



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Seafarers Pension Plan,)
Plaintiff,)
v.)
Robert A. Bradway, *et al.*,)
Defendants.) C.A. No. 2020-0556-MTZ
)
)
)
)
)

**PLAINTIFF’S BRIEF IN SUPPORT OF THE DELAWARE SETTLEMENT
AND CERTIFICATION OF A SETTLEMENT CLASS**

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Plaintiff Seafarers Pension Plan (“Plaintiff” or “Seafarers”) respectfully submits this Brief in support of its motion for approval of the Delaware Settlement and certification of a settlement class.¹

I. PRELIMINARY STATEMENT

Subject to the approval of this Court, and the United States District Court for the Northern District of Illinois,² Plaintiff, Defendants,³ and Boeing have agreed to a global settlement that will resolve the actions pending respectively in each Court: this putative class action concerning the validity, maintenance, and use of Boeing’s

¹ The terms of settlement are embodied in the Stipulation and Agreement of Settlement, Compromise and Release, dated August 10, 2022, (“Stipulation”), between Seafarers and the Defendants including, The Boeing Company (“Boeing” or the “Company”). Dkt. 26.

² “Delaware Action” refers to this class action, and “Federal Action” refers to the Seafarers’ earlier derivative action filed in the United States District Court for the Northern District of Illinois (the “Federal Court”). “Actions” refers to both the Delaware Action and the Federal Action.

³ The individual defendants in the Delaware Action are: Robert A. Bradway, David L. Calhoun, Arthur D. Collins Jr., Edmund P. Giambastiani Jr., Lynn J. Good, Akhil Johri, Lawrence W. Kellner, Caroline B. Kennedy, Steven M. Mollenkopf, John M. Richardson, Susan C. Schwab, and Ronald A. Williams (hereinafter, “Delaware Individual Defendants”). The individual defendants in the Federal Action are: Robert A. Bradway, David L. Calhoun, Arthur D. Collins Jr., Edmund P. Giambastiani Jr., Lynn J. Good, Lawrence W. Kellner, Caroline B. Kennedy, Edward M. Liddy, Dennis A. Muilenburg, Susan C. Schwab, Randall L. Stephenson, Ronald A. Williams, and Mike S. Zafirovski (hereinafter, “Federal Individual Defendants”). The Boeing Company (“Boeing” or the “Company”) is named a named Defendant in the Delaware Action and as Nominal Defendant in the Federal Action.

forum provision in its bylaws (the “Forum Bylaw”) by Boeing’s Board of Directors (the “Board”), and the earlier filed, related federal derivative action asserting proxy claims under Section 14(a) of the Securities and Exchange Act of 1934 (the “Exchange Act”). The Delaware Action was filed shortly after Plaintiff filed its Notice of Appeal of the Federal Court’s enforcement of the Forum Bylaw and dismissal of the Federal Action. The parties reached the global settlement after vigorously contested litigation in this Court, the Federal Court, and the Seventh Circuit Court of Appeals. Notably, Plaintiff prevailed on its appeal before the Seventh Circuit, which found that the application of Boeing’s Forum Bylaw against Plaintiff’s Section 14(a) claims violated both federal and Delaware law.

The global settlement contains a corporate governance settlement term that resolves both the Delaware and Federal Actions (in addition to the monetary settlement term that relates solely to the Federal Action), consisting of the revision of Boeing’s Forum Bylaw. The settlement of the Delaware Action, including the release of its claims, was a necessary condition for obtaining the significant corporate governance change to Boeing’s Forum Bylaw. Notably, the proposed revision to Boeing’s Forum Bylaw will provide Boeing’s stockholders with the option of filing derivative claims, where federal courts possess exclusive jurisdiction over such claims, in either the Delaware federal court (i.e., Boeing’s state of

incorporation) or the federal court in the Eastern District of Virginia (i.e., the location of Boeing's corporate headquarters).⁴

The settlement was the product of serious and informed months-long negotiations between the parties in the Actions facilitated by an independent, well-regarded mediator Greg Danilow, Esq. of Phillips ADR, a leading alternative dispute resolution firm founded by former federal judge Layn R. Phillips that specializes in the mediation of large class action, derivative and other complex litigation. As confirmed by Mr. Danilow, "The mediation process reflected extremely hard-fought negotiations from beginning to end that were conducted by experienced and able counsel on all sides." *See* attached Transmittal Affidavit of Frank E. Noyes, II in Support of Plaintiff's Brief in Support of the Delaware Settlement and Certification of a Settlement Class ("Noyes Aff."), Ex. 1 (Declaration of Greg Danilow) at ¶10. Moreover, Seafarers also supports the Delaware Settlement as "a fair, reasonable, and adequate compromise that is in the best interests of Boeing and the Class."

