EFiled: Mar 06 2018 12:41PM EST
Filing ID 61761714
Case Number 5,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BOEING COMPANY, Plaintiff Below, Appellant, v. SPIRIT AEROSYSTEMS, INC., Defendant Below, Appellee.	No. 5, 2018 Court Below: Superior Court of the State of Delaware C.A. No. N14C-12-055 EMD [CCLD] **PUBLIC VERSION EFILED** MARCH 6, 2018

APPELLANT'S OPENING BRIEF

OF COUNSEL:

KIRKLAND & ELLIS LLP

Paul D. Clement, P.C.
Craig S. Primis, P.C.
Michael A. Glick
Jason M. Wilcox
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Sopan Joshi
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

William M. Lafferty (#2755)
John P. DiTomo (#4850)
Barnaby Grzaslewicz (#6037)
1201 North Market Street
Wilmington, DE 19801
(302) 658-9200

Attorneys for Appellant-Plaintiff Below The Boeing Company

Dated: February 19, 2018

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

NATURE OF PROCEEDINGS

This case involves a straightforward interpretation of the Asset Purchase Agreement ("APA") that governed Boeing's sale of aircraft manufacturing facilities in Oklahoma and Kansas to Spirit Aerosystems, Inc. ("Spirit"). The fundamental question presented is whether Spirit agreed to indemnify Boeing for payments in connection with certain early retirement benefits owed to former Boeing employees who continued working for Spirit after the sale.

Because the parties had anticipated that Spirit would hire most of Boeing's employees to continue working at the facilities sold, the APA expressly allocated responsibility for pension, medical, and other employee benefits the workers had accrued while working for Boeing. To accomplish this, the APA assigned Spirit certain "Assumed Liabilities," and obligated Spirit to indemnify Boeing for any liabilities "in connection with or arising from" those "Assumed Liabilities." Those "Assumed Liabilities" expressly included "Liabilities for pension Liability, Accrued Vacation, retiree medical, flexible spending accounts, sick leave, and personal time" for the former Boeing employees Spirit hired after the asset sale. In exchange for Spirit's assumption of those liabilities, Boeing transferred more than $700 million in pension assets to Spirit and reduced Spirit's purchase price by nearly $250 million. But when Boeing incurred losses of $150 million for disputed

early retirement benefits and sought indemnification under the APA, Spirit refused, and this litigation ensued.

Boeing is entitled to indemnification under the plain terms of the APA. Spirit agreed to indemnify Boeing for losses "in connection with or arising out of Assumed Liabilities," and the early retirement benefit obligations at issue here are enumerated as "Assumed Liabilities" under the APA. The Superior Court, however, granted summary judgment for Spirit, holding that the benefit obligations were not subject to indemnification because Boeing's liability for those obligations arose out of Boeing's collective bargaining agreements ("CBAs"), which Spirit did not assume. In so holding, the Superior Court fundamentally misread the parties' agreement. It wrongly believed that under the APA, (i) Spirit had assumed only liabilities corresponding to the assets it assumed under the APA, and (ii) likewise had assumed *no* liability corresponding to "Excluded Assets." Because Boeing's CBAs were excluded assets under the APA, the Superior Court thus wrongly concluded that any liabilities arising under the CBAs—even liabilities for the early retirement and medical benefits of Boeing employees Spirit had hired—necessarily were excluded liabilities.

That was reversible error. The plain language of the APA shows that Spirit expressly assumed liability for a host of benefits that arise *only* under the CBAs, such as vacation and sick leave, as well as for the benefits at issue here. The

multiple APA provisions reflecting Spirit's express assumption of these benefit liabilities confirm that, contrary to the Superior Court's reading, the APA did *not* simply divide up assets between Boeing and Spirit and proclaim that liabilities followed the assets to which they related. Instead, the APA carefully divided particular assets *and* enumerated liabilities between Spirit and Boeing, and *nowhere* provided that the latter necessarily followed the former. Among the "Assumed Liabilities" Spirit expressly undertook was liability for the pension and retiree benefits of the former Boeing workers hired by Spirit. Underscoring this point, the APA also specifically provides that neither Boeing nor its benefit plans would have "any further responsibility" for such benefits after the closing.

Resolution of this appeal is clear. "Assumed Liabilities" is a defined term under the APA and includes the pension and retiree medical benefits at issue here. Spirit expressly agreed to indemnify Boeing not only for these "Assumed Liabilities," but for any losses "in connection with or arising from Assumed Liabilities." That phrase encompasses the losses Boeing has incurred, and Boeing is entitled to indemnification under the APA. Thus, the judgment below should be reversed and summary judgment should be entered in favor of Boeing on its indemnification claims.

SUMMARY OF ARGUMENT

1. The Superior Court erred in denying Boeing's motion for summary judgment on its indemnification claim and in granting Spirit's corresponding motion. In Section 9.2 of the APA, Spirit agreed to indemnify Boeing for any losses "in connection with or arising from Assumed Liabilities." Under Section 1.2(a) of the APA, which enumerates the "Assumed Liabilities," Spirit specifically assumed "Liabilities for pension Liability, Accrued Vacation, retiree medical, flexible spending accounts, sick leave, and personal time, to the extent provided in Section 6.2." APA § 1.2(a)(iv).[1] Section 6.2, in turn, specified how both Spirit and its plans would assume liability for the Hired Employee's pension and retiree medical benefits, and expressly provided that Boeing and its plans would have "*no further responsibility*" for those benefits. *See* APA §§ 6.2(f), 6.2(g). The payments to Boeing's former workers hired by Spirit in Oklahoma and Kansas, for which Boeing seeks indemnification here, unquestionably are "in connection with" these pension and retiree medical liabilities that Spirit expressly assumed. APA §§ 1.2(a)(iv), 6.2(f), 6.2(g). Spirit therefore must indemnify Boeing for these payments. *See* APA § 9.2(a).

[1] The APA is at A362-487, and schedule 6.2(f) to the APA is at A488-492.

