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Case Number 5,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BOEING COMPANY,	)	No. 5, 2018
	)	
Plaintiff-Below, Appellant,	)	CASE BELOW:
	)	Superior Court of the State of
v.	)	Delaware, C.A. No. N14C-12-055
	)	EMD CCLD
SPIRIT AEROSYSTEMS, INC.,	)	
	)	[redacted]
Defendant-Below, Appellee.	)	

PUBLIC VERSION

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[redacted]

TABLE OF CONTENTS

Page

Page

[redacted]

TABLE OF CITATIONS

Page(s)

Cases

Statutes & Rules

Other Authorities

[redacted]

NATURE OF PROCEEDINGS

This is a contract dispute. In February 2005, The Boeing Company ("Boeing") divested certain assets and certain liabilities to Spirit AeroSystems ("Spirit"), pursuant to the terms of an Asset Purchase Agreement ("APA"). Under the APA, any liability that Spirit did not expressly assume was "Excluded", and remains the "sole responsibility" of Boeing.

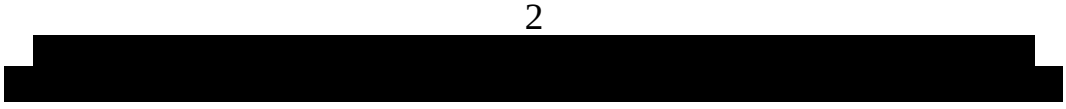
In connection with the divestiture, Boeing classified union employees who were hired by Spirit as "terminated due to divestiture" rather than "laid off". The unions immediately challenged that classification, arguing that by terminating the employees (rather than laying them off) Boeing had breached the seniority and workforce administration provisions of its collective bargaining agreements ("CBAs") with each union, including CBAs with the UAW, SPEEA and IAM.

Ultimately, the UAW elected to arbitrate Boeing's breach of its CBA. SPEEA instead chose litigation and sued Boeing for its CBA breach in a case called *Harkness*. IAM and a class of former Boeing employees who were members of those unions joined the *Harkness* lawsuit. In both proceedings, Boeing repeatedly attempted to avoid liability by recasting the breach of contract CBA claims as claims for the payment of pension and retiree medical "benefits". Boeing's argument was rejected by the UAW arbitrator, the Northern District of Illinois (twice), and the Seventh Circuit. In fact, every tribunal that considered

Boeing's argument rejected it, ruling that Boeing was ordered to pay damages for breach of contract, and not pension or retiree medical benefits. As the Northern District of Illinois admonished Boeing: "Throughout its briefs Boeing calls the payments 'pension payments' and 'pension benefits', but repeating something like a mantra does not make it so."

After losing the UAW arbitration and settling *Harkness*, Boeing sued Spirit for indemnification for expenses relating to those proceedings. Again, Boeing repeated its "benefits" mantra—the fundamental basis of Boeing's indemnification claim against Spirit was that it had been ordered to pay pension and retiree medical benefits that Spirit assumed under the APA. Boeing opposed Spirit's motion to dismiss on that basis, claiming that discovery would show that the liabilities it had incurred were pension and retiree medical benefits, not breach of contract damages. The Superior Court directed the parties to take discovery and "focus[] on . . . developing the facts that would put [the liabilities] either within a Collective Bargaining Agreement situation, or part of this [APA Section] 6.2 that talks about setting up the [Spirit] plans". (B810-11 at 80:21-81:8.)

After discovery, in support of its motion for summary judgment, Spirit presented overwhelming evidence that the liabilities at issue arose from Boeing's breach of its CBAs. The evidence included statements by the unions that their claims were based on Boeing's CBA breaches, repeated statements by Boeing that



the claims arose from its CBAs, admissions by Boeing's key witness in this case that the underlying proceedings arose from Boeing's CBAs, and rulings by the arbitrator, lower courts and appellate court that the liabilities arose from Boeing's breach of its CBAs.

In the face of that overwhelming evidence, Boeing, in its summary judgment opposition, was forced to concede that the liabilities at issue arose from its breach of the CBAs. Boeing repeats that concession on appeal. It is fatal to Boeing's indemnification claims.

Spirit did not assume liability for Boeing CBA breaches in the APA. Section 1.2(a) of the APA lists each and every liability that Spirit assumed; it makes no reference to Boeing CBAs at all. Because any liability not expressly assumed by Spirit in Section 1.2(a) of the APA is excluded, liabilities for Boeing's breach of its CBAs are Boeing's "sole responsibility". (APA §§ 1.2(a), (b).)

Were there any doubt, liabilities for breach of Boeing's CBAs also are expressly identified "Excluded Liabilities". Section 1.2(b) contains a non-exhaustive list of liabilities that Spirit did not assume, *i.e.*, "Excluded Liabilities". Any Excluded Liability remains the "sole responsibility" of Boeing. Section 1.2(b)(xiii) excludes "Liabilities under any Contract not assumed by Buyer under Section 1.2(a)". Boeing's CBAs (and liabilities for breach of Boeing's CBAs) are not assumed in Section 1.2(a). Indeed, under Section 1.2(a)(ii), Spirit

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assumed liability only for "Assigned Contracts", a term defined by Section 1.1(a)(v) to expressly exclude the "Contracts described in Section 1.1(b)", which lists a number of Excluded Assets, including, *inter alia*, Boeing's CBAs. Boeing has no basis to claim indemnification from Spirit for CBA breach liabilities, and its arguments to the contrary are meritless.

First, Boeing misreads the Superior Court's opinion as conflating Excluded Assets with Excluded Liabilities. It did not do so. The Superior Court held that because Boeing's CBAs were Excluded Assets, they were not included within the definition of Assigned Contracts, which meant that they were not included in the list of contracts assumed under Section 1.2(a)(ii), which means liabilities under the CBAs are Excluded Liabilities under Section 1.2(b)(xiii). That analysis is correct, not confused.

Second, the Superior Court did not make improper inferences about the intent of the parties. Its observations about lack of cross-references to the CBAs in Section 1.2(a) or Section 6.2 only reinforce that the parties could have expressly assigned liability for CBA breaches to Spirit, but did not.

Third, Boeing's argument that the Superior Court ignored the "in connection with" language of the indemnity provision of the APA is incorrect. Under the APA, the liability at issue must be an Assumed Liability before Spirit has any responsibility to indemnify expenses incurred by Boeing "in connection

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with" it. Because the liabilities at issue were not assumed by Spirit, the "in connection with" language cannot reach them.

Fourth, Boeing's reliance on the "no further responsibility" language in Section 6.2 is misplaced. That language does not expand Spirit's liability beyond the specific obligations set forth in those provisions—to set up new pension and retiree medical plans and credit prior service at Boeing. The "no further responsibility" language simply means that Spirit cannot sue Boeing if, for example, the assets Boeing transferred were insufficient to cover the cost of the new Spirit plans.

Fifth, Boeing's interpretation of what liabilities were transferred to Spirit under Section 6.2 would require both parties to have violated ERISA, which the APA expressly prohibits.

Sixth, Boeing misstates the purpose of the $243 million credit to the APA's purchase price. That credit reduced by $243 million Spirit's exposure from having to set up a new (unfunded) retiree medical plan, and a new (potentially underfunded) pension plan. It had nothing to do with any CBA liability. In any event, the credit cannot expand liability beyond what is expressly set forth in Section 1.2(a), as Boeing itself has admitted.

Seventh, Boeing's attempt to cleave the *Harkness* settlement from the Superior Court's ruling should be rejected. There is no substantive difference

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between the liability at issue in UAW and in *Harkness*—both turn on Boeing's breach of its CBAs.

