplane division on a company-wide basis. So that was proceeding on a separate track.

So that brings me to the next point. Then we had to evaluate, as these negotiations are going forward, what's our position in the overall litigation and what are the likely paths and what do

they mean in terms of where we are and what we could hope to achieve.

And specifically, from the perspective of co-lead counsel, we had no doubt that the alternative to a negotiated settlement would be the imminent creation of a special litigation committee by the board of directors. And that's a background fact, and it had various implications. And we had various, I'd say, complex thoughts about that prospect.

First, speaking for myself, but I think for our group, we do not believe that Boeing was especially eager to appoint an SLC. And the negotiations went on a while without an SLC having been appointed. We think a factual investigation could unearth additional facts that would support our claims. But the litigation over the outcome of an SLC investigation could be quite protracted and could be perhaps perceived as damaging to Boeing in terms of how it shook out in terms of the investigation process and then all of the *Zapata* process that followed if there was a disagreement about the SLC's determination.

We also, I think with a fair amount of confidence, did not think that this was a situation in

which an SLC would investigate for a long time and say everything is fine, the case should be dismissed, it's meritless, and there should be no resolution of any sort other than the dismissal. We do not view that as a likely prospect.

And for all those reasons I just mentioned, we did not particularly fear an SLC. We felt we had lots of negotiating leverage, even though we were negotiating in the shadow of the imminent appointment of a special litigation committee.

But sort of on the other side of the ledger, we have to look at what would happen if an SLC was appointed. There's a bunch of factors to consider.

One would be that there would be a stay of the litigation for some indeterminate but -- probably a relatively long period of time and that, in the interim, there would be some significant erosion of the D&O coverage. Clearly, all the defense costs and SLC costs associated with the litigation to date and the SLC process could be charged against the insurance.

And additionally, we just don't know what the outcome of the federal securities litigation

would be and whether there would be a resolution of that during the pendency of the stay and the whole process of the SLC, which, itself, could significantly reduce the amount of the available D&O coverage.

Separately, additionally, we were concerned that there could be an SLC determination to try to settle the claim based on some component of insurance coverage which could indeed be less than the amount that we were able to negotiate through the mediation.

And then, of course, we just had to think through just how -- what that would mean, if that happened, for a potential motion to terminate by the SLC, followed by *Zapata* discovery and a *Zapata* hearing, in terms of whatever that outcome the SLC determined.

And if there was an SLC process, there would also be a lost opportunity to negotiate for the governance reforms, which we'd been negotiating for; that if we would not be, like, the parties at the table and Boeing -- the SLC might not perceive any need to do things along the lines that we were seeking and they might have whatever agenda they have and that the opportunities to get the governance reforms that

were secured in the negotiation could be lost if we did not agree to go forward on the terms we did.

So I'd say that's -- well, that's about the posture of the litigation, how we thought about the posture of the litigation.

Separately, we also need to weigh the merits of the post-Lion Air crash *Caremark* claim in light of uncertainty about the ultimate record.

Now, certainly, we had an abundant documentary record. I think 440,000 documents produced and really just this wealth of publicly generated information and reports and such, which continues to come out and will probably continue to come out for the indefinite future, about what happened at Boeing. But there are certain things we didn't know.

There were significant privilege redactions about the role of counsel in advising Mr. Muilenburg, advising the board, advising some committees of the board, whatever advice was rendered in that complex legal environment post Lion Air when dealing with the FAA or the DOJ. And, frankly, we don't know what -- whether we'd ever get access to privileged information, whether privilege would be

waived, whether the SLC might get access to certain privileged information which then could become available to us, or whether the company would operate to try to maintain the privilege to the fullest extent. So that -- there was an aspect of the record that was a mystery to us.

There were also what were denominated in the document production as these "Annex 13" redactions, which related to the international agency investigating the crash. We think we ultimately would have gotten those documents unredacted, but we weren't sure what that would yield.

And then in terms of testimony, we didn't know how people would testify on such questions as what oral reports were given to any directors or committees or the board, what discussions were had along the way that were not reflected in documents that we had already received, what the rationale was for not -- for Boeing not undertaking an internal investigation, to the extent that was not privileged, and the extent and timing of exactly what the interaction was between Boeing and, say, the Department of Justice in terms of that inquiry during this period after the Lion Air crash but before the

Ethiopian Airlines crash.

So there were some significant uncertainties in the record, as there always are. But we did, obviously, feel very comfortable with the documentary record that we had.

So ultimately, taking all of that into account, we had these difficult protracted client-driven negotiations that resulted in a mediated settlement component of $237.5 million. And there's questions, like, how to think about that amount.

In gross terms, it's the second highest *Caremark* settlement of which we're aware, just under the *Wells Fargo Derivative Litigation*, which was in federal court in California a few years ago, litigated by Lieff Cabraser. This amount is by far the largest *Caremark* settlement in Delaware. I think the next one is - I think *Fox News* was about 90 million or something.

And then, thirdly, it actually is a record, I think, in the largest cash derivative settlement in the country for a U.S. corporation viewed in net terms. Like we knew the scope of the attorneys' fees we'd be seeking, the order of magnitude it was, which were, frankly, a lot lower

than in *Wells Fargo*, a lot lower than in *Activision*. And even the total fee application, if it's granted, the net to the company is something just under $220 million, which would be the largest net benefit of any cash derivative settlement, of which we're aware, involving a U.S. company.

It represents a significant portion of the available D&O coverage. I don't know if there's -- I don't think there is any magic threshold percentage about how you equate the fairness to a settlement about percentage of D&O insurance. But it's a lot of it.

I note that the objector, in its sur-reply, says we should have gotten at least 50 percent of the D&O coverage. Well, 50 percent would be $275 million. And I don't know how there's a rule of law that says you need to get 50 percent or that 275 would be within a range of reasonableness, but 237.5 is not.

So I look forward to Mr. Krislov's presentation on that subject. But given the order of magnitude involved, I don't see why that -- we're not talking about saying the settlement should be twice what it is or five times what it is or ten times what

it is. They are saying it should be 15 percent higher than it is. But I'll defer to my reply to say more about that.

To turn to the governance components. There are three features I'd like, in particular, to highlight. I would welcome any questions Your Honor may have about any aspect of the governance. And with Your Honor's permission, I would defer to my colleague Ms. Benson to answer all -- she was deeply involved in all of these negotiations and drafting of the corporate governance. But let me just highlight three of them.

The first is about the expertise of the board members. So there's not a mandated requirement for the board now. There would be two directors that have such expertise in terms of aviation/aerospace, engineering, product safety oversight.

So part of what we're saying is to add a third director who has such expertise -- and on a continuing basis the governance and public policy committee will ensure that at least three directors at any time have this expertise for the life of the settlement -- and that the Aerospace Safety Committee,

the ASC committee, will be comprised, to the extent possible, of people with knowledge, experience, expertise in aviation or aerospace, engineering safety systems oversight or product design, development, manufacture, production, operations, maintenance, and delivery; and that this ASC will be comprised solely of independent directors. So there will be a committee of three people with a certain level of expertise about these issues.

Second, there will be required reporting to this committee and then from the committee to the board. So that the chief engineer and the chief aerospace safety officer will ensure that the ASC receives regular -- at least semiannual reporting on aerospace safety performance, including significant communications with the FAA and information about submissions to the whistleblower portals, what's called the Speak Up portal submissions and the Seek, Speak & Listen program, that this -- that there is regular reporting to the ASC about these matters and that the results of this committee's meetings and the actions of the committee will be reported to the full board. So there will be reporting and updates on significant safety issues,

new safety policies and procedures, and significant safety events will be reported to the full board. And the chief aerospace safety officer will report to the board at least twice annually.

And, thirdly, there is the creation of the ombudsperson program. This program would be an entirely new institutional structure that doesn't otherwise exist at Boeing whereby the ombudsperson, operating consistently with, like, an association that handles -- that supervises ombudsperson programs, will be a neutral person for which any employee, if they have issues respecting how Boeing is dealing with the FAA -- because a lot of FAA regulation and oversight is done through what's called the ODA program through folks at Boeing. If there are members within that ODA unit who have concerns, they can raise them on a confidential basis with the ombudsperson, and that person -- the confidential aspect of those concerns will be relayed and discussed in a confidential way with the chief aerospace safety officer. So through that organizational structure that already exists within Boeing, there will be this overlay of this ombudsperson program to which Boeing employees can turn on a neutral, confidential basis to address

ongoing concerns.

And there are other features, but I wanted to -- there's things about public reporting, about having executive compensation, will take into account safety metrics. So there are other aspects. We wanted to highlight those.

That's my presentation on the settlement, if Your Honor wants me to stop right there for now.

THE COURT: The only question I had about the governance reforms was to confirm that -- I suppose suss out the extent to which these are baked into bylaws or other more enduring corporate documents. I saw the separation of management and board shares baked into the bylaws, but I wanted to be sure I had a holistic understanding of the rest.

ATTORNEY FRIEDLANDER: Right. So right now there is, in fact, a different board chair and a different CEO. David Calhoun is the CEO. Mr. Kellner is the board chair. So that's an additional component I hadn't mentioned, was that there be a bylaw requiring that to be in place.