2. The Superior Court erred by granting summary judgment for Spirit based on a fundamental misreading of the APA. The Superior Court's core error was its belief that any liabilities arising out of "Excluded Assets" not assumed by Spirit were necessarily "Excluded Liabilities." Based on that mistaken premise, the Superior Court concluded that because Boeing's CBAs are excluded assets, any liability arising out of the CBAs necessarily must be an excluded liability. But that is simply not how the APA was written. The APA clearly and specifically assigns certain "Assumed Liabilities" to Spirit in provisions that specifically address any relationship with assumed or excluded assets. Pension and retiree medical benefits are plainly listed among Spirit's contractually defined "Assumed Liabilities," without regard to whether they arise under the CBA, ERISA, or some other source of law, and thus Spirit must indemnify the losses connected to or arising from those benefits.

a. The Superior Court spent much of its opinion establishing the undisputed facts that Boeing's CBAs were excluded assets under the APA and that the liabilities for which Boeing seeks indemnification arose out of breaches of the CBAs. But these two propositions are irrelevant to the indemnification dispute at issue here. Although Spirit did not assume, as assets, the CBAs themselves, the APA expressly and unambiguously transferred *specified liabilities* to Spirit in Section 1.2(a)(iv) and pursuant to Section 6.2, without regard to whether they arose

under the CBAs, ERISA, or some other source of law. Those specified liabilities that transferred to Spirit include responsibility for the pension and retiree medical benefits at issue here.

b. Rather than giving effect to Section 1.2(a)(iv)—the provision that addresses whether the benefits at issue here are "Assumed Liabilities"—the Superior Court relied on other, inapplicable subsections of Section 1.2 to draw erroneous inferences about Spirit's unstated "intent" in entering the APA. The Superior Court posited that Spirit intended only to assume liabilities that arose after the closing and over which Spirit had "control." But the APA does not support this interpretation, and the Superior Court had no license to try to discern such intent, when the plain language of Section 1.2(a)(iv) unambiguously provides that Spirit assumed liability for pension and retiree medical obligations.

c. Even under the Superior Court's erroneous reading of the APA, Spirit would be obligated to indemnify Boeing for settlement of the Kansas class action, which involved direct claims for benefits under ERISA, not solely CBA breach claims. That error alone would necessitate a reversal. Moreover, it also underscores that Spirit's indemnification obligations do not ultimately turn on the underlying legal source for the payments, but on the APA's unambiguous language allocating responsibility to Spirit.

3. The Superior Court improperly awarded Spirit its attorneys' fees and costs under the APA. Spirit's claim for fees rises or falls with its argument that it has no indemnification obligation here, and Boeing is entitled to fees and costs if it prevails. *See* APA §§ 9.1, 9.2.

STATEMENT OF FACTS

A. Background

In 2003, Boeing began to explore the sale of its commercial aircraft parts manufacturing plants in Tulsa and McAlester, Oklahoma, and Wichita, Kansas. A30. In late 2004, a private equity fund began negotiations to buy the Oklahoma and Kansas plants from Boeing, and formed the company now known as Spirit to acquire those plants. A31. Boeing and Spirit entered into the APA in February 2005, and the transaction closed in June. A28; A31. Under the deal, the plants' roughly 9,500 employees would cease working for Boeing, but could apply for positions at Spirit. A31. Spirit hired approximately 85% of those employees—dubbed the "Hired Employees." *Id.*; APA § 6.2(a).

Spirit agreed in the APA to credit the Hired Employees—both unionized and non-unionized—for their full service time with Boeing. Spirit also agreed to assume the liabilities for certain employee benefits, including (as relevant here) "pension" and "retiree medical" benefits. APA §§ 1.2(a)(iv), 6.2(f), (g); APA sched. 6.2(f). In return, Boeing agreed to transfer some $700 million worth of assets in its employee pension plans to Spirit, and to reduce the purchase price by an additional $243 million "as agreed credit … relating to the treatment of pension Liabilities, retiree medical Liabilities and Accrued Sick Leave pursuant to Section 6.2." APA § 1.7(a)(ii).

Among the benefits provided in Boeing's benefit plans applicable to union-represented employees was early retirement, under which an employee with sufficient tenure could choose to retire before the normal age of 65 in exchange for a lower monthly pension over his lifetime. The plans also entitled early retirees to retiree medical benefits. Under the plans, an employee was eligible for early retirement upon reaching age 55 with at least 10 years' service. And—as critical here—the benefit plans included a "Retirement From Layoff Status" benefit (commonly called a "layoff bridge"), which entitled employees with ten years of service to begin collecting early retirement benefits upon turning 55 if (but only if) they were "laid off" after turning 49 (at the Kansas plant) or 50 (at the Oklahoma plants). *See* A511; A537.

As Spirit acknowledged below, "neither party believed the Hired Employees were entitled to [early retirement] benefits as a result of the Divestiture." A288. After all, those Employees continued to work at the same plants with credit for their prior service, and thus were not "laid off" in any conventionally-understood sense. Boeing accordingly transferred to Spirit *all* pension plan assets for those Employees. By contrast, those employees with ten years of service who had *already* reached age 55 at the time of the transaction were eligible for early retirement from Boeing regardless of whether they took jobs at Spirit. Consistent with that understanding, Boeing retained pension plan assets to cover early

retirement liabilities for these employees and began paying their pension and medical benefits. A113. They are not involved in this litigation. *See* A633.

B. The *UAW* Arbitration and *Harkness* Litigation

The Hired Employees with the age and service necessary for the "layoff bridge" at the time of the transaction took the position that they had been "laid off" as a result of the divestiture and thus were entitled to early retirement benefits upon turning 55 even if they continued to work for Spirit. Those employees brought claims against Boeing.

In particular, workers between the ages of 50 and 55 with ten years of service at the Oklahoma plants at the time of the transaction filed a grievance against Boeing, seeking to be "made whole by Boeing for all lost benefits, benefit eligibility rights, and other rights provided to laid-off Boeing employees," including early retirement benefits under the layoff bridge. A564-565. An arbitrator agreed with the workers, concluding that they were "laid off" because a corporate divestiture was not among the specific grounds for termination enumerated in the CBAs. A599. The arbitrator initially expected the workers to collect their lost pension benefits from Boeing's benefit plans, but when Boeing pointed out that its plans could not provide those benefits under ERISA, because the affected workers were no longer participants in the plans and their pension assets had transferred to Spirit, the arbitrator modified the relief provided. A606.

