UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

UNITED STATES OF AMERICA, *Plaintiff* v. THE BOEING COMPANY, *Defendant.*	)	Case No. 4:21-cr-00005-O

MOTION AND MEMORANDUM OF RECOGNIZED CRIME VICTIMS' FAMILIES NAOISE CONNOLLY RYAN, ET AL. REQUESTING THAT THE COURT NOT ACCEPT THE RULE 11(C)(1)(C) BINDING PLEA AGREEMENT PROPOSED BY THE GOVERNMENT AND BOEING

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Naoise Connolly Ryan et al.[1] (the "victims' families" or "families"), through undersigned counsel, file this motion requesting that the Court reject the Rule 11(c)(1)(C) binding plea agreement proposed by the Government and Boeing. The Court has previously authorized the filing of this motion. *See* ECF No. 218 at 1. The Court has undoubted authority to reject the proposed plea agreement. *See* Fed. R. Crim. P. 11(c)(3) (court may "reject" a proposed plea). The Court should do so here.

INTRODUCTORY STATEMENT

Boeing's lies to the FAA directly and proximately killed 346 people, as this Court has previously found. ECF No. 116 at 16. And yet, when the Government's and Boeing's skilled legal teams sat down behind closed doors to negotiate a plea deal, that tragic fact somehow escaped mention. Instead, what emerged from the negotiations was a plea agreement treating Boeing's deadly crime as another run-of-the-mill corporate compliance problem. The plea agreement rests on the premise that the appropriate outcome here is a modest fine and a corporate monitor focused on the "effectiveness of the Company's compliance program and internal controls, record-keeping, policies, and procedures …." Proposed Plea Agreement, Attachment D, at ¶ 3. And as a justification for such lenient treatment, the plea agreement relies on an incomplete and deceptive statement of facts that obscures Boeing's true culpability.

[1] In addition to Ms. Ryan, the other victims' family members filing this motion are Emily Chelangat Babu and Joshua Mwazo Babu, Catherine Berthet, Huguette Debets, Luca Dieci, Bayihe Demissie, Sri Hartati, Zipporah Kuria, Javier de Luis, Nadia Milleron and Michael Stumo, Chris Moore, Paul Njoroge, Yuke Meiske Pelealu, John Karanja Quindos, Guy Daud Iskandar Zen S., and others similarly situated. Many family members support this motion. On Friday of this week, the families will file with the Court a list of other families who support this motion.

The families object, as the Crime Victims' Rights Act gives them the right to do. *See* 18 U.S.C. § 3771(a)(3) (giving victims' representatives the right "to be reasonably heard" regarding a "plea"). The families respectfully ask the Court not to lend its imprimatur to such an inappropriate outcome. Indeed, the families' first objection is that the Court would not be allowed to make its own determination about the appropriate sentence for Boeing but merely to rubber stamp what the parties propose through a "binding" plea deal under Fed. R. Crim. P. 11(c)(1)(C).

In the pages that follow, the families provide eight substantial objections to the proposed plea, including its deceptive factual premises, its inaccurate Sentencing Guidelines foundation, and its inadequate accounting for the deaths Boeing caused. This Court has previously stated that when it has authority "to ensure that justice is done," then "it would not hesitate." ECF No. 186 at 29. This proposed agreement is not justice. The Court should not hesitate to reject it.

BACKGROUND SURROUNDING THE PARTIES' SECRET PLEA NEGOTIATIONS

Before considering the substantive problems with the proposed plea agreement, the Court should be aware that the parties crafted this deal without giving the victims' families a meaningful opportunity to confer on its specific provisions. The victims' families repeatedly asked the Government to provide them with the terms of the proposed agreement before it was offered to Boeing. But instead, on Saturday(!), June 29, 2024, at 1:14 p.m. Eastern time, the Department emailed families and their attorneys around the world, informing them that the Department needed to hold a "conferral session" with the families 25 hours later—at 2:45 p.m. Eastern time on Sunday(!), June 30.

Victims' families from around the world made an effort to join that call. And the Government then laid out for the first time the terms that it was offering Boeing. Family members vigorously objected to some of the provisions. And then, toward the end of the call, one of the

families' attorneys asked the Government whether it would consider the objections that family members had made to the plea before extending the offer to Boeing. The Government responded that it would not take even a few minutes to reflect on the families' concerns. Instead, the purpose of the call was simply to "inform" the victim's families of the agreement's proposed terms. And the Government said that, immediately after the call, it was going to offer the described plea deal to Boeing. The Government also told the family members that the terms were "non-negotiable."

Against this backdrop, the family members have been surprised that, after the Government extended purportedly "non-negotiable" terms to Boeing, it took the parties 24 days to "memorialize" (ECF No. 215 at 1) the agreement. From the families' perspective, it appears that, contrary to what the Government told them, the Government and Boeing have engaged in extensive negotiations about how to resolve this case—negotiations that excluded the families.

The families could argue that the Government's failure to ever specifically discuss the proposed agreement's terms with the victims' families violates their CVRA "reasonable right to confer" with the prosecutors. After all, in 2009, the Fifth Circuit instructed prosecutors that they should develop a "reasonable way" to "ascertain the victims' views on the *possible details* of a plea bargain." *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008) (emphasis added). And in 2015, Congress codified *Dean's* holding by adding a CVRA right for victims "to be informed in a timely manner of any plea bargain …." 18 U.S.C. § 3771(a)(9) (emphasis added). As explained in earlier briefing, protecting this right necessarily would involve an opportunity for victims to be informed of and confer about the details of a proposed plea. *See* ECF No. 52 at 23-24. But rather than delay these proceedings further with a procedural issue surrounding the covert negotiations surrounding the plea, the families will simply argue to the Court why it should reject this rotten deal.

JUDICIAL DISCRETION REGARDING WHETHER TO ACCEPT A PROPOSED PLEA

It has long been settled that "a defendant has no right to be offered a plea, nor a … right that the judge accept it." *Missouri v. Frye*, 566 U.S. 134, 148 (2012). The court plays a significant role in evaluating a proposed plea agreement, because the agreement may ultimately determine a defendant's sentence and sentencing is primarily a judicial responsibility. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §21.3(e) (4th ed. 2023).

In determining whether to accept a proposed plea agreement, the court possesses broad discretion. *See, e.g., United States v. BP Products North America Inc.*, 610 F. Supp.2d 655, 674 (S.D. Tex. 2009). A district court's discretion in evaluating a proposed plea agreement is particularly broad when the parties are proposing an agreement under Rule 11(c)(1)(C)—a so-called "binding" plea or "C-plea." A C-plea "applies in an all-or-nothing fashion. Once the judge accepts a [C-plea], she is compelled to impose the attendant sentence recommendation without tinkering with the details." *United States v. Orthofix, Inc.*, 956 F. Supp. 2d 316, 331 (D. Mass. 2013). Thus, a judge's "hands are tied once she accepts a [C-plea] so that she cannot tailor a sentence [to] fits the defendant's circumstances exactly. The judge ought therefore consider the [C-plea] with no small amount of circumspection, lest her role in dispensing criminal justice amount to no more than that of sentencing-by-number, imposing conditions—as she might apply paint—mechanically from a scheme of the parties' choosing." *Id.* at 331-32. Indeed, a district court is duty-bound to carefully review a proposed C-plea in exercising its discretion. *See Freeman v. United States*, 564 U.S. 522, 529 (2011) ("Rule 11(c)(1)(C) permits the defendant and the prosecutor to agree that a specific sentence is appropriate, but that agreement does not discharge the district court's independent obligation to exercise its discretion.").

The federal rules specifically authorize district courts to reject proposed plea agreements, including C-pleas. *See* Fed. R. Crim. P. 11(c)(3) ("the court may accept the agreement, *reject it,* or defer a decision until the court has reviewed the presentence report" (emphasis added)). The text of Rule 11(c)(3) does not "define the criteria by which a district court should exercise the discretion the rule confers[] or explain how a district court should determine whether to accept a plea agreement." *In re Morgan,* 506 F.3d 705, 710 (9th Cir. 2007). "This conspicuous omission ... appears to be intentional, as the drafters stated that the decision to accept or reject a plea agreement should be 'left to the discretion of the individual trial judge,' rather than governed by any bright-line test." *Id.* at 710 n. 2 (quoting Fed. R. Crim. P. 11, Advisory Committee note).

The Fifth Circuit has squarely held that a district court may properly reject a plea agreement if the defendant would receive too light of a sentence or if accepting the plea agreement would undermine the statutory purposes of sentencing or the sentencing guidelines. *See United States v. Smith,* 417 F.3d 483, 487 (5th Cir. 2005), *cert. denied,* 546 U.S. 1025 (2005); *United States v. Crowell,* 60 F.3d 199, 205–06 (5th Cir. 1995); *United States v. Foy,* 28 F.3d 464, 472 (5th Cir. 1994); *United States v. Bean,* 564 F.2d 700, 704 (5th Cir. 1977). The Fifth Circuit has specifically upheld rejections of pleas where the proposed agreement failed to consider a defendant's "large number of victims." *See, e.g., Smith*, 417 F.3d at 487 ("[t]he district court did not abuse its discretion in concluding that the plea agreement did not adequately reflect the seriousness of the offense, was unduly lenient, and would not meet the objectives of sentencing given [the defendant's] … large number of victims"); *Crowell*, 60 F.3d at 206 ("[g]iven the large number of victims and the protracted course of fraudulent activity, we cannot find that the district court abused its discretion [in rejecting a proposed plea agreement]").

REASONS FOR REJECTING THE PROPOSED PLEA

The Court should exercise its discretion to reject the parties' proposed binding plea because "the agreement is against the public interest in giving the defendant unduly favorable terms." *United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977). Multiple reasons support this conclusion.

I. The Court Should Reject the Proposed Rule 11(c)(1)(C) Binding Plea Agreement Because It Destroys the Court's Ability to Craft a Fair and Just Sentence—and One That is Perceived as Fair and Just by the Public.

The Court is familiar with the terms of the binding plea agreement that the parties have asked it to approve. ECF No. 221-1. If the Court approves the deal, then Boeing will plead guilty to the pending conspiracy charge and pay a fine of $243,600,000, based on the premise that Boeing's "gain" from its crime was that amount. Proposed Plea Agreement ¶ 25(a). Boeing will also be required to retain a corporate monitor, who will work on improving the effectiveness of Boeing's "compliance program and internal controls, record-keeping, policies, and procedures …." *Id.*, Att. D, at ¶ 3. Boeing will also make an annual "safety and compliance" investment of about $152,000,000 over the three-year term of supervision. *Id.* at ¶ 25(g). And the agreement rests on a "statement of facts" recycling the earlier, abbreviated facts attached to the DPA. *Id.*, Att. A-2.

Perhaps this deal serves the public interest—although in the sections that follow the families argue strenuously to the contrary. But what cannot be debated is that the parties are attempting to force the Court to swallow the deal whole. In filing a proposed C-plea, the parties are asking this Court to approve a deal that "cabin[s] judicial discretion," "crowds a judge into a 'take it or leave it' position," and "adds a powerful, near-hydraulic pressure in favor of plea bargaining." *United States v. Kandirakis*, 441 F.Supp.2d 282, 284 n. 5 (D. Mass. 2006).

