09-2766-cv

United States Court of Appeals for the Second Circuit

LOCKHEED MARTIN CORPORATION,
on its own behalf and as Plan Sponsor, Plan Administrator and named fiduciary of the Lockheed Martin Corporation Retirement Income Plan III,
Plaintiff–Counter-Defendant–Appellee,

v.

RETAIL HOLDINGS, N.V.,
Defendant–Counterclaimant–Cross-Claimant–Appellant,

METROPOLITAN LIFE INSURANCE COMPANY INC. and
MELLON INVESTMENT SERVICES LLC,
Defendants–Cross-Defendants.

On Appeal from the United States District Court for the Southern District of New York No. 1:02-cv-3374 (Hon. Thomas P. Griesa)

BRIEF FOR PLAINTIFF–COUNTER-DEFENDANT–APPELLEE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff–Counter-Defendant–Appellee Lockheed Martin Corporation, a private non-governmental party, certifies that 10% or more of its stock is held by State Street Bank and Trust Company, a subsidiary of State Street Corporation.

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INTRODUCTION

In 1986, The Singer Company (together with its successors, "Old Singer") entered into a Reorganization and Distribution Agreement ("Spin-Off Agreement") with SSMC Inc. (together with its successors, "New Singer"). The issue in this case is whether the Spin-Off Agreement transferred a particular pension plan from Old Singer to New Singer. The pension plan was called the Executive Office Foreign Service Retirement Plan ("EOFS Plan"), and it had a single asset, Group Annuity Contract No. 365F ("GAC 365F"). The district court found that the EOFS Plan and GAC 365F had not been transferred and, by virtue of a series of corporate acquisitions and plan mergers, became part of the Lockheed Martin Corporate Retirement Income Plan III ("RIP-III"). That decision should be affirmed.

Article VIII of the Spin-Off Agreement governed the disposition of Old Singer's pension plans. In painstaking detail, Section 8.02 transferred four plans to New Singer in full and two more in part. The EOFS Plan is materially indistinguishable from the plans that were explicitly transferred in full, and yet it was not mentioned at all. That omission is dispositive.

New Singer claims that, notwithstanding the careful treatment of pension plans in Article VIII, the Spin-Off Agreement transferred the EOFS Plan, silently, through the general provisions—Articles II and IV—that transferred certain assets and liabilities. Under New Singer's interpretation, however, substantial portions of Article VIII would serve no purpose, in violation of the principle of New York contract law that agreements should not be construed to leave provisions without force or effect. Indeed, even without regard to Article VIII, the provisions on which New Singer relies could not have transferred the EOFS Plan, because a pension plan is not an asset of the sponsoring employer. The Spin-Off Agreement thus unambiguously left the EOFS Plan with Old Singer.

But even if it did not, the agreement certainly did not unambiguously transfer the plan to New Singer. At the very least, the agreement is ambiguous on that point. If it is, then extrinsic evidence may be considered, and the parties' conduct surrounding the Spin-Off Agreement makes clear that they intended the EOFS Plan to remain with Old Singer.

As the district court found at trial, Old Singer continued to administer the EOFS Plan long after the Spin-Off Agreement took effect. Old Singer had no reason to anticipate that anything could be gained from controlling the EOFS Plan, yet each year it filed the regulatory paperwork required by law and assisted EOFS Plan participants in obtaining their benefits. When Old Singer progressed through a series of corporate transactions, each successor understood that the EOFS Plan was its responsibility, and each took steps to assimilate the EOFS Plan into its pension system.

Meanwhile, New Singer did nothing. It never filed the required annual reports for the EOFS Plan with the Department of Labor; it never created a mirror pension plan to accept the assets of the EOFS Plan; and it continued to contact Old Singer when it needed to know the amounts of benefits payable under the EOFS Plan in order to calculate benefits under a different plan that Article VIII expressly transferred. In short, until New Singer saw an opportunity for a windfall, it treated the EOFS Plan as somebody else's problem.

If the Spin-Off Agreement is ambiguous, therefore, the district court correctly assessed the parties' conduct and found that Old Singer

retained control. At a minimum, that factual finding is not clearly erroneous. New Singer challenges the district court's reliance on post-contract conduct, but New York courts regard such conduct as the most persuasive evidence of the intent of the parties to an ambiguous contract.

Finally, even if New Singer once had rights to the EOFS Plan, those rights have long since been extinguished. After the spin-off, The Singer Company was acquired by Bicoastal Corporation ("Bicoastal"), which declared Chapter 11 bankruptcy in 1992. The successor to the EOFS Plan, which included GAC 365F, was subject to the jurisdiction of the bankruptcy court. In the bankruptcy proceedings, New Singer filed claims relating to the Spin-Off Agreement but did not challenge Old Singer's control over the EOFS Plan and GAC 365F. The bankruptcy court's decisions in that case are thus *res judicata*.

STATEMENT OF THE ISSUES

1. Whether the Spin-Off Agreement unambiguously left the EOFS Plan with Old Singer.

2. Whether, if the Spin-Off Agreement did not unambiguously leave the EOFS Plan with Old Singer, the district court permissibly found that the parties intended that result.

3. Whether New Singer's challenge to Old Singer's control of the EOFS Plan is precluded by the court-approved settlement of New Singer's claims and the confirmation of the reorganization plan in Bi-coastal's Chapter 11 bankruptcy proceedings.

STATEMENT OF THE CASE

Old Singer, in the form of appellee Lockheed Martin Corporation ("Lockheed Martin"), initiated this action on May 2, 2002. As amended, the complaint alleged that Lockheed Martin is the successor-in-interest to all the rights and obligations of The Singer Company under the EOFS Plan and sought a declaratory judgment that the plan's only asset, GAC 365F, belonged to RIP-III, the successor to the EOFS Plan. JA 23 (Second Am. Compl. ("SAC") ¶ 39). New Singer, in the form of appellant Retail Holdings, N.V. ("Retail Holdings"), filed counterclaims and cross-claims seeking control of the disputed assets. JA 33-35 (Answer ¶¶ 55-61). The custodians of the assets, Metropolitan Life Insurance Company ("MetLife") and Mellon Investors Services LLC ("Mellon"),

were named as defendants and cross-defendants but took a neutral position. JA 40-50 (MetLife Answer); JA 51-60 (Mellon Answer).

New Singer moved for judgment on the pleadings and Old Singer cross-moved for summary judgment. Both motions were denied, although Old Singer was granted leave to renew its motion after further discovery had been conducted. JA 61-67. After conducting further discovery, Old Singer did renew its motion, which again was denied, JA 80-85, and the matter was set for trial.

The case was tried to Judge Griesa from April 7 through 9, 2009. After hearing testimony from four live witnesses and four witnesses by deposition, Judge Griesa issued an oral ruling in favor of Old Singer. SPA 1-11. New Singer sought reconsideration, which was denied on May 28, 2009. JA 892-93. Judgment was entered in favor of Old Singer on May 29, 2009. JA 897-98.

STATEMENT OF FACTS

A. Relevant Facts

1. The EOFS Plan

Old Singer created the EOFS Plan on May 1, 1957, to provide retirement benefits to employees stationed outside the United States. JA 504-96. The EOFS Plan was funded by contributions from participating

employees and Old Singer. To satisfy the obligations of the plan, Old Singer purchased GAC 365F from MetLife. JA 15 (SAC ¶ 10); JA 26 (Answer ¶ 10); JA 446-503. GAC 365F required MetLife to provide pension benefits to Old Singer employees participating in the plan when they became eligible for retirement. JA 453-56 (art. III). GAC 365F was an asset of the EOFS Plan. Plaintiffs' Trial Exhibit ("PX") 35 (New Singer Responses to Old Singer's Notice to Admit ("New Singer Admissions"), No. 2).

In 1972, the EOFS Plan was closed to new participants, with pensions based on subsequent foreign service to be provided by the Overseas Retirement Plan. JA 15 (SAC ¶ 11); JA 26 (Answer ¶ 11); JA 234-35, 243 (Bork Tr. 147:10-148:8, 156:6-23). While no new participants were eligible to join the EOFS Plan, existing participants were permitted to and did continue making contributions and receiving benefits. As a result of the freezing of the plan, however, some employees had membership in both the EOFS Plan and the Overseas Retirement Plan; in those circumstances, benefits under the latter were offset by benefits under the former. JA 234, 237-38 (Bork Tr. 147:10-17, 150:7-151:1).

After the passage of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, the EOFS Plan was amended to comply with the statute. JA 506. In particular, the plan was restated as an ERISA-qualified plan operating "for the exclusive benefit of [Old Singer's] employees or their beneficiaries." JA 594 (§ 12.6).

2. The spin-off and the Spin-Off Agreement

Historically, Old Singer engaged in the manufacture of sewing machines and furniture. JA 16 (SAC ¶ 12); JA 26 (Answer ¶ 12). During the 1970s, however, the company expanded into new fields, including aerospace technologies. JA 16 (SAC ¶ 12); JA 26 (Answer ¶ 12). In 1986, Old Singer was advised to concentrate exclusively on its aerospace pursuits and decided to spin off its sewing-machine and furniture divisions. JA 176 (Blatz Tr. 89:10-18).

To effectuate this plan, Old Singer entered into the Spin-Off Agreement with New Singer, which was then a wholly owned subsidiary of Old Singer known as "SSMC Inc." JA 597-710. The basic design of the Spin-Off Agreement was to transfer the sewing and furniture

businesses to New Singer, ensuring that it could proceed as a continuing venture while maximizing value to Old Singer's shareholders.

Section 2.01 of the contract required Old Singer to transfer to New Singer "all of the SSMC Assets," JA 611, which were elsewhere defined as

> collectively, all of the assets of the sewing and related products and furniture businesses of [Old] Singer and its subsidiaries and Affiliates, which shall include, without limitation, all rights of [Old] Singer, its Affiliates and subsidiaries under contracts (e.g., trademark and distribution agreements) relating to the sewing and/or furniture businesses.

JA 608 (§ 1.01). In Section 4.02, New Singer assumed the liabilities "of all of the operations and businesses" to be transferred. JA 617.

Neither Section 2.01 nor Section 4.02 addressed the disposition of Old Singer's pension plans. Old Singer had approximately 25 ERISA-qualified plans, some of which were to be divided between New Singer and Old Singer and others of which were to be retained or transferred intact. JA 123 (Russell Tr. 36:7); JA 769. The pension plans were addressed, in detailed language, in Article VIII of the Spin-Off Agreement, which spanned 17 pages. JA 637-53. Several sections are relevant here.

