IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LARRY A. LAWSON, *Plaintiff,* vs. SPIRIT AEROSYSTEMS, INC., *Defendant.*	Case No. 18-1100-EFM

MEMORANDUM AND ORDER

Before the Court are Defendant Spirit Aerosystems, Inc.'s ("Spirit") Motions to Strike (Doc. 444 and 452) and the parties' cross-motions for summary judgment (Docs. 432 and 435). Plaintiff Larry A. Lawson sues Spirit for breach of contract, alleging that he satisfied all conditions precedent to his post-employment agreement with Spirit and that Spirit therefore lacked a basis to repudiate its payment obligations under the agreement. Spirit argues that, among other things, it was not required to perform its obligations because Lawson failed to comply with all the conditions and covenants under the agreement. For the following reasons, the Court denies both the motions to strike and the motions for summary judgment.

I. Factual and Procedural Background[1]

A. The Employment Contracts

Lawson was Spirit's President and CEO from April 6, 2013, to July 31, 2016. During that time, he was also a member of Spirit's Executive Leadership Team. Likewise, he was a member of Spirit's Board of Directors from April 6, 2013, to July 29, 2016. Spirit and Lawson entered into an employment agreement with an effective date of April 6, 2013 (the "Employment Agreement"). Under the Employment Agreement, Lawson's starting base salary was $1,000,000 per year and he received $6,000,000 in sign-on bonuses. Lawson was also eligible for several incentive awards, including a discretionary bonus up to 10% of his base salary, short-term incentives ranging from 115% to 230% of his base salary, long-term incentives equal to 400% (later modified to up to 535%) of his base salary, and $1,000,000 in deferred compensation. During his employment with Spirit, Lawson received confidential information and trade secrets belonging to Spirit, including information relating to Spirit's strategic initiatives, financial position, customers, and supply chain.

Before his tenure ended, Lawson and Spirit entered into retirement, consulting, and general release agreements, with an effective date of July 31, 2016 (the "Retirement Agreement").[2] Under the Retirement Agreement, Spirit agreed to compensate Lawson with $4,700,000 in cash—comprised of $150,000 annually for consulting services, $1,274,000 as severance pay, $1,115,000 as a short-term incentive payment, and $2,000,000 in deferred compensation—and agreed to allow Lawson to continue to vest in long-term incentive plan ("LTIP") awards—approximately 406,000

[1] In accordance with summary judgment procedures, the Court lays out the parties' stipulated facts and the uncontroverted material facts in the light most favorable to the non-moving party, respective to that party's motion. If controverted, the facts are related in the light most favorable to the party opposing summary judgment on those elements of the claim relying on the controverted facts.

[2] The Parties have stipulated that both the Employment Agreement and the Retirement Agreement are valid contracts supported by consideration.

shares of Spirit common stock if certain conditions were met. The cash payments and LTIP awards were spread over the term of the Retirement Agreement.

Section 2(g) of the Retirement Agreement provides that Lawson's "continuing entitlement to payments and/or vesting shall be conditioned upon his reaffirmation of this Agreement through the Retirement Date . . . and his continuing compliance with Paragraph[] . . . 7 . . . of [this] Agreement." Paragraph 7 then provides that Lawson "acknowledges and agrees that he shall continue to be bound by the terms and conditions of Paragraph 4 of the Employment Agreement . . . provided, however, that [Lawson] further acknowledges and agrees that the noncompetition and non-solicitation periods as set forth under Paragraphs 4(c) and (d) of the Employment Agreement shall be extended [for a period of two years]."

Paragraph 4(c) of the Employment Agreement, in turn, provides that:

> Neither [Lawson] nor an individual, corporation, partnership, limited liability company, trust, estate, joint venture, or other organization or association ("Person") with [Lawson's] assistance nor any Person in which [Lawson] directly or indirectly [has] any interest of any kind (without limitation) will, anywhere in the world, directly or indirectly own, manage, operate, control, be employed by, serve as an officer or director of, solicit sales for, invest in, participate in, advise, consult with, or be connected with the ownership, management, operation, or control of any business that is engaged, in whole or in part, in the Business, or any business that is competitive with the Business or any portion thereof, except for our exclusive benefit.

The Employment Agreement defines the term "Business" as follows:

> We are engaged in the manufacture, fabrication, maintenance, repair, overhaul, and modification of aerostructures and aircraft components, and market and sell our products and services to customers throughout the world (together with any other businesses in which Spirit may in the future engage, by acquisition or otherwise, the "*Business*").

The Retirement Agreement incorporated the Employment Agreement's non-compete provision for two years.

