

SETTLEMENT AGREEMENT

PARTIES

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the United States Department of Defense, The Boeing Company (“Boeing”), and Vincent A. DiMezza, Jr. (“Relator”).

PREAMBLE

A. Boeing is one of the world’s largest aerospace companies, providing civilian and military aircraft and other products to public and private clients worldwide. Boeing Rotocraft Systems manufactures for the United States military a range of fixed-wing and rotary aircrafts, including the CH-47 Chinook twin-rotor helicopter and its variants.

B. The CH-47 entered service in 1962, and the United States Army has flown Chinook helicopters continuously since that time. Different versions of the Chinook have been developed through the decades of its use. Beginning in approximately 2003, the United States Department of Defense awarded Boeing contracts to produce and modify Chinook helicopters as part of the Army’s effort to modernize its fleet of heavy lift helicopters. These contracts are identified by the Department of Defense as contracts number W58RG2 04 G 0023 and W58RGZ 08 C 0098. Over one hundred new Chinooks were ordered, and Boeing also agreed to “remanufacture” several hundred older Chinook helicopters by overhauling their airframes and performing extensive modifications to the avionics and engines. The older Chinook models that Boeing is re-manufacturing are called the “CH-47D” and the “MH-47,” the latter of which is a Special Forces variant of the CH-47D. The newer models that Boeing is producing or remanufacturing from the older CH and MH models are called the “CH-47F” and the “MH-47G.” This program will hereinafter be referred to as the Modification Program.

C. Boeing operates a manufacturing facility in Ridley Park, Pennsylvania. The Ridley Park plant and a Boeing facility in Millville, New Jersey, are the principle sites where work is performed on the Modification Program. Work on the CH-47F continues at Ridley Park while work on the MH-47G has recently ended.

D. Boeing's contracts with the United States provide for Boeing to be compensated in two independent but related ways. First, Boeing receives a fixed price for work that must be completed on every airframe in order to upgrade it. Because this is the standard work required by the contract, this work is referred to as "Basic" work. Second, where there is pre-existing damage or wear to an airframe, Boeing is paid on an hourly basis to fix this damage and restore the airframe. Such airframe specific work is referred to as "Over and Above" work. The majority of the time, Over and Above work is billed to the government based on an estimate of how long a given repair will take to complete. This estimate is agreed upon by the United States and Boeing. Approximately one third of the time, however, in cases in which the United States and Boeing cannot agree on an estimate before the work is complete, the Over and Above work is billed to the United States based on the time that Boeing's employees reported actually spending on that job. The vast majority of the work performed on the Modification Program is Basic work.

E. Boeing tracks the work of its mechanics and allocates their time to the bills submitted to the United States by way of a computer system. Each individual job to be completed as a part of either the Basic or Over and Above work is given an identifying number. When beginning a job, a mechanic swipes his or her unique badge at a scanner and identifies on the system the job that he or she will be doing, a process known as "badging in." At the conclusion of work on that job, the mechanic either "badges out" of that job, i.e. swipes his or her unique badge and indicates that the job or his or her work

on the job is complete, or he or she badges in to another job, which automatically stops the clock running on the first job and starts a clock running on the new job.

F. In February 2010, Relator filed a *qui tam* action in the United States District Court for the Eastern District of Pennsylvania captioned United States ex rel. Vincent A. DiMezza, Jr. v. The Boeing Company, No. 10-cv-634, pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3703(b) (the “Civil Action”). The United States did not file a subsequent Complaint. Relator alleged that Boeing employees had billed the United States for time they claimed was spent performing Over and Above work when in actuality they were performing Basic work, doing personal business, or not working at all.

G. The United States has investigated these claims and contends that, between 2005 and the present:

1. Multiple Boeing mechanics performed Basic work while they were badged in to Over and Above jobs.
2. Multiple Boeing first-line managers instructed Boeing mechanics to badge in to Over and Above jobs while they were actually performing work on Basic jobs. This allowed these managers to improve their mechanics’ apparent efficiency at performing Basic jobs, which Boeing carefully tracked and made part of their annual performance appraisal, at the expense of their mechanics’ efficiency at performing Over and Above jobs, which Boeing did not monitor in like fashion.
3. Some Boeing mechanics who completed their work on Over and Above jobs in less than the job’s estimated time began performing Basic work while still badged in to the Over and Above job, until the Over and Above job reached its estimated time.

4. At a meeting in approximately late 2005, a Boeing first-level manager instructed a number of senior mechanics at Boeing that they could remain badged in on Over and Above jobs while performing Basic work for up to four to five times the estimated hours for the Over and Above work.
5. As a result of the foregoing mis-billing, the United States paid Boeing extra for work that was already included in Boeing's contract payment.

H. The United States contends that it has certain civil causes of action, as specified in Paragraphs 2 and 3, below, against Boeing for billing Over and Above time when mechanics were actually performing Basic work or not working. The conduct described in this Paragraph or Paragraph G above is collectively hereinafter referred to as the "Covered Conduct."

I. The United States also contends that it has certain administrative claims, as specified in Paragraphs 2 and 3 below, against Boeing for engaging in the Covered Conduct.