Section 8.02(a) governed the disposition of pension plans that were to be transferred without division. Old Singer was required to "cause the transfer to [New Singer] as of the Deposit Date of all of [Old] Singer's rights and interests" with respect to four specifically identified plans and their associated trusts. JA 639 (§ 8.02(a)(1)). In exchange, New Singer was to "assume and be solely responsible for all liabilities and obligations whatsoever of [Old] Singer and its subsidiaries" under those plans. JA 640 (§ 8.02(a)(2)). Section 8.02(a) did not identify the EOFS Plan as one of the plans to be transferred in full.

Section 8.02(b) addressed two specific plans that were to be divided between Old Singer and New Singer. Old Singer was required to allocate those plans' liabilities between the companies and to cause sufficient assets to satisfy the allocated liabilities to be transferred from the existing plans to the new plans sponsored by New Singer. JA 641-42 (§ 8.02(b)(1)). All of Old Singer's liabilities or obligations to the transferred participants under those plans were discharged. JA 642-43 (§ 8.02(b)(2)). Section 8.02(b) did not identify the EOFS Plan as one of the plans whose assets and liabilities were divided.

Section 8.02(h) detailed the mechanics of transferring the materials needed to administer the plans that were transferred in full or in part under Sections 8.02(a) and 8.02(b). For the plans that were transferred in full, Old Singer agreed to furnish copies of the plan documents and IRS determination letters, lists of "all persons having any rights" under the plans, records showing employee eligibility to participate in the plans, computer programs necessary to administer the plans, actuarial valuations of the plans, and current disclosures to participants in the plans. JA 647-50 (§ 8.02(h)(1)).

Section 8.03 provided that Old Singer would "continue to be solely and exclusively responsible" for providing all benefits to former employees who had worked for units to be transferred to New Singer and were receiving retirement benefits under (i) employee welfare plans, (ii) the supplemental plan for senior executives, and (iii) qualified defined benefit plans other than those identified in Section 8.02. JA 650-51. Thus, under Section 8.03, Old Singer was responsible for the EOFS Plan pensions for retired employees. JA 651.[1]

[1] As of the effective date of the Spin-Off Agreement, 36 of the 72 participants in the EOFS Plan were retired and receiving pensions. Most of the others had left Old Singer and deferred their pensions. JA 860-75.

Section 8.04 addressed the Overseas Retirement Plan, and provided that Old Singer's liabilities under that plan would be transferred to New Singer. JA 651-52. Because the Overseas Retirement Plan was an unfunded, non-ERISA-qualified plan, it did not accrue assets in anticipation of future benefit obligations and thus had no assets to transfer. JA 243 (Bork Tr. 156:6-23).

The Spin-Off Agreement was effective July 18, 1986. JA 597. By a separate Master Technical and Administrative Services Agreement effective the same day, Old Singer agreed to perform "[p]ension and benefits administration" services for a fee until the end of 1987 for plans that had been transferred to New Singer. JA 710. After that time, New Singer was solely responsible for administering any transferred plan.

3. After the reorganization

After Old Singer and New Singer began operating as independent entities, the EOFS Plan continued to function and to disburse benefits. In 1987, Old Singer's board of directors passed a resolution merging the EOFS Plan with the Singer Company Piecework Systems Hourly Employees Retirement Plan, JA 851, the name of which was subsequently changed to the Singer Company Retirement Plan for Discontinued Op-

erations, R.38, Tab 2, at 5 (New Singer Admissions, No. 24). That plan was subsequently merged into the Revised Retirement Plan for the United States Employees of the Singer Company ("U.S. Plan"). *Id.* at 6 (New Singer Admissions, No. 25).

In 1988, Old Singer was purchased by Bicoastal, which adopted the U.S. Plan. *See United States v. Bicoastal Corp. (In re Bicoastal Corp.)*, 125 B.R. 658, 660 (M.D. Fla. 1991). The following year, Bicoastal filed for Chapter 11 bankruptcy. *Id.* at 661. The filing prompted numerous proofs of claim, including one by New Singer alleging breaches of the Spin-Off Agreement, JA 71-72, 858-59, and one by the United States seeking surplus assets of the U.S. Plan, *Bicoastal Corp. v. N. Trust Co. (In re Bicoastal Corp.)*, 146 B.R. 486 (Bankr. M.D. Fla. 1992). New Singer did not stake any claim to the EOFS Plan during the Bicoastal bankruptcy. With respect to the claims that it did raise, New Singer entered into a stipulated settlement that the bankruptcy court approved. JA 74-79. Bicoastal's reorganization plan was confirmed on September 14, 1992. *See In re Bicoastal Corp.*, 164 B.R. 1009, 1013 (Bankr. M.D. Fla. 1993).

During the course of the bankruptcy proceedings, Loral Librascope Corporation ("Loral") entered into an agreement with Bicoastal under which Loral acquired a business unit of Bicoastal. As part of that agreement, Loral paid $15 million to the bankruptcy estate to acquire "100% of the plan assets and 100% of the plan benefit liabilities" of the U.S. Plan. *In re Bicoastal Corp.*, 146 B.R. at 488. According to public filings, GAC 365F was among those assets. JA 853. The bankruptcy court approved the transaction. *Id.*

Loral merged Bicoastal's U.S. Plan into its Librascope Retirement Plan and then into the Retirement Plan of Loral Aerospace Corporation (the "LAC Plan"). R.38, Tab 2, at 6 (New Singer Admissions, Nos. 27, 29). In 1996, Lockheed Martin acquired Loral and adopted the LAC Plan, which was renamed the Retirement Plan of Lockheed Martin Aerospace Corporation. *Id.* at 7 (New Singer Admissions, No. 31). In 1999, that plan was merged into RIP-III. *Id.* (New Singer Admissions, No. 33).

Throughout this period, Old Singer continued to monitor, administer, and manage the EOFS Plan, in accordance with its fiduciary obligations under ERISA. Each year, consistent with ERISA §§ 104 and 4065

(29 U.S.C. §§ 1024, 1365), Old Singer filed with the Department of Labor a required annual report—known as Form 5500—for the EOFS Plan (or its successor), each time identifying GAC 365F as an asset of the plan. JA 853-54. Old Singer also maintained the records of participants in the EOFS Plan. JA 238-39, 254 (Bork Tr. 151:12-152:7, 167:10-17). And when a participant became eligible for retirement benefits under the plan, Old Singer computed the benefits due and instructed MetLife to initiate payment under GAC 365F. JA 242 (Bork Tr. 155:16-20). Under the Master Technical and Administrative Services Agreement, Old Singer was responsible for performing some of these tasks for the transferred plans through 1987. That agreement, however, expired in 1987, when Old Singer sent New Singer the "files and [participant] cards" of the plans that had been transferred—but not of the EOFS Plan. JA 254 (Bork Tr. 167:5-12).

Conversely, New Singer never undertook any tasks related to the administration of the EOFS Plan. New Singer's board of directors never passed a resolution adopting or merging the EOFS Plan or amending it to designate named fiduciaries. JA 855-56. Nor did New Singer ever file Form 5500 for the EOFS Plan or any plan purporting to hold GAC

365F. JA 853-54. New Singer also maintained no records for the EOFS Plan, never calculated pension benefits under the plan, and never instructed MetLife to pay benefits under GAC 365F. SPA 10. When an employee with membership in both the Overseas Retirement Plan and the EOFS Plan retired, New Singer could not compute its obligations under the Overseas Retirement Plan without contacting Old Singer to find out how much the employee would be paid under the EOFS Plan. JA 237-38, 242-43 (Bork Tr. 150:11-151:1, 155:21-156:3). New Singer thus failed to undertake any tasks related to the administration of the EOFS Plan despite the fact that it was fully aware of the existence of the plan and Old Singer's continued control over it.

4. The current dispute

In 2000, MetLife decided to discontinue its business of deposit administration contracts and canceled GAC 365F, effective November 30, 2000. JA 884-85. The account then had reserves of approximately $3.8 million, and MetLife sought to transfer the reserves to the sponsor of the EOFS Plan. *Id.* MetLife—which did not take a position on the proper disposition of GAC 365F—notified New Singer of the cancella-

tion but declined to transfer the proceeds after learning of Old Singer's claim. JA 891.

At roughly the same time, MetLife underwent demutualization, the process by which a mutual insurance company owned by its policyholders becomes a publicly held company owned by shareholders. JA 771-850. As a result of the demutualization, 46,434 shares of common stock were issued for the policyholder of GAC 365F. JA 21 (SAC ¶ 32); JA 29 (Answer ¶ 32). Those shares were retained by Mellon pending the determination of their rightful owner. JA 55-56 (Mellon Answer ¶ 32).

B. Proceedings In The District Court

1. Pre-trial proceedings

To resolve the deadlock over the ownership of the funds, Old Singer, in the form of Lockheed Martin, filed a complaint seeking declaratory relief on May 2, 2002, on behalf of itself and as plan sponsor, plan administrator, and named fiduciary of RIP-III. New Singer, in the form of Retail Holdings, counterclaimed against Old Singer and cross-claimed against nominal defendants MetLife and Mellon, both of which disclaimed any personal stake in the assets.

After discovery was underway, New Singer moved for judgment on the pleadings, arguing that the Spin-Off Agreement "unquestionably transferred to [New Singer] the pension plan in question," because the EOFS Plan was an asset and/or a liability of the sewing business and sewing assets and liabilities were transferred to New Singer by Sections 2.01 and 4.02 of the Spin-Off Agreement. JA 63-65. Old Singer cross-moved for summary judgment, on the ground that Article VIII governed the disposition of pension plans, as was confirmed by the parties' conduct. The district court denied both motions. JA 61-67. Although the court found "considerable persuasiveness" in Old Singer's contention that, "if there was an intention to transfer the pension plan in question to [New Singer], it would have been natural to include this plan in Section 8.02," it concluded that "questions about what was actually intended" provided "reason to allow some further discovery." JA 65-66.

After further discovery, Old Singer renewed its motion for summary judgment, contending that there was no material dispute as to the parties' intent and that, regardless of the parties' intent, New Singer waived its claim by failing to assert any right to the EOFS Plan in its proof of claim in the Bicoastal bankruptcy proceedings. The court again

denied the motion, finding that "the additional discovery ha[d] not yielded any dispositive evidence" and that New Singer could not have waived its rights to the EOFS Plan during the Bicoastal bankruptcy because "GAC 365F was not 'held by' BiCoastal, but by MetLife." JA 84-85.