⁴ The Stipulation explains that "the corporate governance measures obtained by Plaintiff and Plaintiff's Counsel resulted from their work in both Actions; however, because the Parties wish to avoid needless duplication or inefficiency, the Fee and Expense Application to be filed by Plaintiff and Plaintiff's Counsel in the Federal Action will be the sole application by Plaintiff or Plaintiff's Counsel for an award of fees or expenses, or any service award, in connection with the Settlements." Stipulation at ¶84. As a result, no submission for a fee and expense application or service award is made before the Delaware Court.

Noyes Aff., Ex. 2 (Affidavit of Maggie Bowen, Fund Administrator for Seafarers Pension Plan Pursuant to Court of Chancery Rule 23 (“Bowen Affidavit”)) at ¶7.

The amended Forum Bylaw will allow Boeing’s stockholders to file exclusively federal derivative claims in two different federal jurisdictions (i.e., where Boeing is headquartered and incorporated). This important corporate governance reform will eliminate the Company’s restrictive Forum Bylaw, which led to the dismissal of Seafarers’ federal derivative claims and prevented other exclusively federal derivative claims from being brought in federal court. Further, this reform addresses the very purpose underlying the class action brought by the Seafarers. As explained by Plaintiff’s expert, Professor Jeffrey Gordon of Columbia Law School, “the revised by-law, which was plainly a result of the litigation of these Actions and would not have been adopted otherwise, is a significant addition to the corporate governance structure of Boeing and creates value for Boeing and its shareholders.” potentially worth an estimated “\$85 million.” Noyes Aff., Ex. 3 (Declaration of Jeffrey N. Gordon) at ¶¶19, 28.

In light of the substantial benefits of the Delaware Settlement, a settlement class should be certified under Court of Chancery Rule 23. Moreover, the proposed settlement class meets the requirements of both Rule 23(a) and Rule 23(b).⁵

⁵ Del. Ch. Ct. R. 23(a) & (b).

Further, Plaintiff submits that the proposed Delaware Settlement is fair, reasonable and adequate, and in the best interests of Boeing and its stockholders, and should therefore be approved.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Boeing's 737 MAX Accidents, Grounding, and Plaintiff's Related Books & Records Demand under DGCL Section 220

On October 29, 2018, a Boeing 737 MAX aircraft, Lion Air Flight 610, crashed off the coast of Indonesia (the "Lion Air Accident"). Then, on March 10, 2019, a Boeing 737 MAX aircraft, Ethiopian Airlines Flight 302, crashed in Ethiopia (the "Ethiopian Airlines Accident," together with the Lion Air Accident, the "Accidents"). On March 13, 2019, the Federal Aviation Administration ("FAA") grounded Boeing's global fleet of 737 MAX aircraft, as had other international regulating authorities (the "Grounding").

On April 15, 2019 and May 16, 2019, Plaintiff made demands for documents under 8 Del. C. § 220 to Boeing related to the Accidents and the Grounding. Seafarers then engaged in extensive negotiations with Boeing through multiple written communications and related meet and confers concerning the demands, resulting in productions of more than 13,400 pages of documents, which included Boeing's Board and its Committees' meeting minutes, and presentations, and emails between Boeing's CEO and the rest of the Board.

B. Procedural History of the Federal Action, Including the Seventh Circuit Appeal

On December 11, 2019, Seafarers filed a stockholder derivative action in the Federal Court, *Seafarers Pension Plan v. Bradway et al.*, No. 1:19-cv-08095, against Boeing’s current and former directors and officers, and Boeing as nominal defendant, alleging violations of Section 14(a) of the Exchange Act arising from the 2017, 2018, and 2019 proxy statements (Claim I), as well as breach of fiduciary duty and other Delaware state law claims (Claims II-IV).⁶

Count I of Seafarers’ derivative complaint (the “Federal Complaint”) alleged, among other things, that Boeing’s 2017 proxy statement, 2018 proxy statement, and 2019 proxy statement each contained misleading statements related to Boeing’s “recommendation[s] to re-elect . . . directors, approve certain executive compensation, and vote against stockholder proposals to adopt a policy to require an independent Chairman,” and that these proxy statements omitted material information about, among other things, Boeing’s 2015 settlement with the FAA and the development, operation and safety of the 737 MAX fleet. The Federal Complaint also alleged that Boeing’s 2019 proxy statement omitted material information concerning the Accidents, the Grounding, and regulatory and safety matters.

On February 13, 2020, defendants filed a motion to dismiss Seafarers’ federal proxy claims for *forum non conveniens* asserting that the Forum Bylaw precluded

⁶ On February 13, 2020, the federal parties filed a joint motion to dismiss Plaintiff’s state law claims without prejudice, which the Federal Court granted on February 18, 2020.