J. Boeing disputes the allegations made against it and denies any liability for the claims specified in the Covered Conduct or under the Paragraphs of this Preamble.

K. Relator claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees and costs.

L. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below. This Settlement Agreement is neither an admission of liability by Boeing nor a concession by the United States that its claims are not well founded.

TERMS AND CONDITIONS

1. Boeing agrees to pay to the United States \$4,392,779.74. This payment shall be made within thirty (30) business days from the Effective Date of this Agreement by electronic funds transfer

pursuant to written instructions to be provided by the United States Attorney's Office for the Eastern District of Pennsylvania no later than ten (14) calendar days after the Effective Date of this Agreement. Boeing agrees that if the settlement amount is not paid in full within the time required, then Boeing shall be in material breach of this Agreement.

2. Boeing further agrees to undertake the following with respect to the Modification Program at Ridley Park:

- a. Boeing has already instituted an electronic modification to its existing manufacturing computer system that will prevent any employee from billing time to an Over and Above job once that job has hours attributed to it that are equal to a predetermined multiple of the estimate for that job. Such jobs can only be re-opened once a first-line manager provides a narrative explanation for the overrun. Boeing agrees to keep this electronic system, or its equivalent, in place while the Modification Program is ongoing. The predetermined multiple is currently set at 2.5x the estimate, and Boeing agrees that (i) for the two years following the Effective Date of this agreement, it will alter that setting only with the concurrence of the local Philadelphia DCMA commander and (ii) after two years following the Effective Date of this agreement, it will alter that setting only in coordination with the local Philadelphia DCMA commander.
- b. Boeing agrees to assign a second-level or higher manager to periodically review the narrative justifications provided by first-line managers for re-opening Over and Above jobs that have reached the predetermined multiple to ensure that the re-opening of those jobs is justified.

- c. Boeing agrees to include as a portion of first-line managers' annual performance reviews the efficiency of the managers' employees at accomplishing Over and Above jobs relative to their estimates.
- d. Boeing agrees to include as part of its pre-existing annual compliance training for mechanics and managers a section describing the allegations in this investigation, instructing its employees that such actions should not be taken and should not have been taken, and reminding employees that they are required to report such incidents or instructions to Boeing's compliance and ethics hotlines. Boeing shall also remind employees of other mechanisms by which they can bring such incidents or instructions to the attention of Boeing management, including, without limitation, reporting such incidents or instructions to their lead men, supervisors, and/or union representatives.
- e. Boeing is already working to implement a standard labor tracking computer system for its defense manufacturing facilities. It is anticipated that this system will be in place at all U.S.-based defense manufacturing facilities by the end of 2013. When that system is implemented at a particular facility, Boeing management will use it as appropriate to monitor Over and Above efficiency in those facilities.

3. Conditioned upon the United States receiving \$4,392,779.74 from Boeing, as soon as feasible after receipt, and in consideration of the substantial assistance provided by Relator, the United States shall pay \$812,664.25 to Relator by electronic funds transfer pursuant to written instructions provided to the government by Relator's counsel. Boeing and Relator have reached a separate agreement regarding Relator's attorneys' fees and costs.

4. Subject to the exceptions in Paragraph 6 below, in consideration of the obligations of Boeing in this Agreement and conditioned upon Boeing's full payment of the Settlement Amount pursuant to Paragraph 1 and continued compliance with the requirements of Paragraph 2, and subject to Paragraph 13, below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment made under this Agreement), the United States (on behalf of itself, its officers, agents, agencies, and departments) agrees to release Boeing together with its direct and indirect subsidiaries, and/or divisions, and the successors and assigns of any of them, from any civil or administrative monetary claim the United States has or may have for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; the Contract Disputes Act, 41 U.S.C. §§ 7101-09; or the common law theories of payment by mistake, breach of contract, unjust enrichment, misrepresentation and fraud.

5. The United States also releases the current and former officers, directors, employees, and shareholders of Boeing from any civil or administrative monetary claim the United States has or may have for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; the Contract Disputes Act, 41 U.S.C. §§ 7101-09; or the common law theories of payment by mistake, breach of contract, unjust enrichment, misrepresentation and fraud.

6. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including Boeing) are the following claims of the United States:

a. Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

- c. Except as explicitly stated in this Agreement, any administrative liability, including the debarment and suspension rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any common law liability for express or implied warranty claims or for defective or deficient products or services;
- g. Any liability for failure to deliver goods or services due; and
- h. Except as explicitly stated in this Agreement, any liability of individuals.

7. Relator and his/her heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Conditioned upon Relator's receipt of the payment described in Paragraph 3, Relator and his/her heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

8. Relator, for himself/herself, and for his/her heirs, successors, attorneys, agents, and assigns, releases Boeing, and its officers, agents, and employees, from any liability to Relator arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs. This release shall not include a release of Boeing by relator for any liability which may accrue after the Effective Date of this agreement under 31 U.S.C. § 3730(H) for retaliatory actions and/or for any liability which may accrue after the Effective Date of this agreement under common law causes of action for wrongful discharge or retaliatory discharge or other employment-related causes of action .