Now, this, as I understand it through these agreements -- I don't think -- a bylaw is not a

mechanism, but these will be part of the requirements of, say, the various committees in terms of, like, how what I'll call the nominating committee would function to make sure this applies and how the Aerospace Safety Committee -- how it operates.

In terms of the mechanic -- I'll defer to Ms. Benson about how -- it's built into, obviously, the order by the Court and then into the settlement agreement. All these terms would be imposed or required in some fashion by the Court and throughout the company.

Do you have any specifics on that?

ATTORNEY BENSON: Thank you, Your Honor. I'll be brief.

So to your question, there are changes that have been proposed -- and this is in Exhibit A to the settlement agreement -- that include changes to the company's bylaws. And that change is the permanent separation of the chairman and CEO position.

There are changes to the -- Boeing has corporate governance principles which are separate and apart from the bylaws. Those principles, to Mr. Friedlander's point, did separate those two positions. We then moved that into the bylaws as part

of the settlement.

The corporate governance principles themselves have been amended in several ways, as set forth in Exhibit A. The first is to add the language -- and if Your Honor is looking at the Exhibit A, the bolded, underlined language is the language that is proposed to be added to the corporate governance principles and to the bylaws. The language that exists already nonbolded, nonunderlined is the existing language from, I believe, the August 2021 corporate governance principles. And so those are changes that go to the number of directors, the director expertise, and the requirement that the governance and public policy committee, which identifies new directors, is looking at particular areas of expertise when bringing individuals onto the board and then as part of the Aerospace Safety Committee.

And then there are changes to the Aerospace Safety Committee charter. And those are set forth -- I'm looking in Exhibit A, Section IV(A), which require the -- certain reportings. So again, the bold, underlined reporting by the chief aerospace safety officer to the Aerospace Safety Committee, the

chief compliance officer, and then additional detail there about the types of reporting that those two individuals and others within management of the company will make to the Aerospace Safety Committee.

And I believe the final edits to the Aerospace Safety Committee charter appear in Section VI(A) regarding the membership. And so that's a change both to require independent directors serving on the Aerospace Safety Committee and then the additional expertise.

THE COURT: Do you know sort of on a clear day or in the ordinary course what it takes to amend the corporate governance principles at the company?

ATTORNEY BENSON: It's my understanding -- and I'm sure counsel for Boeing or the directors will correct me -- that those changes are made by the board itself and ratified -- a proposed amendment and then are ratified by the board itself, and those corporate governance principles are then publicly updated.

THE COURT: Thank you.

ATTORNEY FRIEDLANDER: Your Honor, should I just stop there with the settlement and then

talk about the fee application later after the objections?

THE COURT: Yes, let's proceed that way. Thank you very much.

Mr. Krislov.

ATTORNEY KRISLOV: Your Honor, would you like me to --

THE COURT: If counsel at the front counsel tables are comfortable, I'd prefer that you were at the podium, if that's all right.

ATTORNEY KRISLOV: Thank you, Your Honor. Clinton Krislov for Walter E. Ryan Jr, Ryan Asset Management, and the Ryan Trust.

Mr. Ryan is -- I know that objectors are, at times, not looked at with favor. Mr. Ryan poses a very important -- he's a person who has $6 million worth of shares that are his money. And while I understand that the pension funds, the trustees, they are looking for -- and they do their fiduciary duties. I understand that. But there is no replacement for the fact when it is your investment in the company over a long term. And Mr. Ryan has previously, in other cases, brought cases that have corrected misdeeds with *Maxim Integrated*, the option

backdating that was back before this court some years ago.

Mr. Ryan poses -- when he received the notice, we went through the notice and we looked for it because Mr. Ryan believes in this company. Mr. Ryan wants this company to be the company that it has been in the past. And so there are three items that we focused on that were very important.

Number one, the Court's burden is to -- the Court's job is to evaluate the overall fairness of a settlement. Rather than picking out one point or another, the Court must determine that the settlement, given all of its parameters and all of its terms, is fair and appropriate.

Here, on the monetary component, it was never disclosed in the notices that the -- what the available money was, what the insurance policies amounted to.

THE COURT: Mr. Krislov, before we go much further, could you speak into the microphone.

ATTORNEY KRISLOV: I'm sorry.

THE COURT: Thank you very much.

ATTORNEY KRISLOV: I'm sure Mr. Ryan will want a transcript of this afterwards, so it's

better to be clear.

We noted that the total amount of the policy proceeds available was omitted. And they are saying, well, you could have asked. And somebody could have asked. But it was never revealed in any of the public filings.

And in order for the Court to know even just the monetary -- whether the monetary component is fair, the Court must know the elements of what are the damages, what is the likelihood of prevailing, what are the sources of recovery and how much. And so it was their burden to show those points. And I'm glad to say that after we pointed out the issue, that they did disclose it, which puts it into a different sort of a realm.

We know that there are about $23 billion in actual damages that the company has suffered because of the wrongdoing that the board did, which Your Honor's decision of September 7th points out a great deal of them, which is of grave concern for shareholders of a company that wants their company to be the company that it was, which is the global premier provider of quality, most-advanced airliners, which makes passenger travel as safe as riding on a

bus. In fact, these days, generally safer than riding on a city bus. And it's important to restore that confidence.

It was a big deal when I had my first trip to Chicago on a DC-6 at age seven -- it was a big deal to travel 300 miles by air. Today, we go halfway around the world nonstop. And we need to restore the confidence that this break that caused the 737 MAX crashes -- the break that nobody really knew what was going on at the simulator or the flight experience.

Back to the monetary. The monetary component, evaluating it requires the knowledge of the damages. We know it's about $23 billion so far. And it's going to keep growing because Mr. Robison's book has come out, which identifies the break between the board and the product development and the simulators in the planes flying, and the Ron Howard documentary that just came out last week, *Downfall*, which people will be seeing for months. It will be a long time for the company to get restored to its position of confidence. But we need to do that.

One is the monetary component. And while it took our objection for them to disclose the mere slice that they did -- I mean, they haven't

produced the policies. They say, well, you could have asked for discovery. It's not our burden to show the fairness of the settlement. It is their burden. And that's a necessary element. And if we've done nothing other than force the disclosure of what the policy proceeds were available to negotiate against, we feel that we have helped this Court make a better determination, better evaluation, which the Court needs to do in order to approve a settlement.

Second -- and so the concept that in a case where there's $23 billion in losses, there's $550 million in available resources from just the insurance policies, and that they are only getting 237.5 million, only 43 percent of available policy proceeds -- that's a factor.

It is a factor also in a case like this, which the Court recognized in your September 7th ruling, *Marchand*-type cases, cases which involve a company which exists in a regulatory -- in a very serious regulatory environment for health and human safety. *Marchand*, which involved a listeria outbreak involving an ice cream company that poisoned a number of its customers, three died. 300 people died as a result of the 737 MAX crashes.

Marchand-type cases deserve this Court's special scrutiny to make sure that the fairness ensures that there is both recognition of the wrongdoing, of what needs to be fixed; repairs to fix them; compensation -- restitution, if you want to keep this within the Rs, that there is appropriate compensation for the company for its damages; and restored confidence that it will not recur in the future, as the fourth R.

Now, dealing with the way their settlement went, as soon as the -- as soon as you ruled on the motion to dismiss, they were in mediation less than a week later, and in two or three days they got the settlement. You know, I'm sure they worked hard during those two or three days. That's not a long time for a mediation of a big case. I've been through them where you have three or four sessions spaced by weeks. They get speed on their side. Whether they get to claim credit for the amount, it's less than half, and there are no individual contributions.

And this is one in which the individual contributions -- they say, well, those individuals wouldn't have had the money to contribute

on the same level as the insurance policies. But that doesn't really answer the question because -- for one thing, it's public knowledge that Muilenburg got $62 million as he's going out the door. And a contribution, an individual contribution of even an amount that would be significant for that person -- a million dollars or so from just Mr. Muilenburg would have sent a different signal, would have said that there is recognition by the individuals and a motivation that would deter this from ever happening again. And it wouldn't have cost them that much.

Instead of getting -- and we had a DVI case across the river in the Eastern District of Pennsylvania where the insurance policies were all exhausted within months of the company's filing in bankruptcy, and we spent ten years pursuing individuals. And we got, I believe, 75 percent of security damages from about a dozen different individuals, institutions, brokers, underwriters, whatever, because the insurance in that case was insufficient.

I understand the concept that you want people to serve -- we want people to serve on Delaware corporations who are skilled and know that there will

be insurance for them. By the same token, it sends a great message if there were even the pursuit of some individual contributions. It wouldn't have taken that much. And it wouldn't have required it to be -- you know, it didn't have to be another 237 million, although who knows what assets they had. They chose not to pursue them for any.

This is an overall evaluation, and the Court can say -- whether looking at one point or another point in isolation, you'd say: Well, I don't know if I would agree on that. This Court has to take an overall view and say: Overall, do I believe that this settlement is fair in the Court's determination? And we believe that we have helped in that respect in, number one, the transparency of forcing the public disclosure of the resources available.