2. The trial

The case was tried to the court from April 7 through 9, 2009. In expressing some of his tentative views about the case during the course of the trial, Judge Griesa repeatedly noted the tension between Articles II and IV (which provided generally that sewing assets and liabilities would be transferred) and Article VIII (which provided specific instructions concerning pension plans). For example, the court observed that, if it "put aside [Section] 8.03," then it might deem Article II controlling and conclude that New Singer had the better claim. JA 414 (Tr. 327:16-17). However, "the transfer of a pension plan involves more than just the transfer of a building or a bank account," JA 381 (Tr. 294:21-22), and the court found "a great deal * * * consistent with the idea that the pension plan was a particular kind of asset and only those pension

plans were transferred which are specifically listed in Article VIII," JA 382 (Tr. 295:20-23).

After hearing testimony from four live witnesses and four witnesses by deposition, Judge Griesa ruled in favor of Old Singer. Notwithstanding the provisions requiring the transfer of sewing assets and liabilities "in a general and broad way," the court concluded that "the agreement does not leave the subject of pension funds to be taken care of solely by Sections 2.01 and 4.02." SPA 4-5. The court determined that "it was obviously decided that there was a need to have specific treatment of the subject of pension plans and not to leave that subject to the general language of Section 2.01 and Section 4.02." SPA 5-6. The court nevertheless found Article VIII to be inconclusive: "The EOFS Plan was not specified in Section 8.02 as being one of the plans to be transferred; however, Section 8.02 does not state that the specified plans were the only ones to be transferred." SPA 6.

The court then turned to the trial evidence to resolve the ambiguity, relying, in particular, on "evidence about what was done in carrying out the agreement." SPA 8. The court found that, notwithstanding requirements to file forms such as Form 5500, "[New Singer] and its suc-

cessors made no such filings." *Id.* And although "if there was a transfer MetLife needed to be apprised of any new owner or transferee of the pension plan[,] [n]o such notice was given to MetLife." SPA 9. In the meantime, "[Old] Singer and its successors administered the plan. [New Singer] and its successors did not." *Id.* The court viewed this conduct as "evidence of how the parties construed the contract" and rejected New Singer's theory that "the continuation of the work of [Old] Singer was simply a mistake." SPA 10. The court accordingly "f[ound] and conclud[ed] that the EOFS Plan was not transferred from [Old] Singer to [New Singer]" and that the disputed assets now "belong to Lockheed Martin." SPA 11.

New Singer moved for reconsideration, arguing that the district court had misperceived a filing requirement for transferring a pension plan. The court denied the motion. It explained that, regardless of whether that particular filing was required, "what was critical was that [Old] Singer, not [New Singer], administered the plan after the July 1986 spin-off by assuming several relevant responsibilities, including the tracking of pensioners' benefits under the plan and the annual filing

of a Form 5500." JA 892. It was "th[is] evidence," the court ruled, that proved that "the plan was not transferred to [New Singer]." JA 893.

SUMMARY OF ARGUMENT

The district court correctly determined that the EOFS Plan remained with Old Singer.

I. By the unambiguous terms of the Spin-Off Agreement, the EOFS Plan was not transferred to New Singer. The subject of pension plans is governed exclusively by Article VIII, which provides, in extraordinarily detailed language in Section 8.02, that four plans would be transferred to New Singer in full and two plans in part. The EOFS Plan is not listed among the plans to be transferred in full, even though it is materially indistinguishable from the specified plans. If the EOFS Plan were covered by the general provisions transferring assets and liabilities (Articles II and IV), as New Singer contends, then Section 8.02(a)(1), which lists the pension plans to be transferred in full, would serve no purpose, because those plans, too, would be transferred by the general provisions. It is a basic principle of New York contract law that an agreement should not be read in a way that leaves provisions without force or effect.

This interpretation of Section 8.02 is consistent with Section 8.03. The latter provision requires Old Singer to continue providing benefits to retirees who worked for units to be transferred to New Singer under (i) employee welfare benefit plans, (ii) the supplemental plan for senior executives, and (iii) those qualified defined benefit plans not listed in Section 8.02. It also requires New Singer to administer the retiree life and medical programs. Section 8.03 was thus intended to allocate responsibility for retiree benefits. According to New Singer, Section 8.03 shows that the Spin-Off Agreement transferred to New Singer pension plans not specified in Section 8.02—even as Old Singer would continue to be responsible for providing benefits to retirees under those plans. But Section 8.03 neither says nor implies any such thing. Indeed, Section 8.03 strongly suggests the contrary, because, if plans other than those specified in Section 8.02 were transferred, Section 8.03 would have the effect of separating their liabilities from the assets needed to pay retiree benefits. That result would serve no business purpose and would contravene ERISA.

These provisions thus demonstrate that the disposition of pension plans is governed by Article VIII and not by the general provisions

transferring assets and liabilities. Indeed, the parties could not have intended to treat the EOFS Plan as an "SSMC Asset" under Article II even without regard to Article VIII, because pension plans are not "assets" of the sponsoring employer but trusts held for the benefit of employees. ERISA specifically forbids a qualified plan from inuring to the benefit of the employer, a prohibition that is inconsistent with characterizing a plan as the employer's "asset."

II. If the Spin-Off Agreement does not unambiguously leave the EOFS Plan with Old Singer, it certainly does not unambiguously transfer the plan to New Singer, as New Singer contends. A contract is unambiguous only if it is clear and explicit, and provides no reasonable basis for disagreement. At a minimum, the features of Article VIII discussed above, and the fact that the assets of a pension plan are held for the benefit of plan participants, not for the benefit of the sponsoring employer, create a reasonable basis for disagreement about whether the Spin-Off Agreement transferred the EOFS Plan.

If the contract is ambiguous, then the district court correctly found that the parties did not intend to transfer the EOFS Plan. At the very least, that factual finding is not clearly erroneous. For more than

a decade after the Spin-Off Agreement was executed, Old Singer continued to administer the EOFS Plan by maintaining participant records, computing benefits, and filing required regulatory paperwork. During the same period, New Singer did nothing. The district court permissibly inferred from this conduct that the parties intended to leave the EOFS Plan with Old Singer. New Singer's principal objection to this finding is that the district court should not have relied on post-contract conduct. But far from being disfavored, such conduct, under New York law, is the strongest evidence of the intent of the parties to an ambiguous contract.

III. Regardless of whether New Singer once had rights to the EOFS Plan, those rights were extinguished during the Bicoastal bankruptcy. The bankruptcy court exercised jurisdiction over the successor to the EOFS Plan and GAC 365F, and ultimately approved the transfer of both to Lockheed Martin's predecessor. It then confirmed Bicoastal's plan of reorganization. During the proceedings, the United States filed a proof of claim with respect to the successor to the EOFS Plan, but New Singer did not, even though it did file a proof of claim alleging breaches of the Spin-Off Agreement. New Singer's failure to stake any

claim to the pension plan in the bankruptcy proceedings is *res judicata* and precludes its claim here.

STANDARD OF REVIEW

Under New York law, which governs here, JA 657 (§ 10.03)), the question whether a contract is ambiguous and, if it is not, the meaning of the contract's terms are issues of law that are reviewed *de novo*. *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 187 (2d Cir. 2006); *New Windsor Volunteer Ambulance Corps v. Meyers*, 442 F.3d 101, 111 (2d Cir. 2006). Under New York law, the intent of the parties to an ambiguous contract is an issue of fact that is reviewed for clear error. *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009); *Hatalmud v. Spellings*, 505 F.3d 139, 145 (2d Cir. 2007). Whether New Singer's claim is precluded by decisions of the bankruptcy court in Bicoastal's bankruptcy proceedings is a question of law subject to *de novo* review. *O'Connor v. Pierson*, 568 F.3d 64, 69 (2d Cir. 2009); *EDP Medical Computer Sys., Inc. v. United States*, 480 F.3d 621, 624 (2d Cir. 2007).

ARGUMENT

If a contract is unambiguous, a court must enforce its plain terms. *Norma Reynolds Realty, Inc. v. Edelman*, 817 N.Y.S.2d 85, 86 (App. Div. 2006). If a contract is ambiguous, however, a court may consider ex-

trinsic evidence to determine the parties' intent. *Fernandez v. Price*, 880 N.Y.S.2d 169, 173 (App. Div. 2009). In that event, "the parties' course of performance under the contract is * * * the 'most persuasive evidence of the agreed intention of the parties.'" *Fed. Ins. Co. v. Ams. Ins. Co.*, 691 N.Y.S.2d 508, 512 (App. Div. 1999) (quoting *Webster's Red Seal Publ'ns v. Gilberton World-Wide Publ'ns*, 415 N.Y.S.2d 229, 341 (App. Div. 1979), *aff'd*, 421 N.E.2d 118 (N.Y. 1981)).

The Spin-Off Agreement unambiguously expressed the parties' intent to transfer certain pension plans, but not the EOFS Plan. Accordingly, although no trial was necessary, the district court correctly ruled for Old Singer. *See infra* Point I.

Even if the contract is deemed ambiguous, the district court properly relied on more than a decade's worth of post-contractual conduct in finding that the parties did not intend to transfer the EOFS Plan. That factual finding was correct, was supported by the evidence, and certainly was not clearly erroneous. *See infra* Point II.

In any event, New Singer's claim to the EOFS Plan is barred. When Bicoastal declared bankruptcy and GAC 365F came under the jurisdiction of the bankruptcy court, New Singer was required to raise or

forfeit any claim to the plan. Its failure to raise the claim at issue here is *res judicata*. *See infra* Point III.

For these three independent reasons, the judgment of the district court should be affirmed.

I. THE SPIN-OFF AGREEMENT UNAMBIGUOUSLY LEFT THE EOFS PLAN WITH OLD SINGER.

The language of the Spin-Off Agreement precludes the possibility that the EOFS Plan was transferred to New Singer. Under New York law, a contract must be read as a whole and in a manner that will "implement the reasonable expectations of the parties who undertake to be bound by its provisions." *Spear, Leeds & Kellogg v. Cent. Life Assurance Co.*, 85 F.3d 21, 28 (2d Cir. 1996). The reasonable expectations of the parties to the Spin-Off Agreement were that Article VIII governed the disposition of Old Singer's pension plans. And it is undisputed that Article VIII did not effect a transfer of the EOFS Plan.

New Singer contends that the parties intended to transfer the EOFS Plan, *sub silentio*, as part of the general pool of assets allocated to New Singer under Article II. It is implausible, to say the least, that sophisticated parties would leave issues as complex as pension plans to a generic catch-all provision. More fundamentally, New Singer's inter-

pretation violates the canon that "no provision of a contract should be left without force and effect," *Muzak Corp. v. Hotel Taft Corp.*, 133 N.E.2d 688, 690 (N.Y. 1956), because, if pension plans were transferred as part of the general asset pool, then detailed and carefully worded portions of Article VIII would serve no purpose. In any event, the general asset-transfer provision does not encompass pension plans even without regard to Article VIII, because a trust operates for the benefit of its beneficiaries and is not an asset of the grantor.

A. Articles II And IV Did Not Transfer The EOFS Plan Because Pension Plans Are Governed Exclusively By Article VIII.

Article VIII spans 17 pages of the Spin-Off Agreement, JA 637-53, and provides specific and detailed instructions about the disposition of Old Singer's pension plans. Article VIII as a whole, and Sections 8.02 and 8.03 in particular, unambiguously show that the parties intended the EOFS Plan to remain with Old Singer.

1. Section 8.02 governs the transfer of pension plans and did not transfer the EOFS Plan.

a. Pension plans are specifically addressed in the Spin-Off Agreement by Section 8.02. Under the heading "Pension Plans," the parties identified four plans to be transferred in full and two plans to be

divided between Old Singer and New Singer. JA 639-42.[2] If the parties had intended to transfer the EOFS Plan to New Singer, they would have listed it in Section 8.02(a)(1), with the other plans that were to be transferred in full. Like the EOFS Plan, the plans listed in Section 8.02(a)(1) were fully funded. *See* JA 725-38, 769. Like the EOFS Plan, they covered employees from business units that would be transferred to New Singer.[3] And like the EOFS Plan, three of the listed plans were intended to remain independent plans after the spin-off. But *un*like the EOFS Plan, the listed plans were explicitly transferred by Section 8.02(a)(1).

New Singer asserts, without explanation, that "Section 8.02 is not exhaustive." Br. 41. But "[c]ourts are obliged to interpret a contract so as to give meaning to all of its terms," *Mionis v. Bank Julius Baer & Co.*, 749 N.Y.S.2d 497, 502 (App. Div. 2002), and to avoid interpreta-

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[2] Old Singer's 401(k) plan was to be divided as well. JA 645 (§ 8.02(d)).

[3] The four plans transferred by Section 8.02(a)(1) were The Singer Company Furniture Division Hourly Employees Pension Plan, The Singer Company Furniture Division Bryson City Hourly Employee Pension Plan, The Singer Company Furniture Division Lenoir Hourly Employees Pension Plan (collectively, "Hourly Plans"), and The Singer Company Furniture Division Salaried Employees Retirement Plan ("Furniture Salaried Plan"). JA 639.

tions that leave provisions "without force and effect," *Muzak Corp.*, 133 N.E.2d at 690. If all the pension plans covering employees who once worked for sewing and furniture units were intended to be transferred through the general provisions of the Spin-Off Agreement, then Section 8.02(a)(1) would serve no purpose. Particularly given the complex nature of pension plans and the careful and detailed language of the provision, Section 8.02(a)(1) could not have been included merely to confirm what was already required by other, more general, provisions.[4]

b. New Singer attempts to avoid the clear implication of Section 8.02 by asserting that it "dealt specifically with actions that were required with respect to pension plans." Br. 18 (quoting New Singer witness Phillip Watson). Notwithstanding New Singer's contention that the EOFS Plan was transferred under the unambiguous language of the Spin-Off Agreement, however, this interpretation of Article VIII is based entirely on self-serving testimony from its only trial witness. *See* Br. 18-19 & nn.5-6. Such testimony obviously has no bearing on the plain-text meaning of Article VIII, because "extrinsic evidence may not

[4] Likewise, Section 8.04, which transferred liabilities under the Overseas Plan, would serve no purpose if pension plans were transferred through the general asset and liability provisions.

be considered unless the document itself is ambiguous." *S. Rd. Assocs. v. IBM Corp.*, 826 N.E.2d 806, 809 (N.Y. 2005)

In any event, New Singer's description of the "actions" that supposedly needed to be taken with respect to the plans enumerated in Section 8.02—that "the assets of th[os]e * * * [p]lans were either split and/or merged with the other pension plans," Br. 18—is simply inaccurate. Two of the plans were split pursuant to Section 8.02(b)(1), and the spun-off parts of those plans were then merged with the Furniture Salaried Plan to create the New Salaried Plan. But three of the plans listed in Section 8.02(a)(1)—the Hourly Plans—were neither split nor merged. Those plans, which were materially indistinguishable from the EOFS Plan, were transferred in full to New Singer. There is nothing in the contract indicating that they required any more "special action," New Singer Br. 18, than the EOFS Plan.

The only possible difference between the EOFS Plan and the plans explicitly transferred by Section 8.02 is that the former was frozen, whereas the latter may have been accepting new participants. But that distinction would provide no justification for omitting the EOFS Plan from Section 8.02, while including the others, if the parties had in-

tended that the EOFS Plan be transferred. To the contrary, the closed status of the EOFS Plan may explain why it was deemed unnecessary to transfer the plan to New Singer while other, active, plans were transferred.

c. To the extent that Section 8.02 "dealt specifically with actions that were required with respect to pension plans," New Singer Br. 18, the specified actions were required for *any* plan that would have been transferred, not just for the plans specified in Section 8.02(a). For example, Section 8.02(h)(1) required Old Singer to deliver to New Singer the materials necessary to administer the plans enumerated in Section 8.02. These materials included plan documents, IRS paperwork, lists of eligible participants, and computer systems used to administer their benefits. JA 647-50. If the parties had intended to transfer the EOFS Plan, it would have been equally necessary for Old Singer to provide similar EOFS Plan materials to New Singer. Section 8.02(h) thus serves as a further refutation of New Singer's assertion that "some special action needed to be taken to effectuate the[] transfer" of the plans specified in Section 8.02(a), Br. 18, that would not have needed to be taken to transfer the EOFS Plan.

At the same time, Section 8.02(h) provides additional confirmation that the Spin-Off Agreement transferred only the specified plans. *First*, Section 8.02(h) would serve no purpose if pension plans were transferred under other provisions, because the information specified in Section 8.02(h) would be available under Article VII, which obligated Old Singer to grant access to records and information relating to assets transferred to New Singer under Article II. JA 633-37. *Second*, the sheer amount of detail in Section 8.02(h) precludes the possibility that Article VIII was meant simply to confirm what was already accomplished in Articles II and IV. *Third*, the need for the materials identified in Section 8.02(h) shows that the transfer of pension plans is far too complex a subject to have been left to a general transfer-of-assets provision.

d. There is yet another reason to reject New Singer's contention that the plans identified in Section 8.02 were not the only ones transferred. New Singer adduced no evidence that any pension plans not listed in the provision *were* in fact transferred. Thus, under New Singer's theory, the parties either (a) mistakenly failed to transfer other plans, and not just the EOFS Plan, or (b) drafted a detailed provision

requiring the transfer of six defined pension benefit plans but intended that a single additional plan would be transferred silently through a separate mechanism. Either alternative is transparently implausible.

2. Section 8.03 does not indicate that the EOFS Plan was transferred.

Contrary to New Singer's suggestion, none of this analysis is undermined by Section 8.03. That provision explains which company will be responsible for which benefits for individuals who have already retired from units designated for transfer to New Singer. In particular, Section 8.03 provides that Old Singer will continue to be responsible for providing benefits to those retirees under (i) employee welfare benefit plans, (ii) the Singer Company Senior Executive Supplemental Benefits, and (iii) the qualified defined benefit pension plans other than those discussed in Section 8.02 ("Enumerated Plans"). Conversely, Section 8.03 provides that New Singer will continue to be responsible for administering the retiree life and medical programs. JA 651.

Although the provision says nothing about the transfer of rights, New Singer asserts that, "[f]or Section 8.03 to have any reasonable meaning, it must be true that there are Non-Enumerated Plans (like the EOFS Plan) that were transferred to New Singer under the Spin Off

Agreement." Br. 20. New Singer then asserts that Section 8.03(iii) was designed to overrule those inferred transfers with respect to liability for retiree benefits, and that "[t]he parties could have imposed a similar limit to the transfer of 'SSMC Assets' relating to a Non-Enumerated Plan, but chose not to." Br. 41. New Singer never explains the basis for these assertions, and in fact there is none. The chain of inferences makes little sense and suffers from serious logical flaws.

As an initial matter, there is a far simpler explanation for Section 8.03 than New Singer's elaborate hypothesis—namely, that the provision merely contains a complete account of who is responsible for benefits to this category of retirees. Some of the benefits—like the employee welfare benefit plans (§ 8.03(i)) and the Singer Company Senior Executive Supplemental Benefits (§ 8.03(ii))—are mentioned nowhere else in the Spin-Off Agreement. In detailing responsibility for all forms of retiree benefits, it might have caused confusion to omit discussion of the qualified defined benefit plans that are not specifically addressed elsewhere. By specifying—in subsection (iii)—that Old Singer would retain its obligations under the Non-Enumerated Plans, the parties avoided the possible implication that the benefits described in subsections (i)

and (ii) were the *only* benefits that Old Singer would continue to provide to these retirees.

Whatever the precise reason for including this language in Section 8.03, however, it does not support New Singer's contention that the Spin-Off Agreement transferred pension plans other than those specified in Section 8.02. On the contrary, Section 8.03 confirms that the Spin-Off Agreement did *not* transfer other pension plans, because a transfer of Non-Enumerated Plans would have consequences under Section 8.03 that the parties could not reasonably have intended. In particular, if New Singer's theory about the meaning of Section 8.03 were correct, it would mean that Old Singer agreed to give up all entitlements to plan assets while continuing to bear the burden of providing plan benefits to retirees. Such an inequitable dichotomy would have made no business sense. "A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." *In re Lipper Holdings, LLC*, 766 N.Y.S.2d 561, 562 (App. Div. 2003) (citations omitted). New Singer's tortured interpretation of Section 8.03 would produce a result that is all of these things.

Beyond this, the mechanism could not have worked. Under its theory, New Singer would have received all the assets that Old Singer had deposited to pay future benefits, while Old Singer would still have been required to provide those benefits. But an ERISA-qualified plan must be adequately funded so that the entity paying the bills has resources on which to draw. *See* 26 U.S.C. § 412.

Even if New Singer's theory is construed more narrowly, such that Old Singer would pay benefits by drawing on the plan but New Singer was entitled to any surplus (while Old Singer remained on the hook for any shortfall), the arrangement still would be grossly unfair. It would allow New Singer to control the investment strategy with all of the upside benefits if the assets performed well but none of the down-side risks. Essentially, New Singer is claiming that Section 8.03 granted it a license to gamble with Old Singer's money.

In short, there was no business purpose for separating the assets and liabilities of the Non-Enumerated Plans between companies. And no such intent—with its negative consequences for Old Singer—can be imputed to the parties, particularly given that Old Singer crafted the

Spin-Off Agreement to maximize value for its shareholders. JA 346 (Watson Tr. 259:2-5).

B. Articles II And IV Did Not Transfer The EOFS Plan Even Without Regard To Article VIII.

New Singer contends that, notwithstanding Article VIII, which describes in exhaustive detail the pension plans to be transferred and the mechanics for transferring them, the parties intended to use Articles II and IV to transfer the EOFS Plan, which is unmentioned in Article VIII, because the EOFS Plan constituted "both an 'SSMC Asset' and [a] 'Liability.'" Br. 45. As we have just explained, New Singer's position is incorrect, because it would render portions of Section 8.02 redundant and portions of Section 8.03 nonsensical. Article VIII thus demonstrates that the parties did not intend to include pension plans among the assets or liabilities to be transferred under Article II or IV. As we explain below, however, pension plans could not be transferred by those provisions even without regard to Article VIII.

Although New Singer's position is that the EOFS Plan was *both* an asset *and* a liability, Br. 45, in reality it was neither. A pension plan is a trust created to benefit plan participants. It constitutes neither an asset nor a liability of the sponsoring employer, and a sophisticated

spin-off agreement could not have addressed pension plans in such a haphazard manner.

1. In interpreting contractual language, a court must give provisions "their plain and ordinary meaning." *White v. Cont'l Cas. Co.*, 878 N.E.2d 1019, 1021 (N.Y. 2007). Section 1.01 of the Spin-Off Agreement defines "asset" in terms of "assets," which confirms that the parties intended the ordinary business meaning of that term to control.

An asset is commonly understood as "[a]n item that is owned and has value." BLACK'S LAW DICTIONARY 134 (9th ed. 2009). Among financial professionals, "[a]ssets are probable future economic benefits obtained or controlled by a particular entity as a result of past transactions or events." Fin. Accounting Standards Bd., *Statement of Financial Accounting Concepts No. 6: Elements of Financial Statements* ¶ 25 (1985) (footnote omitted); *accord* Int'l Accounting Standards Bd., *Framework for the Preparation and Presentation of Financial Statements* ¶ 49 (1989) ("An asset is a resource controlled by the enterprise as a result of past events and from which future economic benefits are expected to flow to the enterprise.").

Both definitions include such things as cash, buildings, equipment, and distribution agreements. But neither definition supports the conclusion that the EOFS Plan was an "asset" of Old Singer that was transferred to New Singer under Section 2.01 of the Spin-Off Agreement. In ordinary usage, a pension plan is not an "asset" of the sponsoring employer.

2. A pension plan cannot be an asset of the sponsoring employer because a pension plan is not "owned" by the sponsor and federal law precludes any probability of "future economic benefits" to the sponsor. Under ERISA, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). To effectuate this guarantee, plan assets must be held in trust for the benefit of beneficiaries or deposited in an insurance contract, which has the same practical effect. *Id.* § 1103(a), (b). The grantor of a trust is not, in any sense, the owner of the trust's assets. It would therefore make little sense to speak of a grantor as having transferred *its* "assets."

Indeed, when the parties specifically addressed the transfer of pension plans in the Spin-Off Agreement, they did not use such careless language. Section 8.02(a)(2)(ii) requires Old Singer

> to direct the trustee of the individual trust, or to the extent applicable, the master trust, in which assets of [the enumerated pension plans] are invested, to transfer to the new trustee or other funding agent appointed by [New Singer] for such plans the amount of assets in such individual trust or master trust, as the case may be, attributable to the [plans to be transferred].

JA 640-41. Thus, when dealing directly with pension plans, the parties avoided the incorrect notion that Old Singer would transfer its *own* assets. This confirms that the parties did not view the pension plans as assets belonging to Old Singer.

Consistent with ERISA, the EOFS Plan states that it will operate "for the exclusive benefit of its employees." JA 594 (§ 12.6). At all times, its sole asset was GAC 365F, which likewise operated for the benefit of employees and could not revert to Old Singer. GAC 365F expressly provides that, upon its discontinuance, MetLife will pay the remaining proceeds "to any trustee or other insurance company designated by [Old Singer] for the benefit of Employees of [Old Singer]." JA 452 (art. II, § 3). Indeed, New Singer admitted that GAC 365F was an asset

of the EOFS Plan. PX 35 (New Singer Admissions, No. 2). Under any reasonable definition, therefore, neither the EOFS Plan nor GAC 365F was an asset of Old Singer subject to transfer by Section 2.01.

To the extent that New Singer contends that the "asset" transferred was not the EOFS Plan but the "potential entitlement to a residual surplus," Br. 16, that contention is mistaken. In light of ERISA's anti-inurement provision, New Singer cannot show that Old Singer had any reversionary interest in the plan. Indeed, absent a plan termination, even this litigation could not result in the assets of the EOFS Plan reverting to Old Singer, because the recovery ordered by the district court must be used to benefit plan participants. *See, e.g.*, *Shepley v. New Coleman Holdings Inc.*, 174 F.3d 65, 69 (2d Cir. 1999); 29 U.S.C. §§ 1103(c)(1), 1344(d); *see also* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1150 (1988) ("[I]f an employer tried to write himself a check from the assets of an overfunded pension plan on the ground that

the plan no longer needed all its money, the employer would surely violate the exclusive benefit rule.").[5]

3. For these reasons, a pension plan is not an "asset" that would have been transferred by Section 2.01 of the Spin-Off Agreement. At the very least, there is sufficient doubt on that point as to make it all the more clear that the parties to the Spin-Off Agreement intended pension plans to be governed exclusively by Article VIII.[6]

II. IF THE SPIN-OFF AGREEMENT DID NOT UNAMBIGUOUSLY LEAVE THE EOFS PLAN WITH OLD SINGER, THE DISTRICT COURT PERMISSIBLY FOUND THAT THE PARTIES INTENDED THAT RESULT.

The only reasonable interpretation of the language of the Spin-Off Agreement is that the parties intended that Article VIII would exclusively govern the disposition of pension plans. Because Article VIII did

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[5] The Spin-Off Agreement defines "assets" to include "rights of [Old] Singer * * * under contracts (e.g., trademark and distribution agreements)." JA 608 (§ 1.1). GAC 365F was not an "asset" of Old Singer under that definition. Even if GAC 365F were a "contract" in the sense indicated in the definition, ERISA's anti-inurement provision would guarantee that the plan participants—and not Old Singer—possessed all the rights under the contract. *See* 29 U.S.C. § 1103(c)(1).

[6] Because the parties in this case are contesting ownership of an asset, there is no need to repeat the analysis as to liabilities. New Singer has offered no theory under which it could have acquired the EOFS Plan as a liability and somehow converted it into an asset.

not transfer the EOFS Plan, Old Singer retained control. But even if this Court were to conclude that the Spin-Off Agreement did not *unambiguously* leave the EOFS Plan with Old Singer, the district court's decision still should be affirmed. As we explain below, if the Spin-Off Agreement did not unambiguously leave the EOFS Plan with Old Singer, it certainly did not unambiguously transfer it to New Singer, as New Singer contends; in that event, the most that New Singer could show is that the contract is ambiguous; and the district court correctly resolved any ambiguity—and certainly did not commit clear error—by finding, as a fact, that the parties intended that the EOFS Plan would remain with Old Singer.

A. The Spin-Off Agreement Did Not Unambiguously Transfer The EOFS Plan To New Singer.

1. A contract is unambiguous if it has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280, 1282 (N.Y. 1978). To be deemed unambiguous, a contract must be "clear and explicit in its terms," *Quinn v. Buffa*, 468 N.Y.S.2d 173, 174

(App. Div. 1983), producing a result that is "unequivocal," *Wallace v. 600 Partners Co.*, 658 N.E.2d 715, 717 (N.Y. 1995).

New Singer cannot possibly satisfy this standard. Nothing in the Spin-Off Agreement is "explicit" about transferring the EOFS Plan to New Singer. The meaning of the term "asset," on which New Singer exclusively relies, is anything but "precise," especially when the question is whether a pension plan is an "asset" and the subject of pension plans receives exhaustive treatment in another part of the agreement. Because pension-plan assets belong to plan participants rather than sponsoring employers, and because New Singer's interpretation would render much of Section 8.02 superfluous and much of Section 8.03 nonsensical, that interpretation necessarily entails a "danger of misconception" and is one as to which there are any number of "reasonable bas[e]s for a difference of opinion." The terms of the Spin-Off Agreement thus disprove New Singer's contention that the contract unambiguously transferred the EOFS Plan.

2. New Singer devotes several pages of its brief to the argument that "[p]ost contract conduct can never create ambiguity." Br. 46; *see* Br. 46-50. But we do not take the position that it can, and neither

did the district court. If the Spin-Off Agreement is ambiguous, it is because its terms do not convey a precise meaning.

New Singer suggests that the district court believed that Articles II and IV transferred the EOFS Plan but that the court was nevertheless swayed by the parties' post-contract conduct. Br. 29-32. That suggestion is mistaken. The comments of Judge Griesa that are quoted by New Singer—most of which were made *before* he issued his decision—concerned how he thought the contract might operate if certain terms were viewed *in isolation*. But Judge Griesa clearly understood that a contract "should be read to give effect to *all* its provisions," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (emphasis added), and he qualified his comments by noting the conflict he detected between Articles II and IV, on the one hand, and Article VIII, on the other.