In a revised award, the arbitrator required Boeing itself (as opposed to its benefit plans) to pay the value of the early retirement pension and retiree medical benefits until the workers retired from Spirit (at which time Spirit would begin to pay full retirement benefits out of the pension assets that Boeing had transferred), and the workers' "pension[s] received from Boeing [would be] subject to reduction by any pension payments received by the employee under the Spirit plan that are attributable to the transferred Boeing account." A609-10; *see also* A642. As a result of the arbitration, Boeing estimates that it will eventually pay the *UAW* grievants and their dependents a total of $60 million in damages related to the relevant early retirement pension and medical benefits. A39.

Unionized workers at the Kansas plant brought a federal class action (the *Harkness* litigation) seeking similar relief under their CBAs, while also claiming a breach of their benefit plans under ERISA. After the district court denied cross-motions for summary judgment on both the CBA and ERISA claims, *see Society of Prof'l Eng'g Emps. in Aerospace v. Boeing Co.*, 2012 WL 6158752 (D. Kan. Dec. 11, 2012); A687-735, the parties settled the dispute, and Boeing agreed to pay the class members $90 million to cover their early retirement pension and medical benefits.

C. Relevant APA Provisions

The APA divides the universe of assets and liabilities to be allocated between the parties into four categories: (1) "Assets," APA § 1.1(a); (2) "Excluded Assets," *id.* § 1.1(b); (3) "Assumed Liabilities," *id.* § 1.2(a); and (4) "Excluded Liabilities," *id.* § 1.2(b). The APA establishes no necessary correlation between "Assets" and "Assumed Liabilities," or between "Excluded Assets" and "Excluded Liabilities," but separately defines each of the four categories. The parties also agreed to cross-indemnification provisions for "Indemnifiable Damages," which include "any and all losses, Liabilities, damages, costs and expenses, including costs of investigation and defense and reasonable fees and expenses of lawyers, experts and other professionals." APA § 9.1(a). As relevant here, Spirit agreed to "indemnify, defend and hold harmless [Boeing] from and against any and all Indemnifiable Damages … [1] *in connection with* or [2] *arising from* … the Assumed Liabilities." APA § 9.2(a) (emphasis added).

Among Spirit's "Assumed Liabilities" are "Liabilities for *pension Liability*, Accrued Vacation, *retiree medical*, flexible spending accounts, sick leave, and personal time, to the extent provided in Section 6.2." APA § 1.2(a)(iv) (emphasis added). Section 6.2, in turn, requires Spirit to provide pension benefits to the Hired Employees under Spirit's benefit plans, and to credit their "past service with [Boeing] for eligibility and vesting and, contingent upon the transfers of assets …,

early retirement benefits and benefit accrual previously recognized under [Boeing's] Pension Plans." *Id.* § 6.2(f). To help Spirit cover its obligations, Boeing would "cause assets to be transferred from each of [its] Pension Plans to the respective [Spirit] Pension Plans" *id.*; Boeing also reduced the purchase price by $243 million in consideration of Spirit assuming these liabilities, *id.* § 1.7(b). Spirit further "agree[d] that neither [Boeing] nor [Boeing's] Pension Plans shall have *any further responsibility* with respect to the assets and Liabilities so transferred, including without limitation, obligations following such transfers with respect to the benefits accrued by the Hired Union Employees and Hired Non-Union Employees under the applicable [Boeing] Pension Plans." *Id.* § 6.2(f) (emphasis added).

In the very next subsection, Spirit agreed that it "shall be responsible for and shall maintain retiree medical coverage for the benefit of each Hired Employee who was eligible for *or could have become eligible for* (after meeting applicable age and service requirements) retiree medical coverage …, and shall provide each such Hired Employee full credit for periods of service prior to the Closing for all purposes thereunder." *Id.* § 6.2(g) (emphasis added). Once again Spirit "agree[d] that [Boeing] and its retiree medical plans shall have *no further responsibilities* after the Closing Date to provide to such Hired Employees retiree medical benefits." *Id.* (emphasis added).

D. Proceedings Below

Boeing filed this indemnification action to recover the liabilities it incurred in the *UAW* arbitration and the *Harkness* litigation for early retirement pension and medical benefits for the Hired Employees. Both Boeing and Spirit filed cross-motions for summary judgment.

The Superior Court granted summary judgment to Spirit on the ground that the underlying early retirement benefits are "Excluded Liabilities" under the APA. Ex. A at 21-24. The court reasoned that because Boeing's CBAs were "Excluded Assets" not assumed by Spirit, liabilities associated with the CBAs necessarily were "Excluded Liabilities" for which Spirit had no duty to indemnify Boeing. *Id.* In reaching that conclusion, the Superior Court never even considered whether the *UAW* or *Harkness* payments were "in connection with" Spirit's "Assumed Liabilities" under the APA, pursuant to Spirit's express duty to indemnify Boeing for losses "in connection with or arising from … Assumed Liabilities." APA § 9.2(a). Having granted Spirit's motion for summary judgment, the Superior Court awarded Spirit $11,049,748.61 in attorneys' fees and costs. APA § 9.1(a). *See* Ex. B at 9. Boeing filed a timely notice of appeal.

ARGUMENT

I. Boeing is entitled to indemnification under the APA's plain language because the *UAW* and *Harkness* payments are "in connection with or arising from" the "pension" and "retiree medical" liabilities Spirit expressly assumed under the APA.

A. Question Presented

Whether the Superior Court erred by denying Boeing summary judgment on its indemnification claim, where the underlying early retirement pension and medical obligations are "Assumed Liabilities" under the APA, and the payments at issue are "in connection with or arising from" those liabilities within the meaning of the APA's indemnification provision.

This question was preserved at A123-145; A299-310; A316-322.

B. Scope of Review

"This Court reviews *de novo* the Superior Court's grant or denial of summary judgment." *Shrewsbury v. Bank of N.Y. Mellon*, 160 A.3d 471, 474 (Del. 2017) (internal quotation omitted).

C. Merits of Argument

This is an indemnification action. The APA requires Spirit to indemnify Boeing for "any and all Indemnifiable Damages … in connection with or arising from … the Assumed Liabilities." APA § 9.2(a). Among the "Assumed Liabilities" expressly assigned to Spirit by the APA are "pension" and "retiree

medical" liabilities "to the extent provided in Section 6.2." APA § 1.2(a)(iv). Therefore, Spirit must indemnify Boeing for the *UAW* and *Harkness* payments if those payments are "in connection with or arising from" "pension" or "retiree medical" liabilities "to the extent provided in Section 6.2." APA §§ 1.2(a)(iv), 9.2(a). These APA provisions directly and unambiguously answer the question at issue here and require judgment in Boeing's favor.