B. The Businesses

Spirit is a publicly-traded company headquartered in Wichita and currently has manufacturing facilities in Wichita; Tulsa, Oklahoma; McAlester, Oklahoma; Kinston, North Carolina; San Antonio, Texas; Prestwick, Scotland; Saint Nazaire, France; and Subang, Malaysia. Spirit is one of the largest independent, non-original equipment manufacturers ("OEM"), and as such, manufactures aerostructures for commercial and defense aircraft. Spirit designs, fabricates, assembles, and integrates components and structures for commercial and defense aerospace programs. This includes large, complex, and highly engineered aerostructures such as fuselages, nacelles (including thrust reversers), struts/pylons, wing structures, and flight control surfaces, as well as the thousands of smaller aircraft components that are incorporated into the larger aerostructures. Spirit's customers for large end-item assemblies from 2013 to 2018 included Boeing, Airbus, Bombardier, Mitsubishi Aircraft Corporation, Bell Helicopter, Gulfstream Aerospace, Lockheed Martin, Northrop Grumman, Sikorsky, and Rolls-Royce. A majority of Spirit's cost of goods sold is for items it purchases from suppliers in the form of raw material or component parts. Spirit also has an aftermarket business that includes the sale of replacement components and services for the care and/or repair of aircraft, which components or services are generally purchased by aerospace customers outside of the initial agreements between OEMs and airline customers.

Spirit is one of the largest fabricators of aircraft components in the world. To fabricate a part means to transform raw material into a component part through one or more fabrication processes, which can include machining, cutting, bonding, bending, curing, or otherwise processing the raw material. Spirit's fabrication business also, on occasion, includes the finishing

of component parts from a third party through one of those fabrication processes. A set of fabricated aircraft components is used by a manufacturer to build a larger sub-assembly or assembly. Spirit fabricates approximately 38,000 different aircraft components per day, some of which are sold directly to customers, and some of which are incorporated into larger end items that are sold directly to customers. Spirit produces approximately 3,000,000 fabricated parts annually, has over 150 types of machine tools for fabrication, and has over 2,600,000 square feet of fabrication capacity.

Beginning in the summer of 2016, Spirit sought to expand its fabrication business. At that time, Spirit was aware that several other suppliers were successfully consolidating their fabrication operations through acquisitions, including Alcoa Inc., Arconic, Inc.'s ("Arconic") predecessor. Over the years, Spirit frequently changed which products it made internally versus which ones it sourced from suppliers. Spirit markets, manufactures, and/or sells, among other things, the following aerostructures and aircraft components: (1) access doors, flush handle latches; (2) aft pylon fairings; (3) APU exhaust components; (4) bay frames; (5) bearings; (6) birdstrike panel; (7) bonded assemblies; (8) bulkheads; (9) clam shells; (10) cockpit window frame; (11) diffusers; (12) door frames, surrounds; (13) doors; (14) drain gutter; (15) fan cowl doors and hinges; (16) flap tracks; (17) flaps; (18) floor beams; (19) fuselage chords; (20) fuselage frames; (21) fuselage panels or kits; (22) fuselage skins; (23) fuselage stringers; (24) keel beam; (25) lavatory access panel; (26) leading edge skins; (27) nacelle bulkhead; (28) nacelle structure, skins doors; (29) nose doublers; (30) pylon components; (31) ram air ducts; (32) seat tracks; (33) shear ties; (34) side to body attachments; (35) splice strap; (36) spoilers/flaps; (37) stanchions; (38) structural hook, pressure relief, pin latches; (39) tailcone frames; (40) thrust reversers; (41) trailing edge flaps and

ailerons; (42) upper wing skins; (43) window frames; (44) wing box splice plates; (45) wing components (ribs and skins); (46) wing flap fasteners; and (47) wing ribs.

Arconic was created on November 1, 2016, when its predecessor Alcoa completed the separation of its business into two independent, publicly-traded companies—Alcoa Corporation and Arconic. Among other things, Arconic engineers and manufactures lightweight metals. Its multi-material products—which combine aluminum, titanium, and nickel—are used worldwide in aerospace, automotive, commercial transportation, packaging, building and construction, oil and gas, defense, consumer electronics, and industrial applications. Arconic provides parts to the aerospace industry and is a supplier of raw materials, forgings, castings, and fasteners to Spirit. Arconic's other customers include Boeing, Airbus, GE Aviation, United Technologies, Gulfstream, Rolls Royce, Bombardier, Raytheon, Northrup Grumman, Honeywell, Subaru, and Kawasaki Industries. In 2016, Arconic described itself as producing "a range of high performance multimaterials and highly engineered products and solutions for aero engines and airframe structures on virtually every aircraft platform" and noted that its products "range from the world's largest fuselage panels and wing skins, to 1/16-inch-diameter fasteners that hold an aircraft together." Arconic markets itself as being able to "make 90%—or greater than 90 percent of all the components" on an airplane.

Arconic does not and never has manufactured large aerostructures. Rather, Arconic positions itself as a manufacturer of lightweight engineered metal components for sale to other buyers in the aerospace and automotive industries. Specifically, Arconic creates small components that end up in airplanes—like small fasteners, connectors, engine components, and other lightweight alloy materials. Relevant to the present case, Arconic manufactures and sells at least six products: (1) seat tracks, (2) spoilers, (3) flaps, (4) ailerons, (5) wing ribs (and other wing

components), and (6) finished skins. At no time did Arconic manufacture aircraft fuselages, wings, engine nacelles, or other complex aerostructures. Arconic also manufactures and sells hundreds of other aircraft components, including nearly 300 components, some of which Spirit also sells in the aftermarket.