When Judge Griesa ultimately issued his decision, he stated that "it was obviously decided that there was a need to have specific treatment of the subject of pension plans and not to leave that subject to the general language of Section 2.01 and Section 4.02." SPA 5-6. Turning then to Article VIII, he noted that "[t]he EOFS Plan was not specified in

Section 8.02 as being one of the plans to be transferred; however, Section 8.02 does not state that the specified plans were the only ones to be transferred." SPA 6. In other words, Judge Griesa determined that the contract is ambiguous because its *language* is ambiguous.

In fact, he had already reached that conclusion in denying New Singer's motion for judgment on the pleadings. JA 65-66. Indeed, New Singer concedes that, "in denying [that] [m]otion," Judge Griesa "f[ound] that *the relevant contract provisions* were ambiguous." Br. 3 (emphasis added). That is why he conducted a trial.[7]

B. If The Spin-Off Agreement Is Ambiguous, The District Court Did Not Clearly Err In Finding That The Parties To The Contract Intended That The EOFS Plan Would Remain With Old Singer.

If the Spin-Off Agreement is ambiguous as a matter of law, then the district court permissibly found as a matter of fact that the parties intended the EOFS Plan to remain with Old Singer.

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[7] In any event, this Court would not be bound by the district court's determination that the Spin-Off Agreement unambiguously supports New Singer's position even if it had made that determination, because the question whether a contract is unambiguous is one of law and thus subject to *de novo* review. *See Palmieri*, 445 F.3d at 187. For the reasons set forth above, unless the Spin-Off Agreement unambiguously supports *Old* Singer's position, it is ambiguous as a matter of law.

1. The intent of the parties to an ambiguous contract is a question of fact. *See JA Apparel Corp.*, 568 F.3d at 397. This Court "may not overturn findings [of fact] that are not clearly erroneous," even if it "might have weighed the evidence differently." *Ceraso v. Motiva Enters.*, 326 F.3d 303, 316 (2d Cir. 2003). Clear error exists only when the Court is "left with the definite and firm conviction that a mistake has been committed." *Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1574 (2d Cir. 1994) (internal quotation marks omitted). That means that, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Post-contract conduct is highly relevant evidence of the intent of the parties to an ambiguous contract. "For over a century, courts have looked to the conduct of the parties in resolving ambiguities in contractual language." *IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 26 F.3d 370, 374 (2d Cir. 1994). "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g (1981). Indeed, New York courts have described

post-contract conduct as the "most persuasive evidence of the agreed intention of the parties." *Fed. Ins. Co.*, 691 N.Y.S.2d at 512 (quoting *Webster's Red Seal Publ'ns*, 415 N.Y.S.2d at 341). The U.S. Supreme Court itself has endorsed this view, explaining that "the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913); *see also* 11 WILLISTON ON CONTRACTS § 32:14 (4th ed. 2009).

Here, the district court relied on an extensive body of post-contract conduct and permissibly found that the parties intended the EOFS Plan to remain with Old Singer. The court found that "what was critical was that [Old] Singer, not SSMC, administered the plan after the July 1986 spin-off by assuming several relevant responsibilities, including the tracking of pensioners' benefits under the plan and the annual filing of a Form 5500." JA 892. In the meantime, "SSMC and its successors made no such filings," SPA 8, and although "if there was a transfer MetLife needed to be apprised of any new owner or transferee of the pension plan[,] [n]o such notice was given to MetLife," SPA 9. The district court specifically rejected New Singer's speculation that

"the continuation of the work of [Old] Singer was simply a mistake." SPA 10. In the court's view, the matter was not "trivial," and whereas New Singer "saw that the work was done to effectuate a transfer" of the pension plans enumerated in Section 8.02, "none of this was done as to the EOFS Plan." *Id.*

2. In light of this evidence, the district court did not err, and certainly did not *clearly* err, in finding that the parties were carrying out their original agreement. New Singer offers no persuasive argument to the contrary.

a. New Singer first contends that post-contract conduct is relevant only "under certain circumstances" and that the district court "should not have credited post-contract conduct so heavily." Br. 52. But New York courts have described post-contract conduct as the "most persuasive evidence" of the parties' intent, *Fed. Ins. Co.*, 691 N.Y.S.2d at 512 (quoting *Webster's Red Seal Publ'ns*, 415 N.Y.S.2d at 341), and the U.S. Supreme Court has said that such conduct has "great, if not controlling, influence," *Old Colony*, 230 U.S. at 118. Post-contract evidence is particularly compelling where, as here, the district court found no

dispositive pre-contract conduct that evidenced the parties' intended disposition of the EOFS Plan. SPA 7.

New Singer characterizes the district court's reliance on post-contract conduct as tantamount to allowing "adverse possession of pension plans." Br. 7, 53. But we do not argue, and the district court did not find, that Old Singer "adversely possessed" the EOFS Plan. What we do argue, and what the district court found, is that the parties' post-contract conduct demonstrates their contractual intent. Equating this analysis with "adverse possession" presumes that the plan was in fact transferred by the Spin-Off Agreement. But whether the plan was transferred by the agreement is the issue in this case. And the district court permissibly relied on post-contract conduct in finding that it was not. Old Singer cannot have "adversely possessed" a pension plan that it never transferred.

b. New Singer next claims that the lack of dispositive evidence preceding the contract is a basis for *ignoring* post-contract conduct. Its theory is that, if the parties lacked a specific intent before the contract, then the post-contract conduct shows only "inertia." Br. 53. But none of the cases cited by New Singer supports the theory that post-contract

conduct can be ignored. Much to the contrary, *all* of New Singer's cases *relied* upon post-contract conduct. *See id.* And they all involved claims that a contract had been amended by subsequent conduct, a claim that is not present here.[8]

More fundamentally, this "inertia" theory does not help New Singer. If the parties lacked a specific intent to transfer the EOFS Plan, then it follows that the *status quo* continued. Here, the *status quo* was that Old Singer controlled and administered the EOFS Plan, and all the post-contract evidence is consistent with this conclusion.

In any event, the district court attributed intent to the parties' acts and omissions. At most, New Singer would have inferred differently. But "[i]n reviewing findings for clear error, [this Court is] not al-

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[8] *See Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 784 (2d Cir. 2003) (rejecting claim of amendment where one party's "course of conduct was at all times consistent with the terms of the Agreement" and other party's conduct "was inconsistent with the belief that the Agreement had been modified"); *Commerce Funding Corp. v. Comprehensive Habilitation Servs., Inc.*, 2005 WL 447377, at *13 (S.D.N.Y. Feb. 24, 2005) (rejecting claim of amendment where one party's conduct "belie[d] its language of an intent to be bound to a modified contract"); *Beacon Terminal Corp. v. Chemprene, Inc.*, 429 N.Y.S.2d 715, 717 (App. Div. 1980) (holding that "the meaning of the ambiguous contract was fixed by the parties' conduct").

lowed to second-guess * * * the trial court's * * * choice between permissible competing inferences." *Ceraso*, 326 F.3d at 316.

c. New Singer next attempts to minimize the post-contract conduct as "unilateral" and merely "administrative." Br. 53-54 & n.9. Both claims lack merit.

It is true that the post-contract conduct of Old Singer speaks only to Old Singer's own understanding of the Spin-Off Agreement. Old Singer manifested its understanding that it retained the EOFS Plan every time it filed Form 5500, computed a participant's benefits, or passed a board resolution governing the plan. But as the district court also found, New Singer demonstrated the very same understanding when it *failed* to have its board of directors pass a resolution adopting, amending, merging, or renaming the EOFS Plan, *failed* to administer the EOFS Plan, and *failed* to file Form 5500, even as it was performing those tasks "as to the plans that were actually transferred." SPA 10.

The significance of New Singer's omissions distinguishes this case from *Utilities & Industries Corp. v. Palisades Interstate Park Commission*, 258 N.Y.S.2d 700 (Sup. Ct. 1965), on which New Singer places heavy reliance, Br. 55-56. In that case, the defendant was oblivious to

the plaintiff's conduct and objected as soon as it discovered what the plaintiff was doing. Here, New Singer cannot plausibly claim obliviousness, because if New Singer actually believed that it had secured control over the EOFS Plan, then it would have been independently responsible for filing Form 5500 and administering the plan. In failing to undertake the responsibilities required of the plan sponsor, New Singer demonstrated its belief that Old Singer continued to control the EOFS Plan. *See, e.g.*, *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 511 (N.Y. 1993).

There is no requirement that the parties *simultaneously* demonstrate their mutual understanding of the contract, but if such a requirement did exist, it would be satisfied here. The parties simultaneously showed that they understood Old Singer to have retained the EOFS Plan whenever New Singer contacted Old Singer to compute benefits due for participants enrolled in both the EOFS Plan and the Overseas Retirement Plan. JA 237-38, 242-43 (Bork Tr. 150:11-151:1, 155:21-156:3); *see also* New Singer Br. 56 n.10.

New Singer likewise fails in its attempt to minimize the annual Form 5500 as "an administrative task that took virtually no time at

all." Br. 53 n.9. Form 5500 was relevant to the district court not because it was burdensome but because Old Singer viewed itself as obligated to complete the filing, whereas New Singer did not. The inference drawn by the court is permissible regardless of the complexity of the task.

d. The district court also did not clearly err in relying on the conduct of pension administration personnel hired after the Spin-Off Agreement was executed. New Singer argues that it "never verified what should have been transferred under the Spin Off Agreement" and that its pension team's belief that Old Singer had retained the EOFS Plan is therefore irrelevant. Br. 56-57. Despite the implausibility of that theory, New Singer had every opportunity to convince the finder of fact of its accuracy. But the district court instead found that "[t]he matter was not so trivial as to indicate that the continuation of the work of [Old] Singer was simply a mistake." SPA 10.

This conclusion is perfectly sensible, and certainly is not clearly erroneous. Lower-level employees perform tasks under the supervision of higher-level employees. The idea that pension plans controlling mil-

lions of dollars of benefits were simply unimportant to New Singer is fanciful, and the district court was not required to agree.