Section 6.2(f) and Schedule 6.2(f) dictate in plain terms the scope of Spirit's assumption of pension liabilities, while Section 6.2(g) addresses retiree medical. Beginning with pensions, Section 6.2(f) and its associated schedule required Boeing to transfer to Spirit the pension assets of each employee who accepted Spirit's offer of employment and did not retire from Boeing by August 2005. APA § 6.2(f); APA sched. 6.2(f), § 1(a). That describes every worker at the Oklahoma and Kansas plants whose benefits are the basis for Boeing's indemnification claim.

For each such employee, Spirit agreed that its plans would "include credit for [the employee's] past service with [Boeing] for eligibility and vesting," as well as "early retirement benefits and benefit accrual previously recognized under [Boeing's] Pension Plans." APA § 6.2(f). Spirit further agreed that its plans would assume liability for the employee's "benefits with respect to service recognized under [Boeing's] Pension Plans on or prior to the Closing Date." *Id.* And, critically, Spirit "agree[d] that neither [Boeing] nor [Boeing's] Pension Plans

shall have *any further responsibility* with respect to the assets and *Liabilities* so transferred, including without limitation, obligations following such transfers with respect to the benefits accrued by the [employees] under the applicable [Boeing] Pension Plans." *Id.* (emphasis added).

Similarly with regard to retiree medical benefits, Spirit agreed to "maintain retiree medical coverage for the benefit of each [employee] who was eligible for *or could have become eligible* for (after meeting applicable age and service requirements) retiree medical coverage … and shall provide each such [employee] full credit for periods of service prior to the Closing." *Id.* § 6.2(g) (emphasis added). Once again, Spirit "agree[d] that [Boeing] and its retiree medical plans shall have *no further responsibilities* after the Closing Date to provide to such [employees] retiree medical benefits." *Id.* (emphasis added).

Both the *UAW* grievants and the *Harkness* class members sought to be reclassified as "laid off," despite being fully employed by Spirit, for one reason only: to establish their entitlement to early retirement benefits under Boeing's plans for their Boeing service. Under the plans' layoff bridge, a "laid off" employee is entitled to early retirement benefits, including a monthly pension payment and medical coverage, upon turning 55. *See* A511; A537. Providing the value of those benefits is exactly what Boeing is now obligated to do. *See* A573-642; A736-760. These obligations thus plainly arise from or are at least connected

to the very "pension" and "retiree medical" liabilities that the parties agreed Spirit would assume and Boeing would have "no further responsibility" to provide. APA §§ 6.2(f), (g). It follows that Spirit must indemnify Boeing for the costs of those obligations. APA § 9.2(a).

The Superior Court rejected this straightforward interpretation of the APA in a mere paragraph, declaring that "Spirit's only obligation [under Section 6.2] was to create its own pension plans … that mirrored Boeing's, including its own 'layoff bridge,'" and to "credit [the employees for their] past service with Boeing." Ex. A at 24. But this atextual reading of the contract directly contradicts the APA's language, discussed above, establishing that Spirit assumed these liabilities, and that neither Boeing nor its plans would have "*any* further responsibility" for them. APA §§ 6.2(f), (g) (emphasis added); *see Bonanno v. VTB Holdings, Inc.*, 2016 WL 614412, *15 (Del. Ch. Feb. 8, 2016) (Noble, V.C.) ("any" is an "expansive word"). To underscore how comprehensive the parties intended this provision to be, the APA clarifies that it applies "*without limitation*," including to "obligations following such transfers with respect to the benefits accrued … under the applicable [Boeing] Pension Plans." APA § 6.2(f). This broad language simply cannot be squared with the Superior Court's holding that Spirit's *only* obligation was to credit prior service under its own "mirror" plans. And the Superior Court's reading makes Boeing, rather than Spirit, responsible for the employees' accrued

benefits, which is directly contrary to the parties' express agreement that Boeing would not have "any" such further responsibility.

Spirit argued below that the "any further responsibility" clause does not apply to the early retirement liabilities at issue here because the "bridge benefits were never 'accrued by the Hired Employees.'" A239. That misstates the law. The layoff bridge is a contingent right to garden variety early retirement benefits in the event the employee was laid off within five (or six) years of turning 55. It is thus precisely the sort of "unpredictable contingent event benefit" that, under ERISA, is "accrued upon [its] creation rather than upon the occurrence of the unpredictable contingent event." *Bellas v. CBS, Inc.*, 221 F.3d 517, 532 (3d Cir. 2000); *see also Shaver v. Siemens Corp.*, 670 F.3d 462, 486 (3d Cir. 2012) (same). Thus, as a matter of law, any employee with 10 years' service who was at least 49 or 50 on the closing date had *already accrued* by that date an entitlement to early retirement benefits. And even were that not so, the APA defines "Liabilities" to include "contingencies that have not yet become liabilities," whether "known or unknown"; this broad language unquestionably encompasses the benefits at issue here. APA § 12.1. Either way, the APA transferred Boeing's liability for this early retirement entitlement to Spirit.

Spirit also advanced the erroneous and atextual argument below that it could not have assumed responsibility for these liabilities under the APA because ERISA

prohibited Spirit's pension plans from paying pension benefits to the *UAW* and *Harkness* plaintiffs as current Spirit employees. *See* A88-95. *Whether or not that description of what ERISA provides is accurate, nothing in ERISA prevents Spirit (the corporate entity) from indemnifying Boeing for these costs*. And it is that—indemnification—that *the APA* required. After all, ERISA forbids *Boeing*'s pension plan from paying these benefits, because the affected employees are no longer participants in that plan. Boeing transferred the employees' pension assets to Spirit, and they then participated in Spirit's plans. And as a result, Boeing is presently satisfying the *Harkness* settlement and the *UAW* pension judgment out of its general corporate assets, as Spirit could do as well.[2] The only question thus is whether Spirit (not its plan) must *indemnify* Boeing for these payments, which the APA clearly provides it must do.

