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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 in and for New Castle County, C.A. No. N14C-12-055 EMD CCLD

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PRELIMINARY STATEMENT

In its answering brief, Spirit makes two key concessions that compel the conclusion that this Court should reverse the judgment below. First, Spirit concedes (at 28) that this is an indemnification action in which the dispositive question is whether the losses Boeing seeks to recover were incurred "in connection with or arising from … Assumed Liabilities." Thus, the critical question is not whether the CBAs are "Excluded Assets" or whether they were breached, as Spirit has consistently maintained, but whether the liabilities Boeing incurred in the *UAW* and *Harkness* proceedings are "in connection with or arising from … Assumed Liabilities" under the APA. The APA provides a straightforward answer to this question. "Assumed Liabilities" is a defined term and expressly includes the "pension" and "retiree medical" liabilities of the former Boeing employees hired by Spirit. The *UAW* and *Harkness* judgments require Boeing to pay for such "pension" and "retiree medical" benefits, and those payments are "in connection with or arising from" such benefits. Boeing is thus entitled to indemnification.

In an effort to obfuscate the APA's clear command, Spirit persists in its false dichotomy between liabilities concerning "pension and retiree medical benefits," on the one hand, and "liabilities arising from a breach of Boeing's CBAs," on the other. But the APA nowhere creates this dichotomy and, by its plain terms,

forecloses it. The only thing that matters under the APA is whether the "pension" and "retiree medical" liabilities Boeing incurred are "Assumed Liabilities," not whether they were incurred under CBAs, ERISA, or another law. The APA provisions addressing vacation and sick leave make this crystal clear, as even Spirit is forced to acknowledge: vacation and sick leave are unquestionably "Assumed Liabilities," and yet those liabilities arise *only* under the CBAs. Thus, Spirit is simply wrong in arguing that the pension and retiree medical benefits at issue here are categorically excluded from indemnification because they arose from a CBA (or CBA breach).

Spirit has no answer to this point, leading to its second key concession, buried in footnote 11: that liabilities for vacation and sick leave benefits *are* "Assumed Liabilities" under the plain terms of §§1.2(a)(iv) and 6.2 and thus are indemnifiable, even though they arise under a CBA. The same is true of "pension" and "retiree medical" benefits, which Spirit also expressly assumed in §1.2(a)(iv) "to the extent provided in Section 6.2." Section 6.2, in turn, makes clear that Spirit assumed liabilities for benefits of the former Boeing employees Spirit hired, but not for those Boeing employees who were not hired; as to those latter employees, Boeing retained responsibility. *See* APA §6.2(a).

Spirit's suggestion that its obligation as to pension and retiree medical benefits is limited to creating its own plans and crediting the employees' prior

service is demonstrably wrong. *See* Spirit Br. 31-32. The language of §6.2 is not so limited; it *also* relieves both Boeing and its pension plans of "any further responsibility … with respect to the benefits accrued by the [affected employees] *under the applicable [Boeing] Pension Plans*," APA §6.2(f) (emphasis added), and states that Boeing and its plans "shall have no further responsibilities" for those employees' "retiree medical benefits," §6.2(g).

Spirit's effort to resist its indemnification obligation conflicts not only with the APA's plain language but with the common sense of the parties' transaction. Boeing transferred to Spirit over $700 million in pension fund assets and $243 million in cash, effectively reducing the sales price by a billion dollars, so that Spirit would be responsible (and Boeing would have "no further responsibilities") for the pension and retiree medical benefits of the workers Spirit hired. By contrast, Boeing retained the assets for workers Spirit did not hire (or who were already 55 at closing), and remained responsible for their benefits. Spirit, having hired the workers involved in the *UAW* and *Harkness* actions, having received a billion dollars for its promise to assume responsibility for those workers' pension and retiree medical benefits, and having undertaken a contractual obligation to indemnify Boeing for any of those benefits Boeing was required to pay, should be held to its bargain.

I. The *UAW* and *Harkness* payments are "in connection with or arising from" the "pension" and "retiree medical" liabilities Spirit expressly assumed.

As Boeing detailed in its opening brief (at 16-25), the APA makes clear that Boeing is entitled to indemnification for its liabilities associated with the *UAW* and *Harkness* proceedings. The key starting point in this indemnification action is the APA's indemnification provision, which makes Spirit responsible for liabilities incurred by Boeing "in connection with or arising from … Assumed Liabilities." APA §9.2. "Assumed Liabilities" is a defined term in the APA, *see* §1.2(a), and Spirit assumed liabilities for a variety of employee benefits, including vacation, sick leave, pension, and retiree medical benefits "to the extent provided in Section 6.2," §1.2(a)(iv). Section 6.2, in turn, makes clear that Spirit assumed liability for such benefits for the former Boeing employees it hired, §6.2(a), and that neither Boeing nor its plans were to have "any further responsibility" for their pension and retiree medical benefits. §§6.2(f), (g). Thus, when Boeing was sued and held responsible for paying the value of such benefits, it was entitled to indemnification from Spirit under the APA's plain terms. Spirit can avoid that conclusion only by relying on its false dichotomy between benefits and CBA damages and by ignoring the APA's plain language.

A. Spirit's entire argument rests on a false dichotomy between employee benefits and CBA-related liabilities.

Spirit's admission that it assumed those liabilities expressly enumerated in §1.2(a) essentially concedes the case. Spirit Br. 28. Among the "Assumed Liabilities" *expressly assigned* to Spirit by §1.2(a) of the APA are "pension" and "retiree medical" liabilities "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.B below) is the *only* limitation on Spirit's assumption of these liabilities. The APA does not say that Spirit assumed liabilities for pension and retiree medical benefits "to the extent they are imposed by ERISA" or "to the extent they do not arise from CBAs." Indeed, nothing in §§1.2(a), 6.2, or 9.2(a) creates an exception for liabilities arising under a CBA or otherwise even hints that liabilities arising under a CBA cannot be an "Assumed Liability." To the contrary, as Boeing emphasized, *see* Boeing Br. 27-32, several of the other employee benefits Spirit expressly assumed in §1.2(a)(iv), such as vacation and sick leave, arise *only* under Boeing's CBAs.

Spirit's critical premise—that liabilities arising from Boeing's CBAs are excluded from §1.2(a)—is therefore doubly wrong. Spirit expressly assumed liability for the "pension" and "retiree medical" liabilities at issue here, and CBA-related liabilities are indisputably included in the liabilities Spirit assumed under §1.2(a)(iv). Thus, Spirit's elaborate efforts to establish that the liabilities at issue

arose from Boeing's CBAs, in order to enable its argument that "liabilities arising from Boeing's CBAs" are not "list[ed]" in §1.2(a), are not only misguided, but entirely beside the point. Spirit Br. 30. As the vacation and sick leave examples illustrate, a liability can arise from Boeing's CBAs and still fall within one of §1.2(a)'s enumerated categories of liability that Spirit expressly assumed.

Spirit tries to obscure this fundamental problem by deferring its discussion of vacation and sick leave until a footnote buried on page 40, long after its principal argument that it "did not assume liabilities associated with breach of Boeing's CBAs," Spirit Br. 27. When Spirit finally addresses these liabilities, however, it makes no effort whatever to square its "obligat[ion] to pay sick leave and vacation" benefits, which arise only under the CBAs, with its principal argument that it nowhere assumed responsibilities for any CBA-related liabilities. Spirit Br. 40 n.11. Instead, Spirit concedes that its assumption of sick leave and vacation benefits (and therefore its obligation to indemnify Boeing for those benefits) ultimately turns not on the legal source of those benefits—whether the CBA or another source of law—but on what "*Section 6.2* expressly states that Spirit assumed." *Id.* (emphasis added).

But what is true of sick leave and vacation benefits is equally true of the pension and retiree medical benefits Spirit expressly assumed in the same provision of §1.2(a). This is fatal to Sprit's argument. Nothing in §§1.2(a)(iv),

6.2, 9.2(a), or any other provision of the APA ties Spirit's assumption of liability for the enumerated benefits to, or circumscribes such liability by, their legal source (CBA versus ERISA) or the legal cause of action by which an employee seeks to recover them (arbitration under the CBA or litigation). Spirit must therefore indemnify Boeing's expenses connected to or arising from the pension and retiree medical benefits Spirit expressly assumed without regard to how they are recovered or whether those expenses flow from the CBA, ERISA, or any other source of law.

Spirit relies on the same false dichotomy in touting that Boeing "admits" that the disputed liabilities are "breach of contract damages." Spirit Br. 31. Boeing did no such thing, though it would not matter if it had. By acknowledging that the *UAW* and *Harkness* "proceedings involved claims related to its CBAs," A154, Boeing was not "conceding" that those proceedings did not involve liability for pension and retiree medical benefits Spirit assumed in §1.2(a). Boeing was instead underscoring the *irrelevancy* of the alleged CBA breaches. What matters for purposes of this lawsuit is not whether the underlying proceedings involved claims for benefits arising under the CBAs, ERISA, or both—or whether Boeing breached a CBA—but that the *UAW* grievants and the *Harkness* class members asserted claims "to recover pension and retiree medical benefits." A168; *see also* Boeing Br. 17-19; A154. 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). Indeed, the CBAs themselves do not even spell out what damages or benefits the employees should receive; only the benefit plans do that. A511; A537.

Given that the alleged breach of the CBA resulted from the improper withholding of pension and retiree medical benefits under the benefit plans, Spirit's allegation of a "CBA breach" is wholly irrelevant to the inquiry here. Had Boeing voluntarily classified the affected employees as "laid off" and paid their early retirement benefits (as the arbitrator said it should have done), Boeing would not have breached the CBAs, yet it still would have been entitled to seek indemnification from Spirit for the payments. Nothing in the APA says that Boeing lost its right to seek indemnification for these payments merely because it resisted the employees' claims.

Spirit even admits (at 17) that non-union employees, who plainly cannot claim a CBA breach, would be entitled to the same early retirement benefits as the *Harkness* class members and *UAW* grievants. This admission, too, confirms that the relevant benefits do not depend on the CBA, and that the CBA merely provided a mechanism for unionized employees to recover the claimed pension and retiree medical benefits being withheld.

B. Section 6.2 requires Spirit to indemnify Boeing for the *UAW* and *Harkness* payments and not merely establish "mirror plans."

Spirit also insists that its obligations under §§6.2(f) and (g) were limited to crediting the workers' prior service under Spirit's own pension and retiree medical plans. Spirit Br. 31-32. That is incorrect. After addressing those obligations, both subsections *also* emphasize that Spirit released Boeing and its plans from "*any further responsibility* with respect to the assets and *Liabilities* so transferred." APA §6.2(f) (emphases added); *accord* §6.2(g) (Boeing and its plans "shall have no further responsibilities after the closing date to provide … retiree medical benefits"). Those two provisions make crystal clear that Spirit, not Boeing or its plans, is responsible for the liabilities associated with the employees' pension and retiree medical benefits.

Spirit must and does acknowledge this, but implausibly suggests that the "any further responsibility" clause merely releases Boeing from any liability *to Spirit* if the transferred assets were insufficient to cover the employees' benefits. Spirit Br. 38-39. That argument, like Spirit's principal argument to escape its indemnification liability, ignores the clause's plain language, which is not so limited. As the United States Supreme Court reiterated just this month, "any" is a term of breadth, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141-42 (2018), and the "any further responsibility" clause protects Boeing from liability not just *to Spirit* but also *to former Boeing workers* for "the *benefits accrued* …

under the applicable [*Boeing*] Pension Plans." APA §6.2(f) (emphases added). Spirit conveniently ignores this latter half of the "any further responsibility" sentence. Spirit does not dispute that the employees had already "accrued" the early retirement benefits at issue here. *See* Boeing Br. 19. Nor can Spirit reconcile its reading of the APA with its unmistakable promise that Boeing would have no further responsibility for the "Liabilities so transferred." APA §6.2(f). The liabilities so transferred, as Spirit acknowledges elsewhere in its brief, "are those liabilities sent to Spirit's pension plans," including liabilities for the hired workers' pension benefits. Spirit Br. 43 (emphasis omitted).

Adopting Spirit's erroneous and atextual interpretation would make Boeing ultimately responsible for the employees' accrued benefits in plain contradiction of §§6.2(f) and (g). Nothing prevents employees disappointed with their pension benefits under Spirit's plans from filing a claim against Boeing under ERISA or the CBAs. Under Spirit's view, even though Spirit hired the workers and accepted approximately a billion dollars in assets to pay their benefits, Boeing would be on the hook for the expense of litigating and the costs of providing any additional benefits—all without any right of indemnification from Spirit. That position cannot be reconciled with the APA's plain language, let alone with the basic economic agreement memorialized by the parties in the APA: Boeing handed over a billion dollars in exchange for an emphatic (and clear) promise that it would have

no further responsibility for these benefits. (By contrast, Boeing retained the pension assets and responsibility for benefits for employees who were not hired by Spirit or were already 55 at closing. *See* Boeing Br. 9-10; A113; A633.)

Spirit's promise to assume all responsibility for the Hired Employees' retiree medical benefits is, if anything, more emphatic. Spirit "agree[d] that [Boeing] and its retiree medical plans shall have *no further responsibilities* after the Closing Date to provide … retiree medical benefits" for the Hired Employees. APA §6.2(g) (emphasis added). This is an unqualified promise that Boeing had no further responsibilities for these future retiree medical benefits. *See Harris v. Garner*, 216 F.3d 970, 984-85 (11th Cir. 2000) (en banc) ("'no' means no").

Spirit quibbles (at 39) that, unlike its contractual commitment to create and fund pension plans, it "has no obligation" under the APA to provide "the same leve[l]" of benefits that Boeing's retiree medical plans provide. But this is irrelevant. The difference in language simply reflects that pension plans create vested benefits that employers cannot take away, while employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" retiree medical benefits. *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (citation omitted). Contractually recognizing that ERISA gives Spirit greater flexibility to modify retiree medical coverage does nothing to diminish Spirit's unambiguous promise that Boeing and its plans "shall have no further

responsibilities" to provide any level of such benefits. An employee who sues because of reduced retiree medical benefits may lose on the merits because of the flexibility ERISA gives Spirit, but if the employee sues Boeing, Boeing has "no further responsibilit[y]" for the litigation costs or the judgment in the unlikely event the employee wins.

Spirit argues that if the parties had intended Spirit to indemnify Boeing for pension and retiree medical liability they would have "clearly said so." Spirit Br. 40. But the parties did say so—and in language that could not be clearer. Spirit agreed to indemnify Boeing for "Assumed Liabilities," and the "Assumed Liabilities" expressly include "pension" and "retiree medical" liabilities "to the extent provided in Section 6.2." APA §1.2(a)(iv). Section 6.2, in turn, predictably and reasonably says that Spirit assumed liability for the benefits of the former Boeing workers it hired, and not for the former Boeing workers it did not hire. *See* §6.2(a). Subsections (f) and (g) further state that after the pension assets are transferred and the deal has closed, Boeing and its plans have no further responsibility for pension or retiree medical benefits for the hired workers. If Boeing is nonetheless sued over those benefits, §9.2(a) requires Spirit to indemnify Boeing for "Damages … in connection with or arising from" those "Assumed Liabilities." While the APA accomplishes this through cross-references, Spirit's

responsibility for the hired workers' pension and retiree medical benefits and its duty to indemnify Boeing are clear.

Contrary to Spirit's suggestion (at 40), the fact that §§6.2(d) and (e) address indemnity more explicitly than do §§6.2(f) and (g) does not imply that indemnification is unavailable for pension and retiree medical benefits. Sections 6.2(d) and (e) do not "confer broader liability," Spirit Br. 40; they merely say that Spirit "agrees to indemnify" Boeing for vacation and sick leave "*in accordance with Section 9.2*," the generally applicable indemnification provision, APA §§6.2(d), (e) (emphasis added). That same generally applicable indemnification provision indisputably applies to *any* damages Boeing incurs "in connection with or arising from" Spirit's "Assumed Liabilities," including pension and retiree medical benefits. The lack of an explicit cross-reference to §9.2 in §§6.2(f) and (g) in no way eliminates Spirit's indemnification responsibilities. And the "any further responsibility" and "no further responsibilities" language in §§6.2(f) and (g)—language that is not present in §§6.2(d) and (e)—dispels any doubt that pension and retiree medical benefits for the hired workers are Spirit's responsibility and that Spirit must indemnify Boeing for any liability imposed in connection with or arising from such benefits.

Lacking any textual basis whatsoever for its interpretation of §6.2, Spirit retreats to the argument that it could not have assumed responsibility for the bridge

benefits of the *UAW* and *Harkness* plaintiffs because ERISA prohibits Spirit's pension plans from paying pension benefits to current Spirit employees. Spirit Br. 41-43. (Spirit points to no comparable limitation on retiree medical benefits.) But ERISA likewise prohibits Boeing's pension plans from paying these benefits, because they transferred the pension assets for those individuals to Spirit's plans. Boeing Br. 19-21. In all events, this case does not ask or require Spirit's (or Boeing's) pension plans to pay anything. It asks Spirit, the corporate entity, to indemnify Boeing, the corporate entity, for paying "benefits accrued by the [employees] … under the applicable [Boeing] Pension Plans." APA §6.2(f). Nothing in ERISA even arguably forbids this. And the APA unambiguously requires it.

This leaves Spirit to argue that, even if the early retirement benefits at issue here are the type of pension and retiree medical liabilities Spirit assumed under the APA, the *UAW* and *Harkness* payments do not arise from or in connection with those liabilities. But Spirit concedes, as it must, that the *UAW* grievants and the *Harkness* class members sought to recover "the monetary value of the lost benefits to which [they] would have been entitled had Boeing not breached." Spirit Br. 16; Ex. A at 20. Boeing pays the *UAW* grievants a monthly pension and even placed them back into a retiree medical plan, from which their benefits are being paid. A120-121. When Hired Employees bring actions solely to establish their

entitlement to early retirement benefits under Boeing's plans, any resulting liability from those actions indisputably (at the very least) arise "in connection with" those benefits, which is all that is necessary to trigger the APA's broad indemnity provision.

Spirit tries to rebut this irrebuttable fact of the APA only by offering a contrived hypothetical in which a widow measures the damages from her husband's exposure to asbestos based in part on the pension benefits he never received because of his premature death. Spirit Br. 37-38. But the legal liability in that scenario would flow not from withholding benefits, but from exposing workers to asbestos. Here, in contrast, unpaid benefits were not just a measure of damages, they were the benefits for which Boeing was held liable and are the benefits for which Boeing now seeks indemnification from Spirit. In both *UAW* and *Harkness*, the underlying claim was that certain pension and retiree benefits were owed and wrongfully withheld. Spirit has not, and cannot, offer any serious argument that the liability for those claims is not "in connection with or arising from" the disputed benefits.

As Boeing argued in its opening brief (at 22), the phrase "in connection with" in an indemnity provision is (consistent with the plain meaning of the phrase) "sweeping [in] nature." *Lillis v. AT&T Corp.*, 904 A.2d 325, 331-32 (Del. Ch. 2006). Spirit attempts to dismiss this settled rule as somehow limited to

indemnification claims brought by corporate officers and directors. Spirit Br. 36 n.9. Yet none of the cases cited by Boeing limited its holding to that narrow circumstance, and Spirit tellingly cites no authority adopting its novel limitation. *See* Boeing Br. 23. Section 9.2, moreover, employs multiple terms of breadth: not just "in connection with," but "arising from." That broad language read together with the APA provisions defining Spirit's "Assumed Liabilities" and Boeing's lack of "any further responsibility" demonstrate Spirit's unequivocal undertaking to indemnify Boeing for all losses arising from or in connection with pension and retiree medical liabilities, including the early retirement benefits at issue here. *See Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *3 (Del. Ch. July 14, 2009) (Strine, V.C.). Ultimately, however, whether read broadly or narrowly, the *UAW* and *Harkness* pension and medical payments fall squarely within the heartland of the APA's indemnification provision.

Requiring Spirit to indemnify Boeing is, moreover, all but compelled by the parties' "basic business relationship" as reflected in "the essence of the deal." *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 927 (Del. 2017). Boeing did not transfer nearly a billion dollars in cash and pension assets to Spirit only to be left holding the bag for the affected employees' pension and retiree medical benefits. Contrary to Spirit's self-serving and unsupported claim, the $243 million purchase price adjustment (on top of more than $700

million in transferred pension assets) was not strictly tied to Spirit's exposure for "potentially underfunde[d] plans." Spirit Br. 44. To the contrary, the adjustment unmistakably reflects the parties' agreement in other APA provisions that Spirit would provide pension and retiree medical benefits for the workers it hired, and absolve Boeing and its plans of any further responsibility. *See* APA §§6.2(f), (g). Notwithstanding that understanding, it was always possible that the employees would sue Boeing rather than Spirit, and the indemnification clause accounted for that possibility. The "essence of the deal" compels giving the clause its plain meaning.

II. Liabilities arising from "Excluded Assets" are not invariably "Excluded Liabilities."

A. A liability can arise under an "Excluded Asset" and nonetheless constitute an "Assumed Liability."

Because Spirit concedes in various places (at 28-29, 40 n.11) that the ultimate question here turns on the terms of the indemnification clause and the scope of "Assumed Liabilities," Spirit spends relatively little time defending the Superior Court's extended detour into whether the CBAs are "Excluded Assets." Spirit does, however, embrace the Superior Court's central flawed syllogism that "because the CBAs are Excluded Assets," any and all "liabilities" under those contracts are not assumed under §1.2(a). Spirit Br. 33-34. But just because the CBAs are Excluded Assets does not mean that liabilities under the CBAs are invariably Excluded Liabilities. *See* Boeing Br. 26-32. The APA establishes no necessary correlation between "Assets" and "Assumed Liabilities," or between "Excluded Assets" and "Excluded Liabilities." Quite the contrary: each term is separately and carefully defined. *See* APA §§1.1(a), 1.1(b), 1.2(a), 1.2(b). That point is driven home by the parties' express identification of multiple CBA-related liabilities (pension, medical care, sick leave, and vacation, among others) as "Assumed Liabilities," while simultaneously listing the CBAs themselves as "Excluded Assets."

Spirit contends otherwise by reading §1.2(b)(xiii) to broadly exclude *all liabilities* under any contract the APA did not assign to Spirit—ignoring that the APA addresses assets and liabilities separately. Spirit Br. 30, 33-34. Under Spirit's tortured reading, "because Boeing's CBAs were Excluded Assets, they were not included within the definition of Assigned Contracts, which in turn meant that they were not included in the list of contracts assumed under Section 1.2(a)(ii), which in turn means liabilities under the CBAs are Excluded Liabilities under Section 1.2(b)(xiii)." Spirit Br. 4. Even to articulate Spirit's contention is to expose it as a fallacy. Spirit's reading directly contravenes §1.2(b)(xiii), which lists among the "Excluded Liabilities": "*Liabilities* under any Contract not assumed by [Spirit] *under Section 1.2(a)*." APA §1.2(b)(xiii) (emphases added). Notwithstanding this provision's sole concern with liabilities, Spirit would read that provision as turning not on whether a *liability* is assumed under §1.2(a), but whether a *contract* is assumed under §1.2(a). That reading is unreasonable on its face. As Boeing discussed in its opening brief (at 30-31), what Spirit has assumed "under Section 1.2(a)" are nine categories of *liabilities*—including liabilities for the pension, vacation, retiree medical, sick leave, and other benefits addressed in §1.2(a)(iv)—*not* contracts (which are assets, dealt with in §1.1). *See* APA §1.2(a) (titled "Assumed Liabilities"). Section 1.2(b)(xiii) is plainly focused on whether contractual "*Liabilities*," *not* contracts, have been assumed under §1.2(a). Spirit

assumed nine categories of liabilities under §1.2(a). It did not assume *any contracts* under §1.2(a).

Adopting Spirit's interpretation would have the convenient consequence for Spirit that it would not have *any liability* under *any contract*, even those liabilities it expressly assumed under §1.2(a). The APA itself forecloses that reading, since in the case of the CBAs it excluded those contracts from the deal while also specifically transferring multiple liabilities created by those excluded contracts to Spirit (including liabilities for sick leave and vacation benefits, which even Spirit concedes are assumed liabilities). Spirit's reading is not what §1.2(b)(xiii) says nor can it be what the parties intended. Rather, §1.2(b)(xiii) simply confirms the common-sense point that Spirit did not assume any contractual liabilities *other than* those it expressly assumed under §1.2(a)—including the "pension" and "retiree medical" liabilities Spirit expressly assumed under §1.2(a)(iv).

Spirit's interpretation of §1.2(b)(xiii) is wrong for yet another reason. Not only does it ignore the key phrase "under Section 1.2(a)," but it also ignores the parties' use of the word "assumed." APA §1.2(b)(xiii). The APA consistently uses "assumed" when referring to the *liabilities* Boeing and Spirit transferred. It *never* uses "assumed" when referring to contracts or other assets. For example, §1.2(a) is entitled "Assumed Liabilities" and defines the "Liabilities" Spirit "shall assume from" Boeing. Section 1.2(b) similarly provides that Spirit "shall not

assume any Liabilities other than the 'Assumed Liabilities.'" Not once, in contrast, does the APA refer to Spirit's assuming a contract or any other assets. Those assets are instead "purchase[d]," "convey[ed]," "contribute[d]," "transfer[red]," "deliver[ed]," or "assign[ed]." §§1.1(a), (b). By using the word "assumed" in §1.2(b)(xiii), the parties thus made clear that the clause addresses contractual *liabilities* (not contracts) and says that if a contractual *liability* was not assumed under §1.2(a), then it is an "Excluded Liability."

Spirit's own admissions confirm what the language of §1.2(b)(xiii) already makes clear. Spirit concedes (as noted above) that it assumed Boeing's liabilities for vacation and sick leave. Spirit Br. 40 n.11. That concession alone defeats Spirit's atextual reading of §1.2(b)(xiii). The vacation and sick leave liabilities arise only under the CBAs, after all, which everyone agrees are "Excluded Assets" that Boeing retained. APA §1.1(b)(xiii); Spirit Br. 4. If Spirit assumed those liabilities, it necessarily follows that §1.2(b)(xiii) cannot be read to mean that *Boeing* retained every liability under every excluded contract. The answer to whether Spirit assumed a given liability instead lies—not surprisingly—in the APA provisions directly defining Spirit's "Assumed Liabilities." Those provisions unquestionably make Spirit responsible for the pension and retiree medical benefit payments at issue here.

B. Spirit does not meaningfully defend the Superior Court's inferences.

The Superior Court made a series of incorrect inferences about the parties' presumed "intent" based on provisions in §1.2(a) other than §1.2(a)(iv), positing that Spirit intended to assume only liabilities that arise after the closing and over which Spirit had "control." Ex. A at 22-23; *see* Boeing Br. 32-38. Not even Spirit embraces those inferences, which are wholly unsupported by the agreement; it asserts that "divining the parties' intent" was at worst an unnecessary part of the Superior Court's analysis that this Court should disregard. Spirit Br. 34-35. But Spirit's own efforts to avoid its indemnification obligations based on inapplicable provisions of §1.2(a) are at least as atextual and indefensible.

Relying on §1.2(a)(ii), Spirit contends that it assumed liabilities "only under 'Assigned Contracts.'" Spirit. Br. 33. Again, that argument finds no support in the APA's plain terms and contradicts Spirit's undisputed assumption of vacation and sick leave liabilities that arise only under contracts Boeing did not assign to Spirit. Section 1.2(a)(ii) merely provides that Spirit assumed "Liabilities arising after the Closing under the Assigned Contracts." That provision was necessary because elsewhere the APA made clear that "the transfer of the Assets [including the Assigned Contracts] pursuant to this Agreement shall not include the assumption of any Liability related to the Assets unless [Spirit] expressly assumes that Liability pursuant to Sections 1.2(a), 6.13, or 9.5." APA §1.1(a). But §1.2(a)(ii) is

just one of nine categories of liabilities that Spirit assumed. Contrary to Spirit's erroneous inferences, nowhere does §1.2(a)(ii) say that no other contractual liabilities were assumed, and in fact as discussed above, other provisions of 1.2(a) do transfer to Spirit liabilities that were created under contracts that were not assigned to Spirit. *See*, *e.g.*, APA §1.2(a)(iv).

At bottom, the fact that the CBAs are not among the "Assigned Contracts" is simply irrelevant to the issues before this Court. Parties are free to transfer liabilities in a sophisticated commercial transaction without transferring the underlying asset, and both parties plainly understood that Boeing could not transfer the CBAs themselves to Spirit. Those contracts included many provisions specific to Boeing's relationship with its employees, such as working hours, pay scales, holidays, and travel reimbursement. *See* B124-432. Spirit understandably wanted the flexibility to reach its own agreement with the affected employees about these employment terms, which directly relate to the employees' productivity and job satisfaction *in their jobs with Spirit*. But under the APA, Spirit nonetheless assumed liability for the "pension" and "retiree medical" benefits of these employees that were accrued while they were at Boeing. This Court should hold Spirit to that bargain it struck with Boeing.

C. Even under Spirit's interpretation of the APA, it must still indemnify Boeing for the *Harkness* settlement.

Even if liabilities under CBAs were invariably "Excluded Liabilities" (and they are not), Boeing would still be entitled to indemnification for the *Harkness* settlement. *See* Boeing Br. 38-39. That settlement indisputably resolved the class members' direct claims for benefits under ERISA in addition to their CBA breach claims. In approving the settlement, the *Harkness* court explicitly found "that Payments to Class Members" related to, among other things, "Benefits from a pension plan in which [plaintiffs] allege they were or should have been participants, but which pensions were transferred to Spirit." *Society of Prof'l Eng'g Emps. in Aerospace v. Boeing Co.*, 2015 WL 13643720, at *3 (D. Kan. Sept. 3, 2015).

It makes no difference that the ERISA claims were supposedly "dependent upon" and "duplicative" of the contract claims. Spirit Br. 45. Spirit's argument that it does is nothing but smoke and mirrors. Under Spirit's theory, only CBA breach claims are categorically excluded—and ERISA violations are not CBA breaches. If anything, that the two claims are duplicative and seek the same relief only underscores why the APA assigns liabilities for the workers' pension and retiree medical benefits without regard to whether they arise under ERISA or under the CBAs; Spirit's own argument thus exposes the falseness of its dichotomy—all

in an effort to renege on its contracted obligation to indemnify Boeing for the pension and retiree medical liabilities at issue in this case.

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

Because Spirit must indemnify Boeing for the *UAW* and *Harkness* payments, the APA entitles Boeing, not Spirit, to fees and costs. *See* APA §§9.1(a), 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.

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