Neither of the decisions cited by New Singer, Br. 56-57, supports its position. In one of them, *Beacon Terminal Corp. v. Chemprene, Inc.*, 429 N.Y.S.2d 715, 718 (App. Div. 1980), the court relied on post-contract conduct and concluded that a *change* in the parties' conduct did not evince an intent to *amend* an agreement. In the other, *QVC Network, Inc. v. Christina Sportswear, Ltd.*, 1995 WL 437701 (S.D.N.Y. July 24, 1995), the court interpreted a contract—under Pennsylvania law—by "tak[ing] into account the course of dealing between parties." *Id.* at *4 (citing 13 Pa. Cons. Stat. Ann. § 1205(c) (Purdon 1984)). After relying on the parties' conduct to determine their intent, the court refused to infer a contractual amendment on the basis of subsequent conduct. We do not contend that the Spin-Off Agreement was amended by subsequent conduct. We contend, and the district court permissibly found, that post-contract conduct demonstrates the parties' intent in *entering into* the agreement.

e. New Singer has thus identified no ground on which the district court's factual finding could be held to be clearly erroneous. In any

event, New Singer has offered no competing theory under which the court could possibly have found in its favor. If the Spin-Off Agreement is deemed ambiguous, then all the evidence points in a single direction—namely, that the parties intended to leave the EOFS Plan with Old Singer.[9]

III. NEW SINGER IS IN ANY EVENT PRECLUDED BY THE BICOASTAL BANKRUPTCY FROM ARGUING THAT THE SPIN-OFF AGREEMENT TRANSFERRED THE EOFS PLAN.

Regardless of what the parties intended when they signed the Spin-Off Agreement, it is clear that New Singer never actually assumed the sponsorship of the EOFS Plan. Old Singer continued to file Forms

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[9] We note that all of the *pre*-contractual evidence is consistent with the conclusion that the EOFS Plan was to remain with Old Singer. New Singer's controller, Leo Blatz, sent a memorandum in 1986 requesting that Old Singer transfer "assets and liabilities relative to Plan I and the Furniture plan"—but not the EOFS Plan. JA 745; *accord* JA 175 (Blatz Tr. 98:16-23). The outside lawyer who drafted Article VIII, Susan Serota, testified that, if she had been told that the EOFS Plan was to be transferred, she would have included it in Section 8.02 pursuant to her custom and practice of enumerating the plans to be transferred. JA 164-65 (Serota Tr. 77:10-78:19). And Old Singer's pension manager for planning and funding, Winifred Russell, recalled deciding that the EOFS Plan was not to be transferred. JA 144 (Russell Tr. 57:2-8). While New Singer would rely upon generalized testimony from Philip Watson, he testified that he did not participate in the negotiations concerning the pension plans and that Article VIII was drafted by others. JA 347, 350-51 (Watson Tr. 260:5-14, 263:17-264:1).

5500 disclosing GAC 365F as an asset of a pension plan it sponsored, JA 853, and MetLife was never informed of any assignment of GAC 365F, JA 859. When Bicoastal filed for bankruptcy, the bankruptcy court assumed jurisdiction over the U.S. Plan, which included GAC 365F. New Singer participated in the bankruptcy proceedings but raised no claim to GAC 365F or to any potential surplus. Its failure to do so is *res judicata*.

A. "Under the doctrine of *res judicata*, or claim preclusion, '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *St. Pierre v. Dyer*, 208 F.3d 394, 399 (2d Cir. 2000) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)). *Res judicata* serves important purposes. It "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

A Chapter 11 bankruptcy proceeding is directed toward developing a confirmed plan of reorganization. *See* 11 U.S.C. § 1129. Creditors seeking compensation from the debtor's estate may file proofs of claim,

id. § 501, and join the committee of creditors, *id.* § 1102, but once the reorganization plan has been confirmed, the plan "bind[s] its debtors and creditors as to *all* the plan's provisions, and all related, property or non-property based claims which could have been litigated in the same cause of action." *Sure-Snap Corp. v. State St. Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991). This Court has recognized two sources of claim preclusion in Chapter 11 cases.

First, any claimant must raise its claim prior to the confirmation of the reorganization plan. When a Chapter 11 case is confirmed, claims "which could have been brought in that full and fair proceeding, and whose timely bringing may have affected the parameters of a bankruptcy repayment schedule, cannot be re-litigated another day in another court." *Sure-Snap Corp.*, 948 F.2d at 870; *accord* 11 U.S.C. § 1141. Bicoastal's plan of reorganization was confirmed on September 14, 1992. *See In re Bicoastal Corp.*, 164 B.R. at 1013. If New Singer could have raised its claim to the EOFS Plan or GAC 365F during the bankruptcy proceedings, therefore, the confirmation of the plan operates to bar relitigation today.

Second, a claimant that participates and raises claims is barred from relitigating issues it could have raised in the bankruptcy proceedings. A court order allowing a proof of claim filed in bankruptcy proceedings "constitutes a 'final judgment' and is thus a predicate for *res judicata*," even when the proof of claim is uncontested. *EDP Med. Computer Sys.*, 480 F.3d at 625. New Singer filed a proof of claim in Bicoastal's Chapter 11 bankruptcy proceedings, asserting that Old Singer had breached the Spin-Off Agreement in six different ways. JA 71-72. The proof of claim resulted in a stipulated settlement, which was approved by the bankruptcy court. JA 74-76. The proof of claim and its subsequent settlement thus create a *res judicata* bar for any additional claims under the Spin-Off Agreement that could have been raised but were not.

Under either theory of *res judicata*, it is clear that New Singer could have raised any claim it had to the EOFS Plan and GAC 365F. New Singer obviously could have raised claims stemming from the Spin-Off Agreement, because its proof of claim included such claims. The bankruptcy court specifically ruled, moreover, that it had authority over pension plans sponsored by Bicoastal, and according to Form 5500,

Bicoastal sponsored the U.S. Plan, of which GAC 365F was an asset. JA 853. As a consequence, when the bankruptcy court exercised its jurisdiction over the U.S. Plan, it was necessarily exercising its jurisdiction over GAC 365F.

B. In the Bicoastal bankruptcy proceedings, the United States filed a proof of claim against Old Singer through the Defense Logistics Agency for $142 million of the assets of the U.S. Plan, which the United States claimed was overfunded in violation of federal cost accounting standards. *See In re Bicoastal Corp.*, 125 B.R. at 661. The bankruptcy court ruled that the U.S. Plan fell under its jurisdiction and was susceptible to proofs of claim. *Id.* at 661-62. On appeal, the district court affirmed, concluding that "the funds, although possibly subject to an equitable interest by [the United States], were property of [Bicoastal]'s estate." *Id.* at 663.

On remand, Bicoastal objected to the United States' claim and the bankruptcy court found that the United States lacked an *in rem* interest in the pension plans. *In re Bicoastal Corp.*, 146 B.R. at 488. Before the appeal could be resolved, the parties reached a settlement that "hinge[d] on the * * * transfer of the Plan assets and liabilities to Loral."

Id. Under the terms of the settlement, "100% of the plan assets and 100% of the plan benefit liabilities of [the U.S. Plan] [we]re to be transferred to the Loral Librascope Retirement Plan." *Id.* In exchange, Loral agreed to pay $15 million, because "the Plan [wa]s overfunded by at least $15 million." *Id.* at 489. The bankruptcy court determined that this level of compensation was fair. *Id.* at 492. On this basis, the court ordered the U.S. Plan (and GAC 365F) transferred to Loral.

The course of the Bicoastal bankruptcy proceedings demonstrates that New Singer could have raised its claim to assets held by the U.S. Plan as part of the proceedings. The bankruptcy court described itself as "extremely familiar with [Bicoastal's] pension plan assets and liabilities," *In re Bicoastal Corp.*, No. 89-8191-8P1, Doc. No. 2876, at 2 (Bankr. M.D. Fla. Sept. 16, 1992) (reproduced in Addendum, *infra*), and the district court specifically invited claims against the plans, *In re Bicoastal Corp.*, 125 B.R. at 663. New Singer raised no such claim, even though it raised other claims stemming from the Spin-Off Agreement. Its failure to do so is *res judicata*.

If New Singer had raised its claim during the bankruptcy proceedings, the court might have ruled differently on the transfer to Loral.

New Singer was plainly aware of Old Singer's claim to the EOFS Plan; indeed, New Singer relied upon Old Singer to compute benefits for participants with membership in both the EOFS Plan and the Overseas Plan. JA 237-38, 242-43 (Bork Tr. 150:11-151:1, 155:21-156:3). Having disregarded the EOFS Plan for nearly two decades, it is insufficient for New Singer to argue, as it does now, that it had no obligation to "verif[y] the accuracy of which pension plans were transferred to New Singer under the Spin Off Agreement." Br. 57.

C. In the district court in this case, New Singer argued that Old Singer had waived its *res judicata* claim by failing to assert it as an affirmative defense in response to New Singer's counterclaim. R.52 at 22-23. At the summary judgment stage, the district court rejected Old Singer's *res judicata* claim on the merits, and thus necessarily rejected New Singer's waiver argument. JA 83-84. The court was correct, and certainly did not abuse its discretion, in finding that the *res judicata* claim was properly before it. "[T]he primary purpose of requiring [*res judicata*] to be pled as an affirmative defense is providing notice and an opportunity to respond." *Curry v. City of Syracuse*, 316 F.3d 324, 331 (2d Cir. 2003). Where, as here, a response to the allegations was per-

mitted, this Court has found it "permissible for the district court to consider the [*res judicata*] effect" of previous decisions whether or not *res judicata* was formally pleaded as an affirmative defense. *Id.*

The district court was mistaken, however, in rejecting Old Singer's *res judicata* claim on the merits. The court believed that New Singer had no obligation to file a claim because "GAC 365F was not 'held by' BiCoastal, but by MetLife" and because, if the Spin-Off Agreement did transfer GAC 365F to New Singer, "then BiCoastal's bankruptcy would not affect that interest." JA 84. But a bankruptcy estate includes all property, "wherever located and by whomever held," 11 U.S.C. § 541(a), and GAC 365F was part of the estate over which the bankruptcy court exercised jurisdiction. If New Singer had a claim against that estate—as was the case with the proof of claim that New Singer did file—it was required to raise the claim during bankruptcy or forfeit its right to complain later. Because it said nothing, even as the bankruptcy court was approving the transfer of GAC 365 to Loral, any rights that New Singer may once have had were extinguished.