9. Boeing waives and shall not assert any defenses it may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. The Parties agree that this settlement is not punitive in purpose or effect. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

10. Boeing and its current and former officers, directors, shareholders, parents, affiliates, successors and assigns, fully and finally releases the United States, its agencies, employees, servants, and agents, as well as Relator and Relator's counsel, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) which Boeing or its current and former officers, directors, shareholders, parents, affiliates, successors and assigns asserted, could have asserted, or may assert in the future against the United States, its agencies, employees, servants, and agents, and Relator and Relator's counsel, related to the Covered Conduct and the United States' and Relator's investigation thereof. This release shall not include a waiver of any defenses that Boeing may have to any employment-related actions as described in Paragraph 8 of this Agreement which the Relator may bring against Boeing.

11. This Agreement is intended to be for the benefit of the Parties only. The terms of this Agreement are in no way intended to, nor are they to be construed to, work a release of liability or in any way create a benefit in favor of any person not a party to this Agreement, except as expressly provided herein.

12. Boeing agrees to the following:

a. **Unallowable Costs Defined:** The Parties agree that all costs (as defined by Federal Acquisition Regulation § 31.205-47(a)) incurred in connection with the following by or on behalf of Boeing and its officers, directors, agents and employees , shall be unallowable costs for government contracting purposes:

- (1) the matters covered by this Agreement,
- (2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement,
- (3) investigative, defense, and corrective actions undertaken by Boeing in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney's fees),
- (4) the negotiation and performance of this Agreement, and
- (5) the payment Boeing makes to the United States pursuant to this Agreement, including any costs and attorneys fees.

b. **Future Treatment of Unallowable Costs:** These unallowable costs shall be separately determined and accounted for by Boeing, and Boeing shall not charge such unallowable costs directly or indirectly to any contracts with the United States, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by Boeing or any of its subsidiaries or affiliates to the United States.

c. **Treatment of Unallowable Costs Previously Submitted for Payment:** Within 90 days of the Effective Date of this Agreement, Boeing shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Boeing or any of its subsidiaries or affiliates from the United States. Boeing agrees that the United States, at a minimum, shall be entitled to recoup from Boeing any overpayment plus applicable interest

and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Boeing's books and records and to disagree with any calculations submitted by Boeing or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Boeing, or the effect of any such Unallowable Costs on the amount of such payments.

d. Nothing in this Agreement shall constitute a waiver of any rights of the United States to audit, examine, or re-examine Boeing's books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

13. Boeing warrants that it has reviewed its financial situation and that it is currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the United States of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Boeing, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended and do, in fact, represent a reasonably equivalent exchange of value which is not intended to hinder, delay, or defraud any entity to which Boeing was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

14. Upon receipt of the payments described in Paragraphs 1 and 3, above, the Parties shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal with prejudice of the Civil Action pursuant to Rule 41(a)(1).

15. The United States and Boeing shall bear their own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

16. Boeing represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

17. Relator represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

18. Relator represents that prior to his execution of this Agreement, he has consulted with his attorneys and that he is satisfied with their advice and representation in this matter.

19. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement is the United States District Court for the Eastern District of Pennsylvania.

20. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

21. The individuals signing this Agreement on behalf of Boeing and Relator represent and warrant that they are authorized by Boeing and Relator, respectively, to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

22. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement. Such counterparts may be electronic copies of physical documents, including but not limited to facsimiles, .pdf images, .tiff images, and other, similar electronic formats.

23. This Agreement is binding on Boeing's successors, transferees, heirs, and assigns.

24. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

25. All Parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

26. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). In accordance with Paragraph 22 above, facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement, and identical electronic copies of the signature and this Agreement (facsimile, .pdf, .tiff, etc.) shall be considered acceptable and binding to the same degree as an original.

(Continued on next page)

THE UNITED STATES OF AMERICA

DATED:

12/23/11

BY:



ZANE DAVID MEMEGER
United States Attorney

DATED:

12-23-11

BY:

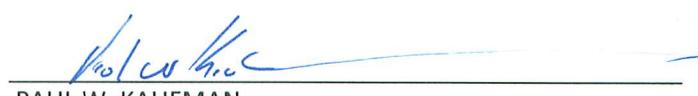


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Assistant United States Attorney
Chief, Civil Division

DATED:

12-23-11

BY:



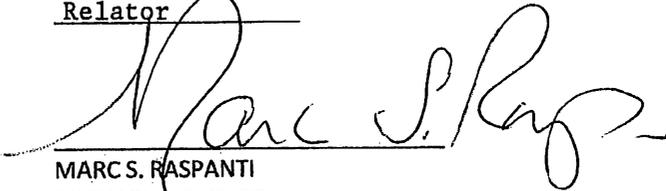
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Assistant United States Attorneys

THE BOEING COMPANY

DATED: 12/22/11 BY: 
THOMAS W. SZROMBA
Attorney for Boeing

 , RELATOR

DATED: *12/20/2011* Vincent A. DiMezza, Jr.
Relator

DATED: *12/20/2011* 

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