Perhaps anticipating such concerns, the Government attempts to reassure the Court that such binding plea deals are its "standard practice in corporate cases." ECF No. 221 at 1. Assuming

this is true,[2] it would be unsurprising to learn that the Department is making increasing use of such agreements, since they effectively transfer sentencing power from the Judiciary to the Executive. But as the Government is no doubt aware, "[c]ourts throughout the country have rejected 'C' pleas [in corporate cases] that do not promote justice." *United States v. Aegerion Pharmaceuticals, Inc.*, 280 F. Supp. 3d 217, 222 (D. Mass. 2017) (collecting examples); *see also* Joshua Levy & Elizabeth Douglas, *DOJ Corporate Plea Deals Face Increased Judicial Resistance*, Law360 (Jan. 8, 2020) (collecting examples of federal judges rejecting C-pleas in corporate crime cases).[3]

Far from being comforting, the Government's "standard practice" supports another, more troubling proposition: "[T]hat a forbidden, two-tier system pervades our courts. Corporations routinely get 'C' pleas after closed door negotiations with the executive branch while individual offenders are rarely afforded the advantages of a 'C' plea. Instead, they plead guilty and face a truly independent judge. This is neither fair nor just; indeed, it mocks our protestations of 'equal justice under law.'" *Aegerion*, 280 F. Supp. 3d at 224-25.

In *Aegerion*, Judge Young capably dispatched some of the arguments that have been made

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[2] While the Government cites three cases where it recently entered into C-pleas with corporations, it is easy to find four, very recent corporate plea deals that are not C-pleas. *See, e.g., United States v. KVK Research, Inc.*, No. 2:24-cr-69-HB, Dkt. 17 (E.D. Pa. Mar. 6, 2024) (Rule 11(c)(1)(B) plea with a corporation); *United States v. GDP Tuning, LLC*, No. 4:23-cr-168-BLW, Dkt. 3 (same); *United States v. Zeaborn Ship Management (Singapore) Pte. Ltd.,* No. 3:23-r-0-1661-JO, Dkt. 22 (S.D. Cal. August 21, 2023) (same); *United States v. FeelGood Natural Health Stores, Ltd.*, No. 2:23-cr-20189, Dkt. 11 (E.D. Mich. June 5, 2023) (same).

[3] *See, e.g., United States v. Aegerion Pharmaceuticals, Inc*, 280 F. Supp.3d 217 (D. Mass. 2017) (rejecting corporate C-plea because it was not in the public interest); *United States v. Holy Stone Holdings Co.*, No. 16-cr-366-JD (N.D. Cal. Aug 9, 2017), ECF No. 21 (same); *United States v. Elna Co.*, No. 16-cr-00365-JD (N.D. Cal. Jun 14, 2017), ECF No. 23 (same); *United States v. Matsuo Elec. Co.*, No. 17-cr-00073-JD (N.D. Cal. May 24, 2017), ECF No. 21 (same); *United States v. Orthofix, Inc.*, 956 F. Supp. 2d 316 (D. Mass. 2013) (rejecting a corporate C-plea because it "hamstrings [the court] in the performance of its sentencing function"); *United States v. Guidant LLC*, 708 F. Supp. 2d 903 (D. Minn. 2010) (rejecting corporate C-plea because it did not adequately address the defendant's criminal history and conduct).

justifying corporate C-pleas. For example, it is sometimes argued that corporations require C-pleas because any other vehicle—even a Rule 11(c)(1)(B) plea agreement affording the Court slightly more discretion—would create too much uncertainty for innocent employees, shareholders, investors, and other interested parties. The pharmaceutical company in *Aegerion* advanced this argument, prompting Judge Young to respond: "Say what? … Does Aegerion think district judges simply are not competent to sentence corporate criminals? Or is it that the interests of drug dealers' innocent wives, children, neighbors, and colleagues are somehow less important than those of a corporation's shareholders and investment bankers?" *Aegerion*, 280 F. Supp. 3d at 223.

Because of issues such as these, it may well be the case that judges should always reject C-pleas because they create a "forbidden, two-tier system of justice." *Cf. United States v. Robertson*, 45 F.3d 1423, 1439 (10th Cir. 1995) (holding it is judicially sound for a judge to reject all C-pleas if the judge concludes that they categorically interfere with judicial sentencing authority). But this Court need not reach such far-reaching conclusions to reject the specific C-plea in front of it. If there was ever a C-plea that should be rejected, this is the one.

As this Court has accurately noted, this case may "properly be considered the deadliest corporate crime in U.S. history." ECF No. 185 at 25. And yet, rather than being pursued vigorously, the prosecution here has appeared to give Boeing extraordinarily generous treatment … and to ignore the victims and their families.

First, the Government falsely denied to the families that it was criminally investigating Boeing (ECF No. 52 at 8-10)—false statements that the Government has never explained.[4]

[4] For several years, the victims' families have asked the Justice Department to explain why it made these false statements, ironically through the Department's Victims' Rights Ombudsperson. But after first agreeing to arrange a meeting between the Ombudsperson and the victims' families, the Department recently backtracked, claiming that the Ombudsperson had

Next, the Department allowed Boeing to negotiate behind closed doors a generous deferred prosecution deal—and to do so in violation of the CVRA by concealing the agreement from the victims' families. *See* ECF No. 116 at 18 (finding that the Government violated the CVRA by failing to confer with the families before reaching its DPA).

Then, when the families challenged the secret deal, the Department (and Boeing) jointly took the position that the only "victims" deceived by Boeing's lies were FAA bureaucrats. *See* ECF No. 58 at 9-14 (Gov't position); Hrng. Tr. (Aug. 26, 2022) at 242-43 (Boeing position). The Court rejected these positions. ECF No. 116 at 18; *see also* ECF No. 90 at 1 (amicus brief of Senator Cruz describing the positions as "nonsensical").

Later, before the Fifth Circuit, both the Department and Boeing argued that this Court was powerless to remedy a proven CVRA violation. The Fifth Circuit disagreed. *See In re Ryan*, 88 F.4th 614, 623 (5th Cir. 2023).

And finally, and perhaps most significant, despite having been given a generous deal, Boeing proceeded to spend the last three years breaching that agreement by failing to implement appropriate corporate compliance measures. *See* ECF 221-1, at A-1 (outlining details of Boeing's breach).

Given this strong suspicion of preferential treatment for Boeing, approving the C-plea here would be particularly inappropriate. Approving the binding plea would "unduly hobble[] [the] Court[]" in performing its "sworn constitutional duty to 'do equal right to the poor and to the rich.' 28 U.S.C. § 453." *Aegerion,* 280 F. Supp. 3d at 228. Disposing of this case through a C-plea would provide enormous advantages to Boeing, including the private negotiations with the Government

"determined such a meeting would not be compatible with the scope of her authority, which is narrowly defined." Ltr. from Glenn Leon to Paul Cassell at 3 (June 11, 2024).

described above, all designed to achieve effective damage control and produce "no surprises from the judiciary." *Id.* at 226. However, it is difficult to fathom why the Government has turned to a C-plea to resolve this particular case, involving 346 deaths. One federal judge noted that "[i]n my experience, individuals are afforded 'C' pleas only when the government's case is weak and it is trying to lock in the plea …." *Id*. at 226. Of course, such a concern is inapplicable here. It would be nearly impossible for the Government to have a stronger case against Boeing, given Boeing's *signed confession* to the conspiracy charge in the Deferred Prosecution Agreement. *See* DPA, ¶ 2.

To be clear, the families' objection to a C-plea does not hinge on anything being wrong with the deal's terms (although there is plenty wrong, as discussed below). Rather, the families' concern is that the deal reeks of having been cooked up collusively by prosecutors and defense attorneys, who have worked together against the families on many aspects of the case. *See, e.g.,* Aron Solomon, *Boeing's Path Out of its 737 Controversy Is Going to be Bumpy*, THE HILL (July 13, 2024) ("I think it's a very fair characterization [to call the Boeing plea deal a 'sweetheart deal']" as "the deal is excessively lenient and fails to hold Boeing adequately accountable for its role in the deaths of [the families'] loved ones.").[5] Whether or not this suspicion is well-founded, the only way to assure public confidence in the outcome here is for the Court—not the parties—to determine the appropriate sentence. Judge Young put this point nicely in rejecting a corporate C-plea, explaining that "[w]ere this Court to have a free hand, I might well sentence [the company] to virtually the same sentence as the parties here urge on the Court … or I might not. I simply do not know because, as yet, the parties have deprived me of that responsibility …." *Aegerion*, 280 F.

[5] Recently various groups asked Deputy Attorney General Lisa Monaco to recuse herself from Boeing plea deal deliberations, due to a perceived conflict of interest. http://www.economicliberties.us/wp-content/uploads/2024/07/DOJ-Boeing-Letter-7.2.24.docx.pdf. DAG Monaco has declined to do so.

Supp. 3d at 228. This Court should likewise reject this proposed plea, without considering its merits, because the agreement would prevent the Court from exercising its discretion.

If this Court rejects the proposed C-plea, a possible next step might be for the parties to work toward turning it into a Rule 11(c)(1)(B) plea. Under such a plea, the Court is permitted to "accept the guilty plea without necessarily imposing the recommendation proffered by the parties." *Orthofix*, 956 F. Supp. 2d at 332. But whatever might follow from the Court's rejection of the current proposed plea agreement is not an appropriate concern at this juncture. Of course, the Court must leave plea bargaining up to the parties, *see* Fed. R. Crim. P. 11(c)(1), a process that should be informed by the victims' families views, 18 U.S.C. § 3771(a)(5). The important point is that if the Court rejects this binding C-plea, whatever may follow will enhance public confidence that the Court itself is performing its judicial duty and determining the appropriate sentence on its own.

II. The Court Should Reject the Proposed Plea Because the Parties Have "Swallowed the Gun" By Hiding Relevant Facts About Boeing's Culpability.

Turning from procedural issues to the substance of the proposed plea agreement, the Court has multiple reasons to reject it. First and foremost is the incomplete and misleading statement of facts that the parties ask the Court to rely on. Because the parties' proffered facts are deceptively incomplete, the Court should reject the plea until all relevant facts surrounding Boeing's culpability are disclosed.

In evaluating the plea agreement, the Court must consider whether accepting the agreement "will undermine the statutory purposes of sentencing or the sentencing guidelines." *United States v. Smith*, 417 F.3d 483, 487 (5th Cir. 2005). In making such a determination, the Court will necessarily and immediately confront the need to consider "the nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1)— that is, the facts of the case.