Lawson alleges that Spirit is a tier-one manufacturer of aerostructures and aircraft components whereas Arconic is a tier-three or tier-four manufacturer of lightweight engineered metal components that are supplied to tier-one manufacturers like Spirit. A tier-one manufacturer of aerostructures and aircraft components builds and sells large structures and components like fuselage, propulsion, and wing systems. A tier-three or tier-four manufacturer of lightweight engineered metal components builds and sells small fasteners, connectors, bolts, engine components, fan blades, etc. Lawson therefore contends that Spirit and Arconic are not in the same "Business"—as defined in the Employment Agreement and subsequently incorporated into the Retirement Agreement—because they do not provide, market, or sell the same specific products and services.

C. Lawson's Engagement with Elliott

Elliott is a hedge fund and asset manager that manages two multi-strategy funds which collectively control over $30 billion in assets. Via these two hedge funds, Elliott had built a substantial investment position in Arconic by late 2016 and early 2017. It wanted to improve Arconic's performance as a company and believed that by increasing its control over Arconic, it could increase the value of its investment. To that end, Elliott launched a proxy contest in which it nominated multiple candidates to Arconic's Board and publicly called for a change of management—specifically, to replace Arconic's then-CEO, Klaus Kleinfeld. Elliott retained a headhunting firm to search for Kleinfeld's replacement if the proxy contest succeeded. The

headhunter identified Lawson as a potential candidate and set up a meeting between him and Adam Katz, Elliott's analyst overseeing the proxy contest. Katz and Lawson first spoke on December 1, 2016. This was followed up by an in-person meeting at Elliott's headquarters in New York City.

While being vetted by Elliott, Lawson contacted Samantha Marnick, Spirit's Executive VP and Chief Administration Officer, to discuss the impact an engagement with Elliott could have on his Retirement Agreement with Spirit. After hearing Lawson's proposal, Marnick informed Lawson that Tom Gentile—Spirit's CEO—and Spirit's Board were concerned about the potential relationship between Lawson, Elliott, and Arconic.

Despite Marnick's stated concerns, Lawson proceeded with his discussions with Elliott and traveled to Elliott's headquarters for the in-person meeting on January 10, 2017. The parties dispute—and the record is unclear—whether Lawson informed Elliott at this meeting of Spirit's concerns. The following day, Katz informed Lawson that if Elliott proceeded with the engagement, it would "figure the proper workaround" to the "Spirit situation." This ultimately resulted in Elliott promising to indemnify Lawson.

Elliott continued to proceed with Lawson's potential candidacy. In furtherance of that plan, Elliott's counsel contacted Spirit on January 19, 2017, to discuss Lawson and Elliott's desire for Lawson to assist with Elliott's takeover of Arconic and to become a candidate for Arconic's Board. Elliott explained that Lawson was seeking Spirit's confirmation that Arconic was not a company in the "Business," or instead a waiver of Lawson's obligations under the Retirement Agreement. To support its argument that Arconic was not a company in the "Business," Elliott retained a management consulting firm to prepare an analysis of the overlap between Arconic and Spirit's operations. Elliott forwarded the analysis—which concluded that the companies' operations did not overlap—to Spirit for its review. On January 26, after reviewing the analysis

and its own investigation, Spirit informed Elliott that it believed Arconic was a company within the meaning of the term "Business" and declined to waive Lawson's obligations under the Retirement Agreement. In response, Elliott offered to buy out Lawson's non-compete. Spirit declined.

Despite Spirit's resistance, Lawson proceeded in his discussions with Elliott. By January 31, Lawson and Elliott had executed two separate agreements—one covering Lawson's consulting services (the "Consulting Agreement") and one indemnifying him from potential lost benefits under his Retirement Agreement with Spirit (the "Indemnification Agreement"). In the Consulting Agreement, Lawson agreed to render "general advisory and professional consulting services . . . in connection with Elliott's nomination of individuals for election to the board of directors of Arconic, Inc." At the time, Elliott was Arconic's largest shareholder. Elliott agreed to pay Lawson $5,300,000 to provide services in connection with Elliott's investment in Arconic and its attempt to increase its control over Arconic via a proxy contest. In the Indemnification Agreement, Elliott also agreed to indemnify Lawson for the potentially lost cash payment under Lawson's Retirement Agreement with Spirit, as well as $59.55 per share for the approximately 406,000 unvested Spirit shares.

On January 31, 2017, Elliott publicly announced the start of its proxy contest against Arconic. Specifically, Elliott announced that it wanted to install five individuals on Arconic's Board, had engaged Lawson to serve as a consultant, and advanced Lawson as a potential replacement for Kleinfeld. In conjunction with the announcement, Elliott released a detailed presentation analyzing Arconic's recent business performance. The presentation flaunted Lawson's resume, stating that he had the "ideal set of skills needed to turnaround Arconic's woefully and continually underperforming business." To support this assertion, Elliott noted

Lawson's extensive aerospace manufacturing experience, including his tenure as the CEO of Spirit.