Seafarers from asserting its action derivatively in the federal court. Following briefing on the motion to dismiss, on June 8, 2020, the Court dismissed the Federal Complaint for *forum non conveniens* on the basis that, as applied to Plaintiff's claims, Boeing's Forum Bylaw required Seafarers to file its federal derivative claims in Delaware state court. On July 9, 2020, Plaintiff filed a notice of appeal of the order to the U.S. Court of Appeals for the Seventh Circuit, *Seafarers Pension Plan v. Bradway*, No. 20-2244. After briefing and oral argument, on January 7, 2022, a three-judge panel of the Court of Appeals issued a decision, with one judge dissenting, holding that the Forum Bylaw was not enforceable as applied to Plaintiff's federal proxy claims. The dismissal order was then reversed, and the case remanded for further proceedings consistent with the Seventh Circuit's opinion, which would have permitted the Federal Action to proceed. *See Seafarers Pension Plan v. Bradway*, 23 F.4th 714 (7th Cir. 2022) (mandate issued January 31, 2022).

C. The Delaware Action

On July 8, 2020, approximately one month after the Federal Court dismissed the Federal Action, Seafarers filed a class action complaint (the "Delaware Complaint") on behalf of Boeing stockholders against Boeing and certain current and former directors and officers of Boeing in the Delaware Court, *Seafarers Pension Plan v. Bradway, et al.*, C.A. No. 2020-0556-MTZ. Specifically, the Delaware Complaint sought a declaratory judgment that Boeing's Forum Bylaw

violated Delaware General Corporation Law Sections 115 and 109(b)⁷ (Counts I and II) and alleged that the Delaware Individual Defendants breached their fiduciary duties by “maintaining and invoking” the Forum Bylaw, “failing to correct and/or rescind” the Forum Bylaw after the passage of Section 115, and “affirmatively asserting” the Forum Bylaw, including against Plaintiff in the Federal Action (Count III).

After the Delaware defendants moved to dismiss the Delaware Complaint, on January 13, 2021, this Court held a hearing on the fully briefed motion to dismiss and ruled that in the “interests of litigative efficiency, judicial economy, and comity,” it was staying the Delaware Action “indefinitely” pending the “final resolution of the federal court’s views on the bylaw’s validity, including on any remand.” Seafarers’ counsel subsequently informed this Court of the Seventh Circuit’s ruling.

D. The Parties Engage in Arms-Length Mediation and Reached a Proposed Settlement

Beginning on November 1, 2021, counsel for the parties began settlement discussions related to both Actions. After failing to reach agreement on resolution of the claims, in December 2021 the parties retained Mr. Danilow, a well-regarded, independent mediator at Phillips ADR who worked with former Judge Layn Phillips

⁷ 8 Del. C. §109 and 8 Del. C. §115.

in mediating the resolution of a separate derivative action related to the Accidents involving state law fiduciary duty claims that had been brought in this Court. *In re The Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ (Del. Ch.).

On March 1, 2022, a mediation was held before Mr. Danilow with the parties in both actions. No agreement was reached during the full-day mediation. In the seven weeks following the mediation, Mr. Danilow continued his efforts by telephone and videoconference. On April 18, 2022, with the assistance of Mr. Danilow, the parties reached an agreement in principle to settle both Actions. Following extensive further discussions and negotiations over the stipulations, on August 10, 2022, the parties executed the settlement stipulations, which were then filed with the Federal Court, and this Court.⁸

The terms of the Delaware Settlement (and Federal Settlement) require Boeing's Board to amend Boeing's Forum Bylaw to allow its stockholders to assert derivative claims in the federal courts of Delaware and the Eastern District of Virginia (the new location of Boeing's headquarters), which will have subject matter jurisdiction to hear exclusively federal claims.⁹ Specifically, Boeing's Forum

⁸ The Stipulation filed in the Federal Court and the Delaware Court are identical, other than: (i) the signatories to the filing in each court are limited to the parties in each action; and (ii) the specific formatting requirements required by each court for filings. Stipulation at fn. 2.

⁹ The Federal Settlement has two components: (1) the Federal Defendants' insurers will pay Boeing \$6.25 million to settle the Federal Action, less any attorneys' fees

Bylaw will be revised as follows (with new language underlined and excised language indicated by a strikethrough):

SECTION 4. Forum for Adjudication of Disputes.

A. ~~With respect to any action arising out of any act or omission occurring after the adoption of this By-Law,~~ Unless the Corporation consents in writing to the selection of an alternative forum, to the fullest extent permitted by law, the Court of Chancery of the State of Delaware (or, if the Court of Chancery does not have jurisdiction, another state court located within the State of Delaware or, if no state court located within the State of Delaware has jurisdiction, the federal district court for the District of Delaware or the federal district court for the Eastern District of Virginia) shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any current or former director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, the Certificate of Incorporation or these By-Laws, or (iv) any action asserting a claim governed by the internal affairs doctrine, in each case subject to the Court of Chancery of the State of Delaware having personal jurisdiction over the indispensable parties named as defendants therein.

and expenses awarded to Plaintiff's Counsel and any service award to Plaintiff; and (2) Boeing's Board will revise the Company's Forum Bylaw. Further, as the Stipulation describes and reflects, Plaintiff also achieved additional corporate governance benefits in the form of enhanced disclosures in Boeing's 2020 Proxy on the subjects at issue in the proxy, which occurred after Seafarers filed the Federal Action. On August 25, 2022, the Federal Court granted preliminary approval of the Federal Settlement and scheduled a hearing for final approval on December 14, 2022.