The deterrent side brings me to point three, which is, between the complaint, the book, the documentary -- all are clear that what was missing was a connection between people with experience flying the 737 MAX, whether by plane or simulator, because the MCAS took over without -- certainly, in the first crash, with no advice to people that it was their doing whatever and that that had -- that experience

had been experienced by people testing the plane, by people in simulators. They knew there was this problem.

And the problem that Boeing had at the time was that there was no direct connection between people with experience actually flying the planes, developing products -- whether the plane or a simulator -- and the board.

And so their response is to say, well, we'll now have three people who are experienced in aviation/aerospace, engineering, and product safety. And that's great, except that that doesn't ensure the connection that was missing in this case.

And so we proposed -- our initial objection was that they should have someone on the board who actually experienced, whether by plane or by simulator, what it is like to fly in the developing products.

Now, I concur that you don't need a director for every new product. But if there was a requirement that there be a report, it would be best if there was a person on the board who had experienced what it was to fly this plane by plane or by simulator.

Their response is, well, Ms. Harris, Retired Lieutenant General Harris who has 10,000 hours flying 747s but is retired, has not flown this plane. And even in her listing of other planes, she hadn't flown -- she apparently hadn't flown the 737. I don't know. But whatever, a requirement that there be a -- I called it a welded or a solid connection so that there would be a requirement that someone who has actually flown the plane, plane or simulator, would report to the board periodically directly on the experience.

Had that happened, had that been the case -- because this was the main plane that was being developed during that time. There was work on the 787 Dreamliner, which is still slow, but whatever. So there would be two planes that people would have to report on directly what the experience is flying that plane. Had that been the case, this would not have had -- the crashes would not have happened because there would have been the report to the board. There was time.

We can't cure all the problems of the company. We're not asking you to take over running the company. But we think in these three respects,

that the settlement -- it's not the worst settlement. They keep bandying about the numbers, that they are big numbers. But the fact is, there's a lot of damage. The company has suffered $23 billion in damages. And though the company may be worth $19 billion now, it's worth far less than half of what it was at one point in terms of the market.

But the key thing is, they need to get enough money from the proceeds in this type of case -- in a *Marchand* case where people die, there was special scrutiny. It's not just your average case that's a derivative case where people come up and complain and say, well, my company ought to get more. In a case where people die -- and here, more than 300 people died. And the losses are terrible, to be sure. But it puts it into a different category than just your average money-loss case. This is a company whose brand depends upon the flying public's confidence in it.

And so if they would -- in terms of the money they are getting, you have to factor in all the factors. The fact that there is 23 -- more than 23 billion in damages, there is now disclosed $550 million in insurance policies -- we haven't read

the policies, so it can be something more. And to just choose not to pursue the individual defendants at all, figuring that they couldn't come up with anything near 237 million themselves, that's settling a little quick.

And the need for a restored -- or a need for a required connection between people with actual experience flying planes under development so that the board has that connection, knows about such problems so that some CEO just doesn't say in the future: Everything is fine. If there's problems, it's because we sold these planes to some people in the third world who shouldn't be driving it. It puts it in the -- this is not a company that sells junk cars to drunk drivers. This is a company that sells airplanes on which people rely.

And if we are going to evaluate the monetary component, we have to evaluate it along with at least the pursuit of an individual contribution, which would have helped send a signal that the board gets it and to ensure the connection between the board and the products that are being developed.

If Your Honor has any questions, I'd be glad to answer them.

THE COURT: Thank you very much. And I do value the role of objectors. So thank you for being here today.

On your first point as to the presence of a pilot on the board who is certified to fly the most recent or recently developed product, I'm wondering why, especially in view of what the first prong of *Caremark* asks of a board, the improved reporting requirements from the engineers and the pilots and the ombudsman program wouldn't accomplish that same goal, given that is what prong one asks of a board. Prong one doesn't ask of a board that its directors have that technical expertise and knowledge themselves; we look for reporting.

ATTORNEY KRISLOV: The reason -- you would say, as a general concept, maybe that would be okay. You know, if we had no history here and somebody said, well, we have a bunch of people with expertise, blah, blah -- whatever. I don't want to diminish what they do have.

The fact is that those things occurred, and they occurred in a way that if there was a required reporting of the flight experience by people who had -- even it wasn't another person on the

board who was a certified pilot, that there would be a report to -- a required report to the board by somebody who had actually flown the plane physically or by -- real plane or by simulator. If there was a required report. To just say, well, we're going to have a bunch of people who have expertise and we're going to have an ombudsperson who -- that if people think there is a problem, they have somebody to bring it to, and between all the things -- those things, you know, you could look at the board's bylaws and the structure, and you'd say, as just a sort of generic thing, you would think maybe those things would occur.

But the fact is -- and I suppose Mr. Ryan's experience is what I would use as an example, somebody who actually physically is there. A report from somebody who actually does this stuff, to put it in a frame, periodically is a whole different creature than saying, well, we've got a bunch of people who are available to look into things. If you have to have a regular report from someone who has actually flown the thing, it's a whole different matter.

And that's why we're not saying there has to be a certified pilot for each plane that they

are developing on the board, but there has to be a sure link so that there is a regular report that gets to the board so the board doesn't have to think about whether all these other people have gone along with the gestalt framework of making sure that things are safe.

And that's why Mr. Ryan is sort of a hands-on operator from where he started to where he is. And a person who actually does the work and knows the experience can relate it better than people three levels upward who are relating what they have heard and making sure that it comes out in a way that's advantageous or whatever. You need a direct connection. Every board probably needs a direct connection between their board meetings, which take place at, you know, the 12th floor and above, and the people who actually do the work.

And so because of the nature of the things that have occurred, that's why we're saying there has to be a direct link.

THE COURT: Thank you.

My second question goes to -- you know, you are pointing out the very tragic facts underlying the failures here and tying that to

Marchand. And I understand your argument to be that on those facts, and in a *Marchand* context, that the Court should demand personal contributions and a higher monetary award. And I wanted to sort of ask if that isn't, in a way, double-counting, because what *Marchand* does, in a way, is allows -- explicitly allows for the inference of that difficult scienter piece from the structural aspects of the company as opposed to having to, for example, go to trial and put a director on the stand and say: Well, what were you thinking when this happened?

And I'm wondering if our common law in that arena doesn't already increase the likelihood of liability such that in order to double-count it -- in asking for essentially heightened damages or a heightened monetary award wouldn't be double-counting. It's sort of a half-baked idea, but I wanted to engage with you on that.

ATTORNEY KRISLOV: I understand. If we're saying, look, we have insurance for these people and you want the people to contribute as well -- this is a unique sort of case. And what I would say is you look at it overall. Because there will be cases where, in a *Marchand* situation, you'd say, well, we've

only got $10 million worth of insurance, but that D&O should cover it, and we shouldn't look to the directors for anything, even if the company's liability is, like, 12 to 15 million. You don't want the directors to get such small insurance that it doesn't cover for the damage that they could actually do. At the same time, you don't want to deter people from wanting to serve on a Delaware corporation.

So we're not saying that in all cases, *Marchand* cases, it has to be that there is an individual contribution. But what we're saying is that in a *Marchand* case -- and this is a *Marchand* on steroids because of the number of deaths, because of the losses -- because the Court has to make an overall balance and valuation of -- between the insurance available, the damages, and what's available from the individuals. It's not unfair to say, look, you got to at least look to -- in a case where the damages are so huge, that they vastly dwarf the insurance available, maybe there should be some contribution, even a small one, in recognition that they had some liability.

On the other hand, then you'd say, well, in a case like this, just getting 43 percent of the available insurance -- you know, don't pat

yourself on the back too much because you are letting these people off, and you are only compensating the company for, like, 1 percent of the damages that were caused.

And so what we're saying is while it's not each individual thing in isolation, it is the whole thing together. And we think that the Court would be well to -- one option for the Court is to say, look, this is not a terrible settlement, but it needs to be improved. And it needs to be improved in a case like this, where the insurance is what it is -- a higher percentage is required in order to support no individual contributions. But where the insurance -- where we're settling the insurance at 43 cents on the dollar and only 1 percent of the damages, say, well, there might need to be some individual contribution.

On the other hand, if you said -- if we were doing, hypothetically, 90 percent of the insurance, then people would not be saying, well, what about those other guys. Although, you know, there's nothing to say the guy who walks out the door with $60 million or more shouldn't have to pay back. And there have been -- the cases are rare. I acknowledge that the cases are rare where there is substantial D&O

insurance. The cases are very rare. You have to go back to, like, *Enron* for individuals contributing some.

But because the Court's job is to determine whether the recovery -- whether the settlement is overall approvable, where we have a case like this, where the damages are huge, the insurance recovery is only 40 percent, and there is no attempt to even negotiate for any individual contributions -- you know, I think the Court would be well-postured to push the parties to get this a little better before it will approve it. And that's why we put our three points to assist the Court, because we think that -- overall, is it the worst settlement ever? No. Overall, is it the best? No. But we think that because of these elements, considered all together as the Court must, that they need to improve it.

Does that answer your question? I'm sorry I was long-winded in that.

