PAUL G. CASSELL
Utah Appellate Project
S.J. Quinney College of Law at the University of Utah
383 S. University St.
Salt Lake City, UT 84112
Telephone: 801-585-5202
cassellp@law.utah.edu*

April 24, 2024

Nicole M. Argentieri
Principal Deputy Assistant Attorney General
Glenn Leon
Chief, Fraud Section
U.S. Department of Justice Criminal Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
Via email: Glenn.Leon@usdoj.gov

Re: Seven Requests from Victims' Families
U.S. v. Boeing, No. 4:21-cr-005 (Fort Worth Div. - N.D. Tex)

Dear Nicole and Glenn (if I may, and to call me Paul),

I write, per your (Glenn's) suggestion, to pass along seven requests from the victims' families whom I represent. Each of these seven requests is something within the Criminal Division's power to commit to doing.

1. The Criminal Division should commit that, if it concludes by a preponderance of the evidence that Boeing committed a new federal felony during the three-year term of the DPA, it will not move to dismiss the conspiracy charge against Boeing.

During the meeting, you (Glenn) initially suggested that a beyond-a-reasonable doubt conviction was required to prove a breach of the DPA. That is, of course, not the standard—and not in the DPA's language. *See United States v. Goldfarb*, No. C 11-00099 WHA, 2012 WL 3860756, at *4 (N.D. Cal. Sept. 5, 2012) (discussing *defense* claim that "preponderance of the evidence" standard required to find breach of a DPA); see *also United States v. Tilley*, 786 F. Supp. 2d 862, 866 (W.D. Pa. 2011) (preponderance of the evidence standard governs issue of breach of plea agreement).

The Division confusion about this critical point is worrisome. In any event, the Division should ultimately make its motion-to-dismiss decision under the correct legal standard outlined above.

* This daytime business address is provided for identification and correspondence purposes only and is not intended to imply institutional endorsement by the University of Utah.

2. If additional time is needed to find breach, the Criminal Division should ask Boeing publicly for an extension of time to evaluate evidence of breach (e.g., evidence surrounding the Alaskan Air blowout).

We understand that the Department is investigating whether Boeing committed a new federal crime in connection with the Alaskan Air blowout. We also understand that it may be difficult for the Department to collect all of the evidence associated with that event in the next month or so. Accordingly, if the Department is unable to find a breach of the agreement in the next month or so, then it should ask Boeing—publicly—for an amendment to the DPA to allow for additional time to review the issue. We believe that Boeing would agree to the extension. But, at the very least, there is no harm in the Division asking Boeing for such an extension and seeing what its answer is.

3. If the Criminal Division concludes that it will move to dismiss the charges, then the Department should allow the families to "appeal" that decision to Attorney General Garland.

The DPA gives Boeing a right to "appeal" a breach determination by the Division. The families should be given the same right—particularly given that the DPA was negotiated in violation of the Crime Victims' Rights Act. Boeing could be given notice that the appeal is pending. The families can also move quickly to present the issue to General Garland.

4. The Division should disclose to the families information filed by Ms. Laryea under seal regarding Boeing's DPA compliance.

At the January 24, 2023, hearing, Judge O'Connor asked whether the Division had suggested corrections to the Boeing in connection with DPA compliance. Subsequently, the Division (via Ms. Laryea) provided such information under seal to Judge O'Connor. The judge did not order that the information be under seal. And there is, to our knowledge, nothing preventing the Division from disclosing that information to the families (or the substance of that information) to the families, under such conditions as might be appropriate.

5. If it moves to dismiss, the Division should commit to disclose information to Judge O'Connor about DOJ's review of the breach issue, so that he can make a fully informed public interest determination.

During today's meeting, the Division pointed out that Judge O'Connor will hold a hearing regarding any motion to dismiss that the Division might file. But the important question is what information will be available to Judge O'Connor at the hearing. The Division has significant information that will bear on whether it is in the public interest to dismiss the charges. The Division should commit to providing all that information to Judge O'Connor—and the substance of that information to the families. It is only with the full record available to Judge O'Connor—presented in an adversarial hearing—that Judge O'Connor can make a fair "public interest" determination.

6. The Division should drop its "legalistic resistance" to the families' FOIA request.

As you know, the families have a pending FOIA request with the Fraud Section—as well as litigation regarding that request in the U.S. District Court for the District of Columbia. During a recent hearing on the FOIA case, Judge Howell observed that if the families received the requested documents "it might provide a lot of assurance and reassurance to the [families] that all of the nefarious smoke that they're seeing is nonexistent." Tr. of March 1 Hearing at 48. Judge Howell continued to ask: "The Department of Justice as an institution, how is Merrick Garland going to feel if the fraud section is resisting providing information? … [D]oesn't the Justice Department want to get to the bottom and find the documents and show that this is just smoke and, in fact, there is no smoking guns and there are really good reasons for this DPA?" *Id.* at 72. Judge Howell went on to encourage disclosure of documents to the families and an end to the Department's "legalistic resistance." *Id.* at 78.

We would like the Criminal Division's various components to work together to quickly produce all the documents covered by the FOIA request to the families. In particular, those documents should be produced by the Division before July 7, 2024, so that the families will have that information to oppose any motion to dismiss.

This transparent approach would be consistent with announced Department policy. On March 15, 2022, Attorney General Merrick Garland released what the Department described as "comprehensive new FOIA guidelines" which were designed to "strengthen the federal government's commitment[] to transparency." The guidelines sought to increase transparency by encouraging federal agencies to make "proactive disclosures." The Division should "proactively" disclose all documents surrounding the DPA.

7. The Division should disclose the course of its negotiations with Boeing in drafting the DPA.

In my experience (both as a federal prosecutor and a federal judge), it is common for the Division to keep victims (and their families) informed about the course of plea negotiations. Of course, in this case, that did not happen, because of the Division's violation of the CVRA. The Division should now, retroactively, go back and tell the families about the course of the negotiations. Of course, there is no "confidentiality" that attaches to the Department's discussions with an adversary. Indeed, courts have ruled that such communications are not privileged, particularly where crime victims have CVRA issues at stake. *See, e.g., Doe No. 1 v. U.S.*, 749 F.3d 999 (11th Cir. 2014) (plea negotiations between Justice Department and Jeffrey Epstein's attorneys not protected from disclosure in CVRA case). At the very least, the Division should describe for the families what happened during its negotiations with Boeing.

* * *

Thank you in advance for considering these requests.

Sincerely,

Paul G. Cassell et al.
Counsel for Fifteen
Boeing 737 MAX crashes victims' families

cc via email:
sean.tonolli@usdoj.gov
jonathan.haray2@usdoj.gov
brian.strang@usdoj.gov
Co-counsel for the victims' families