B. To the fullest extent permitted by law, any person or entity purchasing or otherwise acquiring, holding or having held any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Section 4. Stipulation at Exhibit A (emphasis added).

E. Boeing Issues Notice

On September 1, 2022, this Court entered an order approving the form of notice to Boeing stockholders. On September 28, 2022, Boeing issued a press release notice in the *Wall Street Journal* and over the *PR Newswire*, and by October 14, 2022, Boeing also mailed a detailed 21-page notice to more than 100,000 Boeing stockholders, satisfying the requirements of Rule 23 and due process. As of December 6, 2022, only one Boeing stockholder had voiced an objection, but that objection applied to the Federal Action and focuses on the amount that the insurers are paying Boeing and the absence of punitive damages (discussed *infra*).

III. THE DELAWARE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND SHOULD BE APPROVED

A. Delaware Law Strongly Favors Settlement

Delaware law strongly favors the voluntary settlement of contested claims, particularly in complex representative actions like this one.¹⁰ When deciding whether to approve a proposed settlement, the Court looks to the facts and

¹⁰ See e.g., *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *In re Resorts Int'l S'holder Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990).

circumstances underlying the claims and exercises its informed judgment as to whether the proposed settlement is fair and reasonable.¹¹ The “facts and circumstances” considered by the Court include: (i) the probable validity of the claims; (ii) the apparent difficulties in enforcing the claims through the courts; (iii) the collectability of any judgment recovered; (iv) the delay, expense and trouble of litigation; (v) the amount of compromise as compare with the amount of any collectible judgment; and (vi) the views of the parties involved.¹²

In evaluating the fairness of a settlement, the Court weighs the “give” (i.e., the value of the claims released) against the “get” (i.e., the value of the consideration obtained) to “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 information then available, reasonably could accept.”¹³ Seafarers respectfully submits that the Delaware Settlement meets these standards, is fair, reasonable, and adequate, and should be approved.

¹¹ *Prezant v. De Angelis*, 636 A.2d 915, 921 (Del. 1994).

¹² *Polk v. Good*, 507 A.2d 531, 535-536 (Del. 1986) (citing *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964)).

¹³ *In re Activision Blizzard, Inc. S’holder Litig.*, 124 A.3d 1025, 1043 (Del. Ch. 2015) (“The tasks assigned to the court include ... assessing the reasonableness of the ‘give’ and the ‘get’[.]”).

B. The Delaware Settlement Fully Reflects the Strengths of Plaintiff's Claims Weighed Against the Risks of Further Litigation

The Delaware Settlement provides substantial benefits to the settlement class and fully reflects the strength of Seafarers' claims in this Action weighed against the risks of litigating it to a final judgment.

Here, the Court stayed the Delaware Action pending the resolution in the Federal Action and as a result, Defendants' fully briefed motion to dismiss has not been decided. Defendants had moved to dismiss all of Seafarers' claims related to its challenge to Boeing's Forum Bylaw, including its validity and enforceability against Boeing stockholders' derivative claims, in circumstances where federal courts possess exclusive jurisdiction over such claims. In its brief opposing Defendants' motion to dismiss, Seafarers made credible arguments that its claims were not precluded by the decision of the Federal Court, because, among other issues, that decision was not a "final" judgment.¹⁴ Plaintiff further argued that a declaratory judgment was an appropriate challenge to the validity and enforceability of Boeing's Forum Bylaw.¹⁵ Plaintiff also argued that Boeing's Forum Bylaw violated Section 115's jurisdictional limitation and Section 109(b) of the DGCL as

¹⁴ See *Allahar v. Zahora*, 59 F.3d 693, 696 (7th Cir. 1995).

¹⁵ See *Solak v. Sarowitz*, 153 A.3d 729, 736 (Del Ch. 2016) citing 8 Del. C. § 111(a)(1); see also 10 Del. C. § 6501.

applied to Seafarers' Exchange Act claims.¹⁶ Finally, Plaintiff argued that Boeing's directors breached their fiduciary duty of loyalty by using the "corporate machinery," (i.e., Boeing's Forum Bylaw), to obstruct stockholders' rights, or otherwise treat stockholders inequitably.¹⁷

The proposed settlement satisfies Plaintiff's claims regarding the Forum Bylaw's compliance with Section 115 and Section 109 of the DGCL. As such, the Delaware Settlement will eliminate Boeing directors' ability to abuse their control in a manner adverse to the settlement class and restore the substantive right of stockholders to assert exclusively federal derivative claims, while also resolving Plaintiff's breach of fiduciary duty claims too. Considering the overall strengths and weaknesses of Plaintiff's claims, which were presented through adversarial briefing on Defendants' motion to dismiss before this Court, and vetted through a mediated process, Seafarers submits that this revision to Boeing's Forum Bylaw constitutes an extremely favorable "get" for the settlement class and is more than sufficient to warrant the release provided for in the Stipulation. Indeed, the Delaware

¹⁶ See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96-97 (1991); *Salzberg v. Sciabacucchi*, 227 A.3d 102, 136 (Del. 2020).

¹⁷ See *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

Settlement's Release is consistent with Delaware law because it is narrowly tailored to relate to the claims asserted in the Delaware Action.¹⁸

Notwithstanding that Seafarers vigorously contested Defendants' motion to dismiss, its claims in this action faced risks. For example, Defendants argued that Plaintiff was precluded from "relitigating" its challenge to Boeing's Forum Bylaw in this forum, and that Seafarers' declaratory relief request was improper because it had an adequate remedy in another case (i.e., the Federal Action).¹⁹ Defendants also argued that Boeing's Forum Bylaw was facially valid, and therefore, it did not violate either Section 115 or Section 109(b) of the DGCL when enforced against Seafarers' Exchange Act claims.²⁰ Finally, Defendants argued that the maintenance and use of Boeing's Forum Bylaw did not breach any of the directors' fiduciary duties.²¹ These issues were not decided by the Delaware Court at the time of the settlement negotiations.

¹⁸ Stipulation at 49; *see Griffith v. Stein on behalf of Goldman Sachs Grp., Inc.*, 283 A.3d 1124, 1134 (Del. 2022) ("In the class action context, the Court of Chancery must scrutinize releases to 'ensure that the fiduciary nature of the class action is respected, and that its approval of any class-based settlement does not offend due process.'") (citation omitted).

¹⁹ *See Rezzonico v. H&R Block*, 182 F.3d 144, 148 (2d Cir. 1999); *Hampson v. State*, 233 A.2d 155, 156 (Del. 1967).

²⁰ *See City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 237 (Del. Ch. 2014).

²¹ *See Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

Defendants' agreement to revise Boeing's Forum Bylaw, therefore, represents an exceptional outcome in this highly contested matter. Moreover, a litigation victory on Plaintiff's Section 115 and 109 claims appears unlikely to result in an outcome for the settlement class more favorable than that achieved through the Delaware Settlement. If Plaintiff had prevailed on any of its claims, the appropriate remedy would very likely have been the invalidation of the Forum Bylaw, and the amendment of the Forum Bylaw to provide that exclusively federal claims could be brought in federal court, although it is unclear that such a result would have provided for two such federal venues as here, *i.e.* the place of incorporation *and the location of Boeing's headquarters*. Accordingly, the Delaware Settlement achieves an outcome for the settlement class that is likely superior to the perceived likely outcome through litigation to a favorable judgment on Plaintiff's claims. Moreover, this result would not have been achieved solely by settling the Federal Action, as Defendants sought a resolution of the claims in both Actions. This weighs heavily in favor of approval.

C. The Delaware Settlement Was Reached Through Arms'-Length Negotiations

Further, in assessing whether a settlement is fair, the Court places considerable weight on whether it was reached through arm's-length negotiations

between informed counsel, following diligent litigation efforts.²² That is the case here. Seafarers' claims and Defendants' defenses in this action were fully vetted through adversarial briefing on Defendants' motion to dismiss, and a mediation process conducted by an experienced independent mediator.

First, the parties briefed Defendants' motion to dismiss in full by October 2020, which motion was stayed following the January 2021 hearing. Next, the parties attempted to negotiate a settlement on their own starting on November 1, 2021 but were unsuccessful. By December 2021, the parties agreed to schedule a mediation before Mr. Danilow, a well-regarded independent mediator, associated with Phillips ADR who worked with former Judge Layn Phillips to assist in mediating the resolution of a separate derivative action related to the Accidents and the Grounding involving state law fiduciary duty claims, which was ultimately approved by this Court. *In re The Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ (Del. Ch.).²³ On January 7, 2022, the Seventh Circuit issued its decision, holding that the application of Boeing's Forum Bylaw against Plaintiff's Section

²² See e.g., *Activision*, 124 A.3d at 1067 (“The diligence with which plaintiffs’ counsel pursued the claims and the hard fought negotiation process weigh in favor of approval of the Settlement.”).

²³ This settlement resolved Seafarers’ fiduciary duty claims (Claims II-IV), which it had previously dismissed without prejudice, but did not resolve Plaintiff’s derivative federal Proxy Claims (Claim I).

14(a) claims violated both federal and Delaware law and remanding the case to the Federal Court.

Over the next few months, Mr. Danilow conducted negotiations with the parties. The parties also submitted multiple written submissions, addressing liability, damages and the impact of the Seventh Circuit's decision on Boeing's bylaw, including what a new bylaw should look like. These submissions, including answers to Mr. Danilow's questions, were meant to test the strength and weaknesses of the Actions' claims prior to the mediation. Noyes Aff., Ex. 1 (Declaration of Greg Danilow at ¶¶ 5-6).