THE COURT: Thank you very much. No further questions.

ATTORNEY KRISLOV: Thank you, Your Honor.

THE COURT: As Mr. Krislov goes back

to his seat, I just wanted to be sure that there isn't a Mr. Leahey in the courtroom today.

(No response.)

THE COURT: Just for the record, I have reviewed Mr. Leahey's objection and taken it into account. And by my count, there were no other objections from stockholders that were received. So thank you very much.

Mr. Friedlander.

ATTORNEY FRIEDLANDER: Your Honor, I'll be brief. I'd like to address, like, three points.

One is, I think it's very telling -- one of the last words out of Mr. Krislov's mouth were the settlement should be a "little better." And that that's not the standard for evaluating a settlement. It's is the settlement reasonable in relation to the "give" and the "get" in terms of the claims and their value and what was negotiated for.

And I think so much of what he says mirrors, I think, the actual reality of the settlement on the table. He said he didn't know about the insurance; we knew about the insurance. We retained special insurance counsel to analyze the insurance.

We spent several weeks in negotiations. So the first mediation session -- after mediation submissions, the first mediation session was before Your Honor's ruling on a motion to dismiss. The last one was a month after that ruling that the settlement was reached. So there were several weeks of negotiations. I appreciate if he says we could have done better, maybe we just didn't do a good job negotiating, but I think we did.

In terms of the decision about whether to settle or not on the terms -- I think the real inquiry is not can this be a little better, but it's just yes, no. Should the settlement have happened or should it not? And if it shouldn't happen, then what's the alternative?

I don't hear Mr. Krislov offering to take over the litigation. But we had to think to ourselves: What would the litigation look like? And I tried to portray that. And I think the real hard question is: From whom do you collect money, and how much?

And I'm going to put two names on it because I think Your Honor's question is really -- it's really a deep question, when you think about it:

Marchand and the implications for personal liability. It's one thing to plead that outside directors have a substantial likelihood of personal liability. That's like a requirement to get past a motion to dismiss. Does that mean Caroline Kennedy, who joined the board in 2017, that her entire personal wealth is at stake and to what extent and to what it means to prove a *Caremark* claim or to prove damages from a *Caremark* claim?

I mean, there's not case law about what it means to prove proximate cause damages from a *Caremark* violation, to establish a *Caremark* violation at trial and what would be the level of proof and then what would be the level of damages. And I think that's really profound, because there is a lot of insurance at Boeing. This is a big number. It would be one thing if it was a company that doesn't have much insurance and what it means for directors to be putting their personal wealth on the stake by becoming directors and not exercising appropriate oversight for purposes of a motion to dismiss and then what it means to assume a directorship and what the risk means at trial and after the fact.

And then to put another name on it, we

think the most likely defendant we could prove damages against would be Mr. Muilenburg. Does he have more than $237.5 million after trial to pay a judgment? I don't think so. But how likely is that?

But it's those hard questions. That's ultimately what we're looking at the whole time -- settle or litigate -- at every juncture. A lot went into this. There's not -- the documents arrived long ago. There was lots of litigation. There's lots we knew going into this by the time the settlement was struck. And there was a lot achieved in the settlement from a money perspective.

And what I really don't understand in terms -- I don't even understand how the proposal that's being made on the governance is even a little bit better. The settlement addresses specifically not just the reporting aspect of *Marchand*, but the expertise aspect of -- that you need directors who actually understand the mission-critical risks of the company and that certain people perhaps are better suited. Like maybe not everybody on a board needs to be, like, a safety oversight expert, but that a board could be lacking if there is no such person. So even if they are getting the reports, do they really

understand the significance of them?

Here, we have a requirement that at least three directors have knowledge, experience, and/or expertise with aviation/aerospace, engineering, and/or product safety oversight. So you have three directors with actual industry-specific -- not just the industry, but from a safety oversight perspective -- expertise and you have the overlay of the reporting to the full board and you have the overlay of the ombudsperson program, which means the actual line employees, whether they be pilots or mechanics or any of the level of engineering folks, that their specific concerns are being addressed and channeled through the chief safety officer position to the committee, ultimately to the board; that that's -- all of that is contemplated by the proposed settlement. So I don't even understand how the proposal is a little bit better than what we are already presenting to the Court.

Thank you.

THE COURT: Mr. Friedlander, just one housekeeping question -- more than housekeeping, but I meant to ask in your opening presentation -- and that is sort of standard -- making sure that I understand

the extent to which direct claims are released here in the release.

ATTORNEY FRIEDLANDER: Well, it's purely a derivative settlement. So there's purely derivative release. So no direct claims are being released.

THE COURT: Because the definition of "Released Plaintiff Claims," I didn't read that to be cabined to derivative claims. It looked like it was in paragraph 7, in the act of release by Boeing stockholders. And I just wanted to make sure that we were all on the same page that this is not releasing any direct claims. And I apologize for not asking that.

ATTORNEY FRIEDLANDER: I'll ask everybody in the room to check out the language and see if we can address that to the Court's satisfaction.

So in paragraph 7, "Boeing stockholders to the extent they are acting or purporting to act derivatively" -- having had litigation over the meaning of the words "to the extent" -- I wish that wasn't the phrase -- I think it means if they are, to the extent -- you know, in such

capacity they are acting or purporting to act derivatively. That's the scope of the release claims.

THE COURT: Because in the definition of "Released Plaintiff Claims," that particular definition, I didn't necessarily appreciate that that was -- that those claims are derivative. It looked like it was more in paragraph 7.

ATTORNEY FRIEDLANDER: Okay, paragraph 7: Release of Released Plaintiff Claims."

THE COURT: Yes.

ATTORNEY FRIEDLANDER: I was just going down to the third -- the fourth line. Part (iii), "Boeing stockholders to the extent they are acting or purporting to act derivatively," which may not be the most felicitous way to phrase it. But it should be derivative only.

THE COURT: That's how I was hoping to read it. Thank you.

No further questions.

Yes, Mr. Krislov. Did you want to add something briefly?

ATTORNEY KRISLOV: One thing. My colleague brought up Caroline Kennedy and serving on the board. The fact is, the difference between

Muilenburg, Calhoun -- what they did and what Caroline Kennedy's role was, which was not a part of any of this, are fundamentally different; that the contribution -- an individual contribution from Mr. Calhoun and Mr. Muilenburg, whether -- they never even sought, and there's no explanation of whether they should have contributed. It's a whole different -- you can wave around a Caroline Kennedy flag and say, well, anybody is going to be fearful. The fact is that people who serve on boards have to be honest. They have to be honest with the public. They have to be honest with their board. And the actions that even this Court identified would make them fair game to at least negotiate some -- even if it was just a representative, a number of something, some contribution, to pursue some contribution from people who -- as identified in the motion to dismiss, the book, the movie. Muilenburg and Calhoun are in totally different situations, and it should not deter a person from serving on the board in whatever capacity the person serves. You just don't make misstatements and mislead people.

I think that's all. I appreciate Your Honor's time.

THE COURT: Thank you.

I will ask if counsel for the individual defendants or the nominal defendant want to remark on the terms of the settlement. And then perhaps we can take a recess, and then we'll come back to address the fee.

ATTORNEY NELLES: Thank you, Your Honor. Sharon Nelles for the defendant directors. Thank you for having us here today. It's very nice to be in a courtroom.

Again, I will be very brief. We're just very pleased that the parties have reached a settlement, and we're very happy to be here today in support of it. And as Mr. Friedlander and Ms. Benson have described, the settlement provides significant government enhancements.

I did want to just note that in Exhibit A that Ms. Benson was discussing in response to, I think, a question that Your Honor had posed, that those enhancements must remain in place for no less than four years -- and that's in IX(A) of that Exhibit A -- unless otherwise specified. The only exception to that is for the ombudsperson, and that has to remain in place for five years.

The company is already very hard at work on implementing many of these. And I know the people involved will tell you that that's a substantial effort.

I also just want to take a very quick moment, if I may, to acknowledge the work of the lead plaintiffs who are here, who dug incredibly deep into the company and learning the company and learning the very significant efforts that have been undertaken since the tragic events of the Lion Air flight and the Ethiopian Airlines flight accidents.

I also just want to thank the Court again for its consideration today. It's very nice, as I said, to be in a courtroom.

And, finally, if I could just be clear on the release. I just want to make sure that there is no confusion. And I think we got it 90 percent of the way there. The language that Your Honor was looking at relates only to the named plaintiffs. So only the named parties to the litigation. And that is -- if you go to the section right beneath it where it talks about "any other Boeing stockholder," it is plain that these are only released for derivative claims. You have to work back, I think, through the

definitions to get there. But if you do, you will see that it is quite plainly only a release of derivative claims.

THE COURT: Thank you.

ATTORNEY NELLES: Thank you.

THE COURT: Mr. Rohrbacher, anything to add?

ATTORNEY ROHRBACHER: Nothing from me, Your Honor.

THE COURT: Thank you. Why don't we take a 15-minute recess.

(Recess taken from 2:55 p.m. until 3:16 p.m.)

THE COURT: Thank you. Please be seated.