During the proxy contest, some of Lawson's services included reviewing/providing input on relevant proxy materials, providing commentary on media messages, meeting with Arconic's largest institutional investors, lending his name and reputation to Elliott's cause, and participating in Arconic's CEO search. Lawson also assisted Elliott by providing input and suggestions regarding materials Elliott intended to publish on its proxy contest website, ideas for running proxy contest themes, information regarding how he ran Spirit and how he would run Arconic if chosen to be CEO, and his general philosophies regarding leadership and managing a company. Additionally, Lawson's name appeared as a filer of all proxy contest materials with the SEC. As the proxy contest unfolded, Elliott gradually increased its ownership stake in Arconic. By February 27, 2017, Elliott owned 11.7% of Arconic's outstanding common stock. During the time Lawson was a consultant, Elliott purchased 5,000,000 additional shares of Arconic common stock, increasing its investment by roughly $500,000,000.

To cite one example of Elliott's utilization of Lawson's services and image, in proxy materials issued on February 1, Elliott discussed Lawson's tenure at Spirit and Lockheed Martin and stated that Lawson had, "executive leadership experience with multinational aerospace and manufacturing companies, where he gained a significant knowledge relative to aircraft manufacturing, business development, engineering operations, international marketing and performance-based logistics" which made him the "right kind of candidate to lead a turnaround at Arconic." Also, Elliott set up in-person or telephone meetings between Lawson and several of Arconic's largest investors in hopes of convincing them to support Elliott's plan for management change at Arconic. To that end, Lawson met with: Oak Hill Partners on April 18 in San Francisco;

Sasco Capital on May 3 in New York City; BlackRock, Inc. on May 3 in New York City; Harris Associates on May 15 in Chicago; and Orbis Investment Management by telephone on March 15.

On May 22, Arconic and Elliott settled the proxy contest. They agreed to jointly support a slate of five board members for election (three of whom were chosen by Elliott). Furthermore, Elliott obtained the right to have input into Arconic's search for a new CEO and negotiated for Lawson to be one of the candidates considered. As a result, Lawson participated in an initial interview with Arconic's headhunter on July 11, a second interview on August 3, and a final round of interviews on September 13.

In October 2017, at the end of its search as agreed upon with Elliott, Arconic selected Chip Blankenship to be its new CEO. No longer needing his services, Elliott terminated Lawson's Consulting Agreement on February 23, 2018. During the 13-month term of the Consulting Agreement, Elliott paid Lawson a total of $5,300,000. Elliott also paid Lawson roughly $26,000,000 per their Indemnification Agreement, instead of Lawson receiving payments and vesting of shares from Spirit. In total, Lawson received roughly $32,000,000 from his engagement with Elliott.[3]

D. Spirit's Termination of the Retirement Agreement

Believing that Lawson had violated the non-compete provision of the Retirement Agreement, Spirit ceased paying Lawson his benefits under the Retirement Agreement. Spirit notified Lawson of that cessation on February 2, 2017, asserting that Lawson had "forfeited any continuing entitlement to payment" of the cash and LTIP shares Spirit still owed him, and

[3] Elliott has also paid Lawson for all fees and costs associated with the lawsuit.

demanded that Lawson repay approximately $2,680,000 that Spirit had already paid out. The termination letter states, in relevant part:

> Spirit has reviewed the various pronouncements issued on January 31, 2017 by [Elliott]. Lawson's engagement by Elliott constitutes an egregious violation of Section 7 of the [Retirement] Agreement. Accordingly, effective as of January 31, 2017, and, consistent with Section 2(g) of the [Retirement] Agreement, we are notifying you that Lawson has forfeited any continuing entitlement to payments, any continuing COBRA premium supplement payments, and any vesting, each as provided for under Section 2 of the [Retirement] Agreement. Further, pursuant to Section 14 of the [Retirement] Agreement, Lawson is obligated to tender back all payments made to him under the [Retirement] Agreement to date (other than $1,000), including any payments resulting from vesting of any awards.

On February 6, 2017, Lawson's counsel responded to Spirit's letter, explaining that Lawson's retention by Elliott was not a breach of Lawson's non-competition obligations to Spirit. The letter went on to state that Spirit's refusal to honor its payment and vesting obligations to Lawson would "constitute a material breach and repudiation of the [Retirement] Agreement." Spirit's counsel responded on February 8, 2017. Spirit claimed to be entitled to cease making the payments and vesting awards Spirit was obligated to make under Section 2(g) of the Retirement Agreement.

Lawson claims that the clear understanding between him and Elliott was that he was retained only to remain available to become CEO of Arconic, and to meet Arconic shareholders in that capacity. Elliott reaffirmed this belief when Elliott sent a letter to Lawson reiterating the scope of the Lawson Agreement. In the February 17 Letter, Elliott clarified that it was "not asking [Lawson] to . . . assist with the ownership, management, operation, or control of Arconic," or "advise Elliott concerning Arconic's relationship with Spirit, including but not limited to any potential competition with Spirit," or to "provide, use or rely upon any information inconsistent with [Lawson's] obligations under any agreements with Spirit."