In the district court, New Singer raised the additional argument that the bankruptcy proceedings could have no *res judicata* effect be-

cause New Singer's "claim[] to the Disputed Assets" had not "arisen at th[at] time." R.56 at 24. But New Singer's claim in this case is broader than a claim to the assets. Its claim here, in New Singer's own words, is that "the EOFS Plan and the GAC 365F Contract were transferred to New Singer pursuant to the Spin Off Agreement." Br. 58. Any claim to the assets is entirely dependent on that broader claim. And the claim that the Spin-Off Agreement transferred the plan and the contract had self-evidently arisen at the time of the Bicoastal bankruptcy. Yet New Singer failed to raise the claim. It is too late to do so now.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: November 19, 2009

ADDENDUM

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: * Chapter 11

BICOASTAL CORPORATION, d/b/a SIMUFLITE, f/k/a THE SINGER COMPANY, * Case Number 89-8191-8P1

Debtor. *

ORDER ON DEBTOR'S MOTION FOR AUTHORITY TO ENTER INTO AGREEMENTS WITH THE UNITED STATES OF AMERICA ON ACCOUNT OF THE DEFENSE LOGISTICS AGENCY CLAIM AND WITH LORAL CORP. FOR THE PURPOSE OF COMPROMISING CONTROVERSIES WITH THE DEFENSE LOGISTICS AGENCY

THIS CAUSE initially came on for hearing on June 25, 1992, upon the Debtor's Motion for Authority to Enter into Agreements with the United States of America on Account of the Defense Logistics Agency Claim and with Loral Corp. for the Purpose of Compromising Controversies with the Defense Logistics Agency (the "Motion"). Pursuant to order of this Court, due notice of the hearing was given to parties in interest, and numerous parties were present or represented by counsel at the hearing, including the Official Creditors' Committee. Attached as an Exhibit to the Motion were two agreements, one between the Debtor and the United States of America on behalf of the Defense Logistics Agency ("DLA")(the "Bicoastal-DLA Agreement") and an agreement between the Debtor and Loral Corporation ("Loral"). The agreement between the Debtor and Loral was subsequently revised, and the revised

agreement was executed by the parties and was filed with the Court (the "Bicoastal-Loral Agreement").

The Bicoastal-DLA Agreement and the Bicoastal-Loral Agreement contemplate the occurrence of a number of transactions, including the disallowance of the DLA claim, the dismissal of a DLA appeal from an order determining that DLA had no in rem interest in assets of the Debtor's pension plan, the ratification of the Debtor's 1989 merger of various pension plans, the transfer of sponsorship of the Debtor's pension plan from the Debtor to Loral, the exchange of indemnification agreements with respect to a number of matters between Bicoastal and Loral, and the transfer into escrow of $15 million to be held in accordance with the terms of an escrow agreement attached to the Bicoastal-Loral Agreement.

This Court is extremely familiar with the Debtor's pension plan assets and liabilities. In December, 1989, the Debtor sought authority to merge a number of pension plans. Some of these pension plans were underfunded, but others were overfunded in amounts well in excess of the underfunding. Assuming that the merger is ratified and approved, the overfunding resulting from such merger will have been sufficient to eliminate the necessity of any additional contributions to the pension plan by Bicoastal during the course of this Chapter 11 case.

At a hearing held in late 1989, this Court announced that it would grant the motion to merge the plans, and it subsequently entered an order granting the motion nunc pro tunc as of the date

of the hearing. This order was entered over the objection of DLA, which asserted that the merger of the plans would impair DLA's interest in the plan, and DLA appealed from the merger order. Ultimately, the District Court entered an order reversing the merger order and remanding that order for further consideration by this Court, with instructions to permit the DLA an opportunity to prove that it had an interest in the assets of the pension plan.

Following the remand of the merger order, the Debtor filed a motion seeking a determination that DLA had no in rem interest in the pension plan or its surplus, and DLA filed a motion seeking a contrary determination. Thereafter, this Court entered an order determining that the DLA had no such in rem interest. DLA has appealed from this order.

Following the determination that DLA had no in rem interest in the Debtor's pension plans, the Court considered ratification and approval of the 1989 merger of the plans. Following an announcement at a Court hearing held on June 2, 1992, this Court entered an order ratifying and approving the merger of the pension plans. This order was entered with the consent of DLA and the Debtor, but specifically provided that it would become ineffective in the event that the Debtor and DLA had not compromised their claims within 120 days. Consequently, if the Bicoastal-DLA Agreement is approved and consummated, the plans will deemed to have been merged effective as of December, 1989.

As set forth in the Motion, the DLA has asserted claims not only against the Debtor, but also against various purchasers of stock in subsidiary corporations. These claims have been asserted by DLA against Link-Flight Simulation Corporation, subsequently merged into CAE-Link Corp.; Kearfott Guidance & Navigation Corporation ("Kearfott"); Electronic Systems and Data Communications Corporation ("ESDCC"); Dalmo-Victor Holdings Corporation ("Dalmo-Victor"); and HRB Holdings, Inc. ("HRB"). The stock of these corporations was sold, respectively, to CAE Industries, Ltd. ("CAE Industries"), Plessey North American Corp. ("Plessey"), Astronautics Corporation of America ("Astronautics"), General Instrument Corp. ("General Instrument"), and Hadson Corporation ("Hadson"). As a result of the consummation of the DLA Settlement, CAE-Link, Kearfott, ESDCC, Dalmo-Victor, HRB, CAE Industries, Plessey, Astronautics, General Instrument and Hadson will be released from any claim that DLA may have with respect to the segment closing.

Currently, the pension plan assets are held in trust by the Northern Trust Company ("Northern"), an Illinois corporation. In order for the Bicoastal-Loral Agreement (and thus the Bicoastal-DLA Agreement) to be consummated, sponsorship of the pension plan must be transferred from Bicoastal to Loral.

Loral was approved by this Court as the purchaser of all of the stock of Librascope Corporation, an indirect wholly-owned subsidiary of the Debtor, which transaction closed in December,

1991. As this Court stated in its September 1, 1992, order entered in Adversary Proceeding Number 92-485, in connection with the sale of the stock of Librascope to Loral, Loral and the Debtor agreed to an option to transfer substantially all of the assets and liabilities of the Debtor's pension plans to the Librascope plans, provided that the DLA dispute could be resolved. The Bicoastal-Loral Agreement, by revising Loral's option to cause the transfer of the remaining assets and liabilities of the Debtor's pension plans, accomplishes the intent of Bicoastal and Loral at the time of the sale of Librascope to Loral that this transfer of pension plan assets and liabilities take place.

Northern indicated to the Debtor that it was not in a position to accede to its direction to transfer pension assets or recognize Loral's sponsorship of the pension plan because of its concerns that such a transfer might be prohibited under the terms of ERISA or the Internal Revenue Code. In order to resolve this dispute, the Debtor filed a Complaint for Preliminary and Permanent Injunction with this Court, in which it sought entry of a mandatory injunction compelling Northern to permit implementation of the Bicoastal-Loral Agreement.

This Court has now entered a Final Judgment granting Bicoastal's request for injunctive relief. This Court has concluded that the consummation of the Bicoastal-Loral Agreement and the Bicoastal-DLA Agreement will not violate the terms of ERISA, the Internal Revenue Code, or any other applicable law. It

is, therefore, now appropriate to enter an order granting the motion. Accordingly, it is

ORDERED, ADJUDGED, AND DECREED that the Debtor's Motion for Authority to Enter into Agreements with the United States of America on Account of the Defense Logistics Agency Claim and with Loral Corp. for the Purpose of Compromising Controversies with the Defense Logistics Agency be, and the same hereby is, granted. It is further

ORDERED, ADJUDGED, AND DECREED that the Bicoastal-DLA Agreement, and the Debtor's execution and consummation of the Bicoastal-DLA Agreement be, and the same hereby are, ratified and approved. Bicoastal and DLA are authorized and directed to execute such documents and take such other action as may be necessary to consummate and effectuate the Bicoastal-DLA Agreement. It is further

ORDERED, ADJUDGED, AND DECREED that the Bicoastal-Loral Agreement, and the Debtor's execution and consummation of the Bicoastal-Loral Agreement be, and the same hereby are, ratified and approved. Bicoastal and Loral are authorized and directed to execute such documents and take such other action as may be necessary to consummate and effectuate the Bicoastal-Loral Agreement. It is further

ORDERED, ADJUDGED, AND DECREED that, upon consummation of the Bicoastal-DLA Agreement and the Bicoastal-Loral Agreement, Bicoastal and DLA shall take such steps as are necessary to cause a dismissal of any appeals, the disallowance of the DLA Claim, and

the dismissal of Bicoastal's adversary proceeding seeking injunctive relief against DLA. It is further

ORDERED, ADJUDGED, AND DECREED that, upon consummation of the Bicoastal-DLA Agreement, CAE Industries, CAE-Link, Plessey, ESDCC, Astronautics, Kearfott, General Instrument, Dalmo-Victor, HRB, and Hadson shall be, and will be deemed to be, released from any claim that DLA has or may have with respect to the segment closing that is the subject matter of the DLA Claim against Bicoastal.

DONE AND ORDERED in Tampa, Florida, on SEP 16 1992.

ALEXANDER L. PASKAY
Chief Bankruptcy Judge

Copies to:

Harley E. Riedel, Esquire
William M. Goldman, Esquire
U. S. Trustee
Mr. Joe B. Freeman
Denise L. Schumann, Esquire
for service to all parties on attached Exhibit A and Matrix

orders\DLA-Lora.agr

I CERTIFY THAT THIS ORDER WAS SERVED BY U.S. MAIL TO Denise Schumann, ATTORNEY FOR DEBTOR, FOR SERVICE TO BE EFFECTED UPON THE PARTIES LISTED ON

9/16/92 (Date)

By Deputy Clerk

EXHIBIT A

Charles W. Vernon, III, Esquire
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), counsel for Plaintiff–Counter-Defendant–Appellee Lockheed Martin Corporation hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,325 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type-face using Microsoft Office Word 2007 in 14-point Century Schoolbook.

Dated: November 19, 2009

/s/ Robert Allen Meister
Robert Allen Meister

Counsel for Plaintiff–Counter-Defendant–Appellee Lockheed Martin Corporation

CERTIFICATE OF COMPLIANCE WITH INTERIM LOCAL RULE 25.1(a)(6)

Pursuant to Interim Local Rule 25.1(a)(6), counsel for Plaintiff–Counter-Defendant–Appellee Lockheed Martin Corporation hereby certifies that the PDF version of this document has been scanned for viruses using Symantec Antivirus v. 10.1.4.4000, with virus definitions version 11/16/2009 rev. 2, and that no virus has been detected.

Dated: November 19, 2009

/s/ Robert Allen Meister
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Counsel for Plaintiff–Counter-Defendant–Appellee Lockheed Martin Corporation

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Interim Circuit Rule 25.1(a)(8), that, on November 19, 2009, I caused two copies of this brief to be served by email PDF and overnight delivery upon the following:

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