Mr. Friedlander.

ATTORNEY FRIEDLANDER: Turning to the fee application. Your Honor, we're seeking $18,260,000 in total, which is 7.69 percent of the monetary component of the settlement. And essentially that is -- that's based on the contractual arrangement by which we originally took on the case to represent NYSCRF and FPPA. Frankly, we wanted to be part of this case. We thought it had the potential to be an important case, and we wanted to be part of it. And

we came together on those terms. So it's not with reference to any of this court's precedence, which, frankly, I think, would all be on a higher level. But that's what we agreed.

And the total hours. So Lieff Cabraser has over 10,000 hours. Our firm has more than 1,300 hours at the time of the opening brief. There's time for insurance counsel, about 138 hours. We also realize that we came in -- as Your Honor will recall from the 220 litigation -- you know, we weren't there, but Prickett Jones and Hach Rose were. We always sort of recognized that there was a positive result; that they would deserve to be compensated for their role in obtaining the 220 documents. So this reflects nearly 1,700 hours by Prickett Jones and over 1,200 hours by the Hach Rose firm. As I understand, that's their time solely as relates to the 220 litigation process, not for the subsequent leadership contest in this action.

So there's over 17,600 hours that are reflected in our various declarations. So the implied rate is less than $1,025 per hour after deducting expenses, which exceed $200,000.

Frankly, that's all I really plan to

say because it is, I think, far below any metric we are aware of under the case law.

The other thing I might as well point out at this time is we are seeking an incentive fee award on behalf of FPPA. I want to advise the Court that this issue sort of arose late in the game, so it was not made part of the notice. And we're not -- we're not aware of any Delaware law requiring that be part of the notice. The amount is $12,500 that we're seeking. It reflects over a hundred hours by Mr. Lindahl and Mr. Miller.

Under Rule 23, according to all the affidavits that we have to put in at the time of filing complaints, et cetera -- all those acknowledge that any return to counsel, or whatever, would have to be -- or to the plaintiff has to be approved by the Court. So, obviously, we're seeking court approval. It's a relatively small amount. Obviously -- I think very obviously -- it had no bearing on the manner in which the case was litigated or negotiated. But we would ask that it be appropriate that their staff time, which they undertook, and/or essential parts of -- they were really essential to the mediation. They requested to be compensated, and we ask the Court

to allow that award out of the attorneys' fee.

Thank you.

THE COURT: Two questions on that.

The first is, the other plaintiff, who I am calling the "Fund" because I didn't have the clever way of squishing together the acronym to say out loud that you have, they are not seeking an incentive fee?

ATTORNEY FRIEDLANDER: NYSCRF is not seeking an incentive award.

THE COURT: And then just to be sure that we're abundantly clear on whether the Isman plaintiff's counsel is seeking a fee or objecting to the fee. I don't believe they are here today.

ATTORNEY FRIEDLANDER: So we were in some communication with them before filing our opening brief, and we haven't heard from them since.

THE COURT: Thank you.

Is there anyone who would like to comment on the fee application?

ATTORNEY KRISLOV: Your Honor, I don't usually object to these in the overall percentage -- sorry. We had no objection to the fees as the total amount. But I was having trouble hearing back there.

The incentive award, does this go to the public pension trustee personally, or does this go to the pension fund to compensate the Fund for their efforts as a plaintiff?

ATTORNEY FRIEDLANDER: It's to the Fund.

ATTORNEY KRISLOV: Okay. Then I have no objection to that.

THE COURT: Thank you.

ATTORNEY KRISLOV: Oh, this is what hadn't been part of the notice; right?

ATTORNEY FRIEDLANDER: Right.

ATTORNEY KRISLOV: Well, it's not a lot of money. I guess I would counsel them to -- if you are looking for an incentive fee in the future -- and we have. And I've written in support of incentive fees. I believe in them because when people stick their necks out, especially individuals, they do a great -- they sometimes do a great job for the class. And so I would caution you to put this in the notice in the future because that's an important aspect that people should consider.

THE COURT: Thank you.

Any further comment by counsel for the

individual defendants?

ATTORNEY NELLES: No, Your Honor.

THE COURT: Mr. Rohrbacher?

ATTORNEY ROHRBACHER: No, Your Honor.

THE COURT: Thank you.

Well, as a final display of inefficiency, I'm going to take another recess, put the bow on my remarks, and then I'll be back with you shortly. It will be at least ten minutes, so you can stretch your legs. Thank you very much for the helpful presentations.

(Recess taken from 3:24 p.m. until 3:47 p.m.)

THE COURT: Thank you. Please be seated.

Today I heard from the parties regarding the proposed derivative settlement of the matter captioned *In re The Boeing Company Derivative Litigation*, 2019-0907-MTZ. The action is brought on behalf of nominal defendant The Boeing Company. For the reasons I will explain, I approve the settlement.

The company is a global aerospace corporation that designs, manufactures, and sells commercial airplanes and other aviation equipment for the airline, aerospace, and defense industries.

On October 29th, 2018, a Boeing 737 MAX aircraft, Lion Air Flight 610, crashed off the coast of Indonesia. The plane was directed down by the airplane's new Maneuvering Characteristics Augmentation System, or "MCAS," which directs the flight control system in certain circumstances. On March 10th, 2019, a second Boeing 737 MAX aircraft, Ethiopian Airlines Flight 302, crashed in Ethiopia, again directed down by MCAS. 346 people lost their lives in these two accidents.

On March 13th, 2019, following the second accident, the Federal Aviation Administration, or "FAA," grounded all 737 MAX airplanes. The aircraft was also grounded by international regulatory authorities.

These tragedies have led to numerous investigations and proceedings in multiple arenas to find out what went wrong and who is responsible. Those investigations have revealed that the 737 MAX tended to pitch up due to its engine placement; that MCAS, designed to adjust the plane downward, depended on a single faulty sensor and therefore activated too readily; and that the software program was insufficiently explained to pilots and regulators.

The 737 MAX fleet was grounded for 20 months, until November 18th, 2020. During the grounding period, the company was mandated to cure the defects in the 737 MAX's MCAS system, and other sensors, and to revamp pilot training. But these measures did not rectify the significant damage done to the company's profitability, credibility, reputation, and business prospects; nor did they unwind the company's exposure to substantial criminal, regulatory, and civil liability.

In 2020, the company estimated it had incurred nonlitigation costs of $20 billion and litigation-related costs in excess of $2.5 billion.

As early as October 2019, various potential plaintiffs began coming forward with derivative suits seeking redress of the damage suffered by the company and its stockholders. I will narrate the procedural history that pushed the co-lead plaintiffs' claims to the top of the heap because it supports the strength of those claims and explains the structure of the fee award. The initial actions were the *Isman*, *Kirby*, and *Slotoroff* actions.

In April 2019, the Kirby Family Partnership, LP, and Jon Slotoroff made Section 220

books and records demands upon the company. The company produced 81 documents to Kirby and 389 to Slotoroff. From this starting point, stockholders began to form a record of the board's alleged failure to monitor aircraft safety standards and alleged failure to react to known issues with MCAS before and after the Lion Air crash.

In November 2019, Kirby and Slotoroff each filed a derivative action alleging various breaches of fiduciary duty relating to aircraft safety by the company's board. Both actions asserted demand on the board was futile.

On October 3rd, 2019, plaintiff Arthur Isman filed a derivative complaint following review of documents produced pursuant to a Section 220 demand. The *Isman* action is unique in that Isman made a demand on the board and thus conceded the director defendants' ability to impartially consider a demand. Importantly, a demand by one stockholder does not bar another stockholder from asserting demand futility per *Abacus Partners v. Brian*.

Plaintiff Slotoroff moved to consolidate the *Isman*, *Kirby*, and *Slotoroff* actions on December 13th, 2019, and asked the Court to either

deny the motion to dismiss pending in the *Isman* action or stay the action as moot.

On December 23rd, 2019, another stockholder entered the fray: Construction and General Building Laborers' Local Union No. 79 General Fund. Local 79, represented by Prickett Jones & Elliott and Hach Rose Schirripa & Cheverie, sought to intervene in the above-mentioned actions and stay them pending Local 79's own Section 220 action against the company, analysis of documents produced, and filing of related claims, with particular interest in an October 11th, 2019, FAA technical review report. The Court granted the motion to intervene on January 28th, 2020, and stayed the three aforementioned actions.

Local 79's vigorous prosecution of its Section 220 action resulted in an extensive post-trial production, which included documents the company had withheld as privileged from other stockholders and documents the company had initially redacted. The company ultimately produced over 41,000 documents to Local 79. Many of those documents were key to drafting a more detailed, informed, comprehensive, and particularized complaint. They included officer-level documents, internal email communications, board

minutes, and other internal company communications not received by any other stockholder to date. Local 79 filed their derivative complaint on June 12th, 2020.