Lawson contends that Spirit's termination of his Retirement Agreement robbed him of approximately $2,009,861 in cash and 406,814 shares of stock through Spirit's LTIP plan, which is based on Spirit's closing stock price on the applicable vesting dates, would have been roughly $29,000,000.

E. Expert Reports Relevant to Spirit's Motions to Strike

Lawson seeks to qualify Daniel Dennies, Ph.D. as an expert witness to proffer a report and potential testimony at trial. Dennies works as an engineer in the manufacture of aerospace components, including manufacturing operations such as machining, heat treating, and coating, forgings, castings, and aluminum and titanium bar, plate, and sheet. He holds a Ph.D. in Engineering from the University of California, Davis, and has over 40 years of experience in the aerospace industry, primarily in manufacturing. Dennies has published academic papers in the field of aerospace manufacturing operations and metallurgy. Spirit has previously retained him as an expert witness in litigation against its supplier, SPS Technologies, over whether certain fasteners manufactured by SPS for Spirit met the specifications of Boeing, the ultimate end user for the parts.

Dennies furnished Lawson with an expert report that in relevant part engages in a detailed analysis of the factual record concerning Arconic and Spirit's potentially overlapping operations and, based on that detailed factual review and his acknowledged expertise in the aerospace manufacturing industry, concludes that Spirit and Arconic do not compete concerning the parts in question.

Lawson also seeks to qualify Kevin J. Murphy, Ph.D., as an expert witness to proffer a report and potential testimony at trial. Murphy is a professor of finance at the University of Southern California Marshall School of Business. He holds a Ph.D. in Economics from the

University of Chicago. For over 36 years, Murphy has studied executive compensation and incentive structures, including authoring more than 50 academic publications on the topic. He has advised the SEC in promulgating disclosure rules relating to management compensation, and in 2009, was the U.S. Treasury Department's Special Master of Executive Compensation, in charge of approving compensation for executives at firms that received funds via the Troubled Asset Relief Program. He has also testified before the U.S. House of Representatives Financial Services Committee and presented at the Board of Governors of the Federal Reserve.

Murphy furnished Lawson with an expert report that in relevant part offers his opinion on the value of the compensation that Lawson would have received under the Retirement Agreement had Spirit not ceased its payments. Murphy concluded that the appropriate valuation method for the shares was to use the price of Spirit's stock on the date of vesting. From there, Murphy calculated the value of the compensation that Lawson would have received but for Spirit's actions. He presented two different valuations based on Lawson's and Spirit's competing interpretations of the number of shares that Lawson would have received under the Retirement Agreement.

Finally, Lawson also seeks to qualify William P. Rogerson, Ph.D., as an expert witness to proffer a report and potential testimony at trial. Rogerson is a professor of economics at Northwestern University, previously serving two terms as the Chair of Northwestern's Economics Department. He also serves as the Co-Director of the Center for the Study of Industrial Organization at Northwestern and as the Research Director for Antitrust Economics and Competition Policy at the Center on Law, Business and Economics at Northwestern's Pritzker School of Law. Rogerson holds a bachelor's degree in Economics from the University of Alberta and a Ph.D. in Social Sciences from the California Institute of Technology. Over the past 30 years, Rogerson has served as a consultant to government agencies and think-tanks including the Institute

for Defense Analysis, the Logistics Management Institute, the Office of the Secretary of Defense (Program Analysis and Evaluation), and the RAND Corporation. Over his career, Rogerson has focused his research on the industrial organization of the aerospace industry. He has also worked as an economic expert on cases in both the aerospace industry and telecommunications industry for the Federal Trade Commission and the U.S. Department of Justice as well as for private parties. In 1998–1999, he served as Chief Economist at the Federal Communications Commission.

Rogerson furnished Lawson with an expert report that assesses whether Spirit and Arconic offered products or services in competition with one another from February 2017 to July 2018. Rogerson's report provides an overview of the supply chain in the aerospace industry in which he explains that "[i]ndustry participants and observers generally treat the supply chain as consisting of different levels or tiers of suppliers." Relying on the discovery produced by Spirit and Arconic, Rogerson then concludes that Spirit and Arconic participate at different levels of the aerospace supply chain.

On March 28, 2018, Lawson and Elliott entered into a "Common Interest and Joint Defense Agreement." That day, Lawson filed this lawsuit, asserting a claim against Spirit for breach of contract, as well as seeking a declaratory judgment. Spirit moved to dismiss, and the Court dismissed the declaratory judgment claim on August 8, 2018. Lawson's breach of contract claim remains his sole claim. The parties now move for summary judgment and Spirit moves to strike parts of the expert reports used to support Lawson's motion for summary judgment.

II. Legal Standard

A. Motions to Strike

Rather than bringing *Daubert* motions, Spirit moves to strike Lawson's expert reports under the relevance standard in the Federal Rules of Evidence[4]. Expert testimony that is not relevant and will not assist the trier of fact to understand the evidence or determine a fact in issue is inadmissible.[5] Rule 702 of the Federal Rules of Evidence governs the admissibility of opinion testimony from witnesses qualified as experts by their knowledge, skill, experience, training, or education. Consideration of proffered expert testimony is a flexible inquiry specific to the facts of the case at bar.[6] A Court may strike inadmissible expert reports relied upon in a motion for summary judgment.[7]

B. Motions for Summary Judgment

Summary judgment is appropriate if the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[8] A fact is "material" when it is essential to the claim, and issues of fact are "genuine" if the proffered evidence permits a reasonable jury to decide the issue in either party's favor.[9] The movant bears

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[4] The Court notes that late today, Spirit filed additional motions to exclude evidence from the expert reports. The Court does not address those motions here.

[5] Fed. R. Evid. 702(a); *see also McKenzie v. Benton*, 388 F.3d 1342, 1351–52 (10th Cir. 2004) (Rule 702's requirement that the expert testimony must "assist the trier of fact to understand the evidence or to determine a fact at issue" is a "condition [which] goes primarily to relevance"); *United States v. Abdush-Shakur*, 465 F.3d 458, 466 (10th Cir. 2006) ("[T]he district court must ensure that the expert testimony is both relevant and reliable.").

[6] *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (rejecting formulaic application of reliability factors discussed in *Daubert* because "[t]oo much depends upon the particular circumstances of the particular case at issue").

[7] *See Energy Intel. Grp., Inc. v. CHS McPherson Refin., Inc.*, 300 F. Supp. 3d 1356, 1382 (D. Kan. 2018).

[8] Fed. R. Civ. P. 56(a).

[9] *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283 (10th Cir. 2010) (citations omitted).

the initial burden of proof and must show the lack of evidence on the nonmovant's claim.[10] If the movant carries its initial burden, the nonmovant may not simply rest on its pleadings but must instead set forth specific facts showing a genuine issue for trial as to those matters for which it carries the burden of proof.[11] These facts must be clearly identified through affidavits, deposition transcripts, or incorporated exhibits; conclusory allegations alone cannot survive a motion for summary judgment.[12] The Court views all evidence and reasonable inferences in the light most favorable to the party opposing summary judgment.[13]

Although the parties in this case filed cross-motions for summary judgment, the legal standard remains the same.[14] Each party retains the burden of establishing the lack of a genuine issue of material fact and entitlement to judgment as a matter of law.[15] Each motion will be considered separately.[16] To the extent the cross-motions overlap, however, the court may address the legal arguments together.[17]

III. Analysis

A. Motions to Strike

Spirit moves to strike allegedly irrelevant portions of the expert reports of Dennies, Murphy, and Rogerson, as well as portions of Rogerson's deposition, that Lawson attached in

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[10] *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (citations omitted).

[11] *Id.* (citing *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996)).

[12] *Mitchell v. City of Moore*, 218 F.3d 1190, 1197–98 (10th Cir. 2000) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670–71 (10th Cir. 1998)).

[13] *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004) (citation omitted).

[14] *City of Shawnee v. Argonaut Ins. Co.*, 546 F. Supp. 2d 1163, 1172 (D. Kan. 2008) (citation omitted).

[15] *United Wats, Inc. v. Cincinnati Ins. Co.*, 971 F. Supp. 1375, 1382 (D. Kan. 1997) (citing *Houghton v. Foremost Fin. Servs. Corp.*, 724 F.2d 112, 114 (10th Cir. 1983)).

[16] *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

[17] *Berges v. Standard Ins. Co.*, 704 F. Supp. 2d 1149, 1155 (D. Kan. 2010) (citation omitted).

support of its arguments concerning the parties' cross-motions for summary judgment. Notably, Spirit does not bring *Daubert* motions, but rather attacks the relevance of the expert reports. In his response, Lawson likewise notes that Spirit's motions do not cite the *Daubert* standard. As such, the Court follows the typical legal standard for motions to strike evidence.

Concerning the first report, Spirit disputes Dennies' opinion that most of Arconic's aerospace parts are not similar to Spirit's parts. Spirit also argues that the entire report is unreliable because Dennies at one point states that seat tracks sold by Spirit and Arconic are made from "different metal alloys" when the evidence "conclusively established" that both companies sold titanium seat tracks. Concerning the second report, Spirit argues that Murphy's expert report is irrelevant because Lawson primarily relies upon it for its mathematical calculations, which Spirit argues the Court could independently arrive at. Finally, Spirit disputes Rogerson's characterization of the various "tiers" within the aircraft manufacturing industry, the extent to which Arconic is a supplier of raw materials, and the effect of Arconic's ownership of certain machinery on its competition with Spirit.

"The Court generally disfavors motions to strike" and does so here.[18] "This painstaking motion-within-a-motion approach discourages progress and presses the Court into deciding matters that do not actually advance the case in any meaningful way."[19] "It is perfectly fair" for Spirit to have concerns about the experts' relevance and reliability, "[b]ut those concerns are better expressed on the merits; either by a *Daubert* motion or . . . at trial."[20] "At present, the motions to strike are simply unnecessary. There is no independent fact-finder who requires shielding from

[18] *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 2016 WL 2344561, at *1 (D. Kan. 2016).

[19] *Id.*

[20] *Id.*

inadmissible evidence and improper opinions at this stage in the proceedings."[21] This is especially true since this case will not be tried before a jury. Spirit "can rest assured that the Court is capable of discerning which evidence is relevant and reliable and assigning weight accordingly."[22] The Court therefore denies Spirit's motions to strike.

B. Motions for Summary Judgment

Lawson's sole remaining claim is for breach of contract. A federal court sitting in diversity must apply the choice of law rules of the state in which it sits.[23] The parties agree that Kansas contract law governs this case. To prevail on a claim for breach of contract under Kansas law, the plaintiff must establish five elements: "(1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach."[24] Lawson bears the burden of proof for each of the elements of his claim.[25] The parties do not dispute the existence of the contract or the sufficiency of the consideration.

"The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the contract language without applying rules of construction."[26] If a contract is unambiguous, the Court must

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[21] *Id*.

[22] *Id*.

[23] *Klaxon Co. v. Stentor Elec. Mfg. Co*., 313 U.S. 487, 496 (1941).

[24] *Madison, Inc. v. W. Plains Reg'l Hosp.*, 2018 WL 928822, at *4 (D. Kan. 2018) (quoting *Stechschulte v. Jennings*, 297 Kan. 2, 298 P.3d 1083, 1098 (2013)).

[25] *Van Brunt v. Jackson*, 212 Kan. 621, 512 P.2d 517, 520 (1973).

[26] *Carrothers Constr. Co. v. City of S. Hutchinson*, 288 Kan. 743, 207 P.3d 231, 239 (2009) (citation omitted).

enforce that contract and may not rewrite it.[27] Whether a contract is ambiguous is also a question of law for the Court.[28] "[T]he parties' agreement or lack of agreement on the existence of ambiguity does not compel the court to arrive at the same conclusion."[29] "Ambiguity in a contract does not appear until two or more meanings can be construed from the contract provisions."[30] Even though the parties may not agree as to the meaning of the terms, this dispute does not, by itself, demonstrate that the contract terms are ambiguous.[31] If, however, the Court determines that the contract language is ambiguous, undisputed "extrinsic or parol evidence may be considered to construe it."[32] If the extrinsic or parol evidence is disputed, summary judgment is inappropriate.[33]

Spirit moves for summary judgment on two theories. First, that Lawson failed to comply with a condition precedent in his Retirement Agreement by assisting Elliott with its dealings with Arconic, a company which Spirit argues is engaged in the "Business" as defined by the Retirement Agreement, or by otherwise being connected to or obtaining an interest in Elliott, which has controlling dealings with Arconic. Second, Spirit argues that Lawson's claim fails because he has suffered no damages, contending that the Consulting and Indemnification Agreements compensated Lawson more than the Retirement Agreement would have. Spirit bears the burden to prove that Lawson lacks evidence on those elements of his breach of contract claim.

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[27] *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 732 P.2d 741, 746 (1987).

[28] *Simon v. Nat'l Farmers Org., Inc.*, 250 Kan. 676, 829 P.2d 884, 888 (1992).

[29] *Waste Connections of Kan., Inc. v. Ritchie Corp.*, 296 Kan. 943, 298 P.3d 250, 265 (2013) (citation omitted).

[30] *Carrothers*, 207 P.3d at 239 (citation omitted).

[31] *Stouder v. M & A Tech., Inc.*, 2012 WL 28066, at *7 (D. Kan. 2012) (citation omitted).

[32] *Waste Connections*, 298 P.3d at 264.

[33] *Id.* at 265.

Similarly, Lawson moves for summary judgment on Spirit's affirmative defense. Spirit contends that it did not breach the contract by repudiating its obligations to pay Lawson benefits under the Retirement Agreement because Lawson first violated the condition precedent to those obligations—that he not compete with Spirit's "Business" as defined in the Employment Agreement and subsequently incorporated into the Retirement Agreement. Spirit bears the burden of proof on its affirmative defense.

The crux of the parties' summary judgment arguments hinges on the meaning of the term "Business" as defined in the Employment Agreement and subsequently incorporated into the Retirement Agreement. Because of its importance, the Court restates that provision here. The Employment Agreement defines the term "Business" as:

> We are engaged in the manufacture, fabrication, maintenance, repair, overhaul, and modification of aerostructures and aircraft components, and market and sell our products and services to customers throughout the world (together with any other businesses in which Spirit may in the future engage, by acquisition or otherwise, the "*Business*").