In sum, the Superior Court's analysis was simple, irrefutable and correct: Boeing's claims arise from expenses it incurred as a result of its breach of its CBA contractual obligations, which are not Assumed Liabilities under the APA, and indeed were expressly included in the non-exhaustive list of Excluded Liabilities. Accordingly, the Court should affirm.

[redacted]

SUMMARY OF ARGUMENT

1. **Denied**. Boeing has a right to indemnification only for expenses incurred "in connection with or arising from" the "Assumed Liabilities". (APA § 9.2(a).) Thus, the decisive question in this case is whether the expenses for which Boeing now seeks indemnification—*i.e.*, damages Boeing incurred for violating its CBA contracts with its unions—are an "Assumed Liability". The APA sets up a simple structure for determining this issue: if a liability is listed in Section 1.2(a), it is an Assumed Liability; if it is not, it is an Excluded Liability. Liabilities for Boeing's breach of its CBAs are not listed in Section 1.2(a). As a result, such liabilities are not Assumed Liabilities, but, rather, are "Excluded Liabilities", for which Boeing retains "sole responsibility", under APA Section 1.2(b). That should end the analysis.

To eliminate any ambiguity, however, APA Section 1.2(b) provides a non-exhaustive list of particular liabilities that are expressly excluded from Boeing's transfer to Spirit. Relevant here, Section 1.2(b)(xiii) states that "Liabilities under any Contract not assumed by Buyer under Section 1.2(a)" are Excluded Liabilities. Liabilities for Boeing's breach of its CBAs are "not assumed by Buyer under Section 1.2(a)"—indeed, the CBAs are nowhere mentioned in that section, nor are the CBAs one of the "Assigned Contracts" referenced in

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Section 1.2(a)(ii). Thus, APA Section 1.2(b) expressly states that the liabilities at issue were excluded from the transfer to Spirit.

Boeing tries to wedge its claims into Section 1.2(a)(iv), which relates to, *inter alia*, certain pension and retiree medical benefit liabilities. That fails for two reasons:

First, as multiple courts have held, and as Boeing now concedes, the liabilities for which Boeing seeks indemnification are *not* pension or retiree medical benefit liabilities; they are straightforward breach of contract damages. Thus, Section 1.2(a)(iv) does not apply.

Second, even if Section 1.2(a)(iv) could apply here, that provision states that Spirit assumed pension and retiree medical liabilities only "*to the extent provided in Section 6.2*". And Sections 6.2(f) and (g)—the provisions addressing pension and retiree medical—do not provide Boeing with a hook to seek indemnification from Spirit. Those provisions merely required Spirit to create new pension and retiree medical plans for the hired employees using the assets that Boeing transferred to Spirit for that purpose. The "no further responsibility" language means that ***Spirit cannot sue Boeing*** if, for example, the assets that Boeing transferred to Spirit to set up the new plans were insufficient to cover the liabilities due under those new Spirit plans. It protects ***Boeing from a suit by Spirit***. But no part of Sections 6.2(f) or (g)

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requires Spirit to assume any liability for Boeing's own plans, nor does it provide ***Boeing*** with any affirmative right to seek indemnification ***from Spirit***. This is not a technicality. Other parts of Section 6.2—including (d) and (e)—do require Spirit "to indemnify, hold harmless, and, at the option of [Boeing], to defend [Boeing] from any Liability". When the parties intended Boeing to have an indemnification right in Section 6.2, they said so. The absence of any such language in Sections 6.2(f) and (g) makes clear that Spirit merely was required to set up new plans and credit past service for purposes of those new plans, and that Spirit could not pursue Boeing for any excess liabilities that came due under those plans. There is no basis for Boeing's claim that Spirit assumed any liability associated with Boeing's own plans, let alone that Spirit agreed to indemnify Boeing for contract damages arising from Boeing CBA breaches.

2. **Denied**. The Superior Court did not equate Excluded Assets with Excluded Liabilities. Instead, the Superior Court correctly held that Section 1.2(b)(xiii) of the non-exhaustive list of Excluded Liabilities disclaimed any "Liabilities under any Contract not assumed in Section 1.2(a)". Pursuant to Section 1.2(a)(ii), Spirit assumed post-closing liability only for "Assigned Contracts", a term defined by Section 1.1(a)(v) to expressly carve out the "Contracts described in Section 1.1(b)". Section 1.1(b) is the list of "Excluded

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Assets" referenced by the Superior Court that describes, *inter alia*, Boeing's CBAs. By identifying the CBAs as Excluded Assets, the APA makes clear that the CBAs are ***not*** "Assigned Contracts" and, thus, "Liabilities under" those CBAs ***are*** "Excluded Liabilities" under Section 1.2(b), as the Superior Court properly found.

a. **Denied**. As Boeing concedes, the Superior Court correctly concluded that Boeing's liabilities in the underlying proceedings were liabilities for breach of its CBAs. CBA liabilities were not expressly assumed by Spirit in Section 1.2(a), making them Excluded Liabilities.

b. **Denied**. The APA requires that liabilities be expressly assumed. The Superior Court correctly concluded that it would have been illogical—and impermissible under the APA's express terms—for Spirit to have implicitly assumed the CBA liabilities at issue. Implicit assumption is not allowed.

c. **Denied**. The *Harkness* ERISA claims were dependent upon Boeing's CBA obligations, which Boeing itself recognized in those proceedings. Without the pre-requisite CBA breach, the *Harkness* court found that the *Harkness* plaintiffs would not even have had standing to bring an ERISA claim. Boeing's liabilities in *Harkness* were founded upon breach of its CBAs; Boeing's self-serving settlement cannot change that fact.

3. **Denied**. The Superior Court correctly held that Spirit, not Boeing, is entitled to indemnification because the liabilities at issue are "Excluded

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Liabilities". The APA also has a prevailing party provision. Boeing does not contest the reasonableness of Spirit's expenses. The award to Spirit should be affirmed.

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STATEMENT OF FACTS

A. Boeing's Divesture to Spirit.

In the late 1990s, Boeing began divesting its airplane manufacturing facilities. (B632-33, B636.) Boeing expected that the purchasers of Boeing's divested assets could restructure wages and employee benefits to better align with local markets. (B636.) Boeing also expected that the purchaser would execute new agreements with Boeing's unions, including UAW, SPEEA, IAM and IBEW. (B636-37.) Boeing would then enter into a supply agreement with the purchaser. (B635.) This ensured that Boeing retained ready access to the parts needed for finished products, which, due to efficiencies gained in the divesture, Boeing could purchase at lower prices. (B635.) The divestiture at issue concerned the sale of certain assets and liabilities of Boeing facilities in Kansas and Oklahoma. (B634-35.)

B. The Asset Purchase Agreement.

The divestiture was memorialized in an Asset Purchase Agreement between Boeing and Spirit. (APA §§ 1.1, 1.2.)[1] As in most asset purchases, Spirit assumed "only" the specific liabilities expressly set forth in Section 1.2(a). (APA § 1.2(a) (listing the "Assumed Liabilities").) The APA provides that "[Spirit] shall not assume *any* Liabilities other than the 'Assumed Liabilities'" and that "[a]ll

[1] The APA is at A362-487. Schedule 6.2(f) to the APA is at A488-92.

[redacted]

Liabilities of [Boeing] other than the Assumed Liabilities (the 'Excluded Liabilities') shall remain the sole responsibility of and shall be retained, paid, performed and discharged solely by [Boeing]". (APA § 1.2(b).) Accordingly, unless a particular liability is listed among the Assumed Liabilities in Section 1.2(a), it is an Excluded Liability for which Spirit is not responsible under the APA. Section 1.2(b) of the APA contains a non-exhaustive list of Excluded Liabilities.

The APA contains reciprocal indemnification provisions. Boeing agreed to indemnify Spirit for, among other things, "any and all losses, Liabilities, damages, costs and expenses . . . incurred . . . in connection with or arising from . . . the Excluded Liabilities". (APA § 9.1(a)(iv).) Spirit agreed to indemnify Boeing for, among other things, "any and all [losses, Liabilities, damages, costs and expenses] incurred . . . in connection with or arising from . . . the Assumed Liabilities". (APA § 9.2(a)(iii).)

Spirit did not assume Boeing's CBAs or liabilities for Boeing's breach of its CBAs. Liability for Boeing's breach of its CBAs is not listed among the Assumed Liabilities in Section 1.2(a). And liability for Boeing's breach of its CBAs *is* included within the non-exhaustive list of "Excluded Liabilities" set forth in APA Section 1.2(b). (*See* APA § 1.2(b)(xiii) (defining "Excluded Liabilities" to include "Liabilities under any Contract not assumed by Buyer under

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Section 1.2(a)"; Br. 31 (admitting that "Spirit did not assume any contractual liabilities under the APA other than those it expressly assumed").)[2]

Spirit did assume in Section 1.2(a) "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).) Other "Liabilities of [Boeing] related to all Benefit Plans, except as set forth in Section 6.2" are expressly excluded. (APA § 1.2(b)(iv).) The Boeing CBAs are not mentioned in Section 6.2 and Spirit did not assume any part of Boeing's pension plans or its retiree medical plans. (APA §§ 6.2(a), (f), (g); *see also* APA § 1.2(b)(iv).)

Instead, under Section 6.2, Spirit agreed to: (1) establish its *own* pension plans that credited employees' past service with Boeing; and (2) provide its *own* retiree medical coverage at a level Spirit would negotiate with the unions. (APA §§ 6.2(a), (f), (g).) Boeing agreed to transfer specified assets from its pension plans to fund Spirit's new pension plans, and Spirit agreed that Boeing would have no "further responsibility" for the assets and liabilities "so transferred". (APA § 6.2(f).) The retiree medical plan was unfunded and Spirit agreed that Boeing would have no "further responsibilities" to provide retiree medical benefits to the employees covered under the new Spirit plan, but Spirit

[2] "Br." refers to Boeing's Opening Brief.

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retained the right to change the retiree medical benefits it provided after Closing. (APA § 6.2(g).)[3] By contrast, for accrued vacation and sick leave, Spirit expressly agreed to assume "all Liability" and "to indemnify" Boeing for any liabilities "arising from or relating to" those particular benefits. (APA §§ 6.2(d), (e).)

C. Boeing "Terminates" the Hired Employees.

After signing the APA, Boeing announced that the hired employees would be "terminated due to divestiture" rather than "laid off". (B484.)

Boeing's unions immediately objected. Although the relevant Boeing pension plans did not even define "layoff" (B8-B98 (containing no definition of layoff); B7 at Art. 2.23 (discussing "layoff" but not specifying circumstances under which employees must be laid off)), Boeing's CBAs did contain provisions that enabled the unions to sue Boeing for breach of contract for terminating union employees, rather than laying them off (*see, e.g.*, A596 (UAW award stating that "the layoff provisions of the [CBA] can be found in the article covering seniority").)

Boeing's decision to "terminate", not lay off, the employees had collateral consequences. Relevant here, Boeing's pension plans offered certain protections to participants with at least 10 years of service if those employees were

[3] Because the specific pension liabilities to be transferred to Spirit were underfunded, and the retiree medical obligation was unfunded, Boeing agreed to provide a credit of $243 million to Spirit's purchase price. (B518.)

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"laid off" from the company within a certain number of years of early retirement. (A511; A537.) Such "laid off" eligible employees could "bridge" into early retirement: despite being "laid off", they could elect to "retire" from Boeing upon turning 55, giving them access to heavily subsidized pension benefits, even if they continued to work at Spirit. (*Id.*) This "bridge" also guaranteed access to Boeing retiree medical coverage. (*See, e.g.*, B121 (explaining that eligibility for Boeing retiree medical coverage is contingent upon retiring under a Boeing pension plan).) Critically, only "laid off" employees could access the "layoff bridge". (*See, e.g.*, A511; B734 at 59:3-20 ("[Y]ou had to be laid off. That was number one, you had to be laid off."); B627.) The unions ultimately sought breach of contract damages measured by the monetary value of the lost benefits to which the union members would have been entitled had Boeing not breached. (*See* A573-601; A627-28; B510-13.)

D. The Unions Demand Effects Bargaining and File Grievances.

It was clear from the beginning that Boeing's unions sought to enforce their CBAs. First, the unions demanded effects bargaining under the CBAs. (*See* B727 at 31:3-18.) Boeing agreed to effects bargaining, but sought to limit those negotiations to issues governed by Boeing's CBAs. (B435.)

While effects bargaining was ongoing, SPEEA filed a claim against Boeing with the National Labor Relations Board ("NLRB"). (B461.) Boeing

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urged the NLRB to "defer to the parties[‘] grievance procedure" under the CBAs, which was "designed to resolve disputes arising out of those agreements." (B469-70.) The NLRB agreed to defer action on SPEEA's claim, citing the dispute resolution provisions of the CBAs. (B499.)

Effects bargaining ultimately failed, and IAM, UAW and SPEEA each filed grievances against Boeing, claiming that Boeing's termination of the hired union employees was a breach of their respective CBAs. (*See* B494 (IAM) ("The Union is filing this grievance against the Boeing Company . . . because of Boeing's violation of Attachment B to the collective bargaining agreement"); B497 (UAW) ("Your designation 'Terminated Employee' amounts to a discharge without just cause, in violation of the [Collective Bargaining] Agreement"); B516 (SPEEA) ("Article 8 and Article 21 of the Collective Bargaining Agreements clearly indicate the intent a coding [sic] of 'layoff' for all employees.").)

Boeing denied the unions' grievances, arguing that its decision to terminate the hired union employees was not a violation of the CBAs. (B521 ("[C]oding the employees as separated due to divestiture does not amount to a 'discharge without just cause' in violation of [Article XI, section 17 of the CBA].").) UAW escalated its grievance to arbitration, and SPEEA and IAM brought suit in federal court. Notably, although the layoff bridge was available to both union and non-union employees under Boeing's pension plans (*see* B116

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at Art. 3.2(a); A511; A537), only unions and their members brought claims against Boeing for terminating them. That is because only union members were protected against termination by the CBA provisions. (*E.g.*, B560; B1096.)

E. Boeing Faces Liability for Breaching Its CBAs.

1. The UAW Arbitration

In arbitration, UAW claimed that Boeing's termination of the UAW members' employment broke the members' seniority, which constituted a breach of the Boeing-UAW CBA. (B560 ("Article XI, Section 17 of the [CBA is] the core provision entitling the UAW and its members to the relief sought by the Grievance."); *see* B211-13 (CBA Article XI, Section 17 "Breaking of Seniority").) UAW sought to enforce its rights under the Boeing CBA. (A573-601; A627-28.) Even Boeing initially framed the dispute as involving:

> "only a narrow and limited contract interpretation issue. The Union's only claim is that [Boeing], by designating certain bargaining unit members as terminated when it sold the plants . . . discharged them without cause in violation of Article XI, Section 17 of the [CBA]. And that's the only issue that you [the arbitrator] need to decide". (B613.)

Boeing stressed to the arbitrator that "this is [a] collective bargaining case, not an ERISA case". (B622.) The arbitrator agreed. (A595-601.)

The arbitrator found that Boeing breached the Boeing-UAW CBA. (A600; A602.) To remedy Boeing's breach, the arbitrator required that the UAW

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members' seniority be reinstated and that Boeing pay damages to make them whole for the value of the benefits they lost as a result of the CBA breach. (A600.) In response, Boeing reinstated the UAW members' seniority but refused to compensate the union members for its breach. (A604-05.)

Abandoning its position that the CBAs controlled the UAW's claims, Boeing argued, for the first time, that the union's claims were about "benefits". (A605.) Boeing then moved to vacate the portion of the award that required it to make the grievants whole, arguing that the arbitrator lacked authority to adjudicate "benefits claims". (A765-66.)

The Northern District of Illinois rejected Boeing's argument, finding that the arbitrator properly awarded expectation damages under the CBA, not benefits: "[t]he arbitrator's remedy placed the employees in the position they would have been in had Boeing not breached [its CBA], a solution that this court finds clearly contemplated by the CBA". (A767-68.) Boeing appealed that decision. Writing for the Seventh Circuit, Judge Posner held that the arbitrator had properly "awarded what amount to damages for breach of contract *measured* by the benefits of which the breach deprived the workers, who were third-party beneficiaries of the collective bargaining contract". (A775 (emphasis in original).)

Boeing then returned to the arbitrator with questions about his award. (*See* A612.) The Arbitrator took that opportunity to explain:

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> "[T]he Arbitrator wishes to comment upon his use of the term 'benefits' in the original Award and the Supplemental Awards, including this one. It was not his intent to use that term in the same manner as it is used in [ERISA]. Rather, it is a 'short-hand' way of referring to the remedy of making the affected employees whole for [Boeing's] violation of the Agreement." (A627-68.)

But Boeing still refused to comply with the arbitrator's award, insisting to the district court that the award required Boeing to set up a "pension plan" in violation of ERISA. (*See* A776-77.) The district court rejected that argument and again enforced the award, holding that the arbitrator did not order the "payment of an E[RISA] benefit because the required payments constitute damages awarded to the employees to remedy Boeing's breach of the CBA". (A780.) Frustrated with Boeing's repeated efforts to cast the arbitrator's award as "benefits", the district court wrote:

> "Throughout its briefs Boeing calls the payments 'pension payments' and 'pension benefits', but repeating something like a mantra does not make it so. As the Seventh Circuit has already held, the arbitrator awarded damages for breach of the CBA measured by the amounts of benefits lost as a result of the breach. . . . Damages measured by lost benefits are not benefits governed by ERISA." (*Id*.)

2. The *Harkness* Litigation

After its grievance was denied, SPEEA filed a complaint with the District Court of Kansas, alleging that Boeing's breach of its CBAs violated the

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Labor Management Relations Act ("LMRA") and ERISA and deprived the union members of access to Boeing's layoff bridge. (B510-13.)

SPEEA sought to amend its complaint to add IAM as a plaintiff. (B524.) Boeing contested SPEEA's effort to join IAM, arguing that joinder was inappropriate because the unions' claims (including their ERISA claims) arose from different CBAs:

> "SPEEA and IAM's claims do not ***arise out of*** the same transaction or occurrence. . . . To the contrary, SPEEA's LMRA § 185 claims ***arise out of*** an alleged breach of the two collective bargaining agreements between SPEEA and Boeing, and IAM's LMRA § 185 claims ***arise out of*** an alleged breach of an entirely different collective bargaining agreement between IAM and Boeing. . . . SPEEA and IAM's putative ERISA claims also ***arise out of*** their respective collective bargaining agreements." (B547-48 (emphasis added).)

IAM ultimately was added. (A643.) Later, the individual union members commenced a class action, which was consolidated with the action brought by IAM and SPEEA. (A643-86.)

After years of discovery, the *Harkness* plaintiffs voluntarily dismissed all claims against Spirit, with prejudice, because:

> "[E]vidence developed during discovery demonstrate[d] that Spirit . . . agreed only to offer future retiree health care benefits at levels determined by Spirit . . . [, and] while Spirit . . . assumed certain assets and liabilities for pension benefits . . . , the evidence developed during discovery failed to establish that Spirit . . . violated the

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> terms and provisions of the pension . . . plans created by Spirit." (B653.)

Boeing and the *Harkness* plaintiffs then cross-moved for summary judgment. (A687.) With respect to the LMRA claims, which were controlled by the CBAs, the court found that the CBAs were ambiguous as to the meaning of "layoff" and denied the cross-motions. (A723-25.)

As to the ERISA claims, the court declined to rule on Boeing's motion, because the ERISA claims depended on the LMRA claims and, thus, the CBAs. (A729-30.) To bring an ERISA claim, the *Harkness* plaintiffs needed to (i) be "participants of the [pension] plan at the time the complaint was filed"; and (ii) show that the class members were "former employee[s] with a colorable claim to vested benefits". (A728-29.) The court held that the plaintiffs' ability to satisfy that test was "dependent upon Boeing's contractual obligation to treat the Harkness class as 'laid off'". (A729.) Simply put, the *Harkness* plaintiffs had standing under ERISA *only if* Boeing was obligated under the CBAs to lay them off. (*See id.* ("If Boeing is successful at trial [on the LMRA claim], the Harkness Class members would not have standing to bring ERISA claims.").) The court thus "decline[d] to rule" on the ERISA claims because they were "dependent upon" and "duplicative" of the LMRA (*i.e.*, CBA) claims. (A729-30.) Boeing and the *Harkness* plaintiffs later settled. (B662.)

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F. The Superior Court Rules That Liabilities for Boeing's Breach of Its CBAs Are Not Assumed Liabilities Under the APA.

On December 5, 2014, Boeing commenced this lawsuit against Spirit, demanding indemnification for the money it paid or will pay to the UAW grievants and *Harkness* plaintiffs, plus its fees and costs in those proceedings. (A27-48.) Boeing asserted that the sums paid in the underlying proceedings were "benefits" that Spirit had assumed in the APA. (*Id.*)

Spirit moved to dismiss Boeing's Complaint because the liabilities at issue arose from Boeing's CBAs and, therefore, were Boeing's responsibility under the APA. (*See* B787-91.) The Court believed Spirit likely had "the better argument", but, because it could not consider matters outside the pleadings (including records of the underlying proceedings themselves), the Court allowed discovery to proceed. (B809 at 79:1-22; B815.) The Court instructed the parties to "focus[] on . . . developing the facts that would put [the liabilities] either within a Collective Bargaining Agreement situation" or within the part of the APA "that talks about setting up [certain benefits] plans". (B810 at 80:21-81:8.) Thereafter, Spirit answered Boeing's Complaint and counterclaimed. (B817, B871-75.) After extensive discovery, Spirit and Boeing filed cross-motions for summary judgment. Spirit opposed Boeing's motion and sought indemnification under the APA for all

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losses Spirit incurred in connection with the underlying proceedings. (A97; A212-60.) Spirit also sought its fees and costs in this action. (A97.)

