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RE: ***In re: The Boeing Company Derivative Litigation,***
Civil Action No. 2019-0907-MTZ

Dear Counsel:

I write to address the defendants' Motion for Continued Confidential Treatment Pursuant to Chancery Court Rule 5.1 (the "Motion"), and the opposition filed by non-party objectors Dow Jones & Company, Inc., publisher of *The Wall Street Journal*, and its reporter Andrew Tangel (the "Objectors").[1] For the reasons that follow, the Motion is granted only as to the names of certain employees and whistleblowers.

[1] Docket Item ("D.I.") 99 [hereinafter "Mot."]; D.I. 104.

I. BACKGROUND

In the wake of two tragic airplane crashes involving The Boeing Company's ("Boeing" or "the Company") 737 MAX airplanes, the operative complaint in this derivative action alleges that Boeing's directors and officers failed to monitor the safety of those airplanes. The complaint alleges the defendants failed to ensure the existence of a reasonable information and reporting system, and failed to actively monitor or oversee such systems despite being made aware of red flags concerning airplane safety. The complaint also alleges that the director defendants cashed out the Company CEO's unvested equity-based compensation, despite knowing the CEO had failed to oversee safety and had committed other misdeeds. After a redacted complaint was publicly filed,[2] the Objectors challenged its confidentiality pursuant to Court of Chancery Rule 5.1. The Motion and opposition followed.

Defendants seek to maintain six categories of information as confidential: (1) communications with or about Boeing's customers; (2) the identities and employment details of current and former employees, including potential whistleblowers; (3) business information relating to the Company's supply chain, competitive strategy, and motivation for certain design improvements; (4)

[2] D.I. 93.

"communications concerning sensitive business information by and among Boeing's executives and directors in the wake of the 737 MAX accidents";[3] and (5) communications reflecting the Company CEO's statements to the Board regarding third parties, together with Boeing's assessment of reports concerning the accidents and related events. Defendants make three primary arguments for continued confidential treatment: (1) that the underlying documents pertaining to these categories were produced to the stockholder plaintiffs confidentially under 8 *Del. C.* § 220(c); (2) that the public press already contains a great deal of reporting on the airplane crashes, the Company's responses, and this action's complaint, such that the incremental information kept confidential would not substantially add to the public's knowledge; and (3) that the presumption of public access is overcome because public access to certain information at issue would cause irreparable harm, including competitive harm to the Company and harm to its whistleblower employees.

The Objectors counter that the Section 220 confidentiality agreement is of no moment once the information is disclosed in litigation, and that the Company has failed to meet its burden to justify continued confidential treatment due to the intense

[3] Mot. ¶ 18.

public interest in this litigation and the absence of assertions of any particularized harm from disclosure.

II. ANALYSIS

All court proceedings and filings are presumptively open to the public.[4] The right of access enables the public to "judge the product of the courts in a given case."[5] This, in turn, "helps ensure quality, honesty and respect for our legal system."[6] Court of Chancery Rule 5.1 "reflects the Court of Chancery's commitment to these principles."[7] It states that, "[e]xcept as otherwise provided" in the Rule, "proceedings in a civil action are a matter of public record."[8] This language "makes clear that most information presented to the Court should be made available to the public."[9]

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[4] *See In re Nat'l City Corp. S'holders Litig.*, 2009 WL 1653536, at *1 (Del. Ch. June 5, 2009).

[5] *In re Oxbow Carbon LLC Unitholder Litig.*, 2016 WL 7323443, at *2 (Del. Ch. Dec. 15, 2016) (ORDER) (quoting *Va. Dept. of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004)).

[6] *Horres v. Chick-fil-A, Inc.*, 2013 WL 1223605, at *1 (Del. Ch. Mar. 27, 2013) (internal quotation marks omitted) (quoting *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984)).

[7] *Id.* at *2.

[8] Ct. Ch. R. 5.1(a).

[9] *Sequoia Presidential Yacht Gp. LLC. v. FE P'rs LLC*, 2013 WL 3724946, at *2 (Del. Ch. July 15, 2013) (emphasis and internal quotation marks omitted) (quoting *Protecting Public*

Rule 5.1(b)(3) provides that the party seeking to "maintain Confidential Treatment always bears the burden of establishing good cause for Confidential Treatment."[10] Rule 5.1(b)(2) defines "good cause" as follows:

> For purposes of this Rule, "good cause" for Confidential Treatment shall exist only if the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause. Examples of categories of information that *may* qualify as Confidential Information include trade secrets; sensitive proprietary information; sensitive financial, business, or personnel information; sensitive personal information such as medical records; and personally identifying information such as social security numbers, financial account numbers, and the names of minor children.[11]

In determining whether good cause has been established, the Court must "balanc[e] . . . the public interest against the harm that public disclosure might entail with respect to sensitive nonpublic information."[12] Good cause exists only where the public interest in access to Court proceedings is outweighed by the harm public disclosure of sensitive, non-public information would cause.

Access to the Courts: Chancery Rule 5.1, at 3 (Jan. 1, 2013), *previously available at* http://courts.delaware.gov/rules/ChanceryMemorandumRule5–1.pdf).