Another set of plaintiffs, Fire & Police Pension Association of Colorado, or "FPPA," and the New York State Common Retirement Fund, which I'll call "the Fund," both represented by Friedlander & Gorris and Lieff Cabraser Heimann & Bernstein, also filed a derivative complaint on June 12th. Prior to filing their derivative action, FPPA and the Fund sent the company books and records demands on February 12th and April 20th. FPPA and the Fund obtained additional documents, including board minutes that postdated those obtained by Local 79. In total, FPPA and the Fund obtained and analyzed approximately 44,100 documents from the company, totaling over 630,000 pages, including those produced to Local 79.

The Court's attention then turned to the appointment of lead plaintiffs and lead plaintiffs' counsel. Concurrently, on June 10th, Isman filed a motion asking the Court to lift the stay on the *Isman* action and not to consolidate it with the demand futility cases; rather, keeping the actions on parallel tracks.

On August 3rd, then-Chancellor Bouchard appointed the Fund and FPPA as co-lead plaintiffs. The Court consolidated the *Kirby*, *Slotoroff* and *Local 79* actions with the Fund and FPPA's action. The Court did not consolidate *Isman* with the rest, but the Court did not lift the stay either.

Co-lead plaintiffs filed a verified consolidated complaint on September 4th.

Count I asserts a derivative breach of fiduciary duty claim against current and former directors, alleging they consciously breached their fiduciary duties by failing to implement an aircraft safety reporting system; by failing to respond to the first crash as a red flag of safety reporting deficiencies; by falsely misleading the public about the safety of the planes and their software; and by cashing out the departing CEO's unvested equity-based compensation.

Count II asserts a similar breach of fiduciary duty claim against the company's officers, arguing they consciously or negligently failed to monitor safety, disregarded red flags, and covered up safety risks.

On November 9th, defendants moved to dismiss.

On January 29th, 2021, co-lead plaintiffs filed a verified amended complaint, addressing recent criminal penalties from the Department of Justice.

On March 19th, defendants moved to dismiss that complaint and submitted 88 exhibits in support. The parties briefed that motion, and the Court heard oral argument on June 25th.

A full-day mediation with defendants and their insurers took place before former United States District Judge Layn R. Phillips on September 3rd.

On September 7th, 2021, this Court denied the motion to dismiss the co-lead plaintiffs' primary claim for breach of fiduciary duty against the director defendants, but granted the motion for the claim against the officers and the claim relating to the CEO's compensation.

In view of the objections received, which I will discuss in a moment, it is important to pause here and remember what questions plaintiffs' complaint poses after the motion to dismiss and what

questions the Court has answered. The complaint asks whether Boeing directors and officers acted in bad faith by failing to fulfill their oversight duties owed to company stockholders, thereby causing monetary loss to the company. The Court reviewed plaintiffs' allegations and certain documents produced under Section 220 that the parties put before the Court.

Taking plaintiffs' allegations as true, and finding the documents defendants put forward did not contradict those allegations, the Court concluded that demanding the board bring this derivative action was futile because a majority of the board faced a substantial likelihood of liability. The Court's decision did not conclude the directors were in fact liable or that they had in fact breached their fiduciary duties; only that liability was substantially likely. The Court thus denied the motion to dismiss Count I. The Court dismissed the claims against the officers in Count II because the plaintiffs had failed to plead with particularity that demand was futile.

After the Court's opinion, more mediation sessions followed on September 12th, September 23rd, October 1st, and October 5th. On a

separate track, plaintiffs and their counsel negotiated with Boeing for corporate governance changes.

On October 6th, 2021, the parties agreed to a settlement in principle. The parties filed the stipulation and agreement of compromise, settlement, and release on November 5th.

Part of the settlement involved engaging with plaintiff Isman once again. The proposed settlement contemplated a release and dismissal of the claims asserted in the *Isman* action. Accordingly, co-lead plaintiffs sought consolidation of the *Isman* action for settlement purposes. Over one week later, on November 17th, 2021, plaintiff Isman stated he had no objection to consolidation.

On November 18th, the Court granted the motion to consolidate the *Isman* action into the current derivative action only for the purposes of settlement. The Isman stockholders have not objected to the settlement or to the fee award.

I have four tasks for purposes of the hearing today: First, I need to determine whether the Rule 23.1 requirements have been met; second, I have to review the adequacy of notice of the settlement

delivered to stockholders; third, I must review the terms of the settlement for fairness and determine whether to approve them; and, fourth, if the settlement is approved, I must resolve the petition for an award of attorneys' fees and expenses.

I begin with the Rule 23.1 requirements. Rule 23.1(c) requires that any representative plaintiff seeking approval of a compromise before this Court file with the Register in Chancery an affidavit in the form required by Rule 23.1(b).

General counsel of FPPA filed an executed version of that affidavit on September 2nd, and the counsel for the Fund's comptroller filed an executed version on September 2nd. I find that the requisite affidavits were filed.

Turning to adequacy of notice. Rule 23.1 requires that notice by mail, publication or otherwise of the proposed settlement has to be given to stockholders in such a manner as the Court directs. A notice of settlement is sufficient if it contains a description of the lawsuit, the consideration of the settlement, the location and time of the hearing, and informs the recipients of where additional information

can be obtained. That standard is drawn from *Philadelphia Stock Exchange*. I conclude that the notice here is sufficient.

Together, the stipulation and the notice of pendency of the action, proposed settlement of the action, and the settlement hearing describe the underlying facts related to the litigation, the claims alleged by the co-lead plaintiffs, the procedural history of the action, and the current proposed settlement. This notice adequately describes the lawsuit, including the claims asserted and the proceedings to date.

The notice also adequately describes consideration for the settlement. On page 13, it states that the proposed settlement contemplates a monetary payment of $237.5 million to be paid by defendants' directors and officers liability insurers. It further states that the company shall undertake the corporate governance measures detailed in Exhibit A to the stipulation.

The notice provides the location and time of the hearing. Page 2 indicates that a hearing will be held here on today's date at 1:30 p.m.

Finally, the notice informs

stockholders who to contact for further information. Pages 20 and 21 contain the contact information of co-lead counsel, as they would be the appropriate parties to answer further inquiries regarding the proposed settlement.

Based on its satisfaction of these factors, I conclude the notice is sufficient.

The notice was also adequately delivered. As this Court explained in *In re Activision Blizzard Stockholder Litigation*:

"'In the context of a proposed settlement, the Court typically enters a scheduling order that, in addition to setting a date for a settlement hearing, tentatively approves the form and content of the notice and sets forth the manner in which notice is to be given.' ... There is no requirement to mail a [] notice to every single class member who ever owned a share of a publicly held company."

Rule 23(e) permits delivering notice by mail, publication or otherwise.

Al Lambert at Boeing Commercial Airplanes states in an affidavit that on December 7th, Boeing posted copies of the stipulation and agreement

of compromise and the notice of pendency, proposed settlement, and settlement hearing on its public website, which would be available through at least today. Lambert also states that Boeing caused the summary notice to be published as a quarter-page advisement in the December 17th national and local editions of the *Wall Street Journal*. Also on December 17th, Boeing caused the summary notice to be published over the *PR Newswire*. Exhibits A through D to Lambert's affidavit contain true and correct copies of these postings.

Philip Barone, a director at Broadridge Financial Solutions, states in an affidavit that Boeing retained Broadridge to distribute the notice by mail and email to Boeing stockholders. Broadridge caused the notice to be mailed by First Class Mail to 96,282 Boeing stockholders between December 8th and December 15th. Further, on December 15th, Broadridge caused the notice to be sent by email to 12,286 Boeing stockholders who had previously authorized electronic distribution of stockholder materials.

As of February 7th, 2022, Broadridge has not received any requests to provide any

additional copies of the notice to any stockholders on behalf of Boeing.

Finally, Sean Petterson, attorney at Lieff Cabraser, states in an affidavit that co-lead counsel created a website regarding the notice which contains information about the action, including links to the documents. The website was included in the notice and the summary notice. The website contains the date of the final settlement hearing, information about case deadlines, hyperlinks to important documents, and contact information for co-lead counsel.

Finally, while reporting in the press is no substitute for actual stockholder notice, I will note that the settlement was widely covered in the press.

I now turn to consider, as I must under Rule 23.1, whether the terms of the proposed settlement are fair and reasonable, recognizing that "[t]his Court generally favors settlement of complicated litigation," as set forth in *Gatz v. Ponsoldt*.

It is important to pause again here and consider why the Court undertakes this task. The

reason that derivative and class action settlements are subject to this Court's approval is to protect the interests of the absent corporation *vis-a-vis* the personal interests of the representative plaintiff and the plaintiff's counsel. In particular, the Court's involvement arises from the need to ensure absent stockholders are adequately represented and to guard against buyouts of plaintiffs at the expense of those whom they purport to represent. *In re Celera* dilates on this theme, explaining that care must be taken in approving a settlement of a publicly traded company to ensure the fiduciary nature of the action is respected and that approval is consistent with due process. The Court is to guard against the risk that absent class members and others with a stake in the litigation could have their claims released without an opportunity to be heard.

As explained in *Activision* and *Forsythe*, the Court's role is to act as a fiduciary, applying a range-of-reasonableness review that is one step removed from the litigant's business judgment to accept the settlement.