The indemnification provision read together with Section 6.2(f) dispels any doubt that Spirit must indemnify Boeing here. Section 6.2(f) expressly provides that "[*Spirit*] agrees that neither [Boeing] nor [Boeing's] Pension Plans shall have any further responsibility with respect to the assets and Liabilities so transferred."

[2] Boeing did place the *UAW* employees back into a retiree medical plan to pay for their medical benefits. Like Boeing, Spirit could provide these same retiree medical benefits without violating ERISA. Moreover, when the UAW claimants are actually *in Boeing's medical plan*, there can be no question that these liabilities "arise out of"—and at the very least are "in connection with"—the "Assumed Liabilities" in Section 1.2(a)(iv).

APA § 6.2(f) (emphasis added). So Spirit, *the corporate entity*, agreed to relieve both Boeing and Boeing's pension plans from any further responsibility. Spirit's *plans* made no similar representation, and so the *plans'* ability to pay under ERISA is irrelevant under the APA. Likewise for retiree medical benefits: "[*Spirit*] agrees that [Boeing] and its retiree medical plans shall have no further responsibilities." APA § 6.2(g) (emphasis added). It therefore does not matter if ERISA prohibits Spirit's *plans* from paying for these benefits. The APA imposes that responsibility, and therefore the indemnification obligation, on *Spirit itself*.

The APA's text also makes crystal clear Spirit's agreement to relieve *Boeing itself* from further responsibility. There would have been no need to include Boeing, the corporate entity, in the "no further responsibility" clauses if the liabilities Spirit assumed in Section 6.2 were limited to those payable only by ERISA plans; Boeing's inclusion would have been superfluous. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (courts may not "render any part of the contract mere surplusage") (internal quotation omitted). The APA thus contemplated precisely this scenario: an obligation on Boeing to pay for its former employees' pension and retiree medical liabilities out of its general corporate assets. And Section 6.2 and the indemnification clause make clear that Spirit assumed ultimate responsibility for those liabilities.

In short, the early retirement liabilities at issue here are precisely the "pension" and "retiree medical" "liabilities (or contingencies that have not yet become liabilities)" that Spirit assumed under the APA. APA §§ 1.2(a)(iv), 12.1. The *UAW* and *Harkness* payments indisputably arise from or are "in connection with" such liabilities, which is all that is needed to trigger the APA's broad indemnity provision. APA §9.2(a); *see Lillis v. AT&T Corp.*, 904 A.2d 325, 331-32 (Del. Ch. 2006) ("in connection with" in an indemnity provision is "sweeping [in] nature" and "constitutes the broadest possible authorization"); *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851, 861 (8th Cir. 2010) ("in connection with" is "given broad effect") (brackets omitted); *see also Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *3 (Del. Ch. July 14, 2009) (Strine, V.C.) (describing "a broad indemnification provision" for losses "arising out of or in connection with the affairs of the Partnership"). Even the Superior Court agreed that "the UAW Grievants and the *Harkness* Class Action plaintiffs" brought their claims "to recover [their] *early retirement benefits*" under "Boeing's Benefit Plans." Ex. A at 20 (emphasis added).

At bottom, this case is about how Boeing and Spirit allocated their respective risks in the APA. As the *UAW* arbitrator recognized, the employees here are reaping an unexpected benefit. *See* A619; A622. Ordinarily an employee must choose between either (1) retiring at age 55 but accepting a lower pension, or

(2) waiting to retire until age 65 in exchange for a higher pension. The employees here, however, were relieved of this choice in the underlying proceedings (albeit in error), which permitted them to collect early retirement benefits from Boeing starting at age 55, and then collect a full pension from Spirit upon retiring at age 65. The question for this Court to decide is which party undertook the risk under the APA of having to pay for these unexpected benefits awarded to the Hired Employees.

The answer is Spirit. The APA clearly provides that once Boeing's plans transferred the pension assets to Spirit's plans, Spirit "agree[d] that neither [Boeing] nor [its] Pension Plans shall have *any further responsibility* with respect to the [pension] assets *and Liabilities* so transferred." APA § 6.2(f) (emphasis added). Similarly, Spirit "agree[d] that [Boeing] and its retiree medical plans shall have *no further responsibilities* after the Closing Date to provide to such [employees] retiree medical benefits." APA §6.2(g) (emphasis added). The counter-story proves that Spirit is responsible for the pension liabilities in question. Had Boeing *kept* the pension assets for employees who joined Spirit instead of transferring them to Spirit, Boeing would indeed now be on the hook for their additional early retirement benefits. And in fact that is exactly what happened with the former Boeing employees who were already 55 on the closing date: Boeing retained their pension assets and paid their early retirement benefits (even if they

continued working for Spirit). *See* A113. Boeing is not seeking indemnification for pension and retiree medical liabilities for those employees. *See* A633. But regarding the *UAW* grievants and *Harkness* class members, because Boeing transferred all of their pension assets to Spirit (more than $700 million), and substantially reduced the purchase price (by almost $250 million), Spirit agreed to assume responsibility for *all* of their pension and retiree medical liabilities, and to relieve Boeing of "any further responsibility." This Court should hold Spirit to its bargain.

II. The Superior Court fundamentally misread the APA in concluding that any liabilities, including obligations for pension and retiree medical benefits, arising from "Excluded Assets" are necessarily "Excluded Liabilities."

A. Question Presented

Whether the Superior Court erred by holding that, if the CBAs themselves are "Excluded Assets," then all liabilities arising under the CBAs are necessarily "Excluded Liabilities."

This question was preserved at A160-170; A311-316.

B. Scope of Review

"This Court reviews *de novo* the Superior Court's grant or denial of summary judgment." *Shrewsbury*, 160 A.3d at 474 (internal quotation omitted).

C. Merits of Argument

As shown above, the "Assumed Liabilities" and indemnification provisions of the APA directly govern the dispute at issue here. Rather than simply apply these straightforward provisions, however, the Superior Court granted summary judgment for Spirit based on a fundamental misreading of the APA. The court below clearly erred by holding that because Boeing's CBAs are "Excluded Assets" under the APA, any liabilities arising under the CBAs necessarily are "Excluded Liabilities." *See* Ex. A at 21-24. The Superior Court's reading ignores both the structure of the APA and its plain terms. The APA nowhere establishes any

necessary correlation between "Assets" and "Assumed Liabilities" or between "Excluded Assets" and "Excluded Liabilities," which it naturally would have done had the parties intended what the Superior Court inexplicably said they did. To the contrary, the APA carefully defines the particular liabilities that Spirit assumed, with those provisions standing on their own terms. *See* APA §§ 1.2(a)(i)-(ix). The Superior Court incorrectly held otherwise by misreading the critical APA provisions and drawing implausible and impermissible inferences from other provisions that do not relate to the "pension" or "retiree medical" benefits at issue here at all.

