

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE: ETHIOPIAN AIRLINES FLIGHT ET
302 CRASH

Lead Case: 1:19-cv-02170 (Consolidated)

Honorable Jorge L. Alonso

Magistrate Judge M. David Weisman

**MOTION FOR LIMITED RELIEF FROM THE MAY 4, 2020, AMENDED
PROTECTIVE ORDER**

Plaintiff, Javier de Luis, through his undersigned counsel, makes a new request that this Court provide limited relief from the May 4, 2020, Protective Order entered in this matter (ECF 794) to allow the Hon. Reed O'Connor in the United States Court for the Northern District of Texas to review and discuss a small set of documents, as well as testimony, obtained through discovery in this matter. The motion is based on a new decision from the Fifth Circuit and a consequent new posture of the case before Judge O'Connor. In support thereof, Mr. de Luis states as follows:

1. Mr. de Luis has previously requested similar limited relief, to share information from this litigation with the Department of Justice. Plaintiff's Motion for Expedited and Limited Relief from the May 4, 2020 Amended Protective Order (ECF 1429) was filed on November 10, 2022. On November 17, 2022, this Court denied Mr. de Luis's motion, finding that "at this point, Mr. de Luis has not shown good cause to modify the protective order." (ECF 1440 at 4). The Court noted that "If the Texas court orders plaintiffs to meet with prosecutors and present other theories of criminal liability, plaintiffs are certainly free to renew this motion."

2. After DOJ voluntarily agreed to meet with plaintiffs, Mr. de Luis did renew his motion (ECF 1523.) In the meantime, the Texas court presiding over the criminal case against Boeing ruled that plaintiffs were not entitled to any remedy for the government's violation of the Crime Victims' Rights Act in reaching the deferred prosecution agreement ("DPA") with Boeing, including an order that the DOJ confer with the victims' families about ways other than the DPA to hold Boeing accountable. (ECF 1559, Ex. A.)

3. At that time, this Court stated, "If, in light of that ruling, the DOJ is no longer willing to meet with Mr. de Luis's counsel or to entertain evidence that Mr. de Luis and other families contend supports holding Boeing criminally liable beyond the DPA, there is no reason to amend the protective order. If, on the other hand, the DOJ still intends to meet with [the families'] counsel and will entertain such evidence, then good cause exists." (ECF 1564 at 1.) Accordingly, the Court gave Mr. de Luis several weeks to obtain from the DOJ evidence that shows good cause exists to modify the amended protective order. (Id. at 2.)

4. Subsequently, Mr. de Luis submitted a second letter from DOJ which stated it "continue[d] to support the modification of the protective order" to allow Mr. de Luis to share discovery materials from this litigation with DOJ. (ECF 1651-1 at 1.) This Court then denied Mr. de Luis's motion, ruling he had not shown good cause to modify the relief requested because "DOJ did not say [] that it remains willing to meet [Mr. de Luis' and other families'] counsel and to entertain evidence that [the families] contend supports holding Boeing criminally liable beyond the DPA." (ECF 1658 at 2.)

5. The DPA provides that if DOJ agrees Boeing has complied with its DPA obligations, then "[s]ix months after the Agreement's expiration, the Fraud Section shall seek dismissal with prejudice of the Information filed against the Company." (ECF 1429-1 at 17, ¶ 25.)

The DPA expired January 7, 2024; so, assuming DOJ agrees Boeing complied with its DPA obligations, it will seek dismissal of the Information on or about July 7, 2024.¹

6. Mr. de Luis and other families filed a mandamus petition in the Fifth Circuit to review the Texas court's ruling they were not entitled to any remedy. On December 18, 2023, the Fifth Circuit overturned the district court's ruling that it was powerless to award any remedy to Mr. de Luis and other family members:

We must still address the district court's additional conclusion that, despite its "immense sympathy" for the crime victims here, it lacks legitimate authority "to remedy the incalculable harm" those victims have suffered. To the extent that this conclusion determinatively denies application of the CVRA, that is inconsistent with the statute, the criminal rules, and court authority to resolve criminal proceedings commenced in court.

In re Ryan, 88 F.4th 614, 627 (5th Cir. 2023). After overturning the district court's ruling the Fifth Circuit then denied the petition without prejudice, deciding that "mandamus intercession is premature." *Id.* Regarding DOJ's eventual motion for dismissal of the charges against Boeing, the Fifth Circuit discussed the procedural mechanism for Mr. de Luis and other families to challenge the motion. The Fifth Circuit noted that Federal Rule of Criminal Procedure 48(a) requires court approval of any dismissal of the prosecution. The Court stated it was "confident that the district court will uphold victims' CVRA rights throughout the instant criminal proceedings, above all when, how, and if judicial approval is sought to resolve this case." *Id.* at 629. "We clarify," it said, "that if judicial approval is sought to resolve the instant case, the district court has an ongoing obligation to uphold the public interest and apply the CVRA." *Id.* at 627.

7. The Fifth Circuit went on to state:

If a sought-for final stage is a Government motion to dismiss, we are confident [] that the district court will assess the public interest according to caselaw as well as the CVRA,

¹ See <https://www.justice.gov/criminal/criminal-fraud/case/united-states-v-boeing-company>.

including violations already admitted to, *as well as any other circumstances brought to its attention by the victims' families.*

Id. at 627 (emphasis added).

8. In light of the new Fifth Circuit ruling from December, if and when DOJ moves to dismiss the pending Criminal Information against Boeing (anticipated to be filed on or about July 7, 2024), the families will need to be able to present information to Judge O'Connor as he assesses the public interest in dismissing this criminal action and before ruling on that motion.² Therefore, Mr. de Luis plaintiff limited relief from the protective order to share and review materials with his Texas legal team and Judge O'Connor. These materials bear directly on the issue of whether or not it is in the public interest to dismiss the pending criminal charge (conspiracy to deceive the FAA) that has been filed against Boeing.

9. On February 9, 2024 Counsel met and conferred with Boeing counsel who then indicated Boeing opposes the relief sought.

WHEREFORE, Mr. de Luis requests that this Court grant his Motion for Limited Relief from the May 4, 2020, Amended Protective Order to permit Paul Cassell, Mr. de Luis's counsel in the matter of *United States v. The Boeing Company*, 4:21-cr-5-O, now pending in the United States District Court for the Northern District of Texas, along with other members of Mr.

² The DOJ also understands the Fifth Circuit's language, *supra*, to mean the victims' families will make a submission to Judge O'Connor which will include documentary support. *See Ryan et al v. United States Department of Justice*, Case no. 1:23-cv-03815, Dkt. #8 at 20-21 (D.D.C, Feb. 13, 2024), wherein the DOJ commits to compliance with a FOIA request related to the case in the Northern District of Texas by June 1, 2024, and states:

Third, if Plaintiffs mean that they need the requested documents on an expedited basis to merely respond to any eventual motion to dismiss were the government to file one on July 7, 2024, they again cannot establish irreparable harm. The Criminal Division intends to provide at least an interim disclosure determination to Plaintiffs no later than June 1, 2024... That determination will come well in advance of July 7, 2024—the earliest date that the Government may possibly file a motion to dismiss in the Boeing prosecution. And if the Government files such a motion, it expects that several parties would file additional briefing concerning the merits of that motion—including Boeing, Plaintiffs, and other interested victims—and that the district court will then hold a hearing on that motion. *See In re Ryan*, 88 F. 4th at 627-28 (“If a sought-for final stage is a Government motion to dismiss, we are confident . . . that the district court will assess the public interest according to caselaw as well as the CVRA, including violations already admitted to, as well as any other circumstances brought to its attention by the victims' families.”).

Cassell's legal team, to review the discovery previously provided to Mr. de Luis in this case under the terms of the Amended Protective Order. Mr. Cassell should then be permitted to disclose relevant materials to Judge O'Connor. A proposed order to that effect is submitted herewith.

Dated: February 15, 2024

/s/Robert A. Clifford

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2024, I electronically filed the foregoing Motion, which will send notification of such filing to all attorneys of record.

/s/ Robert A. Clifford _____
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