In its opening summary judgment brief, Spirit proved beyond doubt that the liabilities incurred in the underlying proceedings were breach of CBA contract damages. Spirit demonstrated that (i) the UAW maintained throughout the UAW arbitration that the dispute arose from the Boeing-UAW CBA (A75-76); (ii) the *Harkness* plaintiffs likewise maintained that their dispute was predicated on CBA breaches (A76-77); (iii) Boeing repeatedly acknowledged that the underlying proceedings arose from its CBAs (A78-80); (iv) the key Boeing witness admitted that the underlying proceedings arose from Boeing's CBAs (A81-82); and (v) all of the tribunals in the underlying proceedings held that those proceedings arose from Boeing's CBAs (A82-85).

In the face of that evidence, Boeing was forced to abandon its position that the liabilities at issue were "benefits", conceding that the underlying liabilities were in fact for Boeing's breach of its CBAs. (A154 (it is "unquestionably true" that "the proceedings for which Boeing seeks indemnification involved employees complaining about breaches of CBAs that Spirit did not bring into its business"); *id.* ("Boeing of course agrees that the proceedings involved claims related to its CBAs"); *id.* at A168 ("former Boeing employees brought a grievance under their CBA (in one instance) and asserted CBA-related claims (in addition to ERISA-

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based claims) (in another)").) That concession undermined the very premise of Boeing's indemnification demand that "Boeing has suffered damages 'in connection with [and] arising from' the pension and retiree medical obligations assumed by Spirit in the APA." (A37 at ¶ 32.)

On June 27, 2017, the Superior Court denied Boeing's motion and granted Spirit's motion. (Op. 25-26.)[4] The Superior Court applied the undisputed facts regarding the underlying proceedings to the unambiguous terms of the APA and concluded that Boeing's liabilities in the underlying proceedings arose from Boeing's breach of its CBAs—contractual liabilities that Spirit did not assume under the APA. (Op. 14-24.)

On December 5, 2017, the Superior Court granted in part Spirit's motion for fees and costs, finding that the amount requested by Spirit was reasonable and well-supported. (Award 6-11.)[5]

G. On Appeal, Boeing Again Concedes That the Liabilities at Issue Arose Out of Breaches of Its CBAs.

On January 3, 2018, Boeing appealed. Boeing challenges the Superior Court's summary judgment ruling, but contests the Superior Court's

[4] "Op." refers to the Superior Court's June 27, 2017 summary judgment ruling, attached as Exhibit A to Boeing's Opening Brief.

[5] "Award" refers to the Superior Court's December 5, 2017 ruling, attached as Exhibit B to Boeing's Opening Brief.

[redacted]

award to Spirit only to the extent that it is predicated upon the court's entry of summary judgment in favor of Spirit. (Br. 16, 40-41.) Boeing again admits that "the liabilities for which Boeing seeks indemnification arose out of breaches of the CBAs". (*See* Br. 5; *see also id.* at 28.)

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ARGUMENT

I. Spirit Did Not Assume Liability for Boeing's Breach of Its CBAs Under the APA.

A. Question Presented

Did the Superior Court correctly deny Boeing summary judgment, and correctly grant Spirit summary judgment, where (i) Boeing admits that the liabilities for which Boeing seeks indemnification arose out of breaches of Boeing's CBAs; (ii) the APA provides that any liabilities not expressly assumed by Spirit under the APA are excluded from the transfer and remain the sole responsibility of Boeing; (iii) Spirit did not assume liabilities associated with breach of Boeing's CBAs; and (iv) the APA expressly excludes liabilities associated with a breach of Boeing's CBAs? (Op. 14-24; A73-97; A226-58; A268-90.)

B. Scope of Review

The Court reviews the trial judge's "contract interpretation" and "the trial judge's grant of summary judgment *de novo*". *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

C. Merits of Argument

Under Delaware law, a right to indemnification must be crystal clear from the words of the contract. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808,

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824 n.42 (Del. 2013) ("[U]nder Delaware law, indemnity provisions are to be construed strictly rather than expansively") (quotation marks omitted); *accord Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *8 (Del. Super. Ct. Feb. 8, 2016) (requiring "unequivocal undertaking"). There is no express provision under the APA that transfers contractual liability for Boeing's breach of its CBAs to Spirit. And the APA explicitly states that any liability not expressly assumed by Spirit is an Excluded Liability for which *Spirit* is entitled to indemnification, and lists Boeing CBA breach liability as an example of such an Excluded Liability.

1. Spirit Did Not Assume Liability for Boeing's Breach of Its CBAs Under Section 1.2(a) of the APA.

The analysis under the APA is straightforward. In Section 9.2(a), Spirit agreed to indemnify Boeing for "Indemnifiable Damages incurred by [Boeing] in connection with or arising from . . . Assumed Liabilities." To determine whether expenses incurred in connection with Boeing's breach of its CBAs are indemnifiable, one must determine whether liabilities arising from Boeing's breach of its CBAs are Assumed Liabilities under the APA.

The APA defines "Assumed Liabilities" as "only" the specific liabilities expressly set forth in the enumerated list in Section 1.2(a). Similarly, Section 1.2(b) confirms that Spirit "shall not assume *any* Liabilities *other* than the

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Assumed Liabilities" in Section 1.2(a), and states that all other liabilities of Boeing are "Excluded Liabilities" that "shall remain the sole responsibility of and shall be retained, paid, performed and discharged solely by [Boeing]". Therefore, if a liability is not listed as an Assumed Liability in Section 1.2(a), it is an Excluded Liability.

Boeing concedes that the liabilities for which it seeks indemnification arise out of breaches of Boeing's CBAs. (Br. 5 (admitting that "the liabilities for which Boeing seeks indemnification arose out of breaches of the CBAs").)

Liability arising from breaches of Boeing's CBAs is not listed among the Assumed Liabilities in Section 1.2(a). Therefore, under Sections 1.2(a) and 1.2(b), liabilities for Boeing's breach of its CBAs are "Excluded Liabilities" that remain the "sole responsibility" of Boeing. The Superior Court correctly analyzed this issue and its ruling should be affirmed on that basis alone.

That the contractual liability for Boeing's breach of its CBAs was unknown and even unexpected at the time of the APA (*see* Br. 9) does not change the analysis. ***Any liability*** not expressly assumed by Spirit is an Excluded Liability that stays with Boeing. Boeing agreed to bear the risk associated with *any* liability it did not expressly transfer, whether "known or unknown, disputed or undisputed". (APA § 12.1 (defining "Liabilities").)

[redacted]

2. Liabilities for Boeing's Breach of Its CBAs Are Expressly Excluded Under Section 1.2(b).

Section 1.2(b)(xiii) excludes "liabilities under Contracts not assumed under Section 1.2(a)". Again, Section 1.2(a) does not list liabilities arising from Boeing's CBAs as one of the liabilities that Spirit expressly assumed. Section 1.2(a)(ii) states that Spirit assumed certain liabilities under "Assigned Contracts". But Section 1.1(a)(v) defines the term "Assigned Contracts" so as to carve out any "contracts described in Section 1.1(b)", *i.e.*, the list of Excluded Assets. Boeing's CBAs are in the list of Excluded Assets at Section 1.1(b)(xiii).

Because the CBAs are listed as Excluded Assets in Section 1.1(b), they are by definition not among the "Assigned Contracts" for which Spirit assumed post-closing liability in Section 1.2(a). Because Boeing's breach of the CBAs are liabilities under contracts that Spirit did not assume under Section 1.2(a), they are expressly enumerated Excluded Liabilities under Section 1.2(b)(xiii).

3. Spirit Did Not Assume the Claimed CBA Liabilities Under Section 6.2 of the APA.

Despite Boeing's admission that the liabilities at issue arose from Boeing's breach of its CBAs, Boeing insists that Spirit assumed such liabilities under Section 1.2(a)(iv) of the APA. That is incorrect.

Under Section 1.2(a)(iv), Spirit assumed liability only for "pension Liability, Accrued Vacation, retiree medical, flexible spending accounts, sick

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leave, and personal time, to the extent provided in Section 6.2". As Boeing now admits, the liabilities at issue here are breach of contract damages—not pension, vacation, retiree medical, or any other type of liability listed in Section 1.2(a)(iv). Section 1.2(a)(iv) simply does not apply.

Moreover, Spirit did not assume *all* pension and retiree medical liability from Boeing; it assumed only the specific obligations set forth in Section 6.2.[6] (APA § 1.2(b)(iv) (excluding liabilities of Boeing related to "all" Benefit Plans "except as set forth in Section 6.2").) To determine the scope of the specific pension and retiree medical liability assumed under Section 1.2(a)(iv), the Court must look to the provisions of Section 6.2 concerning pension and retiree medical.

The relevant provisions are Sections 6.2(f) (pension) and 6.2(g) (retiree medical). Contractual liability for Boeing's breach of its CBAs is not mentioned in either section, and Boeing does not contend otherwise. All those provisions obligate Spirit to do is create its own pension and retiree medical plans and credit prior Boeing service for the purpose of determining benefits under

[6] Boeing incorrectly inserts "*all*" in front of "Liability" in Section 1.2(a)(iv). (*E.g.*, Br. 28, 34.) Section 1.2(a)(iv) does not say "all Liabilities"; instead Spirit's assumption of certain liabilities under that provision is limited expressly "to the extent provided in Section 6.2". (APA § 1.2(a)(iv).)

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Spirit's new plans. (APA §§ 6.2(f); 6.2(g).) Spirit has done that. (*See* B889; B940; B1031-32.)[7]

This is the only "extent" to which Spirit assumed liability for pension and retiree medical in Section 6.2—nothing more. To be sure, the "no further responsibility" language in Sections 6.2(f) and (g) prevents ***Spirit from suing Boeing*** if the assets that Boeing transferred to Spirit proved insufficient to cover the liabilities that ultimately came due under the new Spirit plans. But that language does not give Boeing the right to seek indemnification from Spirit for liabilities associated with Boeing's own pension or retiree medical plans, let alone for liabilities arising from Boeing's breach of its CBA contracts with its unions.

4. Boeing's Other Arguments Are Meritless.

In its Opening Brief, Boeing presents a multi-part critique of the Superior Court's purported reading of the APA as a separate "Question". This Court may affirm, however, based solely on the question presented in Part I. In any event, none of Boeing's critiques undermines the correctness of the Superior Court's decision.

[7] This is why Spirit was dismissed in *Harkness*. (B653.)

[redacted]

a. The Superior Court Did Not Equate Excluded Assets with Excluded Liabilities.

Boeing asserts that the Superior Court "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.'" (Br. 26.) This point is irrelevant for the reasons explained above: contractual liabilities for the CBA breaches at issue are excluded because they are *not* included on the list of "Assumed Liabilities"; the Superior Court did not need to find that the CBA liabilities were *also* encompassed by an explicitly non-exhaustive list of Excluded Liabilities to properly rule in favor of Spirit.

But Boeing's criticism is also incorrect. Section 1.2(b)(xiii) expressly excludes "liabilities under Contracts not assumed under Section 1.2(a)". Under Section 1.2(a)(ii), Spirit assumed liabilities only under "Assigned Contracts". The term "Assigned Contracts" is defined in Section 1.1(a)(v), and that definition specifically carves out any "contracts described in Section 1.1(b)", *i.e.*, the Excluded Assets referenced by the Superior Court. Boeing's CBAs are contracts described in the Excluded Assets list at Section 1.1(b)(xiii). Thus, (i) because the CBAs are Excluded Assets they are not Assigned Contracts; (ii) because they are not Assigned Contracts, liabilities under those contracts are not assumed under

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Section 1.2(a); and (iii) because such liabilities are not assumed under Section 1.2(a), they are Excluded Liabilities.

The Superior Court's analysis was correct. Boeing's contention that there is no "relationship between assumed assets and assumed liabilities, or between excluded assets and excluded liabilities", is incorrect. (Br. 27.)

b. The Superior Court Did Not Make Improper Inferences.

Boeing asserts that the Superior Court made incorrect inferences about the parties' "intent". (Br. 32-36.) But all the Superior Court did was point to numerous instances in the APA where the parties stated exactly what was assumed or excluded (Op. 22-23), demonstrating that when the parties intended a liability to be borne by Spirit they knew how to explicitly say so. But divining the parties' intent on this issue was not even necessary to the Court's analysis: the APA is clear that if a liability is *not* expressly assumed, it is excluded. (APA §§ 1.2(a), (b).) The APA expressly *prohibits* Spirit from *implicitly* assuming any liability (or asset), including any liability associated with Boeing's breach of its CBAs. The cases cited by Boeing confirm this point. *E.g.*, *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 881 (Del. 2015) (explaining that a court should not "imply[] contractual obligations" that are "inconsistent with the contract's express terms").

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Nor did the Superior Court improperly "speculat[e]" 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." (Br. 36.) The APA requires an express provision enumerating each liability that Spirit assumes. Absent such a provision, the liability is excluded—full stop. The Superior Court's comment merely reinforces that fundamental fact by noting that a cross-reference could have been used had the parties intended Spirit to assume liability for Boeing's breach of its CBAs.[8] Indeed, given the draconian nature of such an outcome—it would have required Spirit to be liable for a Boeing breach of a non-assumed Boeing agreement that occurred before Spirit acquired any assets from Boeing—such an exception would have had to have been unequivocally stated. *See Alcoa*, 2016 WL 521193, at *8 (requiring an "unequivocal undertaking" before indemnification is owed.) But no cross-reference exists.

c. The Superior Court Did Not Ignore the Language of the Indemnification Clause.

Boeing argues that the Superior Court "never even considered whether the *UAW* or *Harkness* payments were 'in connection with' Spirit's 'Assumed Liabilities' under the APA". (Br. 14.) That argument misses the point.

[8] Section 1.2 contains numerous cross-references to other sections or defined terms to define the scope of, or exceptions to, the liabilities assumed or excluded. *E.g.*, Sections 1.2(a)(i); 1.2(a)(ii); 1.2(a)(iii); 1.2(a)(iv); 1.2(a)(viii); 1.2(b)(ii); 1.2(b)(iv); 1.2(b)(v); 1.2(b)(vi).

[redacted]

Under Section 9.2(a), there must first be an "Assumed Liability" before Boeing can seek indemnification for expenses "in connection with or arising from" it. That is exactly how the Superior Court approached the issue. It analyzed whether "the type of liabilities at issue" was an "Assumed Liability" (Op. 14), correctly concluding that the *UAW* and *Harkness* liabilities "arose out of Boeing's CBA's, not Boeing's Benefit Plans", which supported its determination that such liabilities are not Assumed Liabilities (*id.* at 14-18).[9]

Boeing's arguments concerning Section 1.2(a)(iv) fail for the additional reason that the liabilities at issue could not have been "in connection with" the specific pension or retiree medical obligations that Spirit undertook in Section 6.2. For pension and retiree medical under Section 6.2, Spirit agreed only to establish new plans and to credit past service at Boeing for the purpose of paying benefits under *Spirit's new plans*. Those very specific obligations cannot

[9] Boeing insists that "in connection with" is interpreted broadly under Delaware law. (Br. 23.) This point is irrelevant because Boeing's breach of its CBAs are not an "Assumed Liability", so the "in connection with" language cannot reach them no matter how broadly construed. But Boeing also misstates Delaware law. The Delaware cases cited by Boeing concern indemnification claims by corporate officers and directors pursuant to advancement provisions, for which Delaware has declared a "strong public policy" favoring broad interpretation. *See DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *7 (Del. Ch. Jan. 23, 2006). That policy is inapplicable here. Outside of that narrow context, indemnification claims are disfavored and the use of overly broad or vague language render indemnification provisions unenforceable. *See Alcoa*, 2016 WL 521193, at *7. Thus, if the language Boeing quotes is as broad as it contends, that would be another basis to deny Boeing's claims. *Id.*

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implicitly sweep in more expansive liability for damages under *Boeing's pension and retiree medical plans*, let alone *contractual damages* under *Boeing's CBAs*, simply because the damages awarded or settled might have had some relation to Boeing's benefit plans. Indeed, the language of Section 6.2 is flatly inconsistent with Spirit having any indemnification responsibility here, particularly because the measure of damages in the underlying proceedings was the level of benefits *under the Boeing plans* that Spirit expressly did not assume.

Boeing's reading of "in connection with" would obliterate the APA's division of assumed and excluded liabilities. The CBA liabilities at issue here are contract damages, *measured by Boeing benefits*.[10] (A775.) If the measure of damages turned any liability into a benefit owed under Spirit's new plans, as Boeing contends, then numerous unambiguously excluded liabilities could be transformed into indemnifiable assumed liabilities. For example, there is no dispute that, under the APA, Boeing retained pre-closing asbestos liability. (APA § 1.2(b)(xxiv).) Suppose that a Spirit employee had been injured as a result of asbestos exposure that occurred when he worked at Boeing. The employee's

[10] Boeing attempts to blur this distinction by asserting that "[e]ven the Superior Court agreed" that the plaintiffs "brought their claims 'to recover'" early retirement benefits. (Br. 23-24 (quoting Op. 20).) Boeing fails to mention that the Superior Court expressly found that "[i]t is the contractual terms of the CBAs, *not Boeing's Benefit Plans*, which directed the UAW Arbitration and *Harkness* Class Action." (*Id.* (emphasis added).)

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widow then sues Boeing and is awarded damages for the lost value of her husband's pension benefits. Under Boeing's interpretation, Spirit would be liable for indemnification merely because the damages awarded were measured by lost pension benefits. That is obviously incorrect.

d. Boeing's Reliance on No "Further Responsibility" Is Misplaced.

In arguing for a sweeping interpretation of the limited obligations in Sections 6.2(f) and 6.2(g), Boeing points to language in those sections that says Boeing has no "further responsibility". This language does not mean what Boeing contends. Under Section 6.2(f), Spirit agreed that its new pension plan would be "liable for benefits with respect to service recognized under [Boeing's] Pension Plans on or prior to the Closing Date with respect to Hired Union Employees and Hired Non-Union Employees" contingent upon Boeing's transfer of assets to fund the plans. Spirit also agreed that Boeing and Boeing's pension plans would not have "any further responsibility with respect to the assets and Liabilities so transferred." (APA § 6.2(f).)

The no "further responsibility" language refers only to the assets and liabilities "*so transferred*", *i.e.*, Spirit's obligation to make payments under its *own* pension plans for "service recognized under [Boeing's] Pension Plans on or prior to the Closing Date". This language ensures that *Spirit* could not require *Boeing* to

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fund additional obligations under the new Spirit plans (*e.g.*, if the assets transferred by Boeing to Spirit to fund the pension plans proved to be inadequate). The language did not give *Boeing* a right to pursue *Spirit* for anything other than a failure to set up its new pension plans or credit the employees' prior service.

Similar "no responsibility" language is used in Section 6.2(g) under which Spirit agreed to create a retiree medical plan that was unfunded. Again, the relevant language ensures that Spirit could not sue Boeing for funding if the Spirit retiree medical plan proved more expensive than anticipated. And, as the Superior Court recognized, the APA expressly provides that Spirit was under no obligation to continue the same level of retiree medical coverage as Boeing. (Op. 24.) Instead, Spirit could "make changes" to the retiree medical plans, "subject to the provisions of any collective bargaining agreements between [Spirit] and the unions". (APA § 6.2(g).) Boeing has repeatedly admitted that Spirit has no obligation to continue the same levels of Boeing's retiree medical coverage. (*E.g.*, B573, B576; B629; B646.) Accordingly, Section 6.2(g) cannot encompass any liability beyond setting up a retiree medical plan and crediting employees' past Boeing service for the purposes of that Spirit plan, and the entire provision is flatly inconsistent with any suggestion that Spirit agreed to indemnify Boeing for contract damages for Boeing's CBA breaches, particularly where the measure of damages is the level of benefits under *Boeing's* plan.

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Where the parties intended to confer broader liability on Spirit for a specific category of benefits in Section 6.2, they clearly said so. For example, the Accrued Vacation (Section 6.2(d)) and Sick Leave (Section 6.2(e)) provisions expressly state that Spirit assumes "*all* Liability" for those benefits and "agrees to indemnify, hold harmless, and, at the option of [Boeing], to defend [Boeing] from *any* Liability, including attorneys' fees, arising from or relating to the payment or nonpayment to Hired Employees [of these benefits] in accordance with Section 9.2".[11] Sections 6.2(f) (pension) and 6.2(g) (retiree medical) do not contain similar language. *See RCM LS II, LLC v. Lincoln Circle Assocs., LLC*, 2014 WL 3706618, at *8 (Del. Ch. July 28, 2014) (finding that where contract provisions explicitly use a certain term, the omission of that term in another provision meant that the provision had a different meaning). The much different language in the pension and retiree medical provisions cannot mean what Boeing contends.

[11] Boeing points to Spirit's obligation to pay sick leave and vacation as evidence that CBA liabilities were assumed. That is incorrect. Spirit is obligated to pay sick leave and vacation because Section 6.2 expressly states that Spirit assumed "all Liability" related to those issues (APA §§ 6.2(d), (d)), not because they are swept in by some broader assumption of CBA liability. In contrast, the liability at issue here—*i.e.*, the contract damages expense Boeing incurred for terminating the unionized employees—is not transferred to Spirit anywhere in the APA, making those CBA liabilities nothing like sick leave and vacation.

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e. Boeing's Interpretation of Section 6.2 Is in Tension with ERISA.

Spirit argued to the Superior Court that Boeing's reading of Section 6.2 was illogical because it would mean that Spirit's new plans would be required to pay "pension benefits" to the employees while they were working at Spirit (so-called "in-service distributions"), in violation of ERISA. On appeal, Boeing argues that ERISA would not be violated if Spirit itself, rather than its pension plan, were required to indemnify Boeing out of its corporate assets. (Br. 21-23.) Boeing's argument is beside the point. The Superior Court did not rely on ERISA to rule in Spirit's favor. Similarly, this Court need not reach the ERISA issue if it determines that the liabilities at issue arose from Boeing's breach of its CBAs. Nevertheless, ERISA confirms that the relevant liabilities could not have been "so transferred" to Spirit's new plans, even if those liabilities are construed as somehow relating to "benefits" as Boeing suggests.

Boeing's basic claim is that Spirit agreed in the APA to pay *retirement benefits* to individuals *actively working* at Spirit. (B904; B1077 at n.9.) Critically, ERISA forbids employers from making such in-service distributions from qualified pension plans, *e.g.*, *Carter v. Pension Plan of A. Finkl & Sons Co. for Eligible Office Employees*, 654 F.3d 719, 724 (7th Cir. 2011); Rev. Rul. 2004-12, 2004-1 C.B. 478 (2004); and *the APA expressly obligated Spirit to set up*

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"qualified" plans (*see* Sch. 6.2(f) ¶ 4 (listing as a "Requirement[] of Transfer" that Boeing receive "IRS qualification letters, or an opinion of Buyer's counsel . . . that Buyer's Pension Plans . . . satisfy the qualification requirements . . . of the Code"). Simply put, Spirit could not have simultaneously established "qualified" plans (as required by the APA), and lawfully agreed to pay the liabilities that were at issue in the underlying proceedings.

Moreover, if Spirit *did* agree to do that—and it did not—*Boeing itself* violated ERISA when it transferred such liabilities to Spirit's plans. That is because Boeing's pension plans were ERISA-qualified (B13), and pension assets cannot lawfully be transferred from a qualified plan to a non-qualified plan. *Puerto Rico Tel. Co. v. Sistema de Retiro de Los Empleados del Gobierno y la Judicatura*, 2013 WL 1435052, at *16 (D.P.R. Apr. 4, 2013). Spirit's plans would have necessarily been non-qualified—rendering Boeing's transfer of assets and liabilities unlawful—if they were established to pay in-service distributions as Boeing suggests.[12] *E.g.*, *Carter*, 654 F.3d at 724.

Under Delaware law, the Court should adopt "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms", *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 891 n.45

[12] Boeing does not dispute this conclusion in its opening brief; nor did it disagree with this conclusion in its briefing below.

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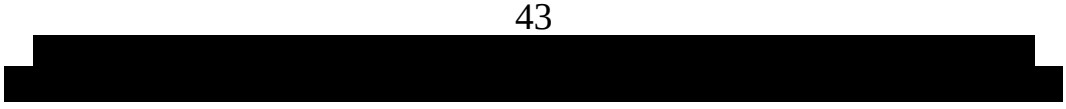
(Del. 2015) (quoting Restatement (Second) of Contracts § 203 (1981)), not one that requires the parties to violate the law and contradict the APA.

To dodge this point, Boeing argues that Spirit, as a corporate entity, separately agreed that Boeing would not have "further responsibility" for the assets and liabilities "so transferred" and that it is only Spirit's plans that must be ERISA compliant. (Br. 22.) That argument misreads Section 6.2. Spirit agreed that Boeing would have no "further responsibility" only "with respect to the assets and liabilities *so transferred*". The "liabilities *so transferred*" are those liabilities sent *to Spirit's pension plans* in compliance with ERISA and the APA. (APA § 6.2(f); Sch. 6.2(f).) And the APA prohibits the transfer of any liability that would have caused Spirit's new plans to violate ERISA; thus, the APA prohibits the transfer of the liabilities that were at issue in the underlying proceedings. Thus, Boeing's claim that Spirit could pay these liabilities from general corporate assets puts the cart before the horse: Spirit has no obligation to indemnify Boeing for such liabilities because they never "so transferred" to Spirit in the first place. (APA § 9.2(a).)

f. The APA Credit Does Not Support Boeing's Argument.

Boeing misstates the purpose of the $243 million credit, suggesting that it was provided "in consideration of Spirit assuming [the] liabilities" at issue



here. (Br. 13.) That argument finds no support in the APA. And Boeing never addresses what the APA actually says—*i.e.*, that the credit "relat[es] to the treatment of pension Liabilities, retiree medical Liabilities and Accrued Sick Leave pursuant to Section 6.2". (APA § 1.7(a)(ii).)

As explained above, Section 6.2 sets forth the extent of Spirit's assumed pension and retiree medical liabilities. The credit does not change that. It merely reflects the extent of the liability that Spirit assumed in Section 6.2—to set up new pension and retiree medical plans and credit employees' past service for those plans, and to then pay out those amounts as the hired employees retired, whether the assets Boeing transferred were sufficient to cover those costs or not. The credit reduced by $243 million Spirit's exposure to setting up new, potentially underfunded, plans. Boeing has admitted that "Section 1.7 of the APA did not independently expand Spirit's liability under the APA". (*See* B686 at No. 32.) Boeing's unfair portrayal of the credit as "consideration" exchanged for Spirit's assumption of the CBA liabilities at issue here is contradicted by both the APA's text and by Boeing's own admissions. Moreover, there is no evidentiary support for Boeing's argument, nor was any presented to the Superior Court.

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g. *Harkness* Was Also Premised on Boeing's Breach of the CBAs.

Boeing argues that "[e]ven under the Superior Court's flawed reasoning that CBA liabilities are excluded, Boeing is still entitled to indemnification for the *Harkness* settlement." (Br. 38.) This is untenable. The liability at issue in *Harkness* was no different than in *UAW*.

As the District of Kansas held, the *Harkness* plaintiffs' ERISA claims were "dependent upon" and "duplicative" of their CBA claims. (A728-30.) Boeing itself recognized in *Harkness* that "SPEEA and IAM's putative ERISA claims also arise out of their respective collective bargaining agreements." (B547-48.) And the *Harkness* court expressly found that without a predicate CBA breach, the *Harkness* plaintiffs could not bring an ERISA claim. (*See* A729 ("If Boeing is successful at trial [on the LMRA claim], the Harkness Class members would not have standing to bring ERISA claims.").)

Boeing's settlement was premised on its exposure under the CBAs, as the Superior Court correctly held. (Op. 18-19.) Boeing cannot escape this obvious conclusion via an opportunistic reversal of what it previously admitted.

Even if one were to ignore the CBA foundation in *Harkness* and assume that the *Harkness* settlement concerned "benefits", Boeing still would not be entitled to indemnification from Spirit because, as explained above, Spirit did

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not agree to indemnify Boeing for liabilities incurred under (or measured by) *Boeing's* pension plans. Spirit merely agreed to set up new plans that honored prior service with Boeing and to not seek additional contributions from Boeing for liabilities due under those new Spirit plans.

II. The Superior Court's Award to Spirit Should Be Affirmed.

A. Question Presented

Did the Superior Court correctly award Spirit attorneys' fees and expenses where it correctly granted summary judgment to Spirit, and where Boeing does not dispute that under such circumstances Spirit is entitled to an award? (Op. 24-25; Award 5-11; A97; A290; A329-36; A355-59.)

B. Scope of Review

This Court reviews "contract interpretation" and "grant of summary judgment *de novo*". *Riverbend Cmty., LLC*, 55 A.3d at 334. The Court also reviews the "interpretation of a contractual fee-shifting provision *de novo*". *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of Argument

Because entry of summary judgment was correct, the Superior Court's award should be affirmed. Under the APA, any liability that is not an "Assumed Liability" is an "Excluded Liability" for which Boeing owes indemnification to Spirit. (APA § 9.1(a).) Moreover, the APA has a clause that awards fees and costs to the prevailing party. (APA § 11.15.) Boeing does not dispute that if the summary judgment ruling was correct, the award to Spirit was appropriate. Nor does Boeing dispute the reasonableness of the amount awarded to Spirit. The summary judgment ruling was correct, and the Award should be affirmed.

[redacted]

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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