It has long been Justice Department policy that "[w]hen advocating at sentencing, prosecutors must fully and accurately alert the court *to all known relevant facts* … and explain why the interests of justice warrant their sentencing recommendations." Memo. for all Federal Prosecutors, General Department Policies Regarding Charging, Pleas, and Sentencing at 5 (Dec. 16, 2022) (emphasis added).[6] In more colorful words, prosecutors should not "swallow the gun"—i.e., withhold incriminating evidence at sentencing. *See, e.g., United States v. Mercer*, 472 F. Supp. 2d 1319, 1323 (D. Utah 2007) (noting that Department policy at sentencing is designed to avoid "the spectacle of government attorneys arguing to the court things that are contrary to fact—it avoids prosecutors swallowing the gun.'"). Thus, parties may not stipulate to misleading facts. U.S.S.G. § 6B1.4(a)(2) (policy statement). Instead, they must "fully and accurately disclose all factors relevant to the determination of sentence." U.S.S.G § 6B1.4, Commentary (policy statement). Under the Guidelines, parties are not permitted to "cloak the facts to reach a result contrary to the Guidelines' mandate." *United States v. Scroggins*, 880 F.2d 1204, 1214 (11th Cir. 1989).

Sadly, here the parties have "swallowed the gun" by concealing the full scope of Boeing's culpable conduct. Understanding that this is a strong allegation, it is possible to prove this point concretely with many examples. Attached to this brief is the families' proposed statement of facts on which the Court should base sentencing. Ex. 1 ("Families' Statement of Facts"). The Court will find in the families' document many highly relevant facts that the parties have omitted.

A straightforward illustration of omitted facts comes from sealed documents contained in civil litigation against Boeing. Through civil discovery, civil litigators representing the families

[6] Available at https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf

have obtained documents from Boeing showing very culpable behavior by the company. While Boeing has succeeded in keeping these documents under wraps through an expansive "protective order" in the civil litigation, undersigned counsel recently received permission to view some of the documents and to provide them to this Court. *See In re: Ethiopian Airlines Flight 302*, No. 1:19-cv-02170, Dkt. 2162 (N.D. Ill. June 25, 2024).[7] The documents contain shocking revelations about the lengths to which Boeing went to conceal the MCAS safety issue from the FAA and, indeed, anyone else—acts of deception in furtherance of Boeing's conspiracy which the parties have not fully disclosed.

One example is Boeing's deceitful correspondence with [redacted]

[7] Because undersigned counsel was also placed under a protective order, the families' description of the materials is redacted in the families' public court filing and provided to the Court separately under seal. Counsel has also previously provided this information to the Justice Department.

[redacted]

Another example of acts in furtherance of Boeing's criminal conspiracy directly involves CEO Muilenburg. In November 2018, pilots continued to tell the media they were not trained to deal with MCAS. Instead of addressing pilot concerns about the safe operation of the aircraft, Boeing [redacted]

[redacted].[8]

In addition to these omitted facts, additional facts about Boeing's crime have surfaced in recent years—new facts the parties have failed to include in their statement of facts. In proposing the plea, the parties have simply dusted off their old statement of facts from the DPA, attaching to the new plea agreement the same 54 paragraphs that they drafted back in January 2021. *Compare* DPA, Att. A (statement of facts) ¶¶ 1-54 *with* Proposed Plea Agreement, Att. A-2 (statement of facts) ¶¶ 1-54.[9] But on September 22, 2022, the Securities and Exchange Commission (SEC) released an agreed "cease-and-desist" order regarding Boeing's false statements to investors and the public regarding the safety of the Boeing 737 MAX in the wake of the Lion Air crash. *See In the Matter of The Boeing Company*, File No. 3-21140 (Sept. 22, 2022) ("SEC Findings").[10] Compared to the parties' statement of facts attached to the proposed plea agreement—which contains just four paragraphs concerning Boeing's conspiracy during the five months between the Lion Air crash and the ET 302 crash (¶¶ 49-52)—the SEC developed thirty-one paragraphs (¶¶ 32-63). The SEC's paragraphs detail ways in which The Boeing Company—and, in particular, its CEO, Dennis A Muilenburg—concealed what Boeing knew about the problem of improper MCAS activations. As the SEC findings explain, on "about November 15, 2018, senior executives at Boeing, including Muilenburg, were informed that the [Safety Review Board] had identified the crew workload issue associated with unintended MCAS activation due to erroneous [angle of

[8] The sealed documents connected with the redacted part of this brief are [redacted]

[9] The statement of facts associated with the guilty plea adds one new paragraph (paragraph 55) concerning Boeing's "gain" from the offense, discussed below in Part V.B, *infra.*

[10] Available at https://www.sec.gov/files/litigation/admin/2022/33-11105.pdf. A similar cease-and-desist order exists for CEO Dennis Muilenburg.

attack] data as an 'airplane safety issue' that required remediation[] and that Boeing engineers were working on redesigning the MCAS software to address the issue." SEC Findings at ¶ 39. Thereafter, Boeing and Muilenburg issued misleading press statements, concealing this known safety issue from the general public. *Id.* ¶¶ 47-51. And Boeing also provided those misleading statements to the FAA. *Id.* ¶ 51. This concealment involved acts in furtherance of the criminal conspiracy charged against Boeing, *see* ECF No. 1 (alleging conspiracy to defraud the FAA), because the acts were designed to keep the public—and the FAA—from learning the truth.

In addition, other public record materials exist providing a more fulsome description of Boeing's crime than the parties have admitted in their statement of facts. The Court will recall that during the August 2022 hearings regarding "victim" status in this case, the families introduced into evidence the House Committee on Transportation and Infrastructure: Final Committee Report: The Design, Development & Certification of the Boeing 737 MAX (Sept. 2020) ("House Transportation Comm. Rep.").[11] The Report is 238 pages long and contains significant information relevant to Boeing's culpability. As one illustration:

> Boeing had internal test data revealing that its own test pilot tried—but failed—to respond in time to an uncommanded MCAS activation event in a flight simulator which would have resulted in the loss of the aircraft in a real world situation. This was not simply a hypothetical scenario. It was the result of a flight simulator test by a trained Boeing test pilot. From everything the Committee has learned in its investigation, there is no evidence we have found that shows Boeing shared the results of that test with the FAA or its 737 MAX customers.

Id. at 207. This concealment of Boeing's internal test data is a clear and chilling example of an act in furtherance of the conspiracy to defraud the FAA—and yet it is not revealed by the parties. And on top of that, the parties have even failed to include in their statement of facts this Court's earlier

[11] Available at https://democrats-transportation.house.gov/download/20200915-final-737-max-report-for-public-release.

ruling that Boeing's conspiracy crime "directly and proximately" caused the crashes of the two planes, killing hundreds. *See* ECF No. 116 at 15-19.

Given the limited space in this brief, the families will not attempt to recount all the facts that are missing from the statement of facts. *Cf.* Families Statement of Facts, Ex. 1 (reciting some of the parties' omitted facts). That is not the job of the families[12]—the Government is supposed to ensure that the Court has all relevant information. Because the Government (and Boeing) have failed to provide all the relevant underlying facts, the Court should reject the proposed plea.

III. The Court Should Reject the Proposed Plea Because It Allows Boeing to Escape Accountability for Directly and Proximately Causing 346 Deaths.

The parties concede that, under *United States v. Booker*, 543 U.S. 220 (2005), the Court must first "determine an advisory Sentencing Guideline range" and then determine a "reasonable" sentence for Boeing in light of that range. Proposed Plea Agreement ¶ 23. The parties even calculate a Guidelines range. *See id.* ¶ 24. But the parties' Guideline calculations assume an ordinary corporate crime—that is, one within the heartland of the sentencing guidelines for fraud. But instead, Boeing's lethal conspiracy crime is an obvious outlier, in which the fraud guideline fails to consider an aggravating circumstance. *See* U.S.S.G. § 5K2.0 (policy statement).

As the Court has found, "Boeing's crime may properly be considered the deadliest corporate crime in U.S. history." ECF No. 185 at 25 (recounting earlier finding, ECF No. 116 at 16, that Boeing "directly and proximately" killed 346 people by lying to the FAA). But the parties present to the Court a Guidelines calculation that evades this stark truth.

[12] And the Government has *opposed* efforts by the family members to obtain all relevant facts surrounding Boeing's crime. *See, e.g.,* ECF No. 73 (government opposition to families' motion for disclosure of relevant information). The Government has also successfully resisted the families' FOIA requests for more than two years, having yet to produce even a single document. *See Ryan v. Dept. of Justice*, No. 23-3815-BAH, Dkt. 15 (D.D.C. June 21, 2024).

First and most jarringly, the parties have failed to add to their Guidelines calculation a specific offense characteristic for Boeing's crime being one "involv[ing] 10 or more victims." U.S.S.G. § 2B1.1(b)(2)(A)(i). The parties thus ignore 346 victims, whom Boeing killed through its conspiracy. For the Court to accept the proposed plea on the premise that the only victim was the FAA would obviously "undermine the statutory purposes of sentencing or the sentencing guidelines." *Smith*, 417 F.3d at 487 (5th Cir. 2005).

Second, the fact that Boeing's crime directly and proximately killed 346 people means that the Court should depart upward from the Guidelines—something that the parties' Guidelines calculations fail to acknowledge. The Guidelines provide that "[i]f the offense resulted in death … or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted." U.S.S.G. § 8C4.2 (risk of death) (policy statement). The parties do not admit the obvious applicability of this departure provision.

The Government and Boeing may contend that issues relating to multiple victims and a possible upward departure are unimportant because their proposed plea already "reflects a fine at the top of the applicable Sentencing Guidelines fine range …." Proposed Plea Agreement ¶ 25. But even if this were true (*cf.* Part V, *infra*, demonstrating errors in the parties' Guidelines fine calculation), it is still important for "truth in sentencing" that the Court accurately calculate the recommended Guidelines sentence. The parties appear to concede as much, claiming that their calculations rest on "a faithful application of the Sentencing Guidelines." Proposed Plea Agreement ¶ 24. But it is obviously "unfaithful" to the Guidelines to ignore the multiple victim provision and the upward departure provision regarding the deaths.

Moreover, if an upward departure is appropriate from the otherwise applicable fine range—as the 346 deaths plainly indicate—then the Guidelines fine is no longer at "the maximum." In

addition, the parties are recommending that Boeing receive a credit of $243 million for payments it previously paid under the DPA. Proposed Plea Agreement ¶ 6(g). If an upward departure from the Guidelines for the deaths suggests a fine of more than $486 million, then the idea that Boeing should be receiving an offset for its earlier payment is called into doubt.

But last and most important, the Guidelines calculation that the parties are presenting rests on a falsehood: That the Court can sentence Boeing without even considering the 346 victims Boeing killed. The parties' Guidelines calculation is not only inaccurate—it is morally reprehensible. The Court should reject the plea agreement for this reason alone.

IV. The Court Should Reject the Proposed Plea Because It Surreptitiously Exonerates Boeing's Then-Senior Leadership.

The Court should also reject the proposed plea agreement because it contains, buried within its Guidelines calculation, a provision effectively exonerating Boeing's then-senior leadership from criminal culpability. The parties have declined to discuss the full role of Boeing's then-leadership in their statement of facts. Without a full accounting of what the leadership did, exonerating them is inappropriate.

Back in 2021, Boeing's DPA included a statement directly exonerating senior management of any criminal wrongdoing. Specifically, the agreement said Boeing's "misconduct was neither pervasive across the organization, nor undertaken by a large number of employees, *nor facilitated by senior management*." ECF No. 4 at 6 (emphasis added). After years of litigation, the Government has never provided an explanation for such a sweeping statement, which effectively gave a get-out-of-jail-free card to Boeing's then-leadership. *See* ECF No. 65 at 2-5 (explaining why this exonerating provision was extraordinary and inappropriate).

Obtaining a criminal prosecution of Boeing's responsible leaders remains a top priority for the families. And in recent conferral meetings, the Government has told the families that it is

continuing to investigate whether top executives at Boeing were involved in the conspiracy. Indeed, during the Sunday meeting on June 30, 2024, when the Government informed the families about the plea terms, the Government indicated that it had excluded the DPA's exonerating language ("no[t] facilitated by senior management") from the plea agreement while the Department's investigation into senior management continued.

But then, when the Government revealed the language of its proposed plea agreement last week, the families were surprised to see buried deep within it in a sentencing guideline calculation that assumed that not even a single senior executive was involved during Boeing's long-running conspiracy. In the Guidelines calculation accompanying the plea deal (¶ 24), the parties compute a proposed "culpability score" under the Guidelines. *See* U.S.S.G. § 8C2.5(a). That culpability score is based, in large part, on the level of culpable corporate employees. If only "substantial authority personnel" (i.e., mid-level executives) were involved in a defendant's crime,[13] then only a two-level increase in the culpability score is appropriate. U.S.S.G. § 8C2.5(b)(4). But if "high-level personnel" (i.e., a senior executive or member of leadership) were involved, then a more substantial five-level increase is appropriate. U.S.S.G. § 8C2.5(b)(1).

In their Guidelines calculation, the parties have inserted the mid-level executive enhancement (two levels) rather than the senior-executive enhancement (five levels). *See* Proposed Plea Agreement ¶ 24(d). This means the parties are stipulating that not even a single Boeing senior executive was involved in the conspiracy.

This Court should not ignore the truth: senior executives at Boeing well above the mid-level executives who have been named (i.e., Forkner and a co-conspirator test pilot) were culpable

[13] Under the Guidelines, "substantial authority personnel" are defined to mean individuals who "within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization."—e.g., a plant manager or a sales manager. U.S.S.G. § 8A1.2, cmt. 3.

in the conspiracy. These culpable individuals include members of Boeing's most senior management, including Boeing's CEO Dennis A. Muilenburg and others. *See generally* Ex. 1, Families' Statement of Facts. At the very least, before signing off on a C-plea resting on the stipulated factual conclusion that senior executives were uninvolved, the Court should require the Government to marshal the relevant facts and present its evidence about Boeing's C-suite involvement. The families respectfully submit that when the Government discloses this evidence, it will show that the appropriate Sentencing Guideline calculation requires a five-level enhancement reflecting the participation in the conspiracy of at least one of Boeing's senior leaders. Indeed, for a Guidelines enhancement to be applicable, it is only necessary that a senior leader "condoned" the offense or was "willfully ignorant" of the offense. U.S.S.G. § 8A1.2, Application Note 3. There is clear evidence to this effect, as the families recount in their statement of facts. Ex. 1, ¶ 66.

V. The Court Should Reject the Proposed Plea Because the $243 Million Fine Is Inadequate Under the Principles of Sentencing.

The Court should also reject the plea because the parties' proposed fine of $487,200,000 is inadequate—or, at the very least, rests on misleading accounting and inaccurate accounting. Here again, the Court should not sign onto the parties' deceptive stipulation.

A. The Parties Deceptively Assume that the "Loss" from Boeing's Crime was Zero When in Fact It was Billions of Dollars.

The standard fine for an organization like Boeing is up to $500,000. *See* 18 U.S.C. § 3571(c). But the "alternative fines" provision immediately comes into play in cases like this one, allowing a fine based on twice the "gross gain" or twice the "gross loss" from a defendant's crime. 18 U.S.C. § 3571(d).

Under the Sentencing Guidelines, this Court must look first to the "loss" caused by an offense in determining the fine. Indeed, the Guidelines instruct that "[t]he court shall use the gain

that resulted from the offense as an alternative measure of loss *only if* there is a loss but it reasonably cannot be determined." U.S.S.G. § 2B1.1, App. Note 3(B) (emphasis added); *see also* U.S.S.G. § 8C2.4(a) (indicating a corporate fine must be based on the greater gain or loss from the offense, to the extent that the loss was caused at least recklessly). Moreover, the sentencing court is not required to calculate the loss with specificity; rather "[t]he court need only make a reasonable estimate of the loss, given the information available." *United States v. Masek,* 588 F.3d 1283, 1287 (10th Cir. 2009). *Accord* U.S.S.G. § 2B1.1, App. Note 3(B) (citing 18 U.S.C. § 3742(e) and (f)).

Perhaps the most remarkable thing about the parties' proposed fine calculation is that it fails to reflect that Boeing's crime killed 346 innocent victims. This staggering loss should be reflected in the sentence in this case—including in the fine. To do anything else would misleadingly suggest that Boeing committed a "victimless" crime.

The families have repeatedly asked the Government for its "loss" calculation in this case. And repeatedly, the Government has declined to provide one, raising the families' suspicion that the Government (joined by Boeing) is effectively taking the position that the loss is zero.

Sentencing Boeing on the premise that its crime caused zero loss is offensive—and this Court should not lend its imprimatur to such an absurd position. As this Court previously found after two days of evidentiary hearings, the truth is that a "tragic *loss of life*" foreseeably resulted from Boeing's conspiracy to defraud the United States. ECF No. 116 at 17 (emphasis added). Indeed, in the very first sentence of its very first filing on these issues, the Department essentially conceded as much. *See* ECF No. 58 at 1 ("The United States of America … recognizes the *indescribable and irreparable losses* suffered by the representatives of eighteen crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 … and the *losses* suffered more generally by the loved ones of the 346 people who perished on those flights" (emphases added)).

Boeing has similarly conceded that it caused losses to the family members … at least when doing so served its public relations purposes. During a June 18, 2024, Senate hearing on "Boeing's Broken Safety Culture," Boeing's current CEO, Dave Calhoun, turned to face the victims' families and told them: "I would like to apologize on behalf of all of our Boeing associates spread throughout the world, past, and present, *for your losses*. They are gut-wrenching. And I apologize for the grief that we have caused …. And so, again, I'm sorry."[14]

Candidly, the families are skeptical of Mr. Calhoun's apparent contriteness while the cameras were running. But if he is sincere, then the losses Boeing caused by killing 346 passengers and crew should not be ignored in the sentencing in this case—which is what the parties' proposed "binding" plea agreement would require the Court to do.[15] Instead, the Court should acknowledge those losses by basing its sentence on a reasonable estimate of the size of these losses.

Multiple approaches are possible for quantifying the "gut-wrenching" losses from Boeing's crime. *See generally* Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, 55 WAKE FOREST L. REV. 933, 973 (2020) (collecting research on losses from homicide-related crimes). For example, in a prominent 2010 article, Professor Matt DeLisi and his colleagues calculated "cost estimates" for the crime of murder (the most intentional form of a crime causing death). *See* Matt DeLisi et al., *Murder by Numbers: Monetary Costs Imposed by a Sample of Homicide Offenders*, 21 J. FORENSIC PSYCHIATRY & PSYCH. 501, 506 (2010). They concluded that

[14] While a transcript of the hearing appears to be unavailable, a video recording of the hearing is available on the Senate Permanent Subcommittee on Investigations website at: https://www.hsgac.senate.gov/subcommittees/investigations/hearings/boeings-broken-safety-culture-ceo-dave-calhoun-testifies/.

[15] The parties apparently envision that, after the sentencing, there would be separate proceedings ninety days later to determine potential restitution. But whether any restitution would be ordered remains uncertain under the parties' proposal. *See* Part VIII, *infra*.

the cost, in 2008 U.S. dollars, was $4,712,769. *Id.* at 506 tbl. 1. Translated into 2018 dollars, the cost of a homicide would be $5,496,483. The same "cost estimate" for a death caused by an intentional murder would, by definition, be the same as the cost estimate for a death caused by Boeing's intentional conspiracy to defraud the FAA. Multiplied across 346 crime victims, the total loss to victims from Boeing's crime (in 2018 dollars) is $1,901,783,118.[16]

To be sure, there are other ways the Court could calculate a reasonable "loss" figure for the deaths of 346 persons, which could produce even larger figures.[17] And the families here use a conservative approach, limiting the "*gross* loss" to just *pecuniary* losses.[18] But the Court need not,

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[16] 346 deaths x $5,496,483 loss/death = $1,901,783,118.

[17] One alternative calculation would use the U.S. Department of Transportation's Value of a Statistical Life (VSL) methodology. The VSL measure is a conventional approach for calculating the benefit of preventing a fatality. In 2013, the Transportation Department issued a comprehensive memorandum on the subject and thereafter updated its VSL figures annually. *See* U.S. Dept. of Transportation, Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses (Feb. 28, 2013) (hereinafter "Transportation Dept. VSL Memo.") (available at https://www.transportation.gov/sites/dot.gov/files/docs/VSL%20Guidance_2013.pdf). Notably, the Federal Aviation Administration (FAA) has implemented the Transportation Department's approach. *See* FAA, Treatment of the Values of Life and Injury in Economic Analysis (n.d.) (available at https://www.faa.gov/sites/faa.gov/files/regulations_policies/policy_guidance/benefit_cost/econ-value-section-2-tx-values.pdf).

VSL is simply an improved and expanded measure of a victim's "expected earnings"—clearly a pecuniary loss. Because VSL more fully captures all of the "value of reduced risk," in a case (like this one) where the risk has actually materialized, it is best viewed as comparable to a calculation of lost expected earnings. A standard VSL calculation produces a reasonable estimate of the loss to the victims and their families caused by Boeing's crime of $10.5 million per life (in 2018 dollars) x 346 lives lost = $12,390,000,000. *See* https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis. After doubling, the VSL method results in a maximum possible fine of $24,780,000,000.

[18] The alternative fine provision's plain language does not limit the relevant losses to "pecuniary" losses. The alternative fine provision has two parts—a "trigger mechanism" and a "penalty calculator." Broken into those two parts, the statute reads: "If any person derives pecuniary gain from the offense, or if the offense results in *pecuniary loss* to a person other than the defendant," (trigger mechanism) "… the defendant may be fined not more than the greater of twice the gross gain or twice the *gross loss*, unless imposition of a fine under this subsection would

at this juncture, firmly decide these methodological issues. To reject the proposed plea, the Court need only conclude that the parties' failure to offer the Court *any* loss figure for the families' losses renders their proposed plea unacceptable.

In addition to failing to consider the losses to the families, the parties have failed to consider other losses as well. To the loss figure for the deaths must be added other losses Boeing caused. Just as Boeing's lies to the FAA directly and proximately caused the two planes to crash, the lies also directly and proximately caused the grounding of Boeing's 737 MAXs in the U.S. and around the world. Indeed, in the DPA, the Government and Boeing appeared to acknowledge that fact. The DPA required Boeing to pay an "Airline Compensation Amount" of $1,770,000,000 to Boeing's "airline customers for the direct pecuniary harm that its airline customers incurred as a result of the grounding of the Company's 737 MAX." DPA ¶ 12.

In order for an event such as a grounding to be "proximately" caused by a crime, it is only necessary that the connection not be "so attenuated that the consequence is more aptly described as mere fortuity." ECF No. 116 at 16 (citing *Paroline v. United States*, 572 U.S. 434, 445 (2014)).

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unduly complicate or prolong the sentencing process" (penalty calculator). 18 U.S.C. §3571(d) (emphases added). Restricting the "gross loss" provision to "gross pecuniary losses" is inconsistent with the statute's plain language.

While one district court has disagreed with the interpretation advanced above, *see United States v. BP Products North America, Inc.*, 610 F.Supp.2d 655, 682 (S.D. Tex. 2009) (concluding that alternative fines provision is limited to pecuniary losses), the families' position is consistent with the "cardinal principle" of statutory interpretation that courts "must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358 (2014). Indeed, the Supreme Court has "often noted that when Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—this Court presumes that Congress intended a difference in meaning. *Id.* at 23 (cleaned up)). Here, of course, Congress omitted the word "pecuniary" in the very next part of the same provision—indicating Congress intended a different meaning between "pecuniary loss" and "gross loss."

Because the alternative fines provision for "gross loss" encompasses non-pecuniary losses such as pain and suffering, the families' pecuniary loss figures recounted above are substantially more conservative than required by the statute. For the full, statutory "gross loss" calculation, the Court should include both pecuniary and non-pecuniary losses.

In encompassing losses that directly followed from Boeing's crime, the DPA was not describing a mere fortuity. Once planes began falling from the sky, it was obvious that domestic and foreign regulators would step in to protect the flying public.

The circumstances surrounding the domestic (and foreign) grounding of Boeing's 737 MAXs around the world are discussed in the House Transportation Committee Report. *See* House Transportation Comm. Rep., *supra*, at 219-21. As recounted there, on March 13, 2019 (three days after the ET 302 crash), the FAA held an "urgent" call with Boeing. According to Ali Bahrami, the FAA's head of safety, Boeing shared information showing that the traces from the Lion Air crash and the Ethiopian Airlines crash showed striking similarities. *Id.* at 220. Immediately after that meeting, Mr. Bahrami walked to the FAA Administrator's Office and said: "We need to ground the fleet." *Id.* at 221. Both domestic and foreign grounding orders swiftly followed.

Clearly, the grounding orders were proximately caused by Boeing's crime. And so, just as the DPA recognized that compensation was required for losses to Boeing's aircraft customers, an appropriate "loss" calculation must also take these immediate consequences into account. The DPA figure for airline customer compensation was $1,770,000,000, which Boeing cannot dispute. But additional incontrovertible documents are available from Boeing (its Form 10-K), showing total losses to Boeing's customers of at least $9,257,000,000.[19]

[19] According to Boeing Form 10-K for FY 2020, in 2019 Boeing took a revenue reduction of $8.259 billion "for estimated potential concessions and other considerations to customers related to the 737 MAX grounding, net of $500 million of insurance recoveries." Boeing 2020 Form 10-K at 35, available at https://d18rn0p25nwr6d.cloudfront.net/CIK-0000012927/31b93a2e-c565-4279-9806-69750eaa5361.pdf. Because insured losses from a crime become losses to the insurance company, the total losses would include the $500 million, producing a total 2019 "loss" of $8.759 billion. In the next year, 2020, the additional losses related to the 737 MAX grounding were $498 million (*id.* at 36), producing a total loss for both years of $9.257 billion.

737 MAX "customer considerations" reflect the estimated "concessions and other considerations to customers for disruptions related to the 737 MAX grounding and associated delivery delays." Boeing to Recognize Charge and Increased Costs in Second Quarter Due to 737

Combining losses to the families ($1,901,783,118) with the losses to Boeing's customers ($9,257,000,000), the total losses Boeing caused are $11,158,000,000. And, under the alternative fines provision, 18 U.S.C. § 3571(d), the loss must be doubled to calculate the fine range, producing a maximum possible fine of $22,316,000,000. The parties' effort to bind the Court to imposing a fine of only about 2% of the maximum possible[20] is plainly inadequate and would not serve the requirement that the sentence needs "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(1)(2)(A).[21]

B. The Parties' "Gain" Calculation Is Misleading and Understates Boeing's True Gain of Billions of Dollars.

For the reasons explained above, in the first instance, the fine range for Boeing should be determined by a loss calculation. *Cf.* 18 U.S.C. § 3571(c) (fine range determined by *"the greater of"* twice the gross loss or gain (emphasis added)). But even if the Court were to avert its eyes from the losses Boeing's crime caused and focus instead on Boing's ill-gotten "gain," the Court would swiftly find the parties are trying to bind it to adopt an unexplained and misleading calculation that understates Boeing's true gain.

At the outset, it is important to understand that maximizing profits was the very purpose of Boeing's conspiracy. *See* Proposed Plea Agreement ¶ 17 (describing the "purpose of the conspiracy" to include interfering with the FAA "in order to bring about a financial gain to Boeing"). *See generally* House Transportation Comm. Rep. at 24 ("Boeing had tremendous

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MAX Grounding, July 18, 2019, available at https://boeing.mediaroom.com/2019-07-18-Boeing-to-Recognize-Charge-and-Increased-Costs-in-Second-Quarter-Due-to-737-MAX-Grounding.

[20] $487,200,000 proposed fine ÷ $22,316,000,000 maximum possible ≈ 2.2%.

[21] To be clear, the families are not arguing that the Court would be required to impose a $22 billion fine. But they have explained that $22 billion is the maximum *possible* fine—and the parties' failure to acknowledge this foundational fact and calculate a proposed fine against that backdrop should lead the Court to reject the proposed binding plea.

financial incentive to ensure that no regulatory determination requiring pilot simulator training for the 737 MAX was made").

So what was Boeing's gain from its crime? $243,600,000 the parties report. *See* Proposed Plea Agreement ¶ 55. Where did this number come from? In the 2021 DPA, the parties described the number as "representing Boeing's cost-savings, *based on Boeing's assessment* of the cost associated with the implementation of full-flight simulator training for the 737 MAX." DPA ¶ 9(b) (emphasis added).

In other words, the $243,600,000 gain figure comes from … Boeing!

And how exactly did Boeing calculate this figure? No one knows—least of all the Court, whom the parties expect to just rubber stamp this figure from the old DPA.[22]

In the current plea agreement, the parties have simply left out the acknowledgment that the figure is "based on Boeing's assessment of the cost." *See* Proposed Plea Agreement ¶ 55. One can understand why the parties are apparently too embarrassed to acknowledge the original source of this information. Criminals do not get to calculate their own fines. The Justice Department does not rely on bank robbers to report how much loot they got away with. The Court should be skeptical of this calculation, which is based on defendant Boeing's own, unexplained accounting.

Moreover, even a quick perusal of information made public by Boeing reveals this figure to be a substantial underrepresentation of Boeing's gains from obtaining FAA certification of the 737 MAX through fraud. A more fulsome calculation is based on Boeing's own value of 737 MAX

[22] Because the figure comes from the old DPA, the figure was cooked up in secret negotiations between the Government and Boeing. Had the Government protected the families' CVRA rights during the DPA negotiations, the families would have explained the problems with this figure. Reusing this improperly developed figure now violates the families' CVRA rights.

aircraft orders placed through 2018, with a (conservatively calculated) profit margin of $7.9 million per aircraft, for a total gain of at least $2,607,000,000.[23]

The families' calculations are extremely conservative. Some courts have understandably interpreted the "gross *gain*" provision in § 3571(d) as meaning the gross *revenues* that the

[23] Unlike the parties, the families will "show their work" (and accompanying sources) so that the Court can make its own determination of the reliability of their figures.

To make a "gain" calculation, it is first necessary to determine the "additional before-tax profit to the defendant resulting from the relevant conduct of the offense." U.S.S.G. § 8A1.1, App. Note 3(H). The purpose of Boeing's conspiracy was to secure after-tax profit for Boeing by defrauding the FAA into giving the 737 MAX differences training determination, which would allow Boeing to market 737 MAX over competing aircraft. *See* ECF No. 221-1 at A-2-5. Boeing used the conspiracy to market its planes. *See* ECF No. 221-1 at A-2-12. Accordingly, the profit that Boeing gained through its conspiracy (and associated relevant conduct) can be derived by multiplying (1) the number of 737 MAXs that Boeing was able to successfully market through the illegally obtained FAA determination, multiplied by (2) Boeing's profit per each 737 MAX it sold.

With regard to (1)—the number of planes sold—from the inception of the 737 MAX program, in 2011, through 2018, Boeing won 5,211 orders for the 737 MAX. By the end of 2018, 330 deliveries had been made. Boeing Orders & Deliveries Report, available at https://www.boeing.com/commercial#orders-deliveries. To be conservative, we will stop our calculation at the end of 2018, even though the conspiracy continued after that.

With regard to (2)—the before-tax profit per plane—Boeing's Commercial Airplanes Division reported 262 net orders during Q4 2018, valued at $16 billion. *Id.* In Q4, Boeing received 287 total gross orders, with 248 gross 737 MAX orders. Boeing Orders & Deliveries Report, *supra*. To be conservative, assume all 25 canceled orders were MAX aircraft, resulting in 223 net MAX orders. The approximate value of these orders was $13.6 billion, or $61 million per aircraft. In 2018, Boeing's operating margin was 13%—as reflected in Boeing's Form 10-K for the year. https://www.sec.gov/Archives/edgar/data/12927/000001292719000010/a201812dec3110k.htm/. Using the $61 million per aircraft valuation, Boeing's profit per plane was $7.9 million.

Multiplying (1) and (2) together, i.e., combining 330 deliveries through 2018 at a profit of $7.9 per plane, Boeing earned $2,607,000,000 in MAX aircraft deliveries made possible through its criminal conspiracy to defraud the FAA.

The Government could assist in refining this calculation, as it may already be in possession of the purchase contracts or other information about Boeing's profit margins for the 737 MAX.

Boeing's actual profit margin was likely substantially higher than the figures above. Citing Moody's, *Business Insider* reported profit margins for the 737 MAX of $12-15 million per aircraft before the crash of flight ET 302. *Business Insider*, March 13, 2019, available at https://www.businessinsider.com/boeing-737-max-profit-moodys-2019-3.

Notably, largely because of the profitably of the MAX program, Boeing's stock price reached a record high on March 1, 2019—producing a "gain" to the company (and its insiders) that is not captured by the calculations above.

corporation derived from the crime—not the net *profits*. *See, e.g., United States v. Baderi,* 2010 WL 2681707 at *2 (D. Colo. 2010). The calculation above uses the more restricted, net profits approach. The families' calculation also does not take into account the benefits accrued to Boeing, as well as its insiders, from the 737 MAX project *before* the fraud was discovered.[24]

In sum, straightforwardly (and extremely conservatively) calculated, the gain to Boeing from its conspiracy crime was at least $2,607,000,000. And again, under the alternative fines provision, the gain must be doubled, producing a maximum possible fine under this approach of $5,214,800,000. The parties' effort to bind the Court to impose a fine of only about 11% of the maximum possible under a gain-from-the-crime theory[25] demands rejection of the plea.[26]

C. The Parties' Guidelines Calculations Are Also Inaccurate for Other Reasons.

For the reasons explained above, the maximum possible fine against Boeing in this case is either $22,316,000,000 (on a "loss" theory) or $5,214,800,000 (on a "gain" theory). The figures above represent the statutory maximum possible fine that the Court could impose on Boeing.[27] In considering the fine it will ultimately impose, the Court must also consider the Sentencing

[24] By way of example, Muilenburg, Boeing's former CEO, made $23 million in 2018, according to Boeing's proxy statement—the year the first 737 MAX crashed—on top of the $49 million he earned during the previous two years. Similarly, Kevin McAllister, former head of Boeing's commercial division that produced the 737 MAX, was paid more than $57 million during his nearly three years at the company. In a more detailed calculation, these kinds of gains should also be considered.

[25] $487,200,000 proposed fine ÷ $4,214,800,000 maximum possible ≈ 11%.

[26] Here again, the families are not necessarily arguing that the Court would be required to impose a $5 billion fine. But they have explained that $5 billion is the maximum *possible* fine on a gain theory—and the parties' failure to acknowledge this foundational fact as part of their calculation should lead the Court to reject their proposed plea.

[27] Under *Southern Union v. United States*, 567 U.S. 343 (2012), it might be theoretically possible for Boeing to argue that it needs to be indicted on the specific gain or loss amount. But Boeing has waived its Sixth Amendment rights in this case. *See* ECF No. 3. And, in proposing that the Court should order Boeing to pay a fine of $487,200,000 under the alternative fines provision, the parties appear to agree that no separate indictment is required to support a fine calculation.

Guidelines. The Sentencing Guidelines, in turn, generally track the statutory calculation of a fine range. Of particular relevance here, the Guidelines provide that the recommended "base fine" under the Guidelines is the greatest of either "the pecuniary gain to the organization from the offense … or … the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly." USSG § 8C2.4(a)(2) & (3).

Turning first to "loss" under the Guidelines, Boeing criminally caused its loss at least recklessly. The crime that Boeing committed—conspiracy—is a specific intent crime. *See* Criminal Information, ECF No. 1 (alleging that the Boeing Company *"knowingly and willfully, and with intent to defraud*, conspired and agreed together with others to defraud the United States …."). This Court has previously recognized the risk associated with Boeing's crime was death. ECF No. 116 at 16. So Boeing's intentional criminal conspiracy knowingly and recklessly risked death, meaning Boeing acted (at least) recklessly with respect to the losses it caused. And therefore, applying the loss figures the families recount above, the base Guidelines fine is $11,158,000,000.

An alternative route to a similar destination is to use a "gain" calculation. The Guidelines provide for a fine calculation based on "the pecuniary gain to the organization from the offense." No *mens rea* determination is associated with a gain calculation. And, as explained above, Boeing's gain from its crime was (at least) $2,607,000,000. But because the loss calculation produces a fine larger than the gain calculation, the Guidelines give preference to the larger loss calculation. *See* U.S.S.G. § 8C2.4(a) (directing use of "the greatest" of gain or loss).

After a base fine calculation is made, the Guidelines use a culpability score to determine minimum and maximum multipliers. *See* U.S.S.G. § 8C2.6. In the 2021 DPA, the parties agreed to a culpability score of 5, DPA ¶ 9(c), and they simply recycle that score in the new agreement, Proposed Plea Agreement ¶ 24(d). As the families explained, *see* Part IV, *supra*, that recycled

calculation is incorrect because it fails to reflect the involvement of Boeing's senior leadership in the conspiracy. Rather than a two-level increase, a five-level increase is appropriate.

But one other issue arises in calculating the culpability score: Whether Boeing "accepted responsibility" for its crime. Here again, the parties just dust off and reuse their old calculation from the 2021 DPA, which gave Boeing a two-level credit for acceptance. DPA ¶ 9(c) (citing U.S.S.G. § 8C2.5(g)(2)). That credit was dubious to begin with. To receive credit for acceptance of responsibility, Boeing was required to make "timely" cooperation with the Government. U.S.S.G. § 8C2.5, Application Note 13. To be timely, "the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation." *Id.* And yet, rather than cooperate "timely" with the Government, as recounted in the DPA, Boeing's cooperation "was delayed and only began after the first six months of the Fraud Section's investigation, during which time the Company's response frustrated the Fraud Section's investigation …." DPA ¶ 4(c). Boeing should never have received acceptance-of-responsibility credit back in 2021.

But now, in 2024, things have changed … for the worse. For the last three-and-a-half years, Boeing has breached its obligations under the DPA to reform. As itemized in the proposed plea agreement, Boeing has breached the DPA in multiple ways, such as failing to fully satisfy the DPA's requirement to create and foster a culture of ethics and compliance with the law in its day-to-day operations. Proposed Plea Agreement, Attachment A-1 (factual basis for breach), ¶ 6. Indeed, almost as if to illustrate Boeing's lack of remorse, the introduction to the breach section of the plea agreement indicates that Boeing is not stipulating to the breach finding. *Id.* at ¶ 1. In other words, Boeing is not accepting responsibility for breaching its own promises in the DPA. Even if Boeing was entitled to credit for acceptance of responsibility previously, it no longer is.

Further problems exist with the parties' (stipulated) Guidelines calculation. Because the underlying offense is fraud, the relevant offense guideline is (as the parties' concede) § 2B1.1. There are two obvious enhancements that the parties have failed to add. Specifically, as noted above, under U.S.S.G. § 2B1.1(b)(2)(A)(i), Boeing's offense "involved 10 or more victims"—i.e., 346 victims. A two-level multiple victim enhancement is required. And under U.S.S.G. § 2B1.1(b)(16), the offense "involved … the conscious or reckless risk of death …." The Court has previously made such a finding. *See* ECF No. 116 at 16 ("it is generally foreseeable that Boeing's deceiving the AEG, which resulted in an improperly low level of differences training certification, would potentially cause a disaster"). Another two-level enhancement is required.

Against this backdrop, the parties have inaccurately calculated the Sentencing Guidelines in this case. A faithful application of the Guidelines yields not a level 34, as the parties would have the Court buy into, but rather the substantially higher level 42—along with a culpability score not of 5 but rather of 10. A proper Guidelines calculation is as follows:

a. The 2018 U.S.S.G. are applicable to this matter.

b. Offense Level. Based on U.S.S.G. § 2B1.1, the total offense level is 42, as follows:

(a)(2)	Base Offense Level	6
(b)(1)(N)	Amount of Loss/Gain	+30
(b)(10)	Sophisticated Means	+2
(b)(2)	Multiple victims (346 victims)	+2
(b)(16)	Reckless risk of death	+2
	TOTAL	42

c. Base Fine. Based upon U.S.S.G. § 8C2.4(a)(2), which imposes a base fine equal to the pecuniary loss to the organization from the offense

if such loss was caused at least recklessly, the base fine is $11,158,000,000 (representing losses to the families and Boeing's aircraft customers, as explained above).

d. Culpability Score. Based upon U.S.S.G. § 8C2.5, the culpability score is 10, as follows:

(a) Base Culpability Score	5
(b)(4) the organization had 5,000 or more employees and an individual within high-level personnel participated in, condoned, or was willfully ignorant of the offense	+5
TOTAL	10

Calculation of Fine Range:

Base Fine	$11,158,000,000
Multipliers	2.0 (min) / 4.0 (max)
Fine Range	$22,316,000,000 (min) / $42,632,000,000 (max)[28]

After calculating the proper Guidelines range, the Court must select a point within the range for a fine. In making this selection, the Guidelines provide various factors to consider. For present purposes, it is worth highlighting that one of the factors to be considered is "any nonpecuniary loss caused or threatened by the offense." USSC § 8C2.8(a)(4). In this case, the victims and their families indisputably suffered enormous nonpecuniary losses—namely the pain and anguish associated with the 346 deaths that Boeing directly and proximately caused. As noted above, Boeing's current CEO David Calhoun recently described the families' losses as "gut-wrenching." That factor alone points to a fine at the upper end of the Guidelines range.

[28] In addition, for the reasons explained earlier, because 346 deaths directly and proximately resulted from Boeing's crime, an upward departure is also appropriate. *See* Part III, *supra* (discussing U.S.S.G. § 8C4.2 (risk of death) (policy statement)). The recommended Guideline fines range is subject to the statutory maximum provided by the alternative fines provision, which is discussed above.

In light of the foregoing, the recommended Guidelines fine for Boeing would be at the upper end of the range—i.e., towards $42,632,000,000, with a possible further upward departure for the hundreds of deaths Boeing caused. The parties concede that a prerequisite to imposing a sentence on Boeing in this case is a proper determination of the applicable guidelines. *See* Proposed Plea Agreement ¶ 23 (citing *United States v. Booker*, 543 U.S. 220 (2005)). Indeed, it would be error for the Court to proceed based on an incorrect Guidelines calculation. *See, e.g., United States v. Suchowolski*, 838 F.3d 530, 532 (5th Cir. 2016) ("the district court must still properly calculate the advisory Guidelines-sentencing range for use in deciding on the sentence to impose"). Because the proposed plea agreement lacks a properly calculated Guidelines-sentencing range, the Court should simply reject the agreement on that ground.

VI. The Court Should Reject the Plea Because the Compliance Monitor Provision Is Inadequate.

The parties' proposed plea also contains a provision for an "independent compliance monitor." Proposed Plea Agreement ¶ 25(f). It's about time for a monitor—but the Court should reject the parties' proposal as insufficient.[29]

The Court will recall that, a year and a half ago, the families first proposed that the Court should order the appointment of a monitor as a condition of Boeing's supervised release under the DPA. ECF No. 170 at 22-30. At the arraignment hearing, both the Government and Boeing argued against the families' proposed monitor. Essentially, the parties sold the Court a sanguine story that (at two years into a three-year process) everything was under control because the Department's

[29] Even the Department itself recognizes that "a court can … reject a plea agreement offered under Federal Rule of Criminal Procedure 11(c)(1)(C) if the judge concludes that the proposed terms of the monitorship do not adequately reflect the nature and seriousness of the offense, do not serve the purposes of a criminal sentence, or otherwise undermine faith in the fairness of the justice system." Lana N. Pettus, *Court-Appointed Corporate Monitors in Environmental Crimes Cases*, 69 DOJ J. FED. L. & PRAC. 101, 101 (2021).

monitoring was sufficient. The Government told the Court that that the Justice Department was "best positioned to implement the DPA and evaluate Boeing's compliance with these rigorous requirements. The Fraud Section has compliance experts who routinely evaluate compliance programs and oversee corporate monitorships and self-reporting." Hrng. Tr. (Jan. 26, 2023) at 96. And Boeing chimed in with a similar tale, recounting that "DOJ has been vigilant and thorough. They're professional and they probe, and they make suggestions, and as you would imagine, Boeing accepts those suggestions. And Boeing has been vigilant and thorough too. We sincerely believe the system is working and that any further monitor or examiner, reporting, would be duplicative to DOJ oversight and counterproductive to the processes that are operative now." *Id.* at 113-14.