This Court put it simply in *Kahn v. Sullivan*. The Court's role in reviewing the proposed

settlement is quite restricted. The Supreme Court went on in that case explaining the Court was to balance the policy preference for settlement against the need to ensure that the interests of the shareholders had been fairly represented.

In sum, the role of judicial review is not to second-guess or optimize every element of the settlement; rather, the Court's role as a fiduciary is to ensure due process is followed and to weigh the "give" against the "get" to be sure the corporation is reaping reasonable benefit alongside the representative plaintiff.

In so doing, *Philadelphia Stock Exchange* explains the court's function is "to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and to apply its own business judgment in deciding whether the settlement is reasonable in light of those factors."

Activision explains the Court must then "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."

The Court of Chancery need not limit itself to an examination of the immediate tangible results to a corporation or its shareholders in determining the fairness of a settlement agreement. The probable long-term benefits of the settlement are also properly considered. In other words, I must evaluate the "give" and the "get" of the proposed settlement.

I begin with the nature of the claims and defenses. After the motion to dismiss was granted in part and denied in part, the claim remaining was a *Caremark* claim against Boeing's directors. Such a claim is nonexculpated. It has also repeatedly been called the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.

Plaintiffs stated claims under both prongs of *Caremark*, with the scienter element satisfied due to the presence of structural factors that supported an inference of scienter in *Marchand*, as well as other facts. Defendants' argument in favor of dismissal focused on the *Marchand* factors, asserting that company documents demonstrated those factors were not present here. The Court disagreed.

Going forward, as plaintiffs explained, they faced the risk that the board would form a special litigation committee and the risk that committee might have lesser settlement requirements, and less of a focus on governance reforms, than plaintiffs were seeking. An SLC also presented the risk of a longer litigation timetable with additional costs to stockholders, including further reputational risk to the company and further use of limited insurance funds. Plaintiffs also faced the inherent uncertainty of trial, especially in light of the limited *Caremark* post-trial case law on this issue, and a win at trial would not result in corporate governance reforms.

In my view, the settlement consideration, both monetary and nonmonetary, reflects the strength of the claims and the road ahead for this case. The proposed settlement contemplates a monetary payment of $237.5 million to be paid by defendants' directors and officers liability insurers. The stipulation also provides that as part of the proposed settlement, Boeing will undertake the following corporate governance measures:

The addition of a board director with

aviation/aerospace engineering and/or product safety oversight expertise;

The creation of an ombudsperson program with the organization of the chief aerospace safety officer;

Amending the company bylaws to require the separation of the CEO and the board chair positions;

Amending the company's corporate governance principles to include language that the governance and public policy committee shall ensure that at least three directors have knowledge, experience and/or expertise with aviation/aerospace, engineering and/or product safety oversight;

Amending the aerospace safety committee, or "ASC," charter to include requirements that the chief aerospace safety officer and chief engineer ensure that certain safety-related matters be reported to the ASC, including Speak Up portal submissions, FAA airworthiness directives, the issuance of FAA-type certificates and/or production certificates, and significant communications with the FAA;

Mandatory at least semiannual

reporting by the chief aerospace safety officer to the full board;

Continued consideration of safety metrics in determining executive compensation for named executive officers;

Amending the ASC charter so that the ASC is comprised of only independent directors; and.

Public disclosure of safety enhancements and initiatives implemented by the company since the events giving rise to the action.

The ombudsperson program must remain in effect for five years, and the other measures are binding for no less than four years.

The co-lead plaintiffs, other plaintiffs in the consolidated action, including the *Isman* action, and any other Boeing stockholder, to the extent they are acting or purporting to act derivatively on behalf of Boeing, release the defendants from claims arising out of the subject matter in this action or the *Isman* action. The released claims do not include direct claims in the securities litigation or derivative Section 14(a) litigation in the Northern District of Illinois, Case Nos. 19 Civ. 2934 and 19 Civ. 9095. The defendants

also release claims arising out of or relating to the initiation, prosecution, or resolution of the action.

The defendants deny any and all allegations of fault, liability, wrongdoing or damages.

I also consider stockholders' objections. Out of over 96,000 Boeing stockholders who received paper notices, two stockholders have objected.

Michael J. Leahey asked the Court to reject the settlement for three reasons: (1) it disproportionately impacts small individual stockholders; (2) it fails to hold the directors accountable; and (3) individual stockholders were excluded from the settlement negotiations.

Walter E. Ryan Jr. sought several modifications to the settlement:

One, disclosure of available insurance policy amounts. This information has since been disclosed.

Two, a meaningful monetary contribution and/or statement by directors in pursuit of a perception of contrition.

Three, addition of a pilot certified

to fly the company's most advanced plane product to the board. In this, Mr. Ryan seeks a direct line of communication between the board and pilots.

And, four, in a sur-reply filed after the defendants' insurance coverage was disclosed, Mr. Ryan objected to the monetary amount of the proposed settlement, contending it was inadequate as a percentage of total insurance coverage and as a percentage of the damages the company suffered. Mr. Ryan continues in his sur-reply to seek director contribution.

For the reasons I will explain, I find the terms of the proposed settlement are fair and reasonable. As an initial matter, as in *Activision*, the fact that this settlement arose from extensive mediation led by a highly respected and experienced former United States District Court Judge speaks to its reasonableness.

First, the "get" for the company. Plaintiffs' counsel achieved significant monetary restitution for the trauma the crashes caused the company. The monetary component is the largest *Caremark* recovery in Delaware and the second largest monetary settlement in a derivative action before this

Court. These funds will be paid to the company to remediate some of its losses.

Further, in view of the scale of Boeing's corporate loses, penalties, fines, and settlements after the two crashes, insurance is the only source of any meaningful recovery. The defendants are individuals, not entities. Their insurance policies are the deepest pocket available to Boeing and its stockholders.

After Mr. Ryan's request for disclosure of available insurance policy amounts, Boeing disclosed those amounts. Boeing disclosed it has a total of $280 million in total Side A, B, and C coverage and another $270 million in excess Side A difference in conditions coverage.

I recognize, as Mr. Ryan pointed out, that the settlement amount is a fraction of the losses Boeing has suffered from the crashes and is less than all of Boeing's available insurance. But full restitution is an impossible goal here. All of Boeing's Side A coverage remains a small percentage of the damage to the company. The insurance payment was the product of mediation with sophisticated and specialized counsel before a mediator with experience

in this space.

Over Mr. Ryan's objections, I conclude the monetary amount is reasonable in light of the circumstances and the accompanying corporate governance reforms.

Indeed, the second component of the settlement is those corporate governance reforms. The reforms are wide-ranging, but also targeted at oversight of Boeing's mission-critical airplane safety and reporting to the board. These reforms benefit Boeing and its stockholders by improving the systems and personnel for board-level oversight of airplane safety.

The two objecting stockholders seek contributions or statements of contrition by the directors. Mr. Leahey does not object to the amount of the recovery, but he and Mr. Ryan want some of it to come from the directors personally. Given the tragic facts of this case, this desire for contrition is understandable. But at bottom, the directors have not been held liable. The claims passed a motion to dismiss, taking plaintiffs' allegations as true.

I offer two responses to the stockholders: one doctrinal and one practical.

As a doctrinal matter, it appears that whether the directors admit guilt is outside the scope of what I am supposed to be policing for in reviewing the settlement. The settlement is subject to my range-of-reasonableness review for indicia of self-dealing or failure to maximize recovery by a plaintiff failing to fairly represent the company or her fellow stockholders. It is not clear to me that I could reject a settlement for failure to extract contrition or confession where the balance of the settlement is reasonable, the amount of recovery is satisfactory, and the plaintiffs have performed loyally and competently.

As a practical matter, there is a trade-off between the benefits that were obtained and the contrition the objectors seek. It is true that a favorable verdict at trial would accomplish the objectors' goal: a finding of liability and potentially a higher monetary judgment. But that path does not allow the other consideration that Boeing and its stockholders have received here: corporate governance reforms. While a settlement does not offer a finding of liability, it opens the door for these valuable governance improvements. Plaintiffs contend

that insisting on personal contributions would also have resulted in a trade-off to the size of the monetary settlement, not, as Mr. Ryan contends, another source of additional funds.

To my mind, the reforms and money obtained here are of great benefit to the company and its stockholders and are rightly prioritized over an admission of liability or personal monetary contributions by directors.

Mr. Ryan asserts the company's critical deficiency was the lack of a connection between the board and anyone with a practical understanding of airplane safety. He argues that to remedy this problem, the settlement should compel Boeing to appoint a certified pilot on the board.

In my view, the settlement recognizes and takes steps to remedy the problem Mr. Ryan identifies. The settlement requires the board to have at least three directors with knowledge, experience, and/or expertise with aviation/aerospace, engineering, and/or product safety oversight and the ASC to include three directors with that same experience and/or safe product design, development, manufacture, production, operations, maintenance, and delivery. It also

includes the creation of an ombudsperson program and improves safety reporting requirements to the ASC and full board.

I find these are eminently reasonable additions and that it is not clear that pilot experience is more appropriate, at all or in significant enough measure to reject the settlement.

Turning to the "give" by the stockholders. The stockholders released derivative claims arising out of the 737 MAX development, the crashes, and corporate oversight of airplane safety. Those claims had passed a motion to dismiss and appeared strong, but were subject to being assumed by a special litigation committee. The stockholders also gave up the opportunity to win a post-trial decree of liability against the directors.

I read Mr. Leahey to object that these releases were negotiated without input from individual stockholders. But respectfully, when this Court appointed FPPA and the Fund as co-lead plaintiffs based on the strength of their complaint and their counsel, this Court empowered those plaintiffs to negotiate on behalf of all stockholders. Mr. Leahey exercised his right to object to the terms of the

settlement, but the fact that the settlement was negotiated by the co-lead plaintiffs is a core element of our civil procedure for derivative cases.

So, for the reasons I have explained, I conclude the terms of the proposed settlement are fair and reasonable, and the settlement is approved. Plaintiffs' claims focus on the Boeing directors' failure to fulfill their duties of oversight with regard to mission-critical airplane safety. The terms of the settlement give the company a very large monetary award to help ameliorate some of the losses from airplane safety failures, and the settlement directly improves the company's oversight and reporting structures for four to five years. Thus, considering the nature of plaintiffs' claims, the possible alternative fates of those claims, the relief available at trial, and the legal and factual circumstances of this case, and applying my own business judgment in deciding whether the settlement is reasonable in light of those factors, I find that the release given by the plaintiffs is appropriate in light of what the company gets.

Finally, I turn to the plaintiffs' request for an award of attorneys' fees and expenses

and an incentive award.

Delaware's policy is to ensure that "even without a favorable adjudication, counsel will be compensated for the beneficial results they produced, provided that the action was meritorious and had a causal connection to the conferred benefit." That's a quote from *Allied Artists Pictures Corporation v. Baron*.

Under Delaware law, plaintiffs' counsel is entitled to fees and expenses under the corporate benefit doctrine for the benefits it conferred on the nominal defendant. In setting fee awards, the Court of Chancery must make an independent determination of reasonableness.

When setting a fee award, the Court will generally follow the factors identified in the Delaware Supreme Court's *Sugarland* decision. The relevant factors here are: (1) the benefit achieved; (2) the time and effort of counsel; (3) the stage at which the litigation ended; (4) the relative complexities of the litigation; (5) any contingency factor; and (6) the standing and ability of counsel. "This Court has consistently noted that the most important factor in determining a fee award is the

size of the benefit achieved," per *Gatz*.

In this settlement, plaintiffs' counsel seek a fee award of $18,260,000. At 7.69 percent of the monetary settlement component, this is less than the 12.5 percent ceiling co-lead counsel agreed upon with their clients and the defendants. That negotiated threshold between sophisticated parties is presumed reasonable where, as here, it falls within a reasonable range. The fee award compensates co-lead counsel, counsel retained to analyze Boeing's D&O insurance, and the firms that represented Local 79 in its Section 220 action to obtain documents that were made available to co-lead counsel.

I turn first to the results achieved. As mentioned, these include the highest monetary *Caremark* derivative settlement this Court has approved and the second highest of any sort of derivative claim. The corporate governance reforms, obtained through settlement but not available at trial, are wide-ranging, meaningful, and tailored to the issues at hand. According to Mr. Friedlander's declaration, co-lead counsel and co-lead plaintiffs negotiated directly with Boeing for these reforms on a separate

track from the mediation. Comparing fees in cases with comparable components of the benefits obtained here, the fee award is more than reasonable.

Turning to the remaining factors.

First, the complexities of the litigation. The *Caremark* claim that plaintiffs brought and that all Section 220 plaintiffs sought to investigate faced doctrinal headwinds. Plaintiffs built their claim using a very large Section 220 production. As noted during the leadership dispute, plaintiffs' claim cogently focused on, and presented factual allegations relevant to, board knowledge. The facts surrounding the crashes continued to evolve as the case was pending, and plaintiffs incorporated these new facts by amending their complaint.

Next is the standing of counsel. Co-lead counsel are some of the nation's leading plaintiff-side complex litigation firms with experience securing large monetary settlements as well as significant governance reforms. Counsel that contributed to the body of Section 220 documents are also excellent attorneys who pursued those documents efficiently and productively and obtained previously nondisclosed documents. The settlement was achieved

across the aisle from excellent firms, further supporting the reasonableness of the fee.

Next is the contingency factor. This Court recognizes that risky contingent litigation in the interest of shareholders, when done efficiently, warrants a fee that is higher than hourly or contractual rates. Such a fee is warranted here.

Next is the stage at which the litigation ended. This litigation ended after a Section 220 action, a complaint this Court selected as the lead complaint, an amended complaint based on new facts, success on a fully briefed and argued motion to dismiss, and several days of mediation. The 7.69 percent fee award is more than appropriate based on the common law sliding scale that has developed.

Finally, I consider the counsel's time and effort. These metrics provide a cross-check on the reasonableness of a fee award. Here, the time spent by several firms in litigating Section 220 actions and negotiating for documents, in presenting the best complaint possible to encapsulate the derivative claim, in surviving a motion to dismiss, and in presenting the case for mediation totals 14,000 hours. The award therefore translates into an

implied hourly rate of approximately $1,231 per hour, well within, and even below, this Court's precedent and providing only a fractional multiplier for most of the experienced counsel in this case.

Finally, I note that counsel in the consolidated demand futility *Slotoroff* case and the demand-refused *Isman* case, which was consolidated into this matter for purposes of settlement, have not petitioned this Court with an objection or for a fee award.

In light of these *Sugarland* factors, including the benefits conferred on the nominal defendant, the complexity of this litigation, and the risk that the plaintiff and its counsel would get nothing, I find the requested fee to be more than reasonable.

The last issue is the matter of plaintiffs' incentive award. FPPA seeks an incentive award of $12,500 to be paid out of counsel's fee. The Fund, which lent its unique internal resources and its legal department and bureau of corporate governance, as noted in the leadership award, does not seek an incentive award.

As recently explained in *Morrison v.*

Berry, such an award is intended to restore to the plaintiff the costs of its involvement, with additional compensation awarded for extraordinary active participation. This balance echoes the principle I began with: the point of reviewing these settlements is to balance and check the interests of the plaintiffs in view of the benefits to the company.

Here, as in *Morrison*, the plaintiff seeking a fee did what it must: reviewed the pleadings. FPPA also attended hearings, including scheduling conferences, the leadership hearing, and the motion to dismiss hearing. FPPA attended one day of mediation in person and participated in all the other sessions. FPPA totaled over 100 hours of participation. Certainly, an interested and participatory plaintiff is a better plaintiff than a rubber stamp or a potted plant would be, but FPPA did not do work resembling the work that warranted an extraordinary award in *Raider* and in *Oliver*. So I award FPPA $5,000.

I ask plaintiffs' counsel to submit an updated form of order reflecting the adjustment of the incentive award.

With that, are there any questions or

is anything unclear, beginning with Mr. Friedlander?

ATTORNEY FRIEDLANDER: Your Honor, I don't think I've ever had a question before, but I actually do, just for the clarity of the record.

I just want to note that Your Honor referred to the fee being -- twice -- more than reasonable and more than appropriate. And I think we can all agree in context that that doesn't mean in excess of the amount reasonable or appropriate. If you don't mind, Your Honor.

THE COURT: Correct. The modifier goes to the reasonableness and not the quantity of funds sought.

ATTORNEY FRIEDLANDER: Thank you, Your Honor.

Mr. Krislov.

ATTORNEY KRISLOV: Your Honor, would you entertain -- I believe that we have served a positive role in this, and we would ask leave to submit a petition for our fees for our work in the case, which we think materially helped the Court's evaluation, even if, obviously, we may disagree on points. I do think that, at the very least, forcing the revelation of the insurance policies was a

material -- was important for the shareholders' benefit and for the company's benefit. So we would ask leave to submit basically a lodestar-based fee petition for our work, if you would entertain that.

THE COURT: I have some concerns about the timeliness of such a petition.

ATTORNEY KRISLOV: Within a week we would be happy to do it.

THE COURT: Meaning I wonder if it might not be too late.

ATTORNEY KRISLOV: Well, we would not know whether there was a basis for submitting the fee -- I mean, too late because you've decided the fee issue. In equity, I suppose a portion of -- it would still be subject -- or within the 30 days for reconsideration.

But, frankly, the role of an objector is to do what we did. And I don't think that the Court would have been in a position to evaluate a fee petition until after evaluating the briefs and the hearing today.

THE COURT: You may submit it, and I'll review it.

ATTORNEY KRISLOV: Thank you.

THE COURT: Thank you.

Counsel for the individual defendants, any questions? Anything unclear?

ATTORNEY NELLES: No questions from us, Your Honor. Thank you.

THE COURT: And counsel for the nominal defendant?

ATTORNEY ROHRBACHER: Not at this time, Your Honor.

THE COURT: Thank you all very much. I will look for any submission from Mr. Ryan within a week. But otherwise, congratulations. I hope everyone has a good rest of the week.

We're adjourned.

(Court adjourned at 4.28 p.m.)

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CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 103 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 66 through 103, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington, this 28th day of February, 2022.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter