

(Rev. 3/3/08)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SOCIETY OF PROFESSIONAL)	
ENGINEERING EMPLOYEES)	
IN AEROSPACE, IFPTE LOCAL)	
2001, AFL-CIO, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action Nos.
)	05-CV-01251-MLB-KMH
v.)	and
)	07-CV-01043-MLB-KMH
)	
THE BOEING COMPANY, <i>et al.</i>)	
)	
Defendants.)	
_____)	

PRETRIAL ORDER

This pretrial order shall supersede all pleadings and control the subsequent course of this case. It shall not be modified except by consent of the parties and the Court’s approval, or by order of the Court to prevent manifest injustice. *See* Fed. R. Civ. P. 16(d); D. Kan. Rule 16.2(c).

1. APPEARANCES.

The plaintiffs, Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 (“SPEEA”); International Association of Machinists and Aerospace Workers and its District 70 (“IAM”); David A. Harkness, William G. Hartig, Jr., David Lewandowski, Jene Lewandowski, Ronald Owens, Richard Pullen, Tomey Shabshab, Donna Zagonel, and Michael Baker, for themselves and others similarly situated (“Harkness Class”); Michael McCartney, Norris Palmer, Bradley Stevens, Margaret Wieland (“McCartney Plaintiffs”); and James Boone, Bruce Carselowey, Marsha Gray, Darlene Kerns, Randall McFarland, Larry Moore, Russell Norman, James Queen, Timothy Sanders, Marlon Stocking, William Stoner, Lisa Wright, and Gary Leavell

(“Boone Plaintiffs”), appeared at the pretrial conference through counsel, Thomas E. Hammond of Hammond, Zongker & Farris, L.L.C.; Arlus J. Stephens and Renee M. Gerni of Murphy Anderson PLLC; and Joel R. Hurt and William T. Payne of Stember Feinstein Doyle & Payne, LLC.

The defendants, The Boeing Company, Boeing Company Employee Retirement Plan, Boeing Company Retiree Health and Welfare Benefit Plan, Employee Benefit Plans Committee of the Boeing Company, and Boeing Company Layoff Benefits Plan (“Boeing Defendants”), appeared through counsel, James M. Armstrong, Boyd A. Byers, and Charles E. McClellan of Foulston Siefkin LLP; and William J. Kilberg, Paul Blankenstein, Jason J. Mendro, and Jaclyn N. Adams of Gibson, Dunn & Crutcher LLP.

The defendants, Spirit AeroSystems Holdings, Inc., Sprit AeroSystems, Inc., the The Spirit AeroSystems Holdings, Inc. Pension Value Plan (“Spirit Defendants”), appeared through counsel, Michael F. Delaney, Gregory L. Ash, and Eric P. Kelly of Spencer Fane Britt & Browne LLP.

2. NATURE OF THE CASE.

This case concerns claims brought under Section 301 of the Labor Management Relations Act (“LMRA”) and the Employee Retirement Income Security Act of 1974 (“ERISA”).

3. PRELIMINARY MATTERS.

a. Subject Matter Jurisdiction. Subject matter jurisdiction is invoked under 28 U.S.C. § 1331 and 29 U.S.C. § 185(a), and is not disputed.

b. Personal Jurisdiction. The Court’s personal jurisdiction over the respective defendants is not disputed.

c. Venue. The parties stipulate that venue properly rests with this Court.

d. Governing Law. Subject to the Court’s determination of the law that applies to the case, the parties believe and agree that the substantive issues in this case are governed by the following law:

This case is governed by federal law, namely the LMRA, 29 U.S.C. § 185; ERISA, 29 U.S.C. §§ 1001 *et seq.*; the Declaratory Judgment Act, 28 U.S.C. § 2201; and federal common law.

4. **STIPULATIONS.**

a. The following facts are uncontroverted:

1. Plaintiff Society of Professional Engineering Employees in Aerospace (“SPEEA”) is an unincorporated labor organization that represents for purposes of collective bargaining employees of employers in industries affecting commerce.

2. SPEEA is a labor organization within the meaning of 29 U.S.C. §152(5).

3. Plaintiff International Association of Machinists and Aerospace Workers (“IAM”) is an unincorporated labor organization that represents for purposes of collective bargaining employees of employers in industries affecting commerce.

4. IAM is a “labor organization” within the meaning of 29 U.S.C. §152(5).

5. Plaintiff District Lodge 70 is an unincorporated labor organization that represents for purposes of collective bargaining employees of employers in industries affecting commerce.

6. District 70 is a “labor organization” within the meaning of 29 U.S.C. §152(5).

7. International Brotherhood of Electrical Workers, Local 271 (“IBEW 271”) is an unincorporated labor organization that represents for purposes of collective bargaining employees of employers in industries affecting commerce. The IBEW 271 is a “labor organization” within the meaning of 29 U.S.C. §152(5), but it is not a named party to this lawsuit. Plaintiffs Michael Baker and Larry Moore were represented by IBEW 271 for certain purposes during their employment at Boeing.

8. Plaintiff David A. Harkness was born on June 23, 1951. He worked for Defendant Boeing from November 1978 until June 16, 2005. He began working for Defendant Spirit as an employee on June 17, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

9. Plaintiff William G. Hartig Jr. was born on May 5, 1954. He worked for Defendant Boeing from October 20, 1980 until June 16, 2005. He began working for Defendant Spirit as an employee on June 17, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

10. Plaintiff David Lewandowski was born on May 26, 1951. He worked for Defendant Boeing from October 1978 until June 16, 2005. He began working for Defendant Spirit as an employee on June 17, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

11. Plaintiff Jene Lewandowski was born on August 10, 1951. She worked for Defendant Boeing from October 31, 1972 until June 16, 2005. She began working for Defendant Spirit as an employee on June 17, 2005. She was represented by SPEEA for certain purposes during her employment at Boeing.

12. Plaintiff Ronald Owens was born on August 3, 1954. He worked for Defendant Boeing from April 14, 1980 until June 16, 2005. He began working for Defendant Spirit as an employee on June 17, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

13. Plaintiff Richard Pullen was born on October 26, 1951. He worked for Defendant Boeing from February 13, 1974 until June 16, 2005. He began working for Defendant Spirit as an employee on June 17, 2005. He was represented by the IAM for certain purposes during his employment at Boeing.

14. Plaintiff Tomey Shabshab was born on September 18, 1951. He worked for Defendant Boeing from April 9, 1982 until June 16, 2005. He began working for Defendant Spirit as an employee on June 17, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

15. Plaintiff Donna Zagonel was born on August 23, 1952. She worked for Defendant Boeing from January 10, 1980 until June 16, 2005. She began working for Defendant Spirit as an employee on June 17, 2005. She was represented by the IAM for certain purposes during her employment at Boeing.

16. Plaintiff Michael Baker was born on August 7, 1953. He worked for Defendant Boeing from October 16, 1978 until June 16, 2005. He began working for Defendant Spirit as an employee on June 17, 2005. He was represented by the IBEW 271 for certain purposes during his employment at Boeing.

17. Plaintiff Michael McCartney was born on April 14, 1953. He worked for Defendant Boeing from April 1, 1980 until June 16, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

18. Plaintiff Norris Palmer was born on February 3, 1951. He worked for Defendant Boeing from November 8, 1982 until June 16, 2005. He was represented by the IAM for certain purposes during his employment at Boeing.

19. Plaintiff Bradley Stevens was born on January 16, 1956. He worked for Defendant Boeing from April 20, 1989 until June 16, 2005. He was represented by the IAM for certain purposes during his employment at Boeing.

20. Plaintiff Margaret Wieland was born on November 12, 1954. She worked for Defendant Boeing from September 8, 1988 until June 16, 2005. She was represented by SPEEA for certain purposes during her employment at Boeing.

21. Plaintiff James Boone was born on March 15, 1951. He worked for Defendant Boeing until June 16, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

22. Plaintiff Bruce Carselowey was born on June 8, 1956. He worked for Defendant Boeing until June 16, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

23. Plaintiff Marsha Gray was born on February 28, 1954. She worked for Defendant Boeing from November 12, 1973 until June 16, 2005. Plaintiff Marsha Gray returned to work for Boeing in October 2005 and later resigned. She was represented by the IAM for certain purposes during her employment at Boeing.

23. Plaintiff Darlene Kerns was born on February 4, 1956. She worked for Defendant Boeing from November 6, 1979 until on or about June 2005. She was represented by the IAM for certain purposes during her employment at Boeing.

24. Plaintiff Randall McFarland was born on March 12, 1956. He worked for Defendant Boeing from May 1974 until June 16, 2005. He was represented by the IAM for certain purposes during his employment at Boeing.

25. Plaintiff Larry Moore was born on July 22, 1952. He worked for Defendant Boeing from May 7, 1979 until June 16, 2005. He was represented by the IBEW 271 for certain purposes during his employment at Boeing.

26. Plaintiff Russell Norman was born on July 7, 1953. He worked for Defendant Boeing beginning in July 1978 until June 16, 2005. He was represented by the IAM for certain purposes during his employment at Boeing.

27. Plaintiff James Queen was born on August 16, 1952. He worked for Defendant Boeing until June 16, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

28. Plaintiff Timothy Sanders was born on February 6, 1956. He worked for Defendant Boeing until June 16, 2005. He was represented by SPEEA for certain purposes during his employment at Boeing.

29. Plaintiff Marlon Stocking was born on December 17, 1955. He began working for Boeing in July 1974 and ceased working for Boeing on or about June 2005. He was represented by SPEEA at certain times and for certain purposes during his employment at Boeing.

30. Plaintiff William Stoner was born on November 7, 1950. He worked for Defendant Boeing until June 16, 2005. He was represented by the IAM for certain purposes during his employment at Boeing.

31. Plaintiff Lisa Wright was born on February 1, 1952. She worked for Defendant Boeing from November 16, 1979 until June 16, 2005. She was represented by SPEEA for certain purposes during her employment at Boeing.

32. Plaintiff Gary Leavell was born on November 6, 1950. He worked for Defendant Boeing until June 16, 2005. He was represented by the IAM for certain purposes during his employment at Boeing.

33. The Boeing Company (“Boeing”) is a corporation, organized under the laws of Delaware, with headquarters in the State of Illinois.

34. The Boeing Company Employee Retirement Plan (“BCERP”) is an ERISA-covered employee pension benefit plan that provides certain specified pension benefits to eligible participants in accordance with the terms and conditions of that plan.

35. The Boeing Retiree Health and Welfare Benefit Plan (“Boeing Retiree Health Plan”) is an ERISA-covered employee welfare benefit plan that provides certain specified benefits to eligible participants in accordance with the terms and conditions of that plan.

36. The Boeing Company Layoff Benefits Plan (“Boeing Layoff Benefits Plan”) provides for certain severance benefits for eligible Plan participants in accordance with the terms and conditions of that plan.

37. Boeing is the sponsor of the BCERP, the Boeing Retiree Health Plan, and the Boeing Layoff Benefits Plan.

38. The Boeing Employee Benefits Plans Committee (“Committee” or “EBPC”) is the Plan Administrator of the BCERP, Boeing Retiree Health Plan, and Boeing Layoff Benefits Plan. The Committee is comprised of Boeing officers and employees, appointed to the Committee by Boeing’s Board of Directors.

39. Spirit AeroSystems Holdings, Inc. (“Spirit Holdings”) is a Delaware corporation with its headquarters in Kansas.

40. Spirit AeroSystems, Inc. (“Spirit”), a wholly-owned subsidiary of Spirit AeroSystems Holdings, Inc., is a Delaware Corporation with its headquarters in Kansas and is an “employer” within the meaning of Section 3(5) of ERISA.

41. The Spirit AeroSystems Holdings, Inc. Pension Value Plan (hereinafter “the Spirit Plan”) is an employee pension benefit plan within the meaning of Section 3(2)(A) of ERISA (comprised of several sub-plans) that provides certain specified benefits to eligible participants in accordance with the terms and conditions of that plan. The Spirit AeroSystems Holdings, Inc. Retirement Plan for IBEW, WEU and WTPU Employees and the Spirit AeroSystems Holdings, Inc. Retirement Plan for IAM Employees, each identified in Plaintiffs’ Second Consolidated Amended Complaint, were merged into the Spirit Plan on or about December 31, 2005.

42. Spirit AeroSystems Holdings, Inc. is the plan sponsor of the Spirit Plan within the meaning of Section 3(16)(B) of ERISA.

43. Plaintiffs were employed at various times at Boeing's Facility in Wichita ("Wichita plant") in positions that were within bargaining units represented, respectively, by SPEEA, the IAM and IBEW 271.

44. At various times, these unions bargained with Boeing over the terms and conditions of Boeing's employment of bargaining unit employees.

45. Boeing was signatory to certain collective bargaining agreements (or "CBAs") with these labor unions.

46. A collective bargaining agreement between SPEEA and Boeing covering the Wichita Technical and Professional Unit ("WTPU") was executed on July 7, 2004. The SPEEA-WTPU bargaining unit was decertified at Boeing in June 2007.

47. A collective bargaining agreement between SPEEA and Boeing covering the Wichita Engineering Unit ("WEU") was executed on December 6, 2002. SPEEA and Boeing executed another collective bargaining agreement effective on December 20, 2005.

48. A collective bargaining agreement between IBEW 271 and Boeing was executed on December 3, 2002. IBEW 271 and Boeing executed another collective bargaining agreement effective on December 3, 2005.

49. In 2005, Boeing sold certain assets associated with its manufacture of commercial airplanes in Wichita and Oklahoma to Onex, a private equity firm, which had created a company called Mid-Western Aircraft Systems, Inc. ("Mid-Western") to hold the purchased assets and to operate the commercial airplane business. Mid-Western was later renamed Spirit AeroSystems, Inc. ("Spirit").

50. Spirit and Spirit Holdings do not have and have never had any corporate affiliation or other such relationship with Boeing.

51. On February 22, 2005, Boeing and Mid-Western (hereinafter "Spirit") executed an Asset Purchase Agreement.

52. The Asset Purchase Agreement between Boeing and Spirit includes provisions relating to the BCERP and certain of its assets and liabilities.

53. The unions were not consulted by Boeing or Spirit about the terms of the Asset Purchase Agreement before Boeing and Spirit entered into the Asset Purchase Agreement.

54. In March 2005, Boeing advised unions and employees of the Wichita plant that WARN notices would be issued on March 11, 2005, in connection with the sale of assets to Spirit.

55. Spirit announced that it planned to operate the Wichita plant to manufacture airplane parts and that it would hire some of the employees.

56. All Boeing employees who worked at the Wichita plant were informed that they must sign a Consent to Release Information form to be considered for employment by Spirit. The Consent form would allow Boeing to provide Spirit with the employment records of the Boeing employees who signed the Consent form.

57. Boeing entered separate talks with IAM, SPEEA, and IBEW 271 over the effects of the sale of the assets of the Boeing Commercial Aircraft facility in Wichita.

58. Spirit interviewed the Boeing managers of certain employees who applied for work at Spirit.

59. Spirit hired most but not all of the Boeing employees who sought employment with Spirit.

60. Plaintiffs described as the “McCartney Plaintiffs” and “Boone Plaintiffs” either did not apply for or did not accept employment with Spirit.

61. Plaintiffs Michael McCartney, Margaret Wieland, Randall McFarland, James Boone, Lisa Wright, Timothy Sanders, Darlene Kerns, and Marsha Gray declined offers of employment with Spirit.

62. Plaintiffs Norris Palmer, Bradley Stevens, Gary Leavell, Russell Norman, Marlon Stocking, William Stoner, Larry Moore, James Queen, and Bruce Carselowey declined to sign the Consent to Release Information form required for them to be considered for employment by Spirit.

63. The McCartney Plaintiffs and Boone Plaintiffs ceased to be Boeing employees on or before June 16, 2005.

64. On or about June 17, 2005, Spirit began manufacturing airplane parts in Wichita.

65. On or about June 17, 2005, the former Boeing employees hired by Spirit started work as Spirit employees.

66. Plaintiffs Harkness, Hartig, David Lewandowski, Jene Lewandowski, Owens, Pullen, Shabshab, Zagonel, and Baker ceased to be Boeing employees on June 16, 2005. These plaintiffs signed the Consent to Release Information form, were hired by Spirit, and began work as Spirit employees on or around June 17, 2005. Plaintiffs refer to plaintiffs who applied for work at Spirit, were hired by Spirit, and began work as Spirit employees on or about June 17, 2005 as members of the “Harkness Class” or “Harkness Plaintiffs.”

67. Plaintiffs Harkness, Hartig, David Lewandowski, Jene Lewandowski, Owens, Pullen, Shabshab, Zagonel, and Baker are members and named representatives of the Harkness Class.

68. Spirit did not assume any of the existing collective bargaining agreements that Boeing had with the unions representing the commercial-division employees in Wichita.

69. Spirit did not have executed collective bargaining agreements with the IAM, SPEEA-WEU, or SPEEA-WPTU bargaining units on June 17, 2005 (referred to as “Day One”).

70. None of the Plaintiffs received benefits from the Boeing Layoff Benefits Plan, except for Plaintiff Stevens.

71. Spirit created “mirror pension plans”—the Spirit Plans—for the Harkness Class members, under which they will receive certain pension benefits when they terminate their employment with Spirit.

72. Under the terms of the Asset Purchase Agreement, Spirit agreed to assume the accrued pension liabilities for the members of the Harkness Class. Boeing transferred assets from the BCERP to the Spirit Plans that it determined were sufficient to fund the liabilities of the Harkness Class as participants in the Spirit Plans.

73. All the named individual Plaintiffs had 10 or more years of service and were between 49 and 54 years of age as of June 16, 2005.

74. The named Harkness Plaintiffs other than Baker—Harkness, Hartig, David Lewandowski, Jene Lewandowski, Owens, Pullen, Shabshab, and Zagonel—filed claims for benefits or clarification of future benefits under the BCERP and the Boeing Retiree Health Plan. Each of those Plaintiffs was issued a formal written response denying his or her claims. Each of those Plaintiffs appealed the denials of his or her claims. The EBPC issued a formal written response denying each of those appeals. Plaintiff Baker did not file a claim for benefits or clarification of future benefits under the BCERP or the Boeing Retiree Health Plan.

75. Plaintiffs McCartney, McFarland, Palmer, Stevens, and Wieland filed claims for benefits or clarification of future benefits under the BCERP and the Boeing Retiree Health Plan. Each of those Plaintiffs was issued a formal written response denying his or her claims. Plaintiff McFarland did not appeal the denial of his claim. Plaintiffs McCartney, Palmer, Stevens, and Wieland jointly appealed the denials of their claims. The EBPC issued a formal written response denying each of those appeals.

76. Plaintiffs McCartney, Palmer, and Stevens filed claims for severance benefits under the Boeing Layoff Benefits Plan, and Plaintiff Stevens requested that the EBPC immediately cease collections proceedings against him if the EBPC determines he is eligible for severance benefits. The EBPC denied Plaintiffs McCartney, Palmer, and Stevens' claims for severance benefits under the Boeing Layoff Benefits Plan. The other McCartney Plaintiffs and Boone Plaintiffs did not file claims for severance benefits under the Boeing Layoff Benefits Plan.

77. On June 22, 2005, the IAM filed a “union versus company” grievance asserting, *inter alia*, that “employees with 10 years of service and who are age 49 to 55 years old” and ceased to be employed by Boeing as a result of the Wichita divestiture to Spirit were “in fact laid off from Boeing and are entitled *to the negotiated* benefits of early retirement and early retirement medical benefits.”

78. Boeing denied the IAM's June 22 grievance on June 30, 2005, explaining that “the grievance is not subject to arbitration.” Boeing also stated that, “in any event,” employees who accepted work with Spirit are not “eligible for early retirement bridging under a Boing pension plan or the Retiree Medical Plan” because,

among other things, their “pension benefits transferred to Onex and there is no remaining Company-sponsored retirement plan with Boeing under which such employees can retire.”

79. On August 29, 2005, SPEEA filed a written grievance “grieving the coding of [its] represented employees upon completion of their Boeing service as a result of the BCA Wichita divestiture.” The grievance states, *inter alia*: “Article 8 and Article 21 of the Collective Bargaining Agreements clearly indicate the intent a [sic] coding of ‘layoff’ for all employees upon the completion of their advance notification of layoff (WARN) notices.”

80. The EBPC, the Plan Administrator, has stated in response to appeals by various of the individual Plaintiffs that employees at the Wichita plant who continued employment with Spirit, or who refused to apply for or accept employment with Spirit, are not considered laid off from Boeing within the meaning of the BCERP. The individual Plaintiffs who filed claims regarding the Early Retirement Pension Benefit and the so-called “bridging” benefits under the BCERP have been notified that their claims for these benefits have been denied.

81. The individual Plaintiffs and putative Harkness Class members have turned 55 years of age.

82. The members of the EBPC at the time the named individual Plaintiffs’ appeals for benefits were decided were: Pamela French, Paul Kinscherff, Michael Luttig, Alan May, Harry McGee, and Rick Stephens (except that Michael Valliere held Alan May’s seat when Plaintiff Norris Palmer’s September 2006 claim for bridging benefits was denied).

83. The Boeing Company VEBA Master Trust (the “Trust”) is the funding mechanism for the Retiree Health Plan. Some of the benefits Boeing provides under the Retiree Health Plan are self-funded and others are fully-insured. Boeing makes contributions to the Trust (including premium payments from the participants), which are then utilized to purchase or provide the retiree-medical coverage. For insured benefits, premiums are paid from the Trust to the insurer. For self-funded benefits, the benefits are funded from the Trust and paid to a third-party administrator who pays the providers.

84. According to data contained in Boeing's HRMS system, employees who separated from Boeing as part of its Spokane divestiture to Triumph Composite Systems, Inc. ("Triumph") and who accepted employment with Triumph were coded "terminated pursuant to a divestiture" ("TER-DIV") on January 10, 2003.

85. A union-represented employee in Spokane who rejected an offer of employment with Triumph was coded "TER-1101-RIF-NO L.," which indicates a termination pursuant to a reduction in force without severance pay.

86. Employees in Spokane who refused to participate in good faith in the transition process were coded "TER-RIF," were treated as though they had voluntarily resigned from Boeing for purposes of layoff benefits, and did not receive severance pay from the Layoff Plan.

87. Based on data contained in Boeing's HRMS system, all employees who separated from Boeing as part of its divestiture of the Kent Thermal Joining Center to GKN Aerospace Chem-tronics, Inc. ("GKN Chem-tronics") and who accepted employment with GKN Chem-tronics were coded "TER-DIV" on January 10, 2002.

88. Based on data contained in HRMS, employees who separated from Boeing as a result of the divestiture of the Corinth Wiring Business to Labinal and who accepted employment with Labinal were coded "TER-DIV" on June 5, 2003.

89. Based on data contained in HRMS, employees who separated from Boeing as a result of the divestiture of the St. Louis Fabrication Group to GKN Aerospace North America, Inc. ("GKN North America") and who accepted employment with GKN North America were coded as "TER-DIV" on January 6, 2001. Any employees who refused to apply for positions with GKN North America were coded "TER-RES," meaning they were terminated pursuant to a voluntary resignation.

90. Based on data contained in HRMS, employees who separated from Boeing as a result of the divestiture of the Commercial Electronics Business to BAE and who accepted employment with BAE were coded as "TER-DIV" on August 12, 2004. One employee was coded terminated pursuant to a transfer to an affiliate

(“TER-TAF”). Another union-represented employee who was unable to perform work because of a medical issue was coded as “TER-RIF.”

91. Union-represented employees in Spokane who accepted employment with Triumph were coded “TER-DIV” and received the bridge benefit from the relevant Boeing benefit plans. Union-represented employees who refused to participate in good faith in the transition process were coded “TER-RIF,” and received the bridge benefit from the relevant Boeing benefit plans.

92. Union-represented employees in Kent were coded “TER-DIV” and received the bridge benefit from the relevant Boeing benefits plans.

93. Regarding the Corinth transaction, Boeing retained the pension assets and liabilities for the union-represented employees who accepted employment with Labinal. Union-Represented Employees were coded “TER-DIV” and received the bridge benefit from the relevant Boeing benefits plans.

94. Boeing transferred to GKN North America the pension assets and liabilities for the union-represented employees who accepted employment with GKN North America. Union-Represented Employees who accepted employment with GKN North America were coded “TER-DIV” and were not deemed eligible for the bridge benefit from the Boeing pension plan with respect to the assets and liabilities transferred to GKN North America. The pension benefit for these TER-DIV individuals would come from GKN North America’s pension plan, when they retired from GKN North America. These Union-Represented Employees were not deemed eligible for retiree medical benefits from Boeing. Any Union-Represented Employees who refused to apply for employment with GKN North America, or who rejected an offer from GKN North America, were not deemed eligible for the bridge benefit from the Boeing pension plan, and would retire from Boeing as terminated vested participants.

95. BAE assumed the entire stand-alone pension plan for all employees, including retirees and employees who did not accept employment with BAE. Employees who were eligible for benefits under the transferred plan would receive those benefits from BAE under the transferred plan to the extent that plan provided for bridge and other benefits.

b. The following documents constitute business records within the scope of Fed. R. Evid. 803(6) and may be introduced in evidence during trial without further foundation, subject to objections based solely on grounds of relevancy:

1. All deposition exhibits.

2. All documents produced in discovery.

c. Copies of exhibits may be used during trial in lieu of originals.

d. The parties have stipulated to the admission of the following trial exhibits:

The parties stipulate to the admission as trial exhibits of the same documents stipulated to be business records under item 4(b).

e. At trial, witnesses who are within the subpoena power of the Court and who are officers, agents, or employees of the parties need not be formally subpoenaed to testify, provided that opposing counsel is given at least 5 business days advance notice of the desired date of trial testimony. For purposes of this entire pretrial order, the calculation of “business days” does not include Saturday, Sunday, or any legal holiday as defined by Fed. R. Civ. P. 6(a)(4).

f. By no later than 1:30 p.m. each day of trial, counsel shall confer in good faith and exchange a list of the witnesses who are expected to testify the next day of trial.

5. FACTUAL CONTENTIONS.

a. Plaintiffs’ Contentions.

The Plaintiff employees worked for Boeing under employment contracts negotiated by their respective unions with Boeing. These contracts set forth the terms and conditions of their employment with Boeing. These

contracts required Boeing to provide the employees with certain employee benefits, including a defined-benefit pension and retiree health care when they reached a certain age. At age 55, the Plaintiff employees could leave Boeing employment and begin receipt of their monthly Boeing pension (at a 10% reduction) and receive health insurance from Boeing until age 65 (“Age 55 Retirement”). They were then free to work for another company without losing their Age 55 Retirement pension and health insurance from Boeing.

To elect this Age 55 Retirement, an employee ordinarily had to be actively employed at Boeing at age 55. If a nonactive employee sought his Boeing pension before age 65, he was assessed a penalty of 6% per year that he was less than 65 (*e.g.*, a 60% reduction in monthly pension payment for receipt at age 55). In addition, such individuals would not receive any health insurance from Boeing.

The unions negotiated with Boeing for a “layoff bridge” to Age 55 Retirement to protect those men and women who were almost age 55 but who ceased to be active Boeing employees because they were laid off from Boeing employment. Under this layoff bridge, employees who were within six (6) years of age 55 could elect Age 55 retirement once they turned 55, as though they were still active Boeing employees. Consequently, bridge-eligible employees could elect a pension benefit that was subject only to the 10% reduction and also obtain Boeing-paid health insurance until age 65.

In sum, employees were eligible for this contractual layoff bridge if they: 1) had 10 years of Boeing service; 2) were age 49-54; and 3) were laid off from Boeing employment.

Boeing commenced a divestiture process of several of its manufacturing facilities beginning around 2000. Three of these facilities were covered by the same contract language with the IAM and SPEEA: the facility in Kent, Washington; the facility in Spokane, Washington; and the facility in Wichita. At the Boeing facilities in Kent and Spokane, Boeing terminated all the employees upon the asset sale; the purchasing company continued the manufacture of airplanes; the new company did not agree to hire all employees, choosing instead to hire only those who applied and who it wished to hire; and the new company changed the terms and conditions of employment.

At both Kent and Spokane, Boeing treated all the terminated employees as laid off for purpose of the layoff bridge. Thus, once those employees reached age 55, they were able to elect Age 55 Retirement, whether they were working for the new company, working elsewhere, or not working at all.

The number of employees affected by the Wichita divestiture was much larger than the Kent or Spokane divestitures, which occurred a couple of years earlier. Boeing elected to treat the Wichita workforce different than it had treated the employees in Washington state.

On June 16, 2005, Boeing ceased to manufacture commercial airplanes in Wichita and Oklahoma. Pursuant to an agreement it signed in February 2005, Boeing sold certain assets associated with that manufacturing to a third-party company, later known as Spirit. Boeing and Spirit negotiated a long-term supply contract, whereby Spirit would supply Boeing with fuselages and other parts. In that agreement with Spirit, Boeing negotiated to transfer away certain pension obligations it had to its existing workforce. Boeing did not include the unions in any of these discussions with Spirit.

Boeing decided it no longer wished to employ anyone in Oklahoma. Boeing likewise decided to shrink its workforce in Wichita, laying off those employees not needed to perform the remaining military work at the Wichita facility. Indeed, Boeing represented to this Court in another lawsuit that it treated all those terminated employees identically for employment purposes. Moreover, in this Court, Boeing described their collective termination as a reduction in force.

Spirit did not assume the existing workforce or their terms and conditions of employment. Anyone who wanted a job at Spirit was required to apply for one. Spirit insisted that all of its employment relationships would be new ones, based on hiring decisions that would follow the employees' terminations from Boeing. Spirit also insisted on cutting its employment costs for every employee, whether through reductions in pay, benefits or both. To that end, Spirit bargained for brand-new, concessionary employment contracts with the various unions.

Both Boeing and Spirit, however, wanted Spirit to have a skilled workforce on Day One. This was imperative if Spirit was going to satisfactorily supply Boeing with the contracted-for airplane parts. Moreover,

Boeing wanted Spirit to hire as many of the employees as possible, as it developed a scheme that it would save it millions of dollars for its former employees who were hired as Day One employees at Spirit.

Boeing provided the layoff bridge to some, but not all, the employees it laid off on June 16. Boeing refused to provide the layoff bridge to the individual Plaintiffs, asserting that Boeing had not laid them off. Unlike in Kent and Spokane, Boeing insisted that it would treat as laid off only those employees who tried, unsuccessfully, to get hired at the new company.

Plaintiffs have contended since 2005 that Boeing was contractually bound to treat the employees as “laid off” and to provide them with the promised benefits, which had been negotiated in the contracts. The unions argued that the employment contracts left Boeing with no right to treat them as anything other than “laid off.” Indeed, Boeing recognized employees’ rights in the divestiture to “bump” less senior employees and to have recall rights to Boeing employment, rights that exist only in the event of a layoff.

In 2005, the unions complained to Boeing about its announced refusal to treat the employees as “laid off” for purpose of the layoff bridge. Boeing informed the unions they need not file any grievance because, according to Boeing, this subject matter was not covered by the grievance-arbitration provision of the unions’ employment contracts. Thus, Boeing informed the unions in 2005 that Boeing would not arbitrate their disputes with Boeing over its failure to recognize the employees’ standing as “laid off” employees.

Because Boeing repudiated the substantive arbitrability of these disputes, Plaintiffs sued for breach of contract under Section 301. Disputes under a labor contract can be arbitrated only if there is an agreement to arbitrate them. If there is no agreement to arbitrate, either the union, or individual employees, may bring suit for breach of contract in federal court. Boeing asserted then, and continues to assert now, that other entities (e.g., the Boeing benefit plans or Spirit) were actually the ones responsible for Plaintiffs not receiving the layoff bridge.

The UAW represented the Oklahoma employees covered by the June 16 divestiture. Boeing treated those employees the same as it did the Wichita employees. As the unions did in Wichita, the UAW asserted that Boeing should have treated the June 16 employees as “laid off” and should have provided them the layoff bridge.

Boeing refused to arbitrate with the UAW, again arguing this was not an arbitrable matter under the arbitration clause. UAW sued Boeing to compel arbitration in federal court in Chicago. Boeing settled that lawsuit by agreeing to have an arbitrator determine arbitrability.

The arbitrator ruled in favor of the UAW and rejected Boeing's arguments, the same ones Boeing makes here. Specifically, the arbitrator rejected Boeing's argument that the June 16 divestiture did not cause the Last Day employees to be "laid off" from Boeing under the employment contract. The arbitrator found that the divestiture did effect a "layoff" under the contract and ordered that Boeing must provide the employees with the associated contractual benefits. Boeing did not challenge that decision.

The Oklahoma arbitrator subsequently ordered that Boeing must provide the employees with the layoff bridge, if Boeing's associated pension and health funds refused to do so. Boeing sued to overturn this decision, arguing that ERISA case law controlled. The Seventh Circuit rejected Boeing's arguments and affirmed the arbitrator's decision to hold Boeing itself liable in a unanimous decision. *Boeing Co. v. United Auto Workers*, 600 F.3d 722 (7th Cir. 2010).

The Plaintiffs' remaining claims in this lawsuit flow from this threshold position that they were "laid off" for purposes of their Boeing employment under the employment contracts. Boeing's benefit plans premise eligibility for the layoff bridge on *Boeing's* certification of an employee as "laid off." Boeing's plan administrator does not have authority to substitute a different conclusion. Consequently, all the employees should have received the layoff bridge. Boeing and its benefit plans frustrated the employees' attainment of this benefit, however, including by giving improper information. Boeing's February 22, 2005 contract with Spirit, wherein Boeing contracted to transfer the pension assets of certain employees, also breached Boeing's contracts with the employees' unions, all of which forbade Boeing from unilaterally amending the benefit plans.

Boeing insisted that the unions' complaints about its announced treatment of the employees as not laid off were not subject to arbitration under the employment contracts.

Boeing's benefit plans have insisted that none of the Plaintiffs are eligible for the layoff bridge because the June 16 divestiture did not constitute a "layoff." The plans have informed other employees who have inquired that the plans' decision on the layoff-bridge question is final and that no use would be served by other employees filing any additional appeals.

Boeing must abide by its contractual promises, including to treat the employees as laid off and not to amend its plans. One consequence of Boeing's promises was that the affected employees were supposed to be eligible for the layoff bridge. Boeing insists that treating them as laid off would be implausible and contrary to common sense. Boeing argues that being forced to treat the employees as laid off would create a disincentive for it to provide benefits to laid off employees. But this is what Boeing *contracted* to provide. As Judge Posner wrote for the Seventh Circuit, "Boeing is stuck with the commitments that it negotiated with the union unless it can renegotiate them. It was not required to agree to provide lifetime benefits to workers represented by the UAW but it agreed to do so and must live with its decision." *Boeing*, 600 F.3d at 726.

b. Boeing Defendants' Contentions.

This case concerns Boeing's divestiture in 2005 of certain assets of the manufacturing facility of its Commercial Airplanes Division located in Wichita, Kansas. The Wichita facility manufactured parts for use in Boeing's commercial airplanes. However, Boeing had embarked on a business strategy under which it would purchase parts from outside suppliers, rather than manufacturing those parts itself. Boeing believed that this strategy would maximize the value of its assets for the benefit of the company and its shareholders, and would allow Boeing to compete effectively in the international commercial aircraft market. In February 2005, therefore, Boeing entered into an Asset Purchase Agreement with Spirit in which Boeing sold specific assets to Spirit. By finding a buyer for the facility, Boeing ensured that thousands of Wichita residents would be able to retain high-paying jobs with no break in employment.

Employees affected by the divestiture can be categorized into three groups: (1) employees who continued in their roles as employees of Spirit with no break in employment; (2) employees who did not continue in their

roles because they either refused to apply for employment with Spirit or rejected an offer of employment with Spirit; and (3) employees who did not continue in their roles because they applied for, but did not receive, an offer of employment with Spirit.

The first group (the “Day One” employees) enjoyed continuous employment, remaining in the same positions and performing the same tasks on the same projects immediately after the divestiture as employees of the acquiring company, Spirit. The vast majority of employees at the Wichita facility (approximately 85%) were Day One employees. The Day One employees who were represented by SPEEA received salaries with Spirit that were greater than or equal to their salaries with Boeing. The Day One employees who were represented by the IAM and the IBEW received an equity bonus, which ultimately was worth up to \$60,000, for performing the same job for Spirit that they previously performed with Boeing. Spirit created “mirror” pension plans for these Day One employees, and Boeing transferred assets to those mirror plans sufficient to support the accrued pension liabilities that Spirit had assumed for the Day One employees, and to ensure that they would receive at least 100% of the vested pension benefits that they had earned. The mirror plans were also structured to allow Day One employees who had not reached the age of 49, and thus were not eligible at that time for subsidized early retirement benefits under the BCERP, to “grow into” pension benefits and subsidized early retirement benefits that they had not earned at Boeing while working at Spirit. Boeing also agreed to reduce the purchase price of the assets by \$243 million based on Spirit’s agreement to accept pension and retiree medical liabilities (as well as accrued sick leave) pursuant to the transaction.

The members of the Harkness Class are Day One employees who were between the ages of 49 and 55 years old on June 16, 2005, when the divestiture transaction between Boeing and Spirit closed. The EBPC treated the Day One employees as having been terminated pursuant to a divestiture and determined that those employees were no longer participants in the BCERP, and thus denied the Harkness Class members’ claims for pension and retiree health benefits that are reserved solely for participants in the BCERP and the Retiree Health Plan. Nonetheless, the Harkness Class members claim that they were “laid off” and should be allowed to retire

from Boeing, collect generous retirement benefits, and qualify as participants under the Boeing Retiree Health Plan, even as they continue working in the same jobs at Spirit and are covered by Spirit's health plan. These benefits would overlap with those they would be eligible to receive from Spirit when they actually retire from Spirit. And in seeking those benefits, the Harkness Class members advance arguments before the Court in connection with their claims under ERISA that they did not raise before the EBPC.

The second group of employees (the McCartney-Boone Plaintiffs) chose not to continue their employment at the Wichita facility after the divestiture; they either refused to apply for positions with Spirit or rejected Spirit's offers of employment. The McCartney-Boone Plaintiffs also claim, like the Harkness Class, that they were "laid off" and therefore qualified for early retirement benefits, retiree health benefits, and severance benefits from the Boeing plans, even though they deliberately declined the opportunity to retain their positions as employees of Spirit. The McCartney-Boone Plaintiffs who filed claims for benefits or clarification of their entitlement to benefits (*see* Stipulated Fact No. 75, *supra*) advance arguments before the Court in connection with their claims under ERISA that they did not raise before the EBPC.

The third group of employees—none of whom are plaintiffs in this case—sought to retain their jobs as employees of Spirit but were not offered that opportunity. Boeing provided these employees with all the benefits to which laid off employees are entitled.

All of the union and individual plaintiffs had obligations that they were required to satisfy before bringing suit in federal court under ERISA or the LMRA. The plaintiffs failed to satisfy those obligations. Most of the McCartney-Boone plaintiffs failed to follow mandatory procedures under the respective plans for filing claims for benefits and appealing the denial of the benefits they seek to the EBPC.¹ Furthermore, both the union and individual plaintiffs are subject to the terms of the respective collective bargaining agreements between Boeing and the IAM, SPEEA, and the IBEW. Each of those agreements required all of the plaintiffs to comply with the

¹In particular, plaintiffs Boone, Carselowey, Gray, Kerns, Leavell, Moore, Norman, Queen, Sanders, Stocking, Stoner, and Wright did not file any benefit claims. Plaintiff McFarland did not appeal the denial of his benefit claims to the EBPC.

grievance and arbitration procedures mandated by those agreements, which precluded court actions other than to enforce an arbitration award. None of the plaintiffs complied with those governing procedures.

The claims of both the union and individual plaintiffs are, moreover, contrary to the controlling collective bargaining agreements, which are designed to encourage service, provide for an orderly process of dispute resolution, and recognize that certain benefits are payable only to employees who actually are displaced from their jobs. The unions also failed to raise any objection to Boeing's transaction with Spirit during effects bargaining—including any objection to the transfer of the pension assets for the Day One employees to Spirit's mirror plans—and, in fact, represented that they would not object to the transaction by entering into new collective bargaining agreements with Spirit that expressly accepted the transfer of those pension assets. Boeing detrimentally relied on that representation by agreeing to reduce the purchase price of its assets by a quarter billion dollars. The unions, in contrast, accepted the benefits that some employees enjoyed as a result of the structure of the divestiture—but now argue that the same structure should be disregarded for other employees. Under these circumstances, requiring Boeing to provide the same benefits to plaintiffs as to employees who were truly laid off would be inequitable and would deny Boeing the flexibility that employers need when undertaking divestitures and other complex transactions. Indeed, if plaintiffs were permitted to reap the benefits they seek (but have not earned), the consequence would be to discourage Boeing and other companies from engaging in transactions that save jobs—as the divestiture in this case did.

c. Spirit Defendants' Contentions.

1. Section 12.2 of the Spirit Pension Plan gives the Spirit Pension Oversight Committee, as the administrator of the Plan, the authority and discretion to interpret and apply the terms of the Plan, and to resolve facts and disputes arising under it. Those powers include “full discretionary authority to interpret the Plan, including the power to construe ambiguities, remedy inconsistencies, and repair scrivener's errors. The Plan Administrator has full discretionary authority to determine all questions that may arise including all questions relating to the eligibility of Employees to participate in the Plan and the amount of benefits to which any

Participant or Beneficiary may become entitled.” Spirit Pension Plan § 12.2(a). The Spirit Pension Plan also gives the administrator (*i.e.*, the Spirit Pension Oversight Committee) the “full discretionary authority to determine all facts necessary to establish the right of the applicant to benefits under the provisions of the Plan and the amount thereof.” *Id.* § 12.2(c).

2. The Spirit Pension Plan includes reasonable procedures pursuant to which participants and beneficiaries of that Plan may make claims for benefits or request clarification of their rights to benefit, and pursuant to which they may appeal the decisions made on their initial claims or requests.

3. The decisions to deny the Harkness Plaintiffs’ claims and appeals with respect to their benefits under the Spirit Pension Plan were made by the Spirit Pension Oversight Committee acting in its capacity as the Spirit Pension Plan’s administrator.

4. Members of the Harkness Class who became Spirit employees on June 17, 2005, worked at the same tasks and performed the same functions for Spirit on that day as they did for Boeing the day before.

5. Under the Asset Purchase Agreement (“APA”) between Boeing and Spirit, Spirit assumed responsibility to “maintain retiree medical coverage for the benefit” of members of the Harkness Class with “levels of benefits under [a] “[b]enefit [p]lan [Spirit] establishe[d] ... as determined by [Spirit],” but Spirit was not required to provide the same Boeing Early Retirement Health Benefit defined in paragraph 10 the Second Consolidated Amended Complaint, nor did Spirit assume any responsibility to provide retiree health benefits that mirrored, or were similar to, the retiree health benefits provided under the Boeing Retiree Health Plan.

6. As part of the APA between Boeing and Spirit, Spirit did not assume or accept liabilities under Boeing’s Early Retirement Health Benefit defined in paragraph 10 the Second Consolidated Amended Complaint.

7. No member of the Harkness Class has made a claim to Spirit or to any health plan sponsored by Spirit for retiree health benefits identical or similar to the Early Retiree Health Care Benefit described in the Second Consolidated Amended Complaint.

8. Spirit has never established an “employee welfare benefit plan” within the meaning of Section 3(1) of ERISA, 29 U.S.C. § 1002(1), to administer the Early Retiree Health Care Benefit described in the Second Consolidated Amended Complaint.

9. Plaintiffs allege that they were laid off from their employment with Boeing as of June 16, 2005, when they were participants in the Boeing Pension Plan and the Boeing Retiree Health Plan.

10. No Plaintiff has been laid off from his or her employment with Spirit.

11. No member of the Harkness Class who has retired from or otherwise terminated employment with Spirit, and who is otherwise eligible for a benefit under the Spirit Pension Plan, has been denied such a benefit.

12. Members of the Harkness Class who are participants in the Spirit Pension Plan and who have at least 10 years of service under the Plan and are laid off by Spirit between the ages of 49 and 55, and who are otherwise eligible under the terms of the Spirit Pension Plan, may claim the “bridge benefit” – *i.e.*, the ability to receive a subsidized early retirement benefit when they retire at or after age 55 – from the Spirit Pension Plan.

6. THEORIES OF RECOVERY.

a. List of Plaintiffs’ Theories of Recovery. Plaintiffs assert they are entitled to recover upon the following theories:

- Defendant Boeing breached its contractual promises to treat the individual Plaintiffs as laid off and to provide certain pension benefits and health benefits to them as laid-off Boeing employees (Counts 1-4 and 10 of Second Consolidated Amended Complaint).
- Defendant Boeing unlawfully interfered with the pension and health care rights of the individual Plaintiffs in violation of 29 U.S.C. § 1140 (Counts 6 and 7 of Second Consolidated Amended Complaint).
- The actions of Defendants Boeing Company Employee Retirement Plan, the Boeing Company Retiree Health and Welfare Benefit Plan and the Boeing Employee Benefits Plan Committee (“EBPC”) to deny Plaintiffs’ eligibility for “bridging” benefits is incorrect, and

amounted to an incorrect application of the governing terms of the Plans and the law (Counts 8 and 9 of Second Consolidated Amended Complaint).

- The actions of Defendants Boeing Company, the Boeing Company Layoff Benefits Plan, and the EBPC to deny the McCartney/Boone Plaintiffs' eligibility for layoff benefits is incorrect, and amounted to an incorrect application of the governing terms of the Plans and the law (Count 18 of Second Consolidated Amended Complaint)
- The actions of the Spirit Plans and of Spirit and/or Spirit Holdings in repudiating Plaintiffs' eligibility for "bridging" benefits is incorrect, and amounted to an incorrect application of the governing terms of the Plans, the Asset Purchase Agreement, and/or the law (Counts 12 and 13 of Second Consolidated Amended Complaint).
- Defendants Boeing, the Boeing EBPC and the Boeing Company Employee Retirement Plan, by amending the Plan to transfer certain pension assets to Spirit and/or Spirit Holdings and by actually transferring those assets and responsibilities, eliminated the bridge benefit for the Harkness Plaintiffs, thereby decreasing the accrued benefits of the Harkness Plaintiffs and members of the Harkness Class, in violation of 29 U.S.C. § 1054(g) (Count 11 of Second Consolidated Amended Complaint).
- Defendants Spirit and the Spirit Pension Plan, by creating the Spirit Pension Plans for purposes of accepting certain transferred pension assets from the Boeing Company Employee Retirement Plan and by actually accepting those transferred assets and responsibilities, eliminated the bridge benefit for the Harkness Plaintiffs, thereby decreasing the accrued benefits of the Harkness Plaintiffs and members of the Harkness Class, in violation of 29 U.S.C. § 1054(g) (Count 14 of Second Consolidated Amended Complaint).

- The actions of Boeing and the Boeing EBPC, in administering the plans in a manner that contravened the controlling plan documents, including by interpreting the plans in a manner that would deny the bridge benefit to otherwise qualified participants, by implementing and enforcing a retroactive amendment to the Boeing Company Employee Retirement Plan to eliminate the rights of the Harkness Plaintiffs to the bridge benefit, and by transferring certain assets to the Spirit Defendants without ensuring the protection of the Harkness Plaintiffs' accrued rights to the bridge benefit, all had the effect of breaching their fiduciary duties to the Plans and to the Plans' participants and beneficiaries in violation of ERISA (Count 15 of Second Consolidated Amended Complaint).
- Boeing, the Boeing Company Employee Retirement Plan, the Boeing EBPC, Spirit, Spirit Holdings and the Spirit Plans violated the ERISA rights of the Harkness Plaintiffs by arranging the transfer of pension assets to plans that do not provide the same benefits to which Plaintiffs were entitled under the plans prior to the transfer (Count 16 of Second Consolidated Amended Complaint).
- The Harkness Plaintiffs are entitled to recovery as third party beneficiaries of the Asset Purchase Agreement between Defendants Boeing and Spirit (Count 17 of Second Consolidated Amended Complaint).
- Plaintiffs are entitled to declaratory judgment establishing their rights for "bridging benefits" under the applicable collective bargaining agreements and the Boeing and Spirit Plans and, in the case of the McCartney/Boone Plaintiffs, to layoff benefits under the Boeing Company Layoff Benefits Plan (Counts 5 and 19 of Complaint).²

² This theory is not so much a substantive legal theory as it is a procedural one and thus we have not set out the elements in the next section. The substantive legal argument is subsumed in the other theories and set out in the elements associated with each below. The procedural requirements, as Plaintiffs understand them, are that (1) the Court must have jurisdiction of the parties and of the subject matter, and (2) there must be an actual controversy between the plaintiffs and a defendant who asserts and adversary claim or who threatens the invasion of the plaintiff's rights.

b. Essential Elements of Plaintiffs' Claims for Breach of Contract (Counts 1-4 and 10 of Second Consolidated Amended Complaint). Subject to the court's determination of the law that applies to this case, the Plaintiffs believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements: the existence of a contract between Boeing and the unions, and a breach of a duty imposed by the contract. E.g., *Smith v. Evening News Assn.*, 371 U.S. 195, 198–200, 83 S.Ct. 267, 269–270, 9 L.Ed.2d 246 (1962); [*Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 500 \(5th Cir.1982\)](#).

The Boeing Defendants believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements:

1. The existence of a contract between the parties.
2. Sufficient consideration.
3. Plaintiffs' performance or willingness to perform in compliance with the contract.
4. Boeing's breach of the contract.
5. Damages to Plaintiffs caused by the breach.

See Tripoli Mgmt., LLC v. Waste Connections of Kan., Inc., Slip Copy, 2011 WL 2897334, at *17 (D. Kan. July 18, 2011); *Weatherby v. Burlington N. & Santa Fe Ry. Co.*, 209 F. Supp. 2d 1155, 1163 (D. Kan. 2002).

As to Count 10, which is brought by the individual plaintiffs, these plaintiffs do not have a right to sue under LMRA section 301 unless they show, in addition to the above elements, that their respective labor unions breached their duty of fair representation. *Webb v. ABF Freight Sys., Inc.*, 155 F. 3d 1230, 1238-39 (10th Cir. 1998); *Dean v. Boeing*, No. 02-1019-WEB, 2003 U.S. Dist. LEXIS 8787, at *29-31 (D. Kan. Apr. 24, 2003) (following *Vaca v. Sipes*, 386 U.S. 171, 184 (1966)).

c. Essential Elements of Plaintiffs' Claims of Unlawful Interference under ERISA section 510 (Counts 6 and 7 of Second Consolidated Amended Complaint). Subject to the court's determination of the law that applies to this case, the Plaintiffs believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements: (1) the existence of a benefit to which the participants or

beneficiaries are or may become entitled to receive, (2) an adverse action taken by Defendants, with (3) an intent to interfere or retaliate. E.g., *Garratt v. Walker*, 164 F.3d 1249, 1256 (10th Cir. 1998); *Maez v. Mountain States Tel. & Tel.*, 54 F.3d 1488, 1504 (10th Cir.1995); *Phelps v. Field Real Estate Co.*, 991 F.2d 645, 649 (10th Cir.1993). The employee is not required to show that the employer's sole motivation was to interfere with employee benefits; she need only show that it was a motivating factor. *Garratt*, 164 F.3d at 1256.

The Boeing Defendants believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements to establish a *prima facie* case of unlawful interference under section 510 of ERISA, 29 U.S.C. § 1140:

1. Prohibited employer conduct (*i.e.*, “to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary,” 29 U.S.C. § 1140);
2. Taken with the specific intent of interfering;
3. With the attainment of any right to which plaintiffs may become entitled.

If plaintiffs establish a *prima facie* case, Boeing may then present evidence of a legitimate reason for the employment action. If Boeing proffers a legitimate reason for the action, Plaintiffs must then show that the proffered reason is pretext. *See* 29 U.S.C. § 1140; *Maez v. Mountain States Tel. & Tel.*, 54 F.3d 1488, 1504 (10th Cir. 1995) (describing elements); *Babich v. Unisys Corp.*, 842 F. Supp. 1343, 1353-54 (D. Kan. 1994) (Belot, J.) (“plaintiff must present evidence from which the employer’s *specific* intent to interfere with the plaintiff’s entitlement to ERISA benefits can be inferred”).

d. Essential Elements of Plaintiffs’ Claims for Wrongful Denial of ERISA Plan Benefits under ERISA (Counts 8, 9, 12, 13 and 18 of Second Consolidated Amended Complaint). Subject to the court’s determination of the law that applies to this case, the Plaintiffs believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements: (1) that the Plans are covered by ERISA, (2) that the individual Plaintiffs have standing as plan participants and beneficiaries, and (3) that the failure of the Plans to provide the employee benefits was incorrect.

The Boeing and Spirit Defendants believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements:

1. The Boeing and/or Spirit Plans are covered by ERISA.
2. The individual Plaintiffs have standing to bring suit under ERISA section 502(a)(1)(B) as plan participants or beneficiaries under the Boeing and/or Spirit Plans.
3. The individual Plaintiffs exhausted the administrative remedies specified by the respective Boeing and/or Spirit Plans.
4. The individual Plaintiffs have benefits due to them under the terms of the Boeing and/or Spirit Plans, or rights to future benefits under the terms of the Boeing and/or Spirit Plans.
5. The respective decisions denying the individual Plaintiffs' claims for benefits under the terms of the Boeing and/or Spirit Plans were arbitrary and capricious.

See 29 U.S.C. § 1132(a)(1)(B); *Chastain v. AT&T*, 558 F.3d 1177, 1181-83 (10th Cir. 2009) (affirming grant of summary judgment for defendant, and holding that plaintiffs lacked standing to sue their former employer for benefits under ERISA section 502(a)(1)(B) after plaintiffs' pension assets were transferred to another employer's plan); *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 923 (10th Cir. 2006) ("If the plan does explicitly confer discretionary authority on an administrator with so-called *Firestone* language, courts must review benefit determinations under an 'arbitrary and capricious' standard."); *Holcomb v. Unum Life Ins. Co. of Am.*, 578 F.3d 1187, 1192 (10th Cir. 2009); *Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1190 (10th Cir. 1999) (exhaustion of administrative remedies is prerequisite to seeking judicial relief).

e. Essential Elements of Plaintiffs' Claims of Unlawful Cutback of ERISA Plan Benefits under ERISA section 204(g) (Counts 11 and 14 of Second Consolidated Amended Complaint). Subject to the court's determination of the law that applies to this case, the Plaintiffs believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements: (1) that there was an

amendment which (2) resulted in a reduction in Plaintiffs' accrued benefits. *See, e.g., Dooley v. American Airlines, Inc.*, 797 F.2d 1447, 1451 (7th Cir.1986).

The Boeing and Spirit Defendants believe the following: Counts 11 and 14 of Plaintiffs' Second Consolidated Amended Complaint purport to state causes of action under ERISA section 204(g), 29 U.S.C. § 1054(g). However, ERISA section 204(g) does not provide a private right of action. Consequently, the Boeing and Spirit Defendants assume that Plaintiffs intend to rely on ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), to provide a right of action for an alleged violation of ERISA section 204(g). In order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements:

1. The Harkness Class members have standing to bring suit under ERISA section 502(a)(3).
2. The Harkness Class members have no other means of obtaining appropriate relief.
3. The plan that provides for the benefits sought was amended within the meaning of ERISA section 204(g).
4. The benefits that were allegedly decreased were accrued benefits within the meaning of ERISA section 204(g).
5. The amendment actually resulted in a decrease in the Harkness Class members' accrued benefits as participants in the plan that provides for the benefits sought.
6. The respective decisions denying the individual Plaintiffs' claims for benefits under the terms of the Boeing and/or Spirit Plans were arbitrary and capricious.

See 29 U.S.C. §§ 1054(g), 1132(a)(3); *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996); *Stamper v. Total Petroleum, Inc. Retirement Plan*, 188 F.3d 1233, 1240-42 (10th Cir. 1999).

f. Essential Elements of Plaintiffs' Claims for Breach of Fiduciary Duties under ERISA section 404 (Count 15 of Second Consolidated Amended Complaint). Subject to the court's determination of the law that applies to this case, the Plaintiffs believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements: (1) the subject plan(s) and the assets involved are

covered by ERISA, (2) the acting Defendant was a fiduciary within the meaning of ERISA section 3(21) at the time of the occurrence of the breach, (3) the action(s) taken constituted a breach of the fiduciary's duties by violating one or more of ERISA sections 402, 403, 404, 405, 406, 407, and 410.

The Boeing Defendants believe the following: Count 15 of Plaintiffs' Second Consolidated Amended Complaint purports to state a cause of action under ERISA section 404(a)(1)(A), (B), and (D), 29 U.S.C. § 1104(a)(1)(A), (B), and (D), and does not plead a violation of any other provision of ERISA. Plaintiffs' attempt in this pretrial order to allege violations of ERISA provisions other than section 404 is therefore improper. Moreover, ERISA section 404 does not provide a private right of action. Consequently, the Boeing Defendants assume that Plaintiffs intend to rely on ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), to provide a right of action for an alleged violation of ERISA section 404. Thus, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements:

1. The individual Plaintiffs have standing to bring suit under ERISA section 502(a)(3).
2. The individual Plaintiffs have no other means of obtaining appropriate relief.
3. The Plans and assets involved are covered by ERISA.
4. Each Defendant is a legally cognizable entity who may properly be sued for breach of fiduciary duty under ERISA.
5. Each Defendant took action as a fiduciary within the meaning of ERISA section 3(21).
6. Through that action, each Defendant failed to discharge its duties:
 - i. with respect to a plan solely in the interest of the participants and beneficiaries;
 - ii. for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan;
 - iii. with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; or

iv. in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of ERISA.

7. The respective decisions of the EBPC denying the individual Plaintiffs' claims for benefits under the terms of the Boeing Plans were arbitrary and capricious.

8. The EBPC's decisions denying the individual Plaintiffs' claims for benefits caused a loss of benefits due them.

9. The Defendant's breach of fiduciary duty proximately caused that loss.

See 29 U.S.C. §§ 1104(a)(1)(A), (B), (D), 1109, 1132(a)(3); *Varity Corp. v. Howe*, 516 U.S. 489, 514-15 (1996) (“*Firestone*, which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct.”); *Holcomb v. Unum Life Ins. Co. of Am.*, 578 F.3d 1187, 1192 (10th Cir. 2009).

g. Essential Elements of Plaintiffs' Claims for Unlawful Transfer of Plan Assets under ERISA section 208 (Count 16 of Second Consolidated Amended Complaint). Subject to the court's determination of the law that applies to this case, the Plaintiffs believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements: that the Defendants engaged in a transfer of plan assets and liabilities attributable to the Harkness Plaintiffs and that the result of the transfer was the diminished value of the benefits provided after the transfer.

The Boeing and Spirit Defendants believe the following: Count 16 of Plaintiffs' Second Consolidated Amended Complaint purports to state a cause of action under ERISA section 208, 29 U.S.C. § 1058. However, ERISA section 208 does not provide a private right of action. Consequently, the Boeing and Spirit Defendants assume that Plaintiffs intend to rely on ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), to provide a right of action for an alleged violation of ERISA section 208. In order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements:

1. The Harkness Class members have standing to bring suit under ERISA section 502(a)(3).

2. The Harkness Class members have no other means of obtaining appropriate relief.

3. The plan that provides for the benefits sought transferred its assets or liabilities with respect to the Harkness Class members to another plan.

4. The Harkness Class members would not have (if the plan then terminated) received a benefit immediately after the transfer that was equal to or greater than the benefit they would have been entitled to receive immediately before the transfer (if the plan had then terminated).

5. The respective decisions denying the individual Plaintiffs' claims for benefits under the terms of the Boeing and/or Spirit Plans were arbitrary and capricious.

See 29 U.S.C. §§ 1028, 1058, 1132(a)(3), 1334; *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996); *United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189 (6th Cir 1988).

h. Essential Elements of Plaintiffs' Claims as Third Party Beneficiaries of Asset Purchase Agreement (Count 17 of Second Consolidated Amended Complaint). Subject to the court's determination of the law that applies to this case, the Plaintiffs believe that, in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for the Harkness Plaintiffs' benefit, and (3) that the benefit to the Harkness Plaintiffs under that agreement is immediate rather than incidental. *Halliburton Co. Benefits Committee v. Graves*, 463 F.3d 360 (5th Cir. 2006).

The Spirit Defendants believe that Plaintiffs have the burden of proving the following essential elements with respect to retiree pension benefits sought in Count 17 of Plaintiffs' Second Consolidated Amended Complaint: (1) the existence of a valid and binding contract between Boeing and Spirit for Spirit to assume the liabilities for providing the Harkness Plaintiffs with pension benefits accrued under the BCERP; (2) that the contract was intended for the Harkness Plaintiffs' benefit; and (3) that the benefit to the Harkness Plaintiffs under that agreement is immediate rather than incidental. With respect to the retiree health care benefits sought in Count 17 of Plaintiffs' Second Consolidated Amended Complaint, the Spirit Defendants believe Plaintiffs have

the burden of proving the following essential elements: (1) the existence of a valid and binding contract between Boeing and Spirit for Spirit to assume the liabilities for providing the Harkness Plaintiffs with retiree health benefits pursuant to the Early Retirement Health Care Benefit or retiree health care benefits mirroring or similar to the Early Retirement Health Care Benefit; (2) that the contract was intended for the Harkness Plaintiffs' benefit; and (3) that the benefit to the Harkness Plaintiffs under that agreement is immediate rather than incidental.

7. DEFENSES.

A. Boeing Defendants.

a. **List of Boeing Defendant's Defenses and Affirmative Defenses.** The Boeing Defendants assert the following defenses and affirmative defenses:

- Plaintiffs fail to state a claim for which relief can be granted on any of their claims under ERISA or section 301 of the LMRA because they cannot establish essential elements of each of those claims. By way of example, and without any limitation, Plaintiffs fail to state a claim under ERISA because the Tenth Circuit has held that plaintiffs lack standing to sue their former employers for benefits under ERISA section 502(a)(1)(B) when their pension assets have been transferred to the pension plan of another employer, *Chastain v. AT&T*, 558 F.3d 1177, 1181-83 (10th Cir. 2009); because plaintiffs cannot demonstrate that the EBPC's determination that plaintiffs had not been "laid off" within the terms of the Boeing Plans—which grant the EBPC full discretionary authority to interpret and apply the Plans' terms—was arbitrary and capricious; and because Plaintiffs cannot establish that Boeing acted with specific intent to interfere with their attainment of any rights, as required to state a violation of ERISA section 510. *Babich v. Unisys Corp.*, 842 F. Supp. 1343, 1353-54 (D. Kan. 1994) (Belot, J.).

- Plaintiffs' and/or Harkness Class members' claims under ERISA are barred because Plaintiffs and/or Harkness Class members failed to exhaust their administrative remedies. *Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1190 (10th Cir. 1999).

- Plaintiffs' claims under section 301 of the LMRA are barred because Plaintiffs failed to exhaust contractually required grievance procedures under the respective CBAs between Boeing and SPEEA, the IAM, and the IBEW. *Vaca v. Sipes*, 386 U.S. 171, 184 (1968).

- Plaintiffs' claims under section 301 of the LMRA are barred by the doctrine of waiver because plaintiffs knowingly relinquished any right to challenge the transfer of their pension assets from Boeing to Spirit. *Shelter Mortgage Corp. v. Castle Mortgage Co., L.C.*, 117 F. App'x 6, 12 (10th Cir. 2004); *In re Sweet*, 954 F. 2d 610, 613 (10th Cir. 1992).

- Plaintiffs' claims under section 301 of the LMRA are barred by the doctrine of estoppel because Plaintiffs represented that they would not challenge the transfer of their pension assets to Spirit, and because Defendants relied to their detriment on that representation. *Rios v. Ziglar*, 398 F.3d 1201, 1208 (10th Cir. 2005).

- Plaintiffs' claims under section 301 of the LMRA are also barred by the doctrine of estoppel because Plaintiffs accepted a benefit based on their position that they would not challenge the transfer, and because it would be unconscionable to allow plaintiffs to take an inconsistent position now. 28 Am. Jur. 2d *Estoppel and Waiver* §§ 60, 65 (2000); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1125 (9th Cir. 2008); *Ky. Hosp. Ass'n Trust v. Chicago Ins. Co.*, 978 S.W.2d 754, 755 (Ky. Ct. App. 1998).

- Plaintiffs' claims under section 301 of the LMRA are barred by the doctrines of novation and substituted contract because the Plaintiff unions have subsequently entered into new CBAs with Boeing, and those new CBAs acknowledge that the Harkness Class members are no longer participants in the Boeing Plans and that their pension assets were properly transferred to the Spirit mirror plans. *Comeau v. Mt. Carmel Med. Ctr., Inc.*, 869 F. Supp. 858, 862 & n.4 (D. Kan. 1994).

b. Essential Elements of Boeing Defendants' First Affirmative Defense (i.e., failure to exhaust administrative remedies under ERISA). Subject to the Court's determination of the law that applies to this case, the Boeing Defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

1. Administrative remedies were available under the relevant ERISA plan.
2. Plaintiffs failed to exhaust those remedies.

Whitehead v. Okla. Gas & Elec. Co., 187 F.3d 1184, 1190 (10th Cir. 1999).

Plaintiffs observe that the Tenth Circuit recognizes that there is no need to pursue additional recourse to the plan if such would be futile. *E.g.*, *McGraw v. Prudential Ins. Co. of America*, 137 F.3d 1253 (10th Cir. 1998).

c. Essential Elements of Boeing Defendants' Second Affirmative Defense (*i.e.*, failure to exhaust contractually required grievance procedures under the respective collective bargaining agreements). Subject to the Court's determination of the law that applies to this case, the Boeing Defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

1. The relevant collective bargaining agreement provides grievance procedures.
2. The grievance procedures are mandatory.
3. Plaintiffs failed to exhaust the grievance procedures before filing suit.

Vaca v. Sipes, 386 U.S. 171, 184 (1968).

Plaintiffs submit that Boeing must prove that a binding arbitration procedure covered the alleged dispute, that such arbitration procedure was mandatory, and that the party asserting that the procedure applies has not waived arbitration and is not estopped from invoking it. *Carpenters v. Hensel Phelps Construction*, 376 F.2d 731 (10th Cir.), *cert. denied*, 389 U.S. 952 (1967).

d. Essential Elements of Boeing Defendants' Third Affirmative Defense (*i.e.*, waiver). Subject to the Court's determination of the law that applies to this case, the Boeing Defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

1. An existing right, benefit, or advantage.
2. Knowledge of the existence of the right, benefit, or advantage.

3. Intentional relinquishment of the right, benefit, or advantage.

Shelter Mortgage Corp. v. Castle Mortgage Co., L.C., 117 F. App'x 6, 12 (10th Cir. 2004); *In re Sweet*, 954 F. 2d 610, 613 (10th Cir. 1992).

e. Essential Elements of Boeing Defendants' Fourth Affirmative Defense (i.e., estoppel due to detrimental reliance). Subject to the Court's determination of the law that applies to this case, the Boeing Defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

1. The party to be estopped must know the facts.
2. The party to be estopped must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended.
3. The party asserting the estoppel must be ignorant of the true facts.
4. The party asserting the estoppel must rely on the other party's conduct to his injury.

Rios v. Ziglar, 398 F.3d 1201, 1208 (10th Cir. 2005); *Che-Li Shen v. INS*, 749 F.2d 1469, 1473 (10th Cir. 1984).

f. Essential Elements of Boeing Defendants' Fifth Affirmative Defense (i.e., estoppel due to acceptance of a benefit). Subject to the Court's determination of the law that applies to this case, the Boeing Defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

1. The party to be estopped has accepted a benefit.
2. It would be unconscionable to allow the party to be estopped to maintain a position inconsistent with the one from which that party derived the benefit (for example, by questioning the validity of the transaction that provided the benefit).

28 Am. Jur. 2d *Estoppel and Waiver* §§ 60, 65 (2000); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1125 (9th Cir. 2008); *Ky. Hosp. Ass'n Trust v. Chicago Ins. Co.*, 978 S.W.2d 754, 755 (Ky. Ct. App. 1998).

g. Essential Elements of Boeing Defendants' Sixth Affirmative Defense (i.e., novation/substituted contract). Subject to the Court's determination of the law that applies to this case, the Boeing Defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

1. A previous valid contract.
2. Agreement on a new contract.
3. Validity of that new contract.
4. Intent to extinguish the old contract and substitute the new.

Comeau v. Mt. Carmel Med. Ctr., Inc., 869 F. Supp. 858, 862 & n.4 (D. Kan. 1994).

Plaintiffs submit that the fourth element requires proof of clear and definite expression of intent to extinguish all liability under the old contract, not simply the execution of a new contract. *E.g., Glencore Grian v. Seaboard Corp.*, 241 F. Supp. 2d 1324, 1335 (D. Kan. 2003).

B. Spirit Defendants.

a. List of Spirit Defendants' Defenses and Affirmative Defenses. Spirit Defendants assert the following defenses and affirmative defenses:

1. The decisions made by the Spirit Pension Plan's Pension Oversight Committee with respect to Plaintiffs' request for clarification or enforcement of their rights under the Spirit Pension Plan (Count 12) were not arbitrary and capricious, and thus are entitled to deference as a matter of law.
2. Plaintiffs lack standing under ERISA to pursue their claims in Count 13 for clarification and enforcement of rights for health care benefits.
3. Plaintiffs lack standing to pursue their claims against the Spirit Defendants in Count 14 under Section 204(g) of ERISA, 29 U.S.C. § 1054(g).
4. Plaintiffs fail to state a claim under Section 208 of ERISA, 29 U.S.C. § 1058.

5. Some or all of the Plaintiffs' claims are barred or preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.

6. Some or all of the Plaintiffs' claims are barred or preempted by Sections 502 and/or 514 of ERISA, 29 U.S.C. §§ 1132 and/or 1144.

7. Some or all of the Plaintiffs' claims are barred by the Plaintiffs' failure to exhaust the administrative remedies available to them.

8. Plaintiffs' claims to enforce contract rights as a third-party beneficiary are preempted by ERISA and/or the LMRA, and are barred by the terms of the APA.

9. To the extent that Plaintiffs seek remedies from or declarations with respect to the Spirit Pension Plan, the Plan's sponsor (Defendant Spirit AeroSystems Holdings, Inc.) and its participating employer (Defendant Spirit AeroSystems, Inc.) are not proper defendants.

10. Plaintiffs' claims against the Spirit Defendants fail, in whole or in part, under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), as Plaintiffs do not seek "appropriate equitable relief."

b. Essential Elements of Spirit Defendants' First Affirmative Defense (*i.e.*, Spirit Pension Oversight Committee's Decisions Were Not Arbitrary and Capricious). Subject to the court's determination of the law that applies to this case, Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. The Spirit Pension Plan granted the Pension Oversight Committee, as Plan administrator, the discretionary authority to interpret and construe the terms of that Plan.

2. The decisions made by the Pension Oversight Committee were reasonable and supported by facts within its knowledge.

c. Essential Elements of Spirit Defendants' Second Affirmative Defense (*i.e.*, Plaintiffs Lack Standing to Pursue Count 13). Subject to the court's determination of the law that applies to this case, the

Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. Spirit did not establish a welfare benefit plan, within the meaning of ERISA, to provide the retiree health benefits that Plaintiffs seek.

2. Plaintiffs are not participants in or beneficiaries of an ERISA welfare benefit plan from which they seek the benefits described in Count 13.

d. Essential Elements of Spirit Defendants' Third Affirmative Defense (*i.e.*, Plaintiffs Lack Standing to Pursue Count 14). Subject to the court's determination of the law that applies to this case, the Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. Plaintiffs were not laid off from their employment with Spirit.

2. At the time Plaintiffs' allege that they suffered a layoff, they were employed by Boeing, and were participants in Boeing's Pension Plan.

3. The Spirit Pension Plan was not amended in a way that had the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy.

e. Essential Elements of Spirit Defendants' Fourth Affirmative Defense (*i.e.*, Plaintiffs Fail to State a Claim Under Section 208 of ERISA). Subject to the court's determination of the law that applies to this case, the Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. Plaintiffs who are members of the Harkness Class were entitled to the same benefits under the terms of the Spirit Pension Plan following the transfer of assets from the Boeing Pension Plan as the rights to which they were entitled under the Boeing Pension Plan prior to the asset transfer.

f. Essential Elements of Spirit Defendants' Fifth Affirmative Defense (*i.e.*, Some of Plaintiffs' Claims are Barred by Section 185 of the LMRA). Subject to the court's determination of the law that applies

to this case, the Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. Plaintiffs' claims relate to, or are substantially dependent on an analysis of, one or more of the collective bargaining agreements between and among one or more of the parties to this litigation.
2. Plaintiffs' claims are not premised on, or attempt to extend their rights beyond, the rights and remedies afforded under the Labor Management Relations Act, 29 U.S.C. § 185.

g. Essential Elements of Spirit Defendants' Sixth Affirmative Defense (i.e., ERISA Preemption). Subject to the court's determination of the law that applies to this case, the Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. Some of Plaintiffs' claims arise under or relate to an ERISA-covered benefit plan, and/or seek remedies that fall within the scope of existing causes of action authorized and available under ERISA.
2. Plaintiffs attempt to pursue such claims under state law or other theories that are not brought under, or premised on, ERISA.

h. Essential Elements of Spirit Defendants' Seventh Affirmative Defense (i.e., Failure to Exhaust Administrative Remedies). Subject to the court's determination of the law that applies to this case, the Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. One or more of the named Plaintiffs and/or members of the Harkness Class either did not submit a formal request for benefits, or a request for clarification of his or her rights to benefits, under the Spirit Pension Plan and/or any employee welfare benefit plan purportedly sponsored by Spirit; and/or

2. One or more of the named Plaintiffs and/or members of the Harkness Class did not submit a formal appeal of a denial of their claims for benefits or request for clarification of rights to the appropriate fiduciary of an ERISA plan sponsored by Spirit before filing this lawsuit.

i. Essential Elements of Spirit Defendants' Eighth Affirmative Defense (*i.e.*, Absence of Third-Party Beneficiary Rights). Subject to the court's determination of the law that applies to this case, the Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. Plaintiffs are attempting to assert common-law rights as third-party beneficiaries of the APA between Boeing and Spirit.

2. Plaintiffs' claims relate to one or more ERISA plans and/or collective bargaining agreements, and thus are preempted by ERISA and/or the LMRA.

3. To the extent Plaintiffs' claims are not preempted, the APA between Boeing and Spirit expressly disclaims the existence of, and the intention to create, any express or implied rights under the APA in any individual or entity that is not a party to that Agreement.

j. Essential Elements of Spirit Defendants' Ninth Affirmative Defense (*i.e.*, Spirit AeroSystems Holdings, Inc. and Spirit AeroSystems, Inc. are not Proper Party Defendants). Subject to the court's determination of the law that applies to this case, the Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. The remedies that Plaintiffs seek in this lawsuit from the Spirit Defendants relate exclusively to Plaintiffs' alleged rights to benefits under one or more ERISA pension or welfare benefit plans.

2. Defendant Spirit AeroSystems Holdings, Inc. and Defendant Spirit AeroSystems, Inc. are plan sponsors and employers, respectively, within the meaning of ERISA, but are not themselves ERISA

pension or welfare benefit plans, nor are those Defendants the specific ERISA plans from which Plaintiffs seek benefits or a clarification of their rights to benefits.

k. Essential Elements of Spirit Defendants' Tenth Affirmative Defense (*i.e.*, Relief Sought by Plaintiffs Barred by Section 502(a)(3) of ERISA). Subject to the court's determination of the law that applies to this case, the Spirit Defendants argue that, in order to prevail on this affirmative defense, Spirit Defendants have the burden of proving the following essential elements:

1. One or more of Plaintiffs' claims against the Spirit Defendants arises under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

2. Some or all of the relief sought by Plaintiffs through such claims does not constitute "appropriate equitable relief" of the type that may be awarded under Section 502(a)(3).

8. FACTUAL ISSUES.

One or more of the parties believe that the following material issues will need to be resolved at trial by the trier of fact if summary judgment is not granted:

None. The parties believe that there is no genuine dispute with regard to certain material facts that would support their respective motions for summary judgment.

9. LEGAL ISSUES.

One or more of the parties believe that the following are the significant legal or evidentiary issues that will need to be resolved by the Court in this case, whether on summary judgment motion or at trial:

- Whether the Plaintiffs can establish each and every element necessary to their asserted claims.
- Whether the individual Plaintiffs have standing to sue the Boeing Defendants under ERISA.
- Whether the EBPC's decisions to deny the Plaintiffs' claims for benefits under the Boeing Plans were arbitrary and capricious.
- Whether a lesser standard of review applies because of conflicts of interest.
- Whether the claims of certain Plaintiffs under ERISA are barred based on a failure to exhaust

administrative remedies.

- Whether pursuit of additional administrative procedures would be futile.
- Whether the Boeing Defendants violated fiduciary duties to plan participants and beneficiaries.
- Whether the Boeing Defendants and/or the Spirit Defendants violated ERISA section 510 by engaging in prohibited conduct with the specific intent to interfere with the individual Plaintiffs' attainment of rights to pension and health care benefits.
- Whether Boeing breached its collective bargaining agreements with the IAM, SPEEA, and the IBEW because Boeing did not classify all employees who ceased active employment for Boeing on June 16, 2005 as laid-off employees and/or because it amended its employee benefit plans.
- Whether Boeing is estopped from denying that the individual Plaintiffs were laid-off as a result of the Wichita divestiture in June 2005.
- Whether the Plaintiffs' claims under LMRA section 301 are barred based on a failure to comply with grievance procedures provided in the respective collective bargaining agreements between Boeing and the IAM, SPEEA, and the IBEW.
- Whether Boeing has waived or is otherwise estopped from raising the contractual grievance procedure as a defense.
- Whether the Plaintiffs' claims under LMRA section 301 are barred by the doctrines of waiver, estoppel, novation, or substituted contract.
- Whether the Early Retirement Pension Benefit described in the Second Consolidated Amended Complaint constitutes an "early retirement benefit" and/or a "retirement-type subsidy" under Section 204(g) of ERISA, 29 U.S.C. § 1054(g).
- Whether the individual Plaintiffs' accrued benefits were effectively reduced as a consequence of the pension transfer.

10. DAMAGES.

The issues of liability and damages have been bifurcated in this case. Discovery to date has been limited to liability issues, and the Harkness Class has been certified only for purposes of adjudicating the liability issues.

a. Plaintiffs' Damages.

At trial, Plaintiffs submit that an award of contract damages will be appropriate to remedy Boeing's breaches of the labor contracts, in order to attempt to put Plaintiffs in the position they would have been in absent Boeing's breaches. Plaintiffs also will request, as appropriate, any available monetary remedies under ERISA, including attorneys' fees and costs of suit. 29 U.S.C. § 1132(g).

b. Defendants' Damages.

None claimed (apart from attorneys' fees and costs incurred in defense of this action).

11. NON-MONETARY RELIEF REQUESTED, IF ANY.

Plaintiffs submit that they seek available equitable relief as needed to remedy the Defendants' alleged breaches of contract and ERISA. The equitable relief requested includes: specific performance of the contracts; an injunction to provide the employee benefits at issue; disgorgement of any ill-gained profits; all other relief the Court deems just and proper.

12. AMENDMENTS TO PLEADINGS.

None.

13. DISCOVERY.

Under the scheduling order and any amendments, all discovery was to have been served and depositions completed by August 18, 2011. Outstanding issues remain from the 30(b)(6) depositions of Boeing, Boeing's EBPC and the Spirit defendants, which were held in August. The parties agreed, before the end of the discovery period, that Defendants could provide certain answers after the depositions were complete. The Spirit defendants recently provided certain additional information. Boeing defendants have asked for additional time, which Plaintiffs agreed to let them have. Plaintiffs are waiting for their responses.

Unopposed discovery may continue after the deadline for completion of discovery so long as it does not delay the briefing of or ruling on dispositive motions, or other pretrial preparations. Under these circumstances, the parties may conduct discovery beyond the deadline for completion of discovery if all parties are in agreement to do so, but the Court will not be available to resolve any disputes that arise during the course of this extended discovery.

14. WITNESSES AND EXHIBITS.

a. Final Witness and Exhibit Disclosures Under Rule 26(a)(3). The parties' final witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A) shall be filed no later than 21 days before trial. With regard to each witness disclosed under Fed. R. Civ. P. 26(a)(3)(A)(i), the disclosures also shall set forth the subject matter of the expected testimony and a brief synopsis of the substance of the facts to which the witness is expected to testify. Witnesses expected to testify as experts shall be so designated. Witnesses and exhibits disclosed by one party may be called or offered by any other party. Witnesses and exhibits not so disclosed and exchanged as required by the Court's order shall not be permitted to testify or be received in evidence, respectively, except by agreement of counsel or upon order of the Court. The parties should bear in mind that seldom should anything be included in the final Rule 26(a)(3)(A) disclosures that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto; otherwise, the witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

b. Objections. The parties shall file any objections under Fed. R. Civ. P. 26(a)(3)(B) no later than 14 days before trial. The Court shall deem waived any objection not timely asserted, unless excused by the Court for good cause shown.

c. Marking and Exchange of Exhibits. All exhibits shall be marked no later than 5 business days before trial. The parties shall exchange copies of exhibits at or before the time they are marked. The parties shall also prepare lists of their expected exhibits, in the form attached to this pretrial order, for use by the courtroom deputy clerk and the court reporter. In marking their exhibits, the parties shall use preassigned ranges of

numbered exhibits. Exhibit Nos. 1-400 shall be reserved for plaintiff(s); Exhibit Nos. 401-800 shall be reserved for defendant(s); Exhibits 801 and higher shall be reserved for any third party. Each exhibit that the parties expect to offer shall be marked with an exhibit sticker, placed in a three-ring notebook, and tabbed with a numbered tab that corresponds to the exhibit number. The parties shall prepare exhibit books in accordance with the requirements of the judge who will preside over trial. The parties shall contact the judge's courtroom deputy clerk to determine that judge's specific requirements.

d. Designations of Deposition Testimony.

(1) **Written Depositions.** Consistent with Fed. R. Civ. P. 26(a)(3)(A)(ii), any deposition testimony sought to be offered by a party other than to impeach a testifying witness shall be designated by page and line in a pleading filed no later than 21 days before trial. Any counter-designation in accordance with Fed. R. Civ. P. 32(a)(6), and any objections to the designations made by the offering party, shall be filed no later than 14 days before trial. Any objections to counter-designations shall be filed no later than 5 business days before trial. Before filing any objections, the parties shall have conferred in good faith to resolve the dispute among themselves. No later than 3 business days before trial, to facilitate the Court's ruling on any objections to designations or counter-designations, the party seeking to offer the deposition testimony shall provide the trial judge a copy of each deposition transcript at issue. Each such transcript shall be marked with different colored highlighting. Red highlighting shall be used to identify the testimony that plaintiff(s) has designated, blue highlighting shall be used for defendant(s), yellow highlighting shall be used for any third party, and green highlighting shall be used to identify the objections to any designated testimony. After receiving and reviewing these highlighted transcripts, the Court will issue its rulings regarding any objections. The parties shall then file the portions of the depositions to be used at trial in accordance with D. Kan. Rule 32.1.

(2) **Videotaped Depositions.** The paragraph immediately above applies to videotaped depositions as well as written deposition transcripts. After the Court issues its rulings on the objections to

testimony to be presented by videotape or DVD, the Court will set a deadline for the parties to submit the videotape or DVD edited to reflect the designations and the Court's rulings on objections.

15. MOTIONS.

a. Pending Motions.

There are not currently any pending motions.

b. Additional Pretrial Motions.

After the pretrial conference, the parties intend to file the following motions:

If the remaining discovery issues are not resolved, Plaintiffs may file discovery motions to compel production of the agreed items. Plaintiffs do not at present intend to file any other motions.

The Boeing Defendants intend to file a motion to strike plaintiffs' demand for a jury trial.

The parties will file motions for summary judgment. The parties have agreed to, and jointly move the Court to waive the page limitations in the Court's Standing Order. The parties submit that extraordinary and compelling circumstances are present here because of the complexity of the litigation, which originally began as two separate actions, involves two union Plaintiffs, twenty-six individual Plaintiffs, and two groups of Defendants, nineteen class and non-class claims under ERISA and the LMRA, and several defenses. Because of this complexity, the parties respectfully submit that the presentation of facts and argument requires some relief from the existing page limits.

The parties respectfully ask the Court to allow the District of Kansas Local Rule on summary judgment briefing to apply, with one caveat. The parties understand that the existing rule allows for three briefs to be filed in connection with a summary judgment motion, and that each brief may have 30 pages of argument. The parties suggest reducing that number. Because the parties will be filing cross motions for summary judgment, and will be responding to each other's filings, the parties ask the Court to allow them seventy (70) pages total of argument briefing per motion and cross motion, rather than the ninety pages that the Local Rule would otherwise permit.

The parties set forth their proposal below:

DEADLINE	FILING
6 weeks after entry of the pretrial order	Plaintiffs' Summary Judgment Briefs (max 35 pages for argument, per set of Defendants) Plaintiffs' Statement of Uncontested Material Facts
6 weeks later	Each Defendants' Combined Opposition and Cross-Motion (max 45 pages for argument) Each Defendants' Combined Response to Plaintiffs' Fact Statement and Statement of Uncontested Material Facts in Support of the Cross Motion
6 weeks later	Plaintiffs' Combined Reply Brief and Cross-Opposition (max 35 pages for argument, per set of Defendants) Plaintiffs' Combined Reply Statement of Facts and Response to Defendants' Statement of Facts
6 weeks later	Each Defendants' Cross-Reply Brief (max 25 pages for argument) Each Defendants' Combined Response to Plaintiffs' Reply Statement of Facts and Reply Statement in Support of the Cross-Motion
6 weeks later or when the Court's calendar permits	Oral argument

c. Motions Regarding Expert Testimony. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, shall be filed by 28 days before trial. Nonetheless, the parties have agreed that expert witnesses are not needed to determine the issue of liability.

d. Motions in Limine. All motions in limine, other than those challenging the propriety of an expert witness, shall be filed no later than 14 days before trial. Briefs in opposition to such motions shall be filed within the time period required by D. Kan. Rule 6.1(d)(1), or at least 5 business days before trial, whichever is earlier. Reply briefs in support of motions in limine shall not be allowed without leave of Court.

16. TRIAL.

a. This case is not yet set for trial on the Court's docket and probably will not be set for trial until after all timely filed dispositive motions have been decided by the Court.

b. The parties disagree whether plaintiffs have a right to a trial by jury on their claims.

c. Estimated trial time is two to three weeks. The Court's ruling on the forthcoming motions for summary judgment could affect the number and complexity of the issues for trial. The parties would thus confer to reconsider the estimated trial time if necessary at the time of that ruling.

d. Trial will be in Wichita, Kansas, or such other place in the District of Kansas where the case may first be reached for trial.

e. Not all of the parties are willing to consent to the trial of this case being presided over by a U.S. Magistrate Judge, even on a backup basis if the assigned U.S. District Judge determines that his or her schedule will be unable to accommodate any trial date stated above.

f. Because of constraints on the judiciary's budget for the compensation of jurors, in any case in which the Court is not notified of a settlement at least 1 full business day prior to the scheduled trial date, the costs of jury fees and expenses will be assessed to the parties, or any of them, as the Court may order. *See* D. Kan. Rule 40.3.

17. SETTLEMENT.

a. Status of Settlement Efforts.

The parties have not exchanged settlement proposals or engaged in substantive settlement negotiations to date. The parties will assess the possibility of mediation and/or other methods of alternative dispute resolution after they have filed and briefed their summary judgment motions.

b. Mediation and/or Other Method of Alternative Dispute Resolution. Mediation [and/or any other method of alternative dispute resolution] [is] [is not] ordered as follows: _____.

18. FURTHER PROCEEDINGS AND FILINGS.

a. Status and/or Limine Conference. Relatively close to the date of trial, the trial judge [probably] [may] [will] schedule [has scheduled] a status and/or limine conference [for _____ ____, 20__], at _____].

b. Trial Briefs. A party desiring to submit a trial brief shall comply with the requirements of D. Kan. Rule 7.6. The Court does not require trial briefs but finds them helpful if the parties anticipate that unique or difficult issues will arise during trial.

c. Voir Dire. Due to substantially differing views among judges of this Court concerning the extent to which counsel will be allowed to participate in voir dire, counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to determine what, if anything, actually needs to be submitted by way of proposed voir dire questions. Generally, proposed voir dire questions only need to be submitted to address particularly unusual areas of questioning, or questions that are likely to result in objections by the opposing party.

d. Jury Instructions.

As stated above in items 15(b) and 16(b), the parties disagree as to whether plaintiffs have a right to a trial by jury on their claims, and the Boeing Defendants intend to file a motion to strike plaintiffs' jury demand.

(1) Requests for proposed instructions in jury cases shall be submitted in compliance with Fed. R. Civ. P. 51 and D. Kan. Rule 51.1. Under D. Kan. Rule 51.1, the parties and the attorneys have the joint responsibility to attempt to submit one agreed set of preliminary and final instructions that specifically focuses on the parties' factual contentions, the controverted essential elements of any claims or defenses, damages, and any other instructions unique to this case. In the event of disagreement, each party shall submit its own proposed instructions with a brief explanation, including legal authority as to why its proposed instruction is appropriate, or why its opponent's proposed instruction is inappropriate, or both. Counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to

determine that judge's so-called standard or stock instructions, e.g., concerning the jury's deliberations, the evaluation of witnesses' credibility, etc.; it is not necessary to submit such proposed jury instructions to the Court.

(2) Proposed instructions in jury cases shall be filed no later than 3 business days before trial. Objections to any proposed instructions shall be filed no later than 1 business day before trial.

(3) In addition to filing the proposed jury instructions, the parties shall submit their proposed instructions (formatted in WordPerfect 9.0, or earlier version) as an attachment to an Internet e-mail sent to the e-mail address of the assigned trial judge listed in paragraph II(E)(2)(c) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

e. **Proposed Findings of Fact and Conclusions of Law.** If this case is tried to the Court sitting without a jury, in order to better focus the presentation of evidence, the parties shall file preliminary sets of proposed findings of fact and conclusions of law no later than 5 business days before trial. In most cases, the trial judge will order the parties to file final sets of proposed findings after the trial transcript has been prepared.

19. OTHER.

a. **Conventionally Filed Documents.** The following documents shall be served by mail and by fax or hand-delivery on the same date they are filed with the Court if they are filed conventionally (i.e., not filed electronically): final witness and exhibit disclosures and objections; deposition designations, counter-designations, and objections; motions in limine and briefs in support of or in opposition to such motions; trial briefs; proposed voir dire questions and objections; proposed jury instructions and objections; and proposed findings of fact and conclusions of law. In addition, a party filing a trial brief conventionally shall deliver an extra copy to the trial judge's chambers at the time of filing.

b. **Miscellaneous.**

The Court usually will hold a status conference approximately one week prior to trial. Out-of-town counsel may appear by telephone.

The courtroom is equipped with a television, VCR, Elmo, easel and projector screen for your use. Counsel wishing to use other equipment should contract Carolyn Lary at least 5 days prior to trial.

The courtroom number is 161. Directly across from the courtroom are two attorney/witness rooms for your use.

20. POSSIBLE ADJUSTMENT OF DEADLINES BY TRIAL JUDGE.

With regard to pleadings filed shortly before or during trial (e.g., motions in limine, trial briefs, proposed jury instructions, etc.), this pretrial order reflects the deadlines that the Court applies as a norm in most cases. However, the parties should keep in mind that, as a practical matter, complete standardization of the Court's pretrial orders is neither feasible nor desirable. Depending on the judge who will preside over trial, and what adjustments may be appropriate given the complexity of a particular case, different deadlines and settings may be ordered. Therefore, from the pretrial conference up to the date of trial, the parties must comply with any orders that might be entered by the trial judge, as well as that judge's trial guidelines and/or exhibit instructions as posted on the Court's Internet website:

(<http://www.ksd.uscourts.gov/chambers>).

IT IS SO ORDERED.

Dated this ___3rd_ day of __October_____, 20_11_, at _____Wichita_____, Kansas.

s/ Monti Belot

Monti L. Belot

U.S. District Judge

Approved,

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SUMMARY OF DEADLINES AND SETTINGS	
Event	Deadline/Setting
Extended deadline to complete any remaining discovery (if applicable)	
Mediation/settlement conference (if applicable)	
Dispositive motions (e.g., summary judgment)	
Motions challenging admissibility of expert testimony	
Trial	
Status and/or limine conference (if presently set)	
Final witness & exhibit disclosures	21 days before trial
Objections to final witness & exhibit disclosures	14 days before trial
Exhibits marked	5 business days before trial
Deposition testimony designated	21 days before trial
Objections to deposition designations, along with any counter-designations	14 days before trial
Objections to counter-designations of deposition testimony	5 business days before trial
Submission of disputed deposition designations to trial judge	3 business days before trial
Motions in limine	14 days before trial
Briefs in opposition to motions in limine	5 business days before trial, unless due earlier under D. Kan. Rule 6.1(d)(1)

SUMMARY OF DEADLINES AND SETTINGS	
Proposed jury instructions	3 business days before trial
Objections to proposed jury instructions	1 business day before trial
Preliminary sets of proposed findings of fact and conclusions of law in bench trials	5 business days before trial