Have representations to this Court ever proven to be so wide of the mark?!

The Court now knows that Boeing fell dismally—and dangerously— short of meeting its DPA obligations. The Department's "breach" determination in the agreement spans nine pages. Proposed Plea Agreement, Att. A. That determination recounts how (among other things) Boeing "failed to fully satisfy the [DPA] requirement to create and foster a culture of ethics and compliance with the law in its day-to-day operations, by failing to mitigate known manufacturing and quality risks." *Id.* at ¶ 6 (internal citation omitted). And public reports of serious concerns about Boeing's safety are an almost daily occurrence. *See* ECF No. 202 at 6-13.[30]

So now the parties come trotting back to this Court with promises in a plea agreement that—this time—they will get it right. But they offer no explanation for how the Department's previous and supposedly "vigilant and thorough" monitoring failed. The Court and the public can

[30] Another new serious report emerged just yesterday. *See* https://www.king5.com/article/news/investigations/investigators/newly-leaked-boeing-document-ethiopian-airlines-737-max-crash/281-7669b39b-6676-44be-a015-030f3e3cc877.

have little confidence in the Department's monitoring next time without understanding how and why it failed last time.

The plea agreement continues to place the monitoring of Boeing squarely in the Department's hands. Through an elaborate process, DOJ is going to select an "independent" monitor, with input from Boeing. *Id.* at ¶¶ 29-37. During that process, the monitor candidates will "meet with the Defendant and the [prosecutors]", followed by voting within the Criminal Division. *Id.* at 32. The votes will be made "in keeping with the Department's commitment to diversity and inclusion." *Id.* Remarkably, the process makes no provision for the families to have any input into the selection process.

Nor does the process involve this Court. The absence of any judicial role is a change from the plea deal the Government originally described to the Court (and to the families). In the Government's original notice of an agreement in principle, it said it would "notify the Court under seal of its intent to select a certain candidate; and *if*, after 10 days, *the Court does not raise concerns*, the Government will finalize the selection and appoint the monitor." ECF No. 206 at 6 (emphasis added). Now, in the proposed agreement, the parties have simply dropped that judicial-approval provision. *See* Proposed Plea Agreement ¶ 35.

The Court should reject a selection process that deprives it (and the families) of any role in the process. Indeed, some knowledgeable observers have concluded that judges should always select monitors. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 284 (2014). But the Court need not go so far here. Instead, the Court should simply conclude that, given the Government's and Boeing's cozy relationship throughout this case—and serious suggestions that this case may involve "regulatory capture" by Boeing of federal

regulatory agencies[31]—the public cannot have confidence in a Government-selected monitor. The Court must be involved.[32]

But remarkably, not only is the Court excluded from the monitor selection process, but it also lacks any role whatsoever in the monitoring itself. And even if the Court had a role, perhaps even more remarkably, Boeing has *exempted itself from even having to follow the monitoring provisions*, as the defendant's "compliance obligations" are "not conditions of probation." The agreement provides:

> A condition of probation shall be that the Defendant retain an Independent Compliance Monitor, as provided in Paragraph 7(j). However, *the condition of probation is limited to the retention of the Independent Compliance Monitor—not* oversight of the Independent Compliance Monitor or *the Company's compliance with the Independent Compliance Monitor's recommendations*. Rather, the Independent Compliance Monitor will report to and be overseen by the Offices. The Independent Compliance Monitor's selection process, mandate, duties, review, and certification as described in Paragraphs 29-37 and Attachment D, and the Defendant's compliance obligations as described in Paragraphs 7(k), 8, and 9 and Attachment C, *are not conditions of probation*.

Proposed Plea Agreement ¶ 25(f) (emphases added); *see also* Att. D, ¶ 1 (similar language). While the families do not have comprehensive knowledge of all Justice Department monitoring agreements, the families do not believe that this curious provision is a standard one. In the three "standard" cases the Government cited to the court (ECF No. 221 at 1), one of the three involved a monitor—and no such provision is found in the monitoring provisions there. *See United States v. Telefonaktiebolaget LM Ericsson,* No. 1:19-cr-00884, Dkt. 33, Ex. A at ¶ 7(d) (S.D.N.Y. Mar. 20, 2023). And three other recent corporate plea agreements featured on the Fraud Section's

[31] *See, e.g.,* U.S. Sen. Commerce Comm., Committee Investigation Report: Aviation Safety Oversight (Dec. 2020), available at https://www.commerce.senate.gov/services/files/8F636324-2324-43B2-A178-F828B6E490E8.

[32] Of course, because some of the components of the selection process might be time-consuming, the Court could assign them to a Magistrate Judge or a Special Master as needed.

website contain plea agreements with a compliance monitor—and none contain the curious language that parties propose here. *See United States v. Binance Holdings Limited*, No. 2:23-cr-00178-RAJ, Dkt. 23 at ¶¶ 29-33 (W.D. Wash. Nov. 21, 2023); *United States v. Glencore Ltd.*, No. 3:22-cr-00071-SVN, Dkt. 18 at ¶¶ 25-28 (D. Conn. May 24, 2022) (Att. D); *United States v. Natwest Markets PLC*, No. 3:21-cr-187-OAW, Dkt. 9 at ¶¶ 23-27 (D. Conn. Dec. 21, 2021).

By statute and Guidelines, a court is permitted to impose conditions of probation on a corporation that pleads guilty to an offense. *See* 18 U.S.C. § 3563; *see also* U.S.S.G. § 8D1.1. In addition to standard conditions, the Court may impose any other conditions that the court believes "are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization…." U.S.S.G. §8D1.3(c). Against this backdrop, it is hard to understand why the parties are proposing in their plea agreement a non-standard provision setting out "compliance obligations" for Boeing and then specifically indicating that these purported "obligations" are "not conditions of probation." Are the "obligations" really "obligations"? This non-standard language seems rife with complicated interpretation issues.

As the families understand these provisions, if Boeing willfully decides to ignore the monitor's recommendations, nothing can be done about it. The "breach" provision in the plea agreement ties back into conditions that are "conditions of probation." Proposed Plea Agreement ¶ 38. Because Boeing's "compliance obligations" are *not* conditions of probation, the standard enforcement mechanisms for breach are unavailable.

The central point here is that "[a] corporate probation program necessitates court involvement and functions on behalf of the court." Veronica Root, "*The Monitor-'Client' Relationship*," 100 VA. L. REV. 523, 539 (2014). Yet the plea agreement curiously attempts to eliminate the Court's role regarding the monitor by placing all aspects of the monitorship within

the Government's exclusive control. Not only is this dubious as a matter of separation of powers, but it is also unwise policy, given the Government's recent track record of failure in supervising Boeing. And, on top of that, the agreement's "compliance" obligations are rendered unenforceable. *Cf.* GARRETT, *supra*, at 284 ("A company should not be let off the hook until a judge has reviewed the monitor reports, heard from regulators and prosecutors, and decided it is in the public interest to conclude the case.").

Finally, even if the monitor was appropriately selected and provided enforceable compliance obligations, the parties have given the monitor such a narrow focus that the monitorship will not be able to achieve anything meaningful. The monitorship the parties propose is focused on anti-fraud issues and record-keeping. Thus, the proposed agreement sets out the monitor's "mandate" as evaluating "the effectiveness of the Company's compliance program and internal controls, record-keeping, policies, and procedures as they relate to the Company's current and ongoing compliance with U.S. fraud laws … with a focus on the integration of its compliance program with its safety and quality programs as necessary to detect and deter violations of anti-fraud laws or policies …." Proposed Plea Agreement, Att. D ¶ 3. The monitor should have a broader mandate, one that more squarely focuses on the safety issues that are of greatest concern to the public. The families have specifically proposed such a safety-oriented mandate for the monitor that they are currently proposing as a condition of supervised release for Boeing. *See* ECF No. 202-2 at ¶ 1(g)(1)-(15). The Court should reject the parties' proposed monitor because a mandate focused not on safety but on anti-fraud and record-keeping issues is too narrow.[33]

[33] There are other problems with the proposed monitor as well. For example, the monitor's mandate does not include "substantive review…of the correctness of any of the Company's decisions relating to compliance with the FAA's regulatory regime." Proposed Plea Agreement, Attachment D, ¶ 4 (emphasis added). That leaves some of the most critical aspects of Boeing's safety compliance outside the monitor's authority.

VII. The Court Should Reject the Plea Because the Provision Requiring Boeing to Make New Investments in Compliance, Quality, and Safety Programs Is Unenforceable and Inadequate.

As a term of its probation, Boeing has agreed to make an additional investment in its compliance, quality, and safety programs. While the additional-investment requirement is seemingly a step forward, on closer examination, the provision is essentially unenforceable and plainly inadequate to protect public safety.

In the proposed plea agreement, Boeing promises to make a new investment of $455,000,000 over the three-year term of probation into its programs for (1) compliance, (2) quality, and (3) safety. *See* Proposed Plea Agreement ¶ 25(g) ("the Defendant shall invest in its compliance, quality, and safety programs, a total of at least $455,000,000"). This translates into an approximate investment of $152 million per year for three years across three programs—i.e., Boeing's compliance program, quality program, and safety programs.

The parties tout this number as "an increase of approximately 75% above [Boeing's] previously planned expenditures on its *corporate compliance program* for fiscal year 2024" (Proposed Plea Agreement ¶ 25(g) (emphasis added)), suggesting that Boeing had planned an approximately $87 million expenditure for its "corporate compliance" program for the 2024 fiscal year. But, misleadingly, the parties provide no comparison for Boeing's planned expenditures for Boeing's quality or safety programs for any earlier years. A comparison of an investment across three programs to only one of those programs cannot be a fair representation of the size of the

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There are also various provisions allowing the monitor to provide only "executive summaries" of the monitor's reports on the public docket. *See, e.g., id.*, ¶ 14. But the ultimate issues regarding what should and should not be made public should rest in the hands of the Court, not the monitor.

Finally, the monitor is also given only a three-year term to complete the work involved. Proposed Plea Agreement ¶ 14. Given the complexity of the issues, a five-year term is more appropriate.

projected "increase" in investment. Moreover, any expenditures made by Boeing to implement internal support for the Independent Compliance Monitor are specifically identified as "qualifying investments" (*id.*), further artificially inflating the value of the proposed term of probation.

This provision will only have meaning if it is enforced. In a nod to this point, the plea agreement requires Boeing to "periodically, and no less than annually, provide proof of the accumulated investment amounts to the [Government] and the Probation Office." Proposed Plea Agreement ¶ 25(g). But how the prosecutors and the Court's probation office will have the required expertise to evaluate the complicated information Boeing provides is unclear. Curiously, in setting up the mandate for the one person who might have both the perceived independence and required expertise to make such evaluation—the independent compliance monitor—the parties have specifically excluded review of this information. *See* Proposed Plea Agreement, Att. D, ¶ 3 ("independent compliance monitor's mandate" limited to monitoring Paragraph 7(k) of the Agreement concerning anti-fraud programs).

Boeing and the Government have also declined to reveal to the Court any specifics about Boeing's historical expenditures for its compliance, quality, or safety programs. This absence of specific comparison data means it will not be possible to meaningfully evaluate whether Boeing is truly making new "investments" rather than recharacterizing expenditures it was already planning to make for other reasons.

As an example of this problem, on about May 30, 2024 (six weeks before agreeing to the plea deal here), Boeing representatives met with the FAA and presented what Boeing described as "sweeping changes to the company's production process and safety systems." Gregory Wallace, *Three-Hour Meeting Ends with FAA Saying Boeing Can't Increase Max Plane Production Until*

Quality is Fixed, CNN (May 30, 2024).[34] It appears that these previously promised "sweeping changes" count as "new" investments for purposes of the plea agreement. *See* Proposed Plea Agreement ¶ 25(g) (promising increased spending above that "previously planned" for "fiscal year 2024," which would mean spending above that previously planned as of the start of Boeing's fiscal year—i.e., as of January 1, 2024). This is deceptive sleight of hand, giving Boeing credit in the plea agreement for things it had already planned to do.[35] And, on top of all this, the public can have no confidence that Boeing is truly making any "investments" because Boeing's "proof" will apparently not be made available for public scrutiny.

Finally, an even more glaring problem with this provision is its utter inadequacy as a corrective measure. The "new" investment is a drop in a very large bucket.

In order to properly contextualize this term of probation, it is proper to examine Boeing's cost of sales in previous years, since cost of sales includes overhead costs, raw materials, parts, and labor. Essentially cost of sales represents the costs incurred as a result of revenue realized in a given year for goods and services. Boeing's annual reports (Form 10-K) show cost of sales in 2023 at $70,070,000,000, in 2022 at $63,078,000,000, and in 2021 at $59,237,000,000. Form 10-K, Boeing, Dec. 31, 2023 at 27.[36] These numbers yield an average annual cost of sales over that three-year period of approximately $64 billion. An increased investment of $152 million per year would

[34] Available at https://www.cnn.com/2024/05/30/business/boeing-safety-plan-faa/index.html.

[35] The parties pulled off the same legerdemain in the DPA, giving Boeing "credit" for making payments through the DPA to its airline customers that Boeing was already contractually obligated to make. *See* ECF No. 65 at 8 ("The Government deceptively tried to take credit for these monies that not only were owed contractually, and independently of any investigation, but also had already been paid by the time the DPA was executed. The only reason for listing these amounts in the DPA was to mislead the public into believing the Government had obtained a $2.5 billion criminal settlement.").

[36] Available at https://s2.q4cdn.com/661678649/files/doc_financials/2023/q4/BOEING-10Q-Q42023-013124.pdf.

represent, on average, only an approximately 0.24% increase—a pittance.[37] Such a small amount cannot be expected to "afford adequate deterrence to criminal conduct" or to "protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(B) & (C).

VIII. The Court Should Reject the Plea Agreement Because the Restitution Provision is Misleading and Unfairly Allows Boeing to Tie Up Restitution Through Extensive Litigation and Appeals.

The parties also misleadingly try to give Boeing credit for having "agreed to pay lawful restitution owed" to the families. Proposed Plea Agreement ¶ 6(f). But Boeing has agreed to little more than to follow the law and pay whatever restitution the Court awards. *See* Proposed Plea Agreement ¶ 25(c) ("The Court will determine *whether* restitution is owed to *any* Crash Victim Family …. The Defendant retains the right t*o contest any restitution claim* and make any argument related thereto …." (emphases added)). In fact, Boeing appears to be setting up a legal position that it owes no restitution whatsoever. In agreeing to pay only "*lawful* restitution," Boeing is apparently maintaining its position that the families do not represent "victims" of Boeing's crime and, thus, that no restitution would be "lawful."[38]

The Court, of course, is familiar with the standard language in plea agreements presented to it by the U.S. Attorney's Office for the Northern District of Texas in which defendants affirmatively agree to pay restitution. For example, just a few months ago, the Court handled *United States v. Bender*, 4:24-cr-074-O (N.D. Tex.). The plea agreement there provided:

> The defendant agrees that the Court is authorized to order, and *the defendant agrees to pay, restitution* for all loss resulting from the offense(s) of conviction and all relevant conduct, in an amount to be determined by the Court.

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[37] As another point of comparison, in the years leading up to the two crashes, between March 2014 and September 2018, Boeing "bought back" approximately $38,000,000,000 worth of common stock.

[38] Boeing made exactly this argument last year to Fifth Circuit, claiming that the families did not represent crime "victims." *See* Boeing's Resp. to Mandamus Petition at 26, *In re Ryan*, No. 23-10168 (5th Cir. Mar. 27, 2023).

Bender, ECF No. 19 at ¶ 9 (emphasis added). This apparently standard provision[39] is what a defendant in this District agrees to when he or she is truly remorseful and wants to pay restitution. The seemingly unique language in the Boeing plea deal appears to be designed to let Boeing have it both ways: appear to agree to restitution but, in fact, agree to nothing.

But it gets worse. Typically in this District, prosecutors support recognized crime victims when they assert restitution claims. Indeed, such support is statutorily required by the CVRA. *See* 18 U.S.C. § 3771(a)(8) (extending to crime victims "[t]he right to fully and timely restitution as provided in law") and § 3771(c)(1) (requiring Justice Department employees to "make their best efforts to see that crime victims are … accorded the rights [in the CVRA]"). In this case, however, the families cannot even count on the normal, statutorily required support from the prosecutors. Instead, in a remarkable (and so far as undersigned counsel is aware, truly unique) provision, the prosecutors here merely "*retain the right to support any legally authorized claims for restitution presented by a Crash Victim Family.*" Proposed Plea Agreement ¶ 25(c). If the families understand this provision correctly, the Government "retains the right" to support legally authorized restitution claims—but then again, the Government presumably retains the right *not* to support such claims. How this discretionary approach squares with the law (or commonsense) is hard to understand.[40]

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[39] In many cases before this Court (e.g., immigration cases), no restitution is possible. In the cases where restitution is possible, something like the provision above seems to be standard. *See, e.g., United States v. Cisneros*, No. 4:24-cr-018-O, ECF No. 18 at ¶ 9 (N.D. Tex. Mar. 27, 2024) (substantially the same language as above); *United States v. Cota*, No. 4:24-cr-0005-Y, ECF No. 19 at ¶ 9 (same).

[40] The families fear that the Government and Boeing may possibly have reached a secret side deal, under which the Government does not plan to support restitution requests. During the June 30, 2024, information meeting, the Government told the families that the plea terms it was extending to Boeing included the Government's agreement to "stand silent" on restitution requests. Then, on July 9, 2024, during a call with the Government, the families' counsel asked whether the "stand silent" terms were still part of the deal. The Government declined to answer directly, referring counsel to the terms sheet filed with the Court—which, in turn, contained no information

But it gets even worse. The plea agreement indicates that Boeing retains the right "that, with respect to any restitution amount the Court determines the Defendant owes a crash Victim Family, the Court should credit, and thus deduct from the restitution amount, *any other amount* the Defendant has previously paid to the Crash Victim Family." Proposed Plea Agreement ¶ 25(c) (emphasis added). Such a sweeping offset goes beyond what existing law and agreements permit. For example, when Boeing paid $500 million to the victims' families under the DPA, Boeing promised that it would "not use the fact that any beneficiary of the crash victims … seeks or receives any compensation from the Crash-Victim Beneficiaries Compensation Amount to seek to preclude such beneficiary from pursuing any other lawful claim that such beneficiary might have against the Company." DPA ¶ 19. And while there is a federal restitution statute covering offsets for payments made to victims, that provision is limited to payments made in a "civil proceeding" for the "same loss" (18 U.S.C. § 3664(j)(2))—not to "any other amount" paid by defendant, as indicated in the plea agreement. Boeing is seemingly seeking to rewrite its earlier DPA commitments and circumvent the limitations on offsets contained in federal law.

And then it gets even worse on appeal. Boeing has put into the agreement a provision that it will not have to pay restitution until "completion of any timely and properly noticed appeal." Proposed Plea Agreement ¶ 25(c). As the Court is aware, typically whether restitution (or other sentencing obligations) are stayed pending appeal is reviewed in the first instance by the Court, to determine whether a stay is appropriate. *See* Fed. R. Crim. P. 38(e) (giving the Court discretion on whether to stay a restitution order pending appeal). Boeing is cleverly seeking to do an end-run

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on this subject. *See* ECF No. 206 at 5 ("The plea agreement will allow the court to determine the restitution amount for the families in its discretion, consistent with applicable legal principles"). But now, the Agreement contains a unique, retain-the-right-to-support provision that the parties have cooked up without involving the families and with uncertain meaning.

around the normal judicial review of a stay request required by the rules. If the Court approves the agreement now, this end-run will permit Boeing to tie up any restitution award for months and months—placing pressure on victims' families to accede to whatever demands Boeing might make.

To be clear, it may turn out that most of the families will decide not to pursue restitution awards. The families have generally been focusing on obtaining justice in the criminal case, rather than compensation. But there will likely be at least some families who received inadequate payments from Boeing and who will choose to seek restitution. The unusual hurdles that they would face under the unique terms of this proposed plea agreement provide further grounds for the Court to reject this inappropriate plea agreement.[41]

[41] At a minimum, the Court should defer a decision on accepting Boeing's plea until it has an opportunity to review a pre-sentencing report. The parties purport to "waive" the preparation of a Pre-Sentencing Investigation Report in the proposed agreement (Proposed Plea Agreement ¶ 27) but acknowledge that the final decision rests with the Court. For the multiple reasons explained above, the families believe that the Court should simply reject the parties' proposed agreement now. But at the very least, the Court should order a more thorough investigation of the facts of this case before making its decision. *See* Fed. R. Crim. P. 11(c)(3) (court may "defer" a decision on a proposed plea "until the court has reviewed the presentence report").

CONCLUSION

The Court should reject the proposed plea agreement, pursuant to its authority under Fed. R. Crim. P. 11(c)(3)(A). The Court should make its announcement that it is rejecting the plea directly to Boeing in open court, as required by the federal rules. *See* Fed. R. Crim. P. 11(c)(5) ("If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court *must* do the following on the record and in open court … [i.e.,] inform the parties that the court rejects the plea agreement …." (emphasis added)). Consistent with recognized practice in this Circuit, the Court should give its reasons for rejecting the proposed plea agreement. *See United States v. Smith*, 417 F.3d 483, 488 (5th Cir. 2005) (the district court "may state its reasons for rejecting a plea agreement" but cannot "also suggest the plea agreements that would be acceptable" or provide comments "on the hypothetical agreements it would or would not accept"). The families respectfully request that the Court give as its reasons for rejecting the proposed plea the reasons the families outline above.

After rejecting the plea agreement, the Court should exclude from the Speedy Trial Act calculation the time between July 7, 2024, and the date of its rejection of the plea, pursuant to 18 U.S.C. § 3661(h)(1)(G) (time excluded while plea under consideration). The Court should then set the matter for a jury trial within 70 days.

Dated: July 31, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 31, 2024, the foregoing document was served on the parties to the proceedings via the Court's CM/ECF filing system.

/s/ Paul G. Cassell
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