1. The APA specifically contemplates that a liability can arise from an "Excluded Asset" and nonetheless constitute an "Assumed Liability."

The APA's entire purpose was to divide the various assets and liabilities associated with the Oklahoma and Kansas plants between Boeing and Spirit. Spirit would obtain the "Assets" and "Assumed Liabilities" (APA §§ 1.1(a) and 1.2(a), respectively), and Boeing would retain the "Excluded Assets" and "Excluded Liabilities" (§§ 1.1(b) and 1.2(b), respectively). But the APA nowhere suggests any necessary relationship between assumed assets and assumed liabilities, or between excluded assets and excluded liabilities, such that the latter followed the former. *Indeed, the APA carefully carves the assets and liabilities to be allocated*

into four separate categories precisely because there is no simple one-to-one relationship between the assets and liabilities.

The Superior Court went to great lengths to establish that Boeing's CBAs were an excluded asset, and that the liabilities at issue arose under the CBAs, but neither fact is relevant, let alone dispositive. Under the APA, a liability can arise under an "Excluded Asset" and nonetheless constitute an "Assumed Liability." For example, liabilities for vacation and sick leave arise only under the CBAs, which everyone agrees are "Excluded Assets." And yet even Spirit concedes that it assumed those liabilities. A273. It is therefore irrelevant that Boeing's CBAs with the Hired Workers are "Excluded Assets." *See* APA § 1.1(b)(xiii) (among the "Excluded Assets" are "[t]he existing collective bargaining agreements covering the employees of the Business"). The question here is whether Spirit assumed liability for the retiree benefits payments at issue; the answer to that question lies in the provisions of the APA directly defining Spirit's "Assumed Liabilities"—not in an inquiry into whether the CBAs were excluded or assumed assets.

Here, as explained above, Spirit expressly *assumed* all "Liabilities for pension Liability, accrued vacation, retiree medical, flexible spending accounts, sick leave, and personal time, to the extent provided in Section 6.2." APA § 1.2(a)(iv). The proviso "to the extent provided in Section 6.2" (discussed in Part I.C above) is the *only* limitation on Spirit's assumption of these liabilities; there are

no limitations based on whether the liabilities may also relate to an "Excluded Asset" such as a Boeing CBA. Indeed, as noted, several of the liabilities Spirit expressly assumed in Section 1.2(a)(iv), such as vacation and sick leave, arise *only* under the CBAs—as Spirit itself recognized below. *See* A273. If liability for those CBA-related benefits were, in fact, necessarily "Excluded Liabilities" because they arose from an "Excluded Asset," Spirit's express assumption of those liabilities in Section 1.2(a)(iv) would be rendered illusory in violation of the most basic rules of contract interpretation. *See Osborn*, 991 A.2d at 1159 (courts must "read a contract as a whole and … give each provision and term effect, so as not to render any part of the contract mere surplusage").

Nor is there anything illogical about Spirit assuming certain liabilities that arise in whole or in part from the CBAs without also assuming the CBAs themselves. Boeing and Spirit did not, and realistically could not, transfer the CBAs themselves because those contracts included many provisions specific to Boeing. But the fact that Spirit did not broadly assume *all* of Boeing's rights and responsibilities under the relevant CBAs does not mean that Spirit did not or could not assume *specific* rights and responsibilities that flow from those CBAs. Parties are free to transfer specific contractual liabilities without transferring the contracts

as a whole, and that is precisely what the parties did here. The Superior Court erred by failing to grasp this most basic of points about the APA.[3]

In reaching its conclusion that the benefits at issue here were excluded liabilities, the Superior Court relied upon Section 1.2(b)(xiii), which states that Spirit did not assume "Liabilities under any Contract not assumed by [Spirit] under Section 1.2(a)." APA § 1.2(b)(xiii). *See* Ex. A at 22. The court read this provision to mean that liabilities under a CBA—"a Contract not assumed by [Spirit]"—must therefore be excluded. *But that reading overlooks the most important words necessary to understanding this provision: "under Section 1.2(a)."* To recap the discussion above detailing how the APA *actually* divides all assets and liabilities between the parties, *see supra p. 25-26,* Section 1.2(a) refers to "Assumed *Liabilities*." What is assumed (or not) "under Section 1.2(a)" are nine categories of liabilities, not contracts (which are assets). *Thus, there can be no "Contract … assumed [or not assumed] … under Section 1.2(a)."* APA

[3] The Superior Court's lack of understanding of the APA and the distinction between contracts (which are assets) and the liabilities arising from those contracts is highlighted by its pervasive and perplexing jumbling of the terms "assets" and "liabilities" throughout the opinion. *See*, *e.g.*, Ex. A at 21 ("[T]he liabilities are Excluded assets."); *id.* ("Boeing's CBAs constitute Excluded Assets *and* Excluded *Liabilities*."); *id.* at 22 ("The CBAs—specifically as Excluded Assets …—are not Assumed *Liabilities*."); *id.* ("The CBAs … are not Assumed *Liabilities*."); *id.* ("[T]he CBAs are Excluded *Liabilities*."), *id.* at 24 ("[T]he CBAs are Excluded *Liabilities*.") (all emphases added).

§ 1.2(b)(xiii) (emphasis added). The Superior Court's manifest error was that it failed even to consider and therefore to give effect to the most important words necessary to an understanding of Section 1.2(b)(xiii)—its final phrase, "under Section 1.2(a)." The *only* interpretation of Section 1.2(b)(xiii) that gives effect to the entire clause is to read it as saying that if a contractual *liability* was not assumed under Section 1.2(a)—*i.e.,* the subsection that defines "Assumed Liabilities"—then it is an "Excluded Liability." It does not say, and cannot as a matter of law be read to say, that Boeing retained every liability under every excluded contract.

Read in its entirety, Section 1.2(b)(xiii) simply confirms that Spirit did not assume any contractual liabilities under the APA other than those it expressly assumed. But both "pension" and "retiree medical" liabilities *are* expressly assumed "under Section 1.2(a)." *See* APA §1.2(a)(iv). Spirit's specific, express assumption of these liabilities under Section 1.2(a) thus renders inapplicable Section 1.2(b)(xiii)'s exclusion of contractual liabilities not expressly assumed. *Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *7 (Del. Ch. Dec. 7, 1999) (Strine, V.C.) (provision "expressly allocat[ing] liability for the Disputed Benefits … obviat[es] any need to resort to these more general [] provisions"). The Superior Court's misreading of this provision is clear legal error, which alone requires reversal of the summary judgment decision.

2. The Superior Court erred in reading other subparts of 1.2(a) to undermine Spirit's express assumption of pension and retiree medical liabilities in Section 1.2(a)(iv).

The Superior Court also misread other subsections of Section 1.2(a) to support its flawed conclusion that Spirit had not assumed these "pension" and "retiree medical" liabilities in Section 1.2(a)(iv).

First, noting that "Section 1.2(a) provides for Spirit's Assumed Liabilities," the Superior Court incorrectly held that Section 1.2(a) "states that the *only* contracts assumed by Spirit are 'Assigned Contracts.'" Ex. A at 21-22 (emphasis added). It appears that the court was referring to subsections (ii) and (iii) of Section 1.2(a), under which Spirit assumed "Liabilities arising after the Closing under the Assigned Contracts" (and "under any Assigned Contract" Boeing entered into between the signing and closing dates), as long as the liabilities arise from post-closing acts or omissions. APA §§ 1.2(a)(ii), (iii).

These provisions say nothing more than that Spirit assumed some (but not all) liabilities under the Assigned Contracts. Contrary to the court's erroneous inferences, nowhere do these provisions say that those are the "only" contractual liabilities Spirit assumed, nor do they exclude (or even address) liabilities under *non*-assigned contracts (such as CBAs). Indeed, nothing in Section 1.2 purports to limit the liabilities assumed in subsection (iv) to those that arise under assigned contracts, and such a limitation would be nonsensical because (as noted above)

subsection (iv) by its terms *encompasses* certain liabilities (*e.g.*, vacation and sick leave) that arise *only* under the CBAs (*i.e.*, contracts Boeing did not assign to Spirit).

Second, the court made incorrect inferences about the parties' presumed "intent" that are not supported by the APA's plain language. The court started by noting that "[m]ultiple provisions throughout Section 1.2 state that Spirit assumed only those liabilities that arose after closing; Spirit did not assume liability 'arising out of any act or omission that occurred prior to closing.'" Ex. A at 22 & n.109 (citing APA §§ 1.2(a)(ii), (iii), (v), (vi), (vii), and (ix)).[4] From those discrete provisions, the court somehow inferred that Spirit's overall assumption of liabilities in Section 1.2 "reflects Spirit's *intent* to assume only those liabilities over which it had control." *Id.* at 22 (emphasis added). The court rejected Boeing's textual arguments because they would "contravene this clear *intent* by

[4] *See*, *e.g.*, APA § 1.2(a)(ii) (assuming "[l]iabilities arising after the Closing under the Assigned Contracts (other than Liabilities arising out of or relating to any act or omission that occurred prior to the Closing)"); *id.* § 1.2(a)(iii) (assuming "[l]iabilities of Seller arising after the Closing under any Assigned Contract included in the Assets that is entered into by Seller after the date hereof … (other than Liabilities to the extent arising out of or relating to any act or omission that occurred prior to the Closing)"); *id.* § 1.2(a)(v) (assuming warranty liability for products or components "delivered after the Closing Date"); *id.* § 1.2(a)(ix) (assuming asbestos liability for products "manufactured or produced after the Closing Date" and exposure "after the Closing Date").

having Spirit assume liability for Boeing's CBAs, which Boeing negotiated and executed before closing." *Id.* at 23 (emphasis added).

The text of the APA squarely contradicts the court's sweeping declaration of Spirit's unexpressed "intent." Even the provisions the court cites do not support the proposition that Spirit "inten[ded]" to assume "only those liabilities that arose after the closing," much less "only those liabilities over which it had control." Ex. A at 22. For example, Spirit assumed all "Liabilities arising from the defective manufacture of products … delivered after the Closing Date, whether manufactured or repaired *before*, on or after the Closing Date." APA § 1.2(a)(vi) (emphasis added). And Spirit assumed warranty and design defect liabilities for any products "delivered after the Closing Date" with no limitation on when they were designed or manufactured. *See* APA §§ 1.2(a)(v), (vii). Thus, the court's extrapolation of a generalized (but unexpressed) intent from a handful of other subsections in Section 1.2(a) does not withstand even passing scrutiny.

Moreover, the court *failed* to address the specific provision at issue here—Section 1.2(a)(iv)—which governs liability for employee benefits and which includes *no* temporal limitation on the liabilities Spirit assumed. To the contrary, it expressly requires Spirit to assume broad liability for certain employee benefits (including "pension" and "retiree medical" benefits) that had *already* accrued as of the closing, when the employees still worked for Boeing. And that requirement is

no accident: the provision would be meaningless if Spirit were assuming liability only for employee benefits that accrued *after* the closing; in that event, there would be no Boeing liability for Spirit to assume in the first place, and no need for the extra assets Boeing transferred to Spirit to cover the accrued obligations.

If anything, the various temporal limitations on liability in *other* subsections of Section 1.2(a) only underscore the *absence* of such a limitation in Section 1.2(a)(iv). The parties knew how to limit Spirit's "Assumed Liabilities" to a specific time period, yet chose not to do so for the employee benefit liabilities addressed in Section 1.2(a)(iv)—and for obvious reasons, *see supra* at 23-24.

The Superior Court thus clearly erred in relying on a perceived extra-textual "intent" to limit the "Assumed Liabilities" in Section 1.2(a)(iv) to only "those liabilities that arose after closing" (or, alternatively, "those liabilities over which [Spirit] had control"). Ex. A at 22; s*ee generally Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 881 (Del. 2015) ("Instead of giving effect to the parties' contractual bargain, the Superior Court erred by implying contractual obligations on the part of the seller that were inconsistent with the contract's express terms.").

The court also erred in speculating that "the parties would have included a cross-reference to Section 1.2(a)(iv) in Section 1.1(b)(xiii) had they intended to subject this Excluded Asset to an exception." Ex. A at 23. Again, the court

fundamentally misunderstood the structure of the APA. Section 1.2(a)(iv) describes "Assumed Liabilities," while Section 1.1(b)(xiii) describes "Excluded Assets." The way to specify which obligations under excluded contracts are "Assumed Liabilities" is to include those obligations in the list of "Assumed Liabilities"—which is *precisely* what the parties did in Section 1.2(a)(iv). A "cross-reference" would have been superfluous and confusing.

Thus, the APA does not support the court's conclusion that it is "illogical that Spirit would agree in one discrete instance to assume the liabilities associated with Boeing's CBAs, when Spirit was not assuming those agreements or otherwise had control over the agreements which could create those liabilities." Ex. A at 23. The erstwhile Boeing employees continued to work for Spirit at the Oklahoma and Kansas plants after the closing. Either Spirit or Boeing had to pay for employee benefits that accrued on or before the closing. There is nothing "illogical" about the parties' decision that Spirit, who would be responsible for and most directly affected by workers' overall satisfaction (or displeasure) with their benefit package, would assume liability for these particular benefits—in exchange for substantial consideration from Boeing (the workers' accrued plan assets and a quarter-billion-dollar price reduction). The relevant APA provisions are clear and unambiguous, and the Superior Court therefore had no warrant to stray from that text to base its interpretation of the contract on Spirit's perceived extra-textual

intent. *See*, *e.g.*, *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (a court's view of a party's unexpressed "intent" is irrelevant; what matters instead are "the parties' intentions as reflected in the four corners of the agreement").

At bottom, the 113-page APA is a comprehensive agreement, negotiated at arm's length between two sophisticated business parties represented by experienced counsel. Delaware law required the Superior Court to enforce the contract's plain terms as written. Those terms make clear that Spirit assumed liability for the Hired Worker's "pension" and "retiree medical" benefits. The fact that the CBAs were "Excluded Assets" is legally irrelevant to the question decided by the Superior Court and now before this Court. Parties are free to transfer liabilities in a sophisticated commercial transaction even if the underlying asset is not transferred, and that is plainly what the parties to this transaction did. Indeed, that was the whole point of Sections 1.1 and 1.2 of the APA, a fundamental point the Superior Court missed. This Court should thus reverse the Superior Court's grant of summary judgment to Spirit.

3. Even under the Superior Court's flawed reasoning that CBA liabilities are excluded, Boeing is still entitled to indemnification for the *Harkness* settlement.

Even if this Court were to affirm the Superior Court's holding that liabilities arising under CBAs are necessarily "Excluded Liabilities," Boeing would still be

entitled to indemnification for the *Harkness* settlement. The *Harkness* plaintiffs raised direct claims for benefits under ERISA in addition to their CBA breach claims. *See* Second Am. Consolidated Compl., *Harkness*, No. 05-cv-1251 (D. Kan. June 16, 2010), ECF No. 404 (claims 6-9, 11, 15-16); A643-686. The ERISA claims—which were not based on the CBAs at all—survived summary judgment and were included in the settlement of that action. *See* 2012 WL 6158752, at *19-20; A728-30. Thus, Boeing's $90 million settlement liability in *Harkness* resolved ERISA claims for benefits. This undisputed fact is sufficient to reverse the grant of summary judgment to Spirit for the *Harkness* payments, and to grant summary judgment for Boeing. It also serves to underscore that under the APA, properly read, the legal source of the obligation to pay pension benefits—CBA, ERISA or some other law—is beside the point. What matters is that those benefits were among the *liabilities* that Spirit assumed under the APA and that the obligations imposed on Boeing arise from, or at least are in connection with, those *assumed liabilities*.

III. Boeing, Not Spirit, is entitled to attorneys' fees and costs.

A. Question Presented

Whether the Superior Court erred by awarding Spirit more than $11 million in attorneys' fees and costs related to the *UAW* arbitration, the *Harkness* litigation, and this litigation.

This question was preserved at A338-351.

B. Scope of Review

This Court reviews a litigant's contractual entitlement to attorneys' fees and costs, a pure question of law, *de novo*. *See*, *e.g.*, *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of Argument

Under the APA, Spirit must indemnify Boeing for damages arising from or in connection with "Assumed Liabilities," while Boeing must indemnify Spirit for "Excluded Liabilities." APA §§ 9.1(a), 9.2(a). The court awarded Spirit the more than $11 million in attorneys' fees and costs it requested. *See* Ex. B at 9, 11.

If this Court agrees with Boeing, there would be no contractual basis to award Spirit its attorneys' fees and costs under Section 9.1(a). To the contrary, under those circumstances Boeing would be entitled to its fees and costs under Section 9.2(a). Accordingly, Spirit's fee award should be reversed and the case remanded for consideration of Boeing's claim for attorneys' fees and costs.

CONCLUSION

This Court should reverse the grant of summary judgment and the award of attorneys' fees and costs to Spirit, and remand the case with directions to enter judgment in favor of Boeing and to consider Boeing's claim for attorneys' fees and costs.

MORRIS, NICHOLS, ARSHT &
TUNNELL LLP

/s/ William M. Lafferty
William M. Lafferty (#2755)
John P. DiTomo (#4850)
Barnaby Grzaslewicz (#6037)
1201 North Market Street
Wilmington, DE 19801
(302) 658-9200

Attorneys for Appellant-Plaintiff Below
The Boeing Company

OF COUNSEL:

KIRKLAND & ELLIS LLP

Paul D. Clement, P.C.
Craig S. Primis, P.C.
Michael A. Glick
Jason M. Wilcox
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Sopan Joshi
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

February 19, 2018

CERTIFICATE OF SERVICE

I, Barnaby Grzaslewicz, do hereby certify that a copy of the foregoing was served on March 6, 2018 upon the following counsel of record via File & Serve*Xpress*:

John A. Sensing, Esq.
Jesse L. Noa, Esq.
POTTER ANDERSON & CORROON LLP
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899

/s/ Barnaby Grzaslewicz
Barnaby Grzaslewicz (#6037)