[10] Ct. Ch. R. 5.1(b)(3).

[11] *Id.* 5.1(b)(2) (emphasis added).

[12] *Reid v. Siniscalchi*, 2014 WL 6486589, at *1 (Del. Ch. Nov. 20, 2014).

"The public interest is especially strong where the information is material to understanding the nature of the dispute."[13] In those instances, denial of public access to material requires a "strong justification."[14] And generic statements of harm are insufficient to overcome the public right of access: harm must be "particularized" to warrant continued confidentiality.[15] A party must point to specific information and must proffer "tangible evidence of concrete damage" if that information is made accessible to the public.[16] A party seeking confidential treatment based on harm to its business relationships with customers "must point to specific information like trade secrets or competitively sensitive pricing information that is not in the public mix and, if disclosed, will cause clearly identified harm."[17]

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[13] *In re Oxbow Carbon LLC*, 2016 WL 7323443, at *2 (internal quotation marks omitted) (quoting *Al Jazeera Am., LLC v. AT & T Servs., Inc.*, 2013 WL 5614284, at *7 (Del. Ch. Oct. 14, 2013)).

[14] *Id.* (quoting *Horres*, 2013 WL 1223605, at *1).

[15] *Sequoia*, 2013 WL 3724946, at *2 (quoting Ct. Ch. R. 5.1(g)).

[16] *In re Oxbow Carbon LLC*, 2016 WL 7323443, at *2 (quoting *Kronenberg v. Katz*, 872 A.2d 568, 609 (Del. Ch. 2004)).

[17] *Manhattan Telecomms. Corp. v. Granite Telecomms., LLC*, 2020 WL 6799122, at *3 (Del. Ch. Nov. 19, 2020) (internal quotation marks omitted) (quoting *In re Oxbow Carbon LLC*, 2016 WL 7323443, at *2); *accord Kronenberg*, 872 A.2d 608–09 (denying confidential treatment where the movant was "unable to point to anything that [wa]s confidential . . . because nothing in the record involve[d], for example, trade secrets or competitively sensitive pricing information," or contain[ed] personally sensitive information involving [movant]'s private life," and reasoning that "[t]o sanction sealing under these circumstances would therefore create a precedent that would permit sealing in virtually all of this court's cases").

On this foundation, I first address Defendants' two threshold arguments. First, confidential information produced in the books and records context may remain confidential under the Section 220 confidentiality agreement only "unless and until disclosed in the course of litigation," as when "used affirmatively" in a derivative action.[18] Once the documents are used in litigation, their confidentiality is governed by the Court of Chancery Rules, not the Section 220 confidentiality agreement.[19] After the parties' substantive dispute is laid before the Court, confidentiality is no longer simply a matter to be negotiated between the stockholder and the Company; it must yield to this Court's duty to conduct its proceedings with the highest possible degree of public access.

Second, the intense public and governmental reporting on this litigation and the underlying tragedies does not, as Defendants suggest, mean than the public's interest has somehow been sated, or that the details of this litigation are inconsequential as compared to the mass of information already publicly available. To the contrary: the public's intense attention to the Company's safety response

[18] *Stone v. Ritter*, 2005 WL 2416365, at *2 (Del. Ch. Sept. 26, 2005); *see also Al Jazeera*, 2013 WL 5614284, at *3 (instructing redactions should follow only Rule 5.1 as guidance and disregarding the plaintiff's confidentiality agreement).

[19] *See Stone*, 2005 WL 2416365, at *2.

compels the conclusion that even the details are of interest.[20] And reporting to date has specifically bemoaned the lack of insight into the Board's response, highlighting the public significance of the particular details presented in this litigation.[21] The public interest favors disclosure.

And so, I turn to Defendants' specific categories of redactions and whether Defendants have identified any particularized harm capable of overcoming the public interest in disclosure. First, with regard to the Company's communications with or about its customers,[22] "[t]he identity of customers has long been recognized to be a trade secret."[23] Rule 5.1 identifies trade secrets as an exemplary category of information that *may* qualify as confidential.[24] But even against that backdrop, Defendants still must demonstrate that the public identification of Boeing's customers would cause particularized harm.[25] Defendants merely speculate Boeing "could be harmed" and that the information "could be used to put Boeing at a

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[20] *See Sequoia*, 2013 WL 3724946, at *3 (concluding the matter was of public interest "as evidenced by a number of stories in the press").

[21] D.I. 104, Ex. 4.

[22] Mot. Ex. A ¶¶ 103–04, 162, 174–75, 199–200, 343.

[23] *Phila. Gear Corp. v. Power Transmission Servs., Inc.*, 1991 WL 29957, at *3 (Del. Ch. Mar. 6, 1991).

[24] Ct. Ch. R. 5.1(b)(2).

[25] *See id.* 5.1(g)(2); *Manhattan Telecomms. Corp.*, 2020 WL 6799122, at *3.

competitive disadvantage."[26] Defendants have failed to show that the identities of Boeing's customers, and its communications with or about them, would cause particularized harm sufficient to overcome the public interest.

I turn next to the identities and identifying details of Boeing's current or former employees who raised or transmitted safety concerns.[27] The Objectors rightly recognize this information may warrant continued confidentiality. In *Horres v. Chick-fil-A, Inc.*, this Court found that the names of employees who came forward to lodge severe allegations against their employer were not of meaningful public interest, and that there were good reasons to respect those employees' privacy.[28] While the sexual assault allegations in *Horres* were closely associated with those employees' personal lives, and so more clearly warranted maintaining the employees' privacy than the allegations here, I conclude the public interest does not warrant unmasking the concerned Boeing employees whose names do not otherwise appear in the public complaint. Their specific identities have no bearing on the public's understanding of whether the Company's directors and officers breached their fiduciary duties. The employees who would be harmed by unmasking are

[26] D.I. 99, Unsworn Declaration of Albert Charles Lambert ¶ 9 [hereinafter "Lambert Decl."].

[27] Mot. Ex. A ¶¶ 76–78, 157–58, 319, 322.

[28] 2013 WL 1223605, at *2–3.

nonparties whose interests are not presently before the Court. The names of employees who are only identified in the complaint in the context of raising safety concerns may remain redacted.[29]

But the substance of the employees' concerns must be made public. They are central to the complaint's allegations; in this oversight case, the upward transmission of information and raising of concerns, and how the receiver of that information responded, has great significance. Maintaining the employees' anonymity should suffice to protect them while satisfying the public's right to understand this lawsuit.

Third, Boeing seeks to maintain the confidentiality of "sensitive business information," including Boeing's suppliers, competitive strategy, and motivation for certain design improvements.[30] This case accuses the Company's leaders of prioritizing certain business goals over safety; the public interest in this case extends to the Company's pursuit of those business goals, particularly leading up to and in the aftermath of the 737 MAX accidents. And Boeing has failed to articulate any particularized harm from disclosing the redacted information; Boeing merely

[29] The names that may be redacted appear in paragraphs 76 through 78, and the employee named in paragraphs 157 and 158. The individuals named in the second part of paragraph 158, as well as paragraphs 319 and 322, are already publicly identified in other parts of the complaint, and the public interest extends to their involvement. Those redactions and the others in this category must be made public.

[30] Mot. Ex. A ¶¶ 113, 183 n.8, 186, 293–94.

speculates that its competitors "could use" internal Boeing information to harm Boeing in competition.[31]

In a fourth category, the Company also wants to redact from public view "communications . . . by and among Boeing's executives and directors in the wake of the 737 MAX accidents" that "relate to obtaining, providing, communicating, or addressing information relating to the 737 MAX," including "specific information discussed at recent board meetings" and "detailed concerns directors had or have about process improvements at Boeing."[32] These communications are at the very heart of this board oversight case. They are essential to the public's understanding of this litigation, which centers on what the Board knew about the 737 MAX and the crashes, when the Board knew it, and how the Board reacted to that information.[33] In addition, many of the paragraphs in this category detail actions taken by the Company's CEO, whose compensation in view of his actions is also alleged to support a breach of fiduciary duty claim in this case. Boeing's conclusory statements of harm, and remarkable position that these paragraphs would add little to the

[31] Lambert Decl. ¶ 12.

[32] Mot. ¶ 18; *see* Mot. Ex. A ¶¶ 77 n.4, 103–04, 159, 214, 217–21, 238–39, 241–42, 245, 261, 265–69, 271, 276–80, 284–86, 290, 307–08, 313.

[33] I am particularly incredulous that Defendants seek to redact what was present in, and missing from, Board agendas and meeting materials following the crashes. *See* Mot. Ex. A ¶¶ 238–39, 245, 276–80.

information already made public, do not overcome the public's right to access this information.

Finally, Boeing seeks to redact internal communications about third parties and the accuracy of reports about the events.[34] Boeing asserts these remarks and "out-of-context quotes" would be embarrassing and would impede the ability of officers and directors to communicate openly and freely. Boeing mischaracterizes most of the redactions in this category. They include the Company CEO's communications to the Board and officers,[35] and the contents of a Board call.[36] As explained, such communications are of particular importance in an oversight case. As for the off-hand comments,[37] "that the information for which a party seeks confidential treatment may be embarrassing . . . does not alone warrant confidential treatment."[38]

III. CONCLUSION

The only information that may remain redacted is the names of the otherwise anonymous reporting employees. An implementing public version shall be filed

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[34] *Id.* ¶¶ 215–16, 219, 223–26, 228–30, 232–35, 253–54, 270–71, 301.

[35] *Id.* ¶¶ 215–16, 219, 225–26, 228–30, 233–34.

[36] *Id.* ¶ 232.

[37] *Id.* ¶¶ 253, 270, 301.

[38] *Sequoia*, 2013 WL 3724946, at *2 (citing *Horres*, 2013 WL 1223605, at *2).

within five business days. The public version of the recently filed amended complaint shall comport with the guidance in this letter. To the extent an order is necessary to implement this decision, IT IS SO ORDERED.

Sincerely,

/s/ Morgan T. Zurn

Vice Chancellor

MTZ/ms

cc: All Counsel of Record, via *File & ServeXpress*