On March 1, 2022, an all-day mediation was held before Mr. Danilow, which was attended by: (i) attorneys from Seafarers' Counsel Cohen Milstein Sellers & Toll PLLC, (ii) attorneys from Sullivan & Cromwell LLP representing Defendants, (iii) in-house attorneys from Boeing, and (iv) attorneys representing certain insurers, all attending via zoom. *Id.* at ¶ 6. No agreement was reached during the full-day mediation. *Id.* at ¶ 8. Following the mediation, the parties, with the assistance of Mr. Danilow, continued to engage in settlement negotiations, including by telephone and videoconference over the course of the next seven weeks. *Id.* at ¶ 9. On April 18, 2022, the parties reached an agreement in principle to settle both of the Actions. *Id.*

Notably, in his Declaration, Mr. Danilow describes “that the arguments and positions asserted by all involved were the product of substantial work and zealous, arm’s-length advocacy, and reflected a thorough, in-depth understanding of the strengths and weaknesses of the claims and defenses at issue in this case, both with respect to liability and damages.” *Id.* at ¶ 7.

Consistent with both sides’ aggressiveness, even after reaching an agreement in principle in April 2022, the parties negotiated for another four months regarding the specific language that would be included in the Stipulation and the specific changes to Boeing’s Forum Bylaw, which were complicated by Boeing’s move of its corporate headquarters from Illinois to Virginia. Those further negotiations ultimately resulted in the significant reform to Boeing’s Forum Bylaw detailed above, providing the settlement class with substantial benefits.

As such, the negotiating process weighs heavily in favor of final approval of the Delaware Settlement.

D. The Experience and Opinion of Plaintiff, Plaintiff’s Counsel, and the Parties’ Independent Mediator Favor Approval of the Delaware Settlement

Delaware courts also recognize that the opinion of representative plaintiffs and their experienced counsel are entitled to weight in determining the fairness of a

settlement.²⁴ Plaintiff’s counsel are experienced stockholder advocates and have significant experience with prosecuting claims under Delaware common law, the DGCL and class actions asserting federal and state law claims. Plaintiff’s counsel understood the strengths and weaknesses of Seafarers’ claims throughout settlement negotiations. Plaintiff’s counsel’s informed view that the Delaware Settlement is in the best interests of the settlement class provides additional support for final approval.²⁵ Likewise, Seafarers’ support for the Delaware Settlement also favors its approval. Noyes Aff., Ex. 2 (Bowen Affidavit) at ¶7.

The support of an independent mediator further weighs in favor of approval of the Delaware Settlement.²⁶ In fact, here, Mr. Danilow states, “I firmly believe

²⁴ See e.g., *Polk*, 507 A.2d at 536 (noting that court’s consideration of “the views of the parties involved” when determining the “overall reasonableness of the settlement.”); *Jane Doe 30’s Mother v. Bradley*, 64 A.3d 379, 396 (Del. Super. 2012) (“It is appropriate for the Court to consider the opinions of experienced counsel when determining the fairness of a proposed class action.”).

²⁵ See *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99 (Del. 1979) (approving settlement based, in part, on plaintiff’s counsel’s conclusion that the settlement was fair and in the best interests of the class).

²⁶ See *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, C.A. No. 1091-VCL, 2012 WL 1655538, at *3 (Del. Ch. May 9, 2012) (finding that “[s]everal significant factors support the reasonableness of the settlement and weigh in favor of approval[,]” including that “[t]he parties negotiated at arm’s-length with the benefit of an experienced and respected mediator.”); see also *Jane Doe 30’s Mother v. Bradley*, 64 A.3d 379, 396 (Del. Super. 2012) (finding the participation of “an experienced and highly regarded jurist” to facilitate arms-length negotiations weighs “heavily in favor of approval” of a settlement).

that ... the proposed bylaw change to settle both Actions represents a recovery and outcome that is in my view fair, reasonable and adequate for all parties involved in the Federal Action and for members of the Settlement Class in the Delaware Action, and reflects a reasonable compromise on the part of all Parties involved.” Noyes Aff., Ex. 1 (Declaration of Greg Danilow) at ¶11.

Moreover, to date, there has been no opposition to the Delaware Settlement after over 100,000 notices were mailed to Boeing stockholders. In fact, currently the only objection has been to the Federal Settlement by Howard Hoffenberg (“Hoffenberg”), a purported Boeing stockholder, who has claimed that the settlement of the Federal Action is “unfair” because the “full policy value + 9 times full policy value,” is not paid as part of that settlement. Hoffenberg’s objection about the amount of insurance money recovered and the failure to obtain punitive damages in the Federal Settlement is not an objection to the Delaware Settlement, much less the benefits it obtains for Boeing and its stockholders. This also weighs in favor of approval, and Plaintiff will address any objections received regarding the Delaware Settlement following the submission of this brief in its reply.

IV. THE CLASS SHOULD BE CERTIFIED FOR PURPOSES OF SETTLEMENT

A. Applicable Standard

Class actions in this Court are governed by Court of Chancery Rule 23.²⁷ “Certification of a class under Court of Chancery Rule 23 is a two-step process, which requires the purported class meet all four criteria within Court of Chancery Rule 23(a) and at least one of the criteria within Court of Chancery Rule 23(b).”²⁸ Certification of the Settlement Class²⁹ is appropriate because this Action satisfies Rule 23(a) and fits “within the framework provided for in subsection (b)” of Rule 23.³⁰

B. The Settlement Class Satisfies the Requirements of Rule 23(a)

Under Rule 23(a), a class must meet four requirements: (i) it is so numerous that joinder of all members is impracticable, (ii) these are questions of law or fact common to the class, (iii) the claims or defenses of the representative parties are typical of claims or defenses of the class, and (iv) the representative parties will fairly and adequately protect the class’s interests.³¹

1. Rule 23(a)(1): Numerosity is Satisfied

²⁷ See *Nottingham P’rs v. Dana*, 564 A.2d 1089, 1094 (Del. 1989).

²⁸ *In re Ebix, Inc. S’holder Litig.*, 2018 WL 3570126, at *1 (Del. Ch. July 17, 2018).

²⁹ “Settlement Class” means all persons who held Boeing stock at any time between December 11, 2019 and August 10, 2022. See Stipulation at ¶19.

³⁰ *Nottingham P’rs*, 564 A.2d at 1095 (citation omitted).

³¹ Del. Ch. Ct. R. 23(a).

Court of Chancery Rule 23(a)(1) requires that class members be “so numerous that joinder of all members is impracticable.” The Court has previously held: “There is no bright-line cutoffs, but numbers ‘in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement.’”³²

There are at least tens of thousands of potential Settlement Class members in this Action. Indeed, Boeing mailed notice to more than 100,000 Boeing stockholders of record, and as of June 30, 2021, there were 585,875,929 shares of Boeing’s common stock outstanding.³³ It would be impracticable to join all of the potential plaintiffs before this Court. Accordingly, the Settlement Class satisfies the numerosity requirement of Rule 23(a).

2. Rule 23(a)(2): Commonality is Satisfied

Rule 23(a)(2) requires that there be “questions of law or fact common to the class[.]”³⁴ Commonality is met “where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.”³⁵

³² *In re Countrywide Corp. S’holders Litig.*, 2009 WL 846019, at *13 (Del. Ch. Mar. 31, 2009) (citing *Leon N. Weiner & Assocs. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991)).

³³ Boeing, Annual Report (Form 10-K), at 1 (January 31, 2022).

³⁴ Del. Ch. Ct. R. 23(a)(2).

³⁵ *Weiner Assocs.*, 584 A.2d at 1225.

The factual and legal issues in the Action are common for all members of the Settlement Class. They include: (i) whether Boeing's Forum Bylaw violated Sections 115 and 109 of the DGCL, (ii) the appropriate remedy to cure any statutory violations, and (iii) whether Boeing's directors breached their fiduciary duties by maintaining and using Boeing's Forum Bylaw against its stockholders' derivative Exchange Act claims. Because this Action asserts claims that "implicate the interests of all members of the proposed class of shareholders," it meets the commonality requirement of Rule 23(a)(2).³⁶

3. Rule 23(a)(3): Plaintiff's Claims Are Typical of the Settlement Class Claim's

Rule 23(a)(3) requires that the proposed class representative's claims are "typical of the claims or defenses of the class[.]"³⁷ The Court will generally find typicality where, as here, the class representative claims "arise[] from the same event or course of conduct that gives rise to the claims [or defenses] of other class members and [are] based on the same legal theory."³⁸

³⁶ *In re Lawson Software, Inc.*, 2011 WL 2185613, at *2 (Del. Ch. May 27, 2011).

³⁷ *Nottingham P'rs*, 564 A.2d at 1094.

³⁸ *N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, 2013 WL 610143, at *3 (Del. Ch. Jan. 17, 2013).

Plaintiff's claims arise from Boeing's directors' maintenance and use of Boeing's Forum Bylaw. All of the Company's stockholders (excluding Defendants and Defendants' affiliates) are affected by the challenged Forum Bylaw in a manner similar to Plaintiff. Thus, Plaintiff's legal and factual positions are consistent with, and do not create conflicts among, the Settlement Class. Accordingly, the typicality requirement has been met here.

4. Rule 23(a)(4): Plaintiff has Fairly and Adequately Protected the Interests of the Settlement Class

Rule 23(a)(4) requires that the class representatives will "fairly and adequately protect the interests of the class."³⁹ Class representatives are generally adequate if (i) there is no 'economic antagonism[] between the representative and the class,' and (ii) the class representatives are represented by "qualified experienced, and competent" counsel capable of prosecuting the litigation.⁴⁰ This Court has previously noted that "[t]he requirements for an 'adequate' class representative are not onerous."⁴¹

In this Action, Rule 23(a)(4) is easily satisfied. There are no conflicts between Plaintiff's interests and those of the Settlement Class, and Plaintiff is a typical

³⁹ *Nottingham P'rs*, 564 A.2d at 1094-95.

⁴⁰ *N.J. Carpenters Pension Fund*, 2013 WL 610143, at *3.

⁴¹ *O'Malley v. Boris*, 2001 WL 50204, at *5 (Del. Ch. Jan. 11, 2001).

member of the Settlement Class it seeks to represent. Furthermore, Plaintiff has selected counsel who have significant experience representing stockholder class actions, and are highly capable litigators, as demonstrated by their efforts in litigating this Action (as well as Seafarers' other claims) and the global settlement reached which achieves the relief sought by the Delaware Action.

C. The Settlement Class Satisfies the Requirements of Rule 23(b)(1) and (b)(2)

In addition to the requirements of Court of Chancery Rule 23(a), a class may be certified only if “it fits into one of the three categories specified in Court of Chancery Rule 23(b).”⁴² “Delaware courts ‘repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both divisions (b)(1) and (b)(2).’”⁴³

1. Certification Under Rule 23(b)(1) is Appropriate

Rule 23(b)(1) provides for class certification: (i) where the prosecution of separate actions by or against individual class members would create a risk of “[i]nconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class”; and (ii) “[a]djudications with respect to individual members of

⁴² *Ebix*, 2018 WL 3570126, at *4.

⁴³ *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 432-33 (Del. 2012) (internal citations omitted).

the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.”⁴⁴

Absent certification, there is a significant risk that incompatible standards could be created for Boeing stockholders.⁴⁵ Among other things, if Settlement Class members were forced to individually pursue their claims, identical members could be awarded different relief including conflicting governance changes at the Company, producing inequitable results and establishing incompatible standards for Defendants.⁴⁶ Furthermore, if no class is certified, adjudication of claims held by individual plaintiffs, would as a practical matter, prejudice non-parties with identical claims and substantially burden the Court with an inefficient means of resolving the Delaware Action.⁴⁷

2. Certification Pursuant to Rule 23(b)(2) is Appropriate

⁴⁴ *Turner v. Bernstein*, 768 A.2d 24, 30 (Del. Ch. 2000).

⁴⁵ *Id.* at 35.

⁴⁶ *See Ebix*, 2018 WL 3570126, at *5 (“[C]las certification under Rules 23(b)(1) and (2) permit [settlements in which the] adjudication is uniform and the primary relief sought is equitable in nature.”).

⁴⁷ *See In re Best Lock Corp. S’holder Litig.*, 845 A.2d 1057, 1095 (Del. Ch. 2001) (“Class certification under Rule 23(b)(1) is proper in this case because the multiple lawsuits that would follow this motion denied would be both prejudicial to nonparties and inefficient.”).

When particular facts applicable to any one stockholder would have no bearing on the appropriate remedy, Rule 23(b)(2) certification is appropriate.⁴⁸ If defendants are alleged to have engaged in a single course of conduct generally applicable to the Settlement Class, certification under Rule 23(b)(2) is also appropriate.

In this Action, the Settlement Class members were harmed by Defendants' conduct in maintaining and invoking Boeing's Forum Bylaw. Thus, certification under Rule 23(b)(2) is appropriate here as Defendants' conduct was generally applicable to the Settlement Class and the Settlement Class is treated fairly with respect to the application of the relief.

D. The Remaining Requirements of Court of Chancery Rule 23 are Satisfied

Plaintiff and Plaintiff's counsel meet the remaining requirements of Court of Chancery Rule 23. Plaintiff has filed an affidavit in compliance with Rule 23(e) stating its support for the Proposed Settlement.⁴⁹ On September 28, 2022, Boeing issued a press release notice in the *Wall Street Journal* and over the *PR Newswire*, and by October 14, 2022, Boeing also mailed a detailed 21-page notice to more than 100,000 Boeing stockholders, satisfying the requirements of Rule 23 and due

⁴⁸ See *Hynson v. Drummond Coal Co.*, 601 A.2d 570, 575-77 (Del Ch. 1991).

⁴⁹ See *Noyes Aff.*, Ex. 2 (Bowen Affidavit).

process. Pursuant to the Court's Scheduling Order, Boeing will file proof of Notice with the Court no later than ten business days prior to the Settlement Hearing. To date, although the deadline has not passed, no Boeing stockholder has objected to the Delaware Settlement. In addition, only one objection has been received by Plaintiff's counsel or filed with the Federal Court, and it concerned the amount of insurance recovered in the Federal Action, but did not mention the corporate governance revision to Boeing's Forum Bylaw.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that its Motion to approve the Delaware Settlement and certify the Settlement Class should be granted.

Dated: December 6, 2022

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CERTIFICATE OF SERVICE

I, Frank Noyes, do hereby certify that on this December 6, 2022, a copy of the foregoing *Plaintiff's Brief in Support of the Delaware Settlement and Certification of a Settlement Class* was served on the following counsel of record by File and ServeXpress:

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