While the terms "manufacture, fabrication, maintenance," and "repair" may be unambiguous, the term "modification," and particularly the phrase "aerostructures and aircraft components" are ambiguous. Furthermore, the parenthetical phrase "any other *businesses* in which Spirit may in the future engage" is not only ambiguous, but also circular. As evident in the copious amounts of evidence thus far presented by the parties, the aircraft manufacturing industry does not utilize broadly accepted, standardized vocabulary, and these terms and phrases can reasonably be interpreted by industry insiders to mean widely varying things. As such, the Court concludes that the term "Business" as defined in the parties' agreements is ambiguous and that extrinsic and parol evidence may therefore be used to clarify the ambiguity.

The Court concludes that there are multiple genuine disputes of material fact about Lawson's performance or willingness to perform in compliance with the contract. As previously noted, Lawson's Retirement Agreement included a restrictive covenant structured as a non-compete provision. This provision was extended through the term of the Retirement Agreement from Lawson's original Employment Agreement. The Court has previously held that the non-compete provision acted as a condition precedent to Spirit's obligation to perform its end of the bargain under the Retirement Agreement. Whether Lawson performed or was willing to perform in compliance with the non-compete provision is the root of this case, and there are many remaining genuine disputes of material fact on this point. For instance, the parties dispute: the nature and extent of Lawson's engagement with Elliott; whether the services rendered to Elliott fall within the Retirement Agreement's non-compete provision; the nature and extent of Lawson's direct or indirect services to Arconic; whether those services fall within the Retirement Agreement's non-compete provision; whether, and to what extent, Elliott's ownership and attempt at control of Arconic can be indirectly attributed to Lawson via his corresponding engagement with Elliott; and generally, whether Lawson's actions after retiring from Spirit fell within the notion of "Business" as defined in the Employment Agreement and subsequently incorporated into the Retirement Agreement. The parties have submitted voluminous conflicting evidence on these material issues and Spirit has failed to carry its burden to prove that Lawson lacks sufficient evidence to support this element. As such, the Court concludes that factual issues preclude summary judgment on the third element of Lawson's breach of contract claim.

The Court also concludes that there are multiple genuine disputes of material fact about Spirit's breach of the contract. "[W]hether a contract has been breached is a question of fact."[34] It is undisputed that Spirit ceased paying Lawson the amounts under the Retirement Agreement. However, Spirit asserts as an affirmative defense that it was excused from performing its obligations under the agreement as a result of Lawson's alleged failure to comply with a condition precedent to Spirit's performance—the non-compete provision in the Retirement Agreement. Therefore, alleging that Lawson breached the contract first and failed to cure the breach after notice and requests, Spirit argues that its actions do not constitute a breach under the fourth element of the claim. Like the previous element, this factual dispute concerns the heart of the case—which party first terminated its obligations under the Retirement Agreement and whether that party was justified in doing so. Multiple genuine disputes of material fact remain concerning those issues. For instance, the parties dispute: whether Arconic was pursuing business plans, and engaging in operations, similar to Spirit in the areas of advanced manufacturing, fabrication, the building up of assemblies into the assembly arena, machining parts, and complex assembly for supply directly to OEMs; whether Arconic was also pursuing new initiatives in additive manufacturing or 3D printing and whether Arconic and was a competitive threat in that regard; whether, and to what extent, Arconic was a competitor of Spirit; whether, and to what extent, Arconic's business overlapped with Spirit's; and generally, whether Arconic and Elliott's activities and operations fall within the notion of "Business" as defined in the Employment Agreement and subsequently incorporated into the Retirement Agreement. Like the prior element, the parties have submitted conflicting evidence on these material issues and Lawson has failed to carry his burden to prove

[34] *Peterson v. Ferrell*, 302 Kan. 99, 349 P.3d 1269, 1274 (2015) (citing *Waste Connections*, 298 P.3d at 265).

that Spirit lacks sufficient evidence to support its affirmative defense. As such, the Court concludes that factual issues also preclude summary judgment on the fourth element of Lawson's breach of contract claim.

Finally, the Court concludes that there are multiple genuine disputes of material fact about Lawson's damages. While the amount of unpaid cash is well-defined and undisputed, the proper valuation of the LTIP shares of Spirit common stock remains disputed. The parties have presented conflicting evidence and expert reports explaining the commonly used valuation methods for such executive compensation plan stock awards, resulting in widely differing share price valuations. For instance, the shares can be valued when awarded, vested, or sold. What timing and valuation technique was to be used in the present case—and what is commonly used in the industry—is a crucial, factual determination about Lawson's potential damages. Therefore, the Court concludes that factual issues similarly preclude summary judgment on the fifth and final element of Lawson's breach of contract claim.

Since there are multiple genuine disputes of material fact about the final three elements of Lawson's breach of contract claim, the Court concludes that summary judgment is inappropriate. Summary judgment is therefore denied.

IT IS THEREFORE ORDERED that Defendant Spirit Aerosystems, Inc.'s Motions to Strike (Docs. 444 and 452) are **DENIED.**

IT IS FURTHER ORDERED that Defendant Spirit Aerosystems, Inc.'s Motion for Summary Judgment (Doc. 432) is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff Larry A. Lawson's Motion for Summary Judgment (Doc. 435) is **DENIED.**

IT IS SO ORDERED.

Dated this 16th day of April, 2021.

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE