

No. 70756-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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AVCO CORPORATION,

Appellant,

vs.

PAUL THOMAS CREWS, as Personal Representative of the  
ESTATE OF BRENDA HOUSTON, and as Personal Representative  
of ELIZABETH CREWS, and in his individual capacity,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE MONICA BENTON

---

BRIEF OF APPELLANT

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## I. INTRODUCTION

Sunday afternoon, July 27, 2008, a rented Cessna 172 crashed into the cloud-obscured Cascades east of Arlington, Washington, killing all three persons aboard. The families of the decedents filed suit, alleging the crash was caused by fuel retention in the plastic carburetor float, which in turn caused the carburetor to flood and the engine to fail. The lawsuits named a number of defendants involved in rebuilding the engine's carburetor and in maintaining and inspecting the airplane. The lawsuits also named appellant AVCO. AVCO's Lycoming division had manufactured the airplane's engine in 1978, but AVCO had had no involvement with the plane thereafter.

The defendants and the estate of one of the decedents alleged that pilot error caused the crash. As trial was set to commence on February 4, 2013, AVCO was prepared to disprove plaintiffs' factual contention that carburetor failure had caused the crash and to establish that the pilot caused the crash by becoming lost in the clouds after ignoring warnings about bad weather. AVCO also was prepared to argue for dismissal based on federal preemption and other grounds.

Instead, on what was supposed to be the first morning of trial, the trial court entered a dispositive sanctions order that held AVCO liable as a matter of law for the crash. The trial court entered its dispositive sanctions order on the ground that AVCO had willfully violated orders entered over a year earlier by a previous judge who had declined to impose much less severe sanctions. The trial court entered its dispositive sanctions order in connection with discovery disputes that had either been resolved by a special master to whom the trial judge had earlier ordered the parties to present their discovery disputes or that had never before been identified as a basis for sanctions.

Although the only “withheld” discovery identified in the dispositive sanctions order was a single string of e-mails that had been produced by another party, and that plaintiffs had used in successfully arguing against summary judgment by AVCO on the issue of notice to AVCO, the trial court concluded that AVCO’s failure to produce this discovery had caused plaintiffs substantial prejudice. Consequently, the trial court refused to consider any of AVCO’s defenses and refused to make a choice of law inquiry into which state had the most significant relationship with the issues in the litigation. Instead, the trial court imposed the most severe

sanctions possible: 1) ruling that the crash was caused by a flooded carburetor; 2) instructing the jury that AVCO (which designs and manufactures airplane engines, not carburetors) was solely liable for the flooded carburetor and the crash; 3) prohibiting the jury from considering any fault on the part of the pilot or any other defendant; and 4) authorizing the jury to impose punitive damages.

This Court should reverse the judgment based on the trial court's unwarranted dispositive sanctions order and dismiss the claims against AVCO, which could not be liable under the applicable federal aviation standards because it did not manufacture the aftermarket carburetor that plaintiffs allege caused the accident and the federal statute of repose has long run. At a minimum, this Court should vacate the judgment and remand for trial on the merits before a properly instructed jury.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering its March 30, 2011 Order Denying Defendant AVCO Corporations' Motion to Dismiss Cause of Action for Punitive Damages Pursuant to CR 12(b)(6) and to Strike Certain Allegations Pursuant to CR 12(f). (CP 384-85)

2. The trial court erred in entering its September 25, 2012 Order Granting, in Part, and Denying, in Part Motion for CR 56 Summary Judgment. (CP 1997-98)

3. The trial court erred in entering its October 16, 2012 Order Denying AVCO Corporation's ("Lycoming") Second 12(b)(6) Motion to Dismiss. (CP 2823-24)

4. The trial court erred in entering its October 15, 2012 Order Denying Motion for Reconsideration of Defendant AVCO Corporation. (CP 17802-03)

5. The trial court erred in striking and thereby failing to rule on Defendant AVCO Corporation's Renewed Motion for Summary Judgment. (CP 10934-47)

6. The trial court erred in entering its February 5, 2013 Order Granting Discovery Sanctions Against Defendant AVCO Corporation (Lycoming), striking all of AVCO's defenses, imposing liability as a matter of law, including liability for punitive damages, and prohibiting the allocation of fault to any other party, and in entering the following findings in that Order: (CP 2894-908)

- a. Finding of Fact No. 10. (CP 2899)
- b. Finding of Fact No. 11. (CP 2900)
- c. Finding of Fact No. 12. (CP 2900)
- d. Finding of Fact No. 13. (CP 2900)

e. Finding of Fact No. 15. (CP 2900-01)

7. The trial court erred in instructing the juries in both the compensatory damages trial and the punitive damages trial based on the dispositive sanctions in its February 5, 2013 order, including the following instructions:

- a. Compensatory Jury Instruction No. 2. (CP 16581)
- b. Compensatory Jury Instruction No. 10. (CP 16589)
- c. Compensatory Jury Instruction No. 11. (CP 16590-91)
- d. Compensatory Jury Instruction No. 12. (CP 16592-93)
- e. Compensatory Jury Instruction No. 13. (CP 16594)
- f. Compensatory Jury Instruction No. 14. (CP 16595-96)
- e. Punitive Jury Instruction No. 2. (CP 16872)
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- g. Punitive Jury Instruction No. 6. (CP 16876)
- h. Punitive Jury Instruction No. 7. (CP 16877)
- i. Punitive Jury Instruction No. 8. (CP 16878)

8. The trial court erred in entering its June 6, 2013 Judgment against AVCO. (CP 347)

9. The trial court erred in entering its June 6, 2013 Order on AVCO's Motion for Post-Verdict Ruling Addressing Reasonable Relationship. (CP 353)

10. The trial court erred in entering its June 6, 2013 Order Denying Offset from the Judgment. (CP 355)

11. The trial court erred in entering its July 30, 2013 Order Denying Rule 59 Motion for New Trial, Reconsideration, and Amendment of Judgment. (CP 362)

12. The trial court erred in entering its July 30, 2013 Order Denying AVCO's CR 50(b) Motion re Damages. (CP 380)

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court denied a defendant due process by imposing "discovery" sanctions that disposed of all defenses and held defendant liable as a matter of law, without notice or an opportunity to cure and contrary to the rulings of a previous judge and a discovery master to whom the sanctioning judge had ordered all discovery disputes should be directed?

2. Whether the trial court failed to impose the least severe sanction necessary to cure any prejudice arising from any discovery violation?

3. Whether the trial court's dispositive sanctions order wrongly deprived defendant of its right to dismissal under federal and state law?

4. Whether the trial court's dispositive sanctions order wrongly established as a matter of law defendant's liability for

punitive damages without first determining whether applicable state law granted plaintiffs a right to such remedies?

5. Whether the trial court erred by refusing to offset the jury's verdict against defendant for the reasonable value of plaintiffs' settlements with other defendants, as mandated by statute and agreed upon by the parties?

#### IV. STATEMENT OF THE CASE

**A. This lawsuit arises from a tragic airplane accident caused by pilot error. Yet it was decided by a dispositive sanctions order that established AVCO's liability as a matter of law and authorized punitive damages contrary to Washington law.**

A Cessna 172 – a small plane rented to be flown only in good weather (CP 147) – crashed Sunday afternoon, July 27, 2008, on the west face of the Cascades, which were shrouded in clouds. (CP 262, 303, 7326) This tragic accident killed pilot Brenda Houston (CP 150-51), her daughter Elizabeth Crews, and family friend Dr. Virgil Victor (Tory) Becker. (CP 7326, 7295)

The Becker and Houston/Crews families sued several defendants, including the company that rented the small plane to pilot Houston; the mechanics that overhauled the engine and installed an aftermarket carburetor; the company that rebuilt the aftermarket carburetor; the companies that made new parts for the

aftermarket carburetor; the company that performed the last maintenance on the airplane; and appellant AVCO's Lycoming Division, which had manufactured the original engine sold in 1978. (CP 4133-37, 5473 5521, 7324-27) The plaintiffs alleged the aftermarket carburetor had flooded, causing the engine to quit and the plane to crash. (CP 521) The Becker estate also alleged that "[t]he accident may have been caused in whole or in part by the negligence of [pilot Houston . . . in] flying the aircraft into adverse weather conditions and crashing in mountainous terrain." (CP 2652; *see also* CP 4155)

AVCO and other defendants also alleged the fault of pilot Houston. (CP 4124-26) Powerful evidence supported a conclusion that pilot error had caused the accident. (CP 336-40) AVCO was prepared to submit to the jury evidence that pilot Houston flew the rented plane into mountainous terrain in zero visibility (CP 224-26, 336-40), that the aftermarket carburetor had not failed (CP 337-38, 340-42), and that AVCO in any event did not design, manufacture, sell, or install the aftermarket carburetor or any of its component parts blamed for the crash and thus could not be liable under federal or state law. (CP 344, 5472-5521)

But the jurors who heard this case did not get to hear any of this evidence because of a dispositive sanctions order, entered on the day trial was scheduled to start in connection with discovery disputes that had been resolved months earlier by other decisionmakers. (CP 2906-07) Judge Monica Benton, who entered that dispositive sanctions order, had no previous involvement in the underlying discovery orders on which the dispositive sanctions order was based. Judge Spector had entered those underlying discovery orders over a year earlier, and then delegated the task of overseeing discovery to former King County Superior Court Judge (and Division One Commissioner) Paris Kallas, as Discovery Master, for the 18 months before trial. (CP 749-50)

This statement of the case first sets out the powerful evidence in AVCO's defense, wholly unrelated to the discovery that plaintiffs claim was not produced. It then sets out the procedural history of this litigation, including the course of discovery and the resolution (and lack of resolution) on the merits of AVCO's defenses to plaintiffs' claims, culminating in a \$17.3 million judgment for compensatory and punitive damages against AVCO after the trial court prohibited AVCO from putting on any defense.

**B. The trial court's dispositive sanctions order barred all AVCO's defenses, wholly unrelated to the discovery plaintiffs claim was not produced.**

As set out in AVCO's offers of proof and presentations on summary judgment:

- 1. The dispositive sanctions order barred evidence that pilot Houston's decision to fly a small plane into the mountains in bad weather caused the crash.**

Houston was an experienced airline pilot, employed as a first officer for United Airlines. (CP 142-43) The plane she piloted on the day of the crash, however, was substantially different from the Boeing 767 she customarily flew when on the job. (CP 150-52) The Cessna 172 that Houston rented from defendant Crest Airpark, Inc. was to be flown only under Visual Flight Rules (VFR) conditions, not Instrument Flight Rules (IFR) conditions, and Houston's rental agreement required her to "discontinue the flight if the ceiling and visibility are less than the minimums at any time during the flight."<sup>1</sup> (CP 163, 219)

On the morning of the fatal flight, Houston was concerned about bad weather. She logged into an electronic weather and flight

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<sup>1</sup> VFR requires a pilot to be able to see outside the cockpit. If conditions do not allow flying VFR, then IFR prevail. Federally mandated weather minimums for flying VFR require three miles of visibility and a distance from clouds of 500 feet below, 1000 feet above, and 2000 feet horizontal. 14 C.F.R. § 91.155.

plan service at least four times between 9:50 a.m. and 11:15 a.m. and learned of IFR conditions along her contemplated flight path, with the Cascades obscured by clouds. (CP 163-64)

Despite this information, Houston took off from Roche Harbor on San Juan Island at approximately 2:00 p.m. (CP 219) At 2:08 p.m., Houston radioed air traffic control to obtain clearance to proceed through Whidbey Island military airspace en route to her destination in Auburn. (CP 140, 219-20) In response, she was alerted to poor weather on her intended flight route: “Just a heads up for ya I haven’t had anybody go south of Bush Point in the last hour VFR.” (CP 164, 220, 225, 244) At 2:20 p.m., a second air traffic controller radioed another warning of bad weather on pilot Houston’s route: “The weather around Boeing [Field] and Seattle about 15 to 20 miles north is pretty limited visibility with low ceilings.” (CP 220, 225, 254)

When Houston heard these warnings, she was in clear weather and only a few minutes away from several airports suitable for landing (her departure point of Roche Harbor, as well as Friday Harbor and Lopez Island). (CP 164) Houston nonetheless elected to continue the flight, heading in a southeast direction in an attempt to stay beneath the cloud ceiling. (CP 164, 225)

State Senator Cheryl Pflug is a private pilot who was in a plane also flying to Auburn from the San Juan Islands that same day. (CP 140) Because there was bad weather to the east, Senator Pflug and her companion (who also were flying VFR) flew south over Puget Sound down the west side of Whidbey Island. (CP 140) When the weather began to deteriorate, with lowered ceilings, rain, and decreasing visibility, Senator Pflug and her companion decided to abandon their flight and return to Blakely Island to wait for better weather conditions. (CP 140)

While returning northbound, Senator Pflug heard pilot Houston's radio transmission "requesting clearance through Whidbey airspace," heading south toward Crest Airpark. (CP 140-41) Senator Pflug said that Houston "seemed very intentional about her course." (CP 141) Moments later, Senator Pflug saw Houston's plane cross less than a mile in front of her plane before it disappeared in the mist. (CP 141) Her flying companion commented on the direction of travel of Houston's plane, stating, "Maybe she is going to try to go down the eastside [of the Puget Sound]." (CP 141) Senator Pflug replied, "usually that is worse. The clouds tend to stack up against the Cascades in this kind of weather pattern." (CP 141) After returning to Blakely Island,

Senator Pflug and her companion waited several hours before continuing their trip to Auburn. (CP 141)

Houston, however, chose to continue her flight heading south and east, into weather conditions below the minimums for VFR flight. (CP 224-25) But the farther she flew, the worse the weather. (CP 225) At 2:30 p.m., Houston flew directly over Arlington Airport at an elevation of 1600 feet. (CP 221-22, 302) At the time, Arlington Airport was reporting low visibility with ceilings of 400 feet to 900 feet and broken clouds. Houston likely could not see the runway. (CP 221-22, 301-02)

After flying from Roche Harbor on an essentially unwavering southeast-bound course, Houston reversed course shortly after entering the airspace above Arlington Airport, and headed north. (CP 221-22) During the next four to five minutes, Houston made at least six S-turns in a generally northerly direction in an effort to find better visual conditions. (CP 38, 99, 115, 222, 225) She climbed from an altitude of 1600 feet at 2:35 p.m. and to 3000 feet just three minutes later at 2:38 p.m. (CP 38, 97, 125, 222, 225-26, 302)

The Cascades rise sharply east of Arlington. (CP 222, 224) Houston's northbound heading from Arlington Airport also brought

the plane closer to the Cascades. (CP 225-26) Houston's last turn, noted at 2:39 p.m., was eastbound, directly into the rising terrain of the Cascades. (CP 115, 222, 303) Forty seconds after her last turn, radar contact was lost. (CP 222) The plane was found in heavily forested terrain, three hundred yards east of its last radar contact, at an elevation of approximately 2200 feet. (CP 222)

A map charting the plane's fatal route is attached as Appendix A. (CP 37-38, 105, 125) An animation reconstructing the plane's fatal route is designated Exhibit 41-A.

**2. The dispositive sanctions order prohibited AVCO from refuting plaintiffs' theory that failure of an aftermarket carburetor had caused the crash.**

In addition to preventing AVCO from presenting evidence to the jury of these critical events leading up to the crash, the dispositive sanctions order barred AVCO from proving that the crash was not caused by engine failure. (CP 2906-07) Plaintiffs' experts opined that as pilot Houston was climbing to higher elevations near Arlington, the engine suddenly quit due to flooding in the carburetor caused by a leaking float made of Delrin<sup>®</sup>, a DuPont thermoplastic. (See CP 7463-64) But AVCO's evidence would have established 1) that the engine continued to run; and 2)

that if the engine had quit, an experienced pilot like Houston would have reacted by changing the fuel and flaps settings, issuing a radio call, and flying away from, rather than into, mountainous terrain.

First, the propeller blades and tree branches at the crash site confirmed that at the point of impact the propeller was operating consistent with a “power on” setting, in excess of 2000 rpm, and was not at or below idle as plaintiffs' experts contended. (CP 314-20, 325, 335) The plane's calculated airspeed and the distance traveled from the last radar point to the crash site also was inconsistent with engine failure. (CP 99)

Second, the condition of the aircraft was inconsistent with engine failure. The fuel selector valve was in the RIGHT position, rather than in the BOTH position as the Pilot's Operating Handbook (POH) directs in the event of engine failure. (CP 99) The flaps were fully retracted, even though the POH requires flaps to be extended in the event of an engine failure. (CP 169)

Finally, Houston made no emergency radio transmissions before the crash. (CP 169) And even if she had lost engine power, Houston could have turned to the south or west, away from the Cascades, allowing the plane to glide 4.5 nautical miles to level

ground had Houston not instead turned it east into mountainous terrain. (CP 99, 168-69)

**3. The dispositive sanctions order barred all AVCO's legal defenses to liability for its non-defective engine manufactured 30 years earlier.**

Aircraft manufacturing is pervasively regulated by the Federal Aviation Administration (FAA), the federal agency charged with regulation of the field of aviation safety. AVCO is authorized by the FAA to design and manufacture piston aircraft engines, including the O-320-H2AD model engine ultimately installed on the Cessna rented by Houston. (CP 5521, 5659-65) This FAA authorization, known as a type certificate, reflects the FAA's determination that the engine is manufactured according to an approved design that complies with FAA airworthiness – safety – requirements. 49 U.S.C. § 44704(a)(1); 14 C.F.R. pt. 21, subpt. B. Type certification is an exhaustive process during which the FAA compares design documents and processes to determine that the design meets requirements established for the type of equipment. 49 U.S.C. § 44704(a)(1); 14 C.F.R. §§ 21.15, 21.20. An engine's type design cannot be changed without FAA approval. 14 C.F.R. § 21.19; 14 C.F.R. pt. 21, subpts. D, E.

Plaintiffs did not identify any defect in the engine when it left AVCO's hands in 1978. Plaintiffs instead claimed the engine was "rendered defective" by aftermarket parts third parties added to the engine 23 years later. (CP 7442) AVCO had a number of defenses under state law, including plaintiffs' failure to identify any defective condition in the engine at the time of sale and various presumptions given the age of the engine and its non-defective condition at the time of sale. (CP 2806-12, 4119, 5462-66)

AVCO also had a number of dispositive defenses under federal law. AVCO was entitled to dismissal under the General Aviation Revitalization Act (GARA), a federal statute of repose, because the engine it had manufactured was more than 18 years old at the time of the accident. (CP 4120-21) AVCO had also obtained partial summary judgment on federal preemption grounds. (CP 1997-98) While plaintiffs identified various federal regulations relating to engine design and certification, they did not identify any failure to conform to those regulations. (CP 7419-21) Moreover, the regulations cited by plaintiffs were not the engine design and certification regulations under which the FAA issued the type certificate for the O-320-H2AD model engine, but were more recent regulations not applicable to this engine model.

**4. The dispositive sanctions order barred all AVCO's defenses to liability for the aftermarket carburetor.**

The carburetor on the plane when it crashed in 2008 was not the carburetor AVCO supplied with the engine in 1978. (CP 5600, 5755) AVCO did not manufacture the aftermarket carburetor, did not place the aftermarket carburetor in the stream of commerce, and had no obligations under federal law relating thereto.

For close to two decades, Precision Airmotive was AVCO's supplier of Original Equipment Manufacturer (OEM) carburetors for sale with new engines. (CP 2035, 7890-91) Precision also had Parts Manufacturer Approval (PMA) from the FAA to manufacture new carburetor replacement parts for sale to the general public. 14 C.F.R. § 21.303. (CP 2035, 5756-57, 5767-69, 7890-91) Precision replacement parts made in accordance with its PMA approval were not first sent to AVCO, and did not go through AVCO's quality system. Instead, Precision independently manufactured them under Precision's standards and specifications and then shipped directly to Precision's distributors for sale to the aftermarket. (CP 5473, 5495-99, 5506-08, 5510, 5512, 5755, 6332-35, 7942, 10323)

In the 1990s, Precision developed and patented a carburetor float made of Delrin®, a DuPont thermoplastic, to replace a brass

float that had been used in previous carburetors (including the carburetor on the engine AVCO sold in 1978). (CP 5757-58) The Delrin® float was molded by Synergy Systems (CP 5499) and welded by Forward Technology Industries (FTI) (CP 856), then incorporated into a carburetor Precision rebuilt in 2000 (CP 5473), eight years before the crash. Precision shipped the carburetor to a distributor, which sold it to Premier Aircraft Engines in Portland, Oregon. (CP 5473, 5506-08, 5510) Premier overhauled the plane's engine, installed the rebuilt carburetor, and returned the overhauled engine to defendant Crest Airpark on June 19, 2001. (CP 5473, 5510, 5512)

Thus, AVCO did not design, manufacture, sell, or install the replacement carburetor containing the Delrin® float. (CP 9852), Plaintiffs failed to identify any applicable federal standard of care that imposed upon AVCO any obligations for an aftermarket part it did not design or manufacture and which did not go through its quality system. Further, under its regulatory authority to correct unsafe conditions the FAA has not deemed the carburetor or the plastic carburetor float to be unsafe, or required that either be removed or replaced. (CP 5758, 5760)

**C. The lawsuits, the discovery disputes, the dispositive sanctions, and the damages-only trials.**

**1. The trial court dismissed some claims on summary judgment, but failed to address other legal defenses to liability.**

The Houston/Crews estates and the Becker estate each filed separate lawsuits, which were consolidated on January 26, 2011. (CP 1, 29-31, 4131) In addition to AVCO, the plaintiffs sued Crest Airpark (the owner of the Cessna rented to Houston), FTI (welder of the Delrin® float), Synergy (molder of the Delrin® float), Auburn Flight Service (the mechanics who at the request of Crest had performed the last maintenance work on the Cessna), Precision, Premier, and others. (CP 1-4, 4131, 4135-36) The Becker estate also filed suit against the Houston estate, claiming that pilot error contributed to the crash. (CP 4137) All plaintiffs alleged that they were entitled to recover punitive damages, which generally are not permitted under Washington law. (CP 23-24, 4156-57)

Based on the FAA's exclusive regulation of aircraft safety and on other grounds, AVCO and other defendants moved for summary judgment. (CP 807-33, 5453-71, 5522-57) On July 16, 2012, in an order plaintiffs have not appealed, the trial court dismissed defendant FTI, which welded the Delrin® floats, on preemption grounds. (CP 1387) On September 25, 2012, the trial court granted

AVCO partial summary judgment that “state law standards of care are preempted by these federal standard of care” on which it had dismissed FTI from the case. (CP 1997-98) On October 9 and 12, 2012, the trial court dismissed plaintiffs’ claims against Precision and Auburn Flight Services as preempted by federal law, except for those claims alleging “prior knowledge of defects in Delrin® floats,” as material to a “duty to produce floats which are airworthy” and (as to Precision) “to accurately notify the FAA.” (CP 2819-20, 2821-22)

The trial court failed to rule on several substantive defenses to liability raised by summary judgment, including the bars to liability identified in Argument Section C, *infra*. As set out in the next section, extensive discovery continued and was litigated while the court addressed (or failed to address) these substantive defenses to liability.

**2. In the 2-1/2 years before trial AVCO provided extensive discovery under the supervision of a Discovery Master and a previous judge.**

The plaintiff estates each initially served 73 identical discovery requests, seeking a broad array of documents from AVCO. (CP 4340-75) In December 2010, AVCO provided responses and noted objections as warranted. (CP 4309-32) While the Houston/Crews and Becker cases were consolidated, Becker took

the lead in raising arguments and seeking specific relief from the trial court. Becker served additional discovery, but Houston/Crews did not. The history of discovery as described here is also summarized in the timeline in Appendix B.

**a. July 2011: Order Compelling Discovery.**

In March 2011, plaintiffs claimed AVCO's discovery responses were "inadequate." (CP 403) Shortly after AVCO supplemented its responses in June 2011 (CP 405; 4340-75), plaintiffs filed a joint motion to compel, seeking production of "all documents responsive to requests" 1, 4, 11-17, 25-30, 33, 36-38, 40-66, 70, and 72-73. (CP 389) Becker also filed a motion to compel addressing different discovery, and seeking different relief. (CP 4258-66) Both motions were noted without oral argument. (CP 389, 4258)

In plaintiff Becker's reply in support of the motion to compel, her counsel submitted December 2005 e-mails between Precision and AVCO, which plaintiffs had obtained in Precision's discovery responses. (CP 464-68) That e-mail exchange is attached as Appendix C. In it, a Precision employee forwards to five other Precision employees a "proposed response" to questions an AVCO employee had raised about the Delrin® floats. (CP 467) The

December 20 Precision e-mail attaches the AVCO employee's December 19, 2005 e-mail. (CP 467-68) Becker claimed these documents should have been in AVCO's discovery. (CP 455) Because this claim was made in reply, AVCO did not have an opportunity to explain why these five-year-old e-mails were not in its files under AVCO's document retention policy. (CP 452)<sup>2</sup>

On July 20, 2011, Judge Julie Spector, to whom both cases had been assigned, entered plaintiffs' proposed orders on the motions to compel. (CP 2021-24) The order entered on Becker's motion (but not the joint order) required identification of each responsive document by Bates stamp number. (CP 2024) In the joint order, Judge Spector simply ordered AVCO to produce responsive documents within 14 days. (CP 2021-22) Neither order identifies any specific deficiencies with the responses or supplemental responses provided earlier.

AVCO timely responded with supplemented discovery, as required by Judge Spector's orders. Where appropriate, AVCO confirmed that documents had already been produced or made

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<sup>2</sup> AVCO also never had an opportunity to argue to a jury deciding liability that the December 2005 e-mails were, in fact, exculpatory. In the e-mails, *Precision* acknowledged that it was responsible for any necessary notifications to the FAA and the field, and represented to AVCO that it would undertake the responsibilities for any required notifications. (CP 464-68)

available for inspection, and that it had no documents responsive to other requests. (CP 534-40, 714-16) In light of the many discovery disputes, AVCO also proposed appointment of a Discovery Master. (CP 540) On September 12, 2011, Judge Spector delegated the court's authority over discovery matters to retired King County Superior Court Judge (and former Division One Commissioner) Paris Kallas, who thereafter served as Discovery Master. (CP 750)

**b. September 2011: Contempt Order.**

Despite the appointment of Judge Kallas as Discovery Master, Becker and Houston/Crews filed contempt motions in the trial court based on AVCO's August 2011 discovery responses. (CP 576-88, 656-64) Plaintiffs claimed that AVCO had violated the court's July 20, 2011 orders compelling production of documents, and requested five sanctions: that the court 1) strike AVCO's statute of repose defense under GARA and any opposition to the availability of punitive damages, 2) hold that AVCO had a duty to warn of the defective floats, 3) require immediate compliance with the July discovery orders, 4) order that currently scheduled and subsequent depositions be held in Seattle, and 5) award monetary sanctions and terms. (CP 577-78) Once again, these motions were submitted for consideration without oral argument. (CP 576, 656)

Judge Spector entered plaintiffs' proposed orders granting the motions on September 28, 2011, again without identifying any specific deficiencies in AVCO's discovery responses. (CP 755-56, 2028-30) The orders on contempt, drafted by plaintiffs, recited that AVCO had "willfully violated" the July 20, 2011 orders, to plaintiffs' prejudice, but did not explain how. (CP 756, 2029)

However, Judge Spector imposed only two of the sanctions requested by plaintiffs in their proposed orders submitted to her: 1) that if "responsive documents" produced after September 2, 2011, warranted further depositions, AVCO must produce the witnesses in Seattle, paying all costs of depositions, and 2) that plaintiffs were entitled to fees and costs. (CP 756, 2029) Judge Spector "reserved" three potential sanctions in the Houston/Crews case: 1) that AVCO could not present a GARA statute of repose defense, 2) that AVCO could not oppose the availability of punitive damages, and 3) that AVCO had a duty to warn owners and operators of its engines of the defective carburetor floats. (CP 756)

**c. November 2011: No Further Sanctions.**

On October 5, 2011, AVCO's counsel filed a 20-page declaration setting out the efforts undertaken to comply with Judge Spector's orders and to search for and produce discovery. (CP

2032-51) Trial counsel, who has represented AVCO's Lycoming division in various aviation matters since 2003, set out in great detail all of the steps taken to comply with each of plaintiffs' requests (73 separate requests by each set of plaintiffs, resulting in supplemental production of 2,355 additional pages of documents), making available for inspection tens of thousands of additional documents, including original business records as maintained in the ordinary course of business. (CP 2033) She explained the applicable document retention policy of AVCO's Lycoming division. (CP 2033, 2036) The declaration also discussed in detail the tension between the discovery orders in this case and protective orders entered in litigation in other jurisdictions. (CP 2037, 2039)

On October 10, 2011, AVCO moved to vacate Judge Spector's September 2011 contempt orders, and proposed that the subject matter of the orders be referred to Master Kallas for disposition under CR 37. (CP 758-64, 2785) AVCO also argued that it was entitled to summary judgment under the Washington Products Liability Act (WPLA), because it did not manufacture or sell the aftermarket carburetor. (CP 759-60) AVCO advised the court that its motion for summary judgment on this defense, on which other

defendants had been dismissed, was noted for November 4, 2011. (CP 760)

In their response to AVCO's motion to vacate the contempt order, plaintiffs asked the court to deny the motion and impose the three sanctions against AVCO that Judge Spector had previously "reserved" – 1) striking the GARA statute of repose defense, 2) preventing AVCO from challenging the applicability of punitive damages, and 3) holding that AVCO had a duty to warn of the allegedly defective floats in the aftermarket carburetor installed in the engine 23 years after AVCO manufactured it. (CP 777)

Judge Spector signed orders denying AVCO's motion to vacate the contempt on November 8, 2011. (CP 2056-59) The court's November 8, 2011 order is attached as Appendix D. In signing the orders, prepared by plaintiffs' counsel, Judge Spector ruled that plaintiffs were entitled to fees and costs in opposing the motion, "and may submit the same to the Court." (CP 2057, 2059) However, the court struck out and did not grant plaintiffs' proposed relief that "this court will supplement the reserved sections of Judge Spector's Contempt Orders Dated September 27, 2011." (CP 2057, 2059)

In other words, Judge Spector refused to impose additional sanctions on AVCO for the previously found contempt.

**d. 2012: Master Kallas Controls Discovery.**

As set out in the comparison of the requests attached as Appendix E, in April 2012 the Becker estate, which had taken the lead in discovery, served subsequent discovery requests that duplicated earlier requests for production.<sup>3</sup> (CP 2723-32) AVCO responded, supplementing its answers on February 24, 2012. (CP 2546-73) After an April 16, 2012 CR 26(i) discovery conference, AVCO supplemented its answers to the second set of interrogatories and third requests for production again on May 18 and June 19, 2012. (CP 2703-05, 2579-2607, 2613-39)

Master Kallas continued to supervise discovery after the consolidated cases were transferred to Judge Monica Benton (“the trial court”) effective January 9, 2012. (CP 794) On May 11, 2012, Judge Benton entered an order directing the parties “[a]ll future discovery motions must be noted before Judge Kallas.” (CP 806) (emphasis in original) Houston/Crews, Becker, AVCO, and other defendants all filed motions before Master Kallas, who eventually

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<sup>3</sup> By June 2012, the Becker estate had served 149 separate requests for production and 34 interrogatories (including subparts) on AVCO alone. (CP 2704)

entered 15 different orders addressing discovery disputes. (CP 798-800; 801-04; 961-64, 1974-76, 1977-78, 1981-84, 1987-88, 1989-90, 2177-80, 15446-49, 15450-51, 17797-98, 17799-801, 17804-05, 17806)

On June 12, 2012, Master Kallas entered an order that noted that AVCO was required to represent that its responses were complete, and that AVCO had done so. (CP 963-64) On July 3, 2012, Becker's counsel wrote to AVCO's counsel claiming again that AVCO had failed to amend discovery responses or produce additional documents pursuant to the 2011 contempt orders. (CP 2799) AVCO's counsel responded on July 27, 2012, confirming again that AVCO had complied with all court orders and discovery requests to date, including Master Kallas' rulings on discovery. (CP 2800-01) Plaintiffs did not raise the issue again.

Master Kallas' orders addressed much of the discovery that had been at issue in Judge Spector's orders, including the discovery at issue when Judge Spector made her 2011 rulings. Plaintiffs admitted as much, submitting before Master Kallas in November 2012 the issue of the amount of fees and costs AVCO owed pursuant to Judge Spector's July 20, September 29, and November 8, 2011 orders. (CP 15447) On December 10, 2012, Master Kallas awarded

costs and fees of \$18,683.58, and ordered AVCO to bear the Discovery Master's expenses in connection with the motion, noting that AVCO's subsequent production of documents did not "undo" the September 2011 finding of contempt or the award of fees. (CP 15446-49)

Judge Kallas signed her last order as Discovery Master on January 24, 2013, less than two weeks before the scheduled trial. (CP 17806-07) This order was entered on January 31, 2013, less than a week before trial. (CP 17806-07) Master Kallas' rulings addressed both procedural and substantive discovery issues. Master Kallas expressly affirmed the reasonableness of AVCO's efforts to provide complete responses, noting that AVCO's certification that it had searched and provided responsive documents had not been rebutted and must be accepted as true. (CP 963-64)

3. **On the first day of trial in February 2013, a different judge stripped AVCO of all its defenses and imposed punitive damages prohibited by Washington law.**

When opposing AVCO's summary judgment motion in September 2012, plaintiffs did not seek additional time for further discovery under CR 56(f) and did not claim that any shortcoming in

AVCO's discovery responses had affected their ability to respond. (CP 7418-44) Nonetheless, on September 28, 2012, three days after Judge Benton granted AVCO partial summary judgment on federal preemption grounds, plaintiffs moved for "default judgment" – relief they had never previously sought – claiming that AVCO had failed to comply with Judge Spector's July and September 2011 discovery orders. (CP 2001-14)

Nothing but Master Kallas' management of discovery – including approval of AVCO's certification of its compliance with discovery requests – had changed in the year since entry of Judge Spector's 2011 orders. In the face of pending motions for dismissal on legal grounds, to which plaintiffs never claimed they were hindered in responding, plaintiffs nevertheless sought "sanctions" from Judge Benton far beyond those Judge Spector had ever considered (and expressly declined to enter) a year earlier, including a default judgment against AVCO on both liability and punitive damages. (CP 2001-14)

Plaintiffs' noted their "sanctions" motion (which in reality would have disposed of all AVCO's defenses), for consideration without oral argument on October 8, 2012, on less than six days'

notice.<sup>4</sup> (CP 2001) AVCO's counsel responded by declaration on October 4, 2012, outlining the circumstances under which documents had been made available for review by plaintiffs' counsel under CR 34(b)(3)(F) during depositions in February 2012 – the claimed discovery violation that seemed to be the focus of the motion. (CP 2181-95) AVCO also pointed out 1) that the information sought in the five requests for production expressly called out by plaintiff as insufficient were the same – in some instances using identical language (CP 2197, 2723-2732) – as reflected in the comparison of the request attached as Appendix E, and 2) that Master Kallas had confirmed that AVCO's responses were adequate. (CP 963-64)

The trial court never ruled on plaintiffs' motion, untimely noted for consideration without oral argument on October 8, 2012. Nor did plaintiffs ask it to. Instead, in November 2012, plaintiffs sought and received from Master Kallas their award of fees based on Judge Spector's 2011 orders. (CP 15449) That same month, plaintiffs once again opposed AVCO's renewed motion for summary

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<sup>4</sup> The note was untimely. King County LCR 7(b)(4)(A). Plaintiffs also violated King County local rules in seeking dispositive relief without oral argument. KCLCR 7(b)(3) provides that only "non-dispositive motions and motions for orders of default and default judgment shall be ruled on without oral argument."

judgment. Again, plaintiffs did not claim that any shortcoming in AVCO's discovery responses had had any impact on their ability to respond to the motion. (CP 13759-76)

Plaintiffs also did not renew their October 2012 motion for additional sanctions, including "default," based on Judge Spector's 2011 orders when Judge Benton took up pretrial issues in a January 25, 2013 hearing to address pre-trial motions and prepare for trial scheduled to begin ten days later. To the contrary, during this day-long hearing, while arguing a motion concerning "service information records" (SIRs) that it had sought from AVCO in discovery, and that had already been addressed by Master Kallas in her June 2012 order (CP 964), plaintiffs' counsel referred to the motion and represented he was "not going to argue any of that right now." The trial court responded: "I would be flying off the bench" if the issue was raised. (1/25/13 RP 109) And at the conclusion of this hearing, Judge Benton told all counsel: "We have run out of time. Let me quickly say that I have a load of motions that weren't addressed by this Court that, as I call it, is part of my [triage]. There is only so much time to address these. So, I think we are at that place." (1/25/13 RP 172) Plaintiffs did not tell the trial court,

or AVCO, that they thought the issue of additional sanctions was still “alive.”

But on the afternoon of Friday, February 1, 2013, Judge Benton’s bailiff sent an e-mail alerting counsel to be prepared to address the October 2012 motion on Monday, February 4, 2013, scheduled to be the first day of trial. (CP 17268) In court on February 4, Judge Benton expressed concern over the discovery disputes while Judge Spector had the case two years earlier. Without even acknowledging the months of extensive motions practice before Master Kallas, her own order *requiring* that these disputes be decided by Master Kallas, or Master Kallas’ resolution of these disputes over the 18 months before trial, Judge Benton focused exclusively on the contempt orders entered by Judge Spector on September 27, 2011. (RP 57)

After hearing argument only from Becker’s counsel (and before giving AVCO’s counsel any opportunity to respond), the trial court was critical of AVCO for making its insurance policy available for inspection instead of producing a copy – an issue never raised (or addressed) before Judge Spector, and a practice authorized by the court rules. (RP 44-45) CR 34(b)(3)(F). Judge Benton then

announced that she was striking AVCO's expert witnesses and directing a verdict in favor of plaintiffs against AVCO. (RP 59, 73)

The next day, Judge Benton expanded her "sanctions," entering an Order Granting Discovery Sanctions Against Defendant AVCO, in the form proposed by plaintiffs without alteration, on February 5, 2013. (CP 2894-908) The court's February 5, 2013 order is attached as Appendix F. This February 5 dispositive sanctions order struck all of AVCO's defenses, imposed liability as a matter of law, including liability for punitive damages, and prohibited the allocation of fault for the accident to anyone but AVCO.

In support of these dispositive sanctions, which eliminated all of AVCO's substantive defenses and held it liable for the airplane crash as a matter of law, the trial court made a single finding that AVCO had not complied with discovery, based on the December 20, 2005 e-mail, identified *only* in reply in support of plaintiff Becker's motion to compel before Judge Spector in July 2011, that defendant Precision had produced and that plaintiffs had relied upon in depositions and in opposing summary judgment. (CP 452, 2060, 2897-98, 7822-23, 7894-98) Despite its expressed concerns during the hearing the previous day, the trial court did not find the manner

in which AVCO made available for inspection and copying the insurance policy and the SIRs, which Master Kallas had found complied with CR 26 (CP 963-64), to be further sanctionable.

As it had explained to Judge Spector in September 2011 (CP 715), AVCO confirmed before Judge Benton that its business files no longer contained the December 2005 e-mails, and that is why it had not produced them. (RP 24-25) Without considering Master Kallas' determination eight months earlier that AVCO was bound to its representations that its responses were in compliance with CR 26(g), and despite absolutely no evidence that they were not, the trial court rejected that "justification" for nondisclosure – all without making any finding that these e-mails, or any other "withheld" documents, were actually in AVCO's possession or willfully withheld. (CP 2900) Without identifying any other deficiency in AVCO's discovery compliance, and without providing any further explanation, the trial court declared that AVCO's discovery violations were "willful" and "continuing." (CP 2902)

Within a day, the remaining defendants settled with plaintiffs. (RP 97-99) Plaintiffs proceeded to a damages-only trial against AVCO as the sole defendant on February 6, 2013.

**4. The trial court instructed the jury deciding compensatory damages that AVCO was solely responsible for the accident.**

The trial court bifurcated the trial of compensatory and punitive damages against the sole remaining defendant AVCO. (RP 398) The trial court instructed the compensatory damages jury that AVCO alone was responsible for the accident. (2/21 RP 8) The jury returned compensatory damages verdicts of \$6,650,000 for pilot Houston's death and \$4,633,000 for the death of her daughter Elizabeth Crews. (CP 351) After the jury returned its verdict, the Becker family and estate settled with AVCO.

**5. The trial court instructed a differently-constituted jury that AVCO was liable for punitive damages.**

Over AVCO's objections, a different jury, including some but not all the same jurors, considered the punitive damages to be imposed on AVCO. Judge Spector had denied AVCO's motion to dismiss punitive damages claims, without prejudice, anticipating further briefing and argument on choice of law. (CP 384-85; 3/25/11 RP 15, 30-35) But without any choice of law analysis, based solely on the February 5 order, Judge Benton instructed the jury that it could award punitive damages. The jury returned a verdict for punitive damages totaling \$6,000,000. (CP 352)

The trial court entered judgment against AVCO in favor of the Houston/Crews estates for \$17,283,000 (CP 347-49), having denied the parties' stipulated request for a statutorily-required offset for settlements reached with other defendants. (CP 355-56) AVCO timely appealed after denial of its CR 59 and CR 50(b) motions. (CP 370)

## V. ARGUMENT

### A. **The dispositive sanctions order, entered on the eve of trial without notice and inconsistent with the orders of judicial decision-makers who actually supervised discovery, violated AVCO's due process rights.**

The trial court's February 5, 2013 order imposing liability as a matter of law for AVCO's purported prior discovery violations and sanctions in addition to those that had been previously assessed and far in excess of those previously rejected by previous decision-makers who had actually supervised discovery, violated due process. The trial court could not and did not find a "plain violation" of previous orders, 14 months after Judge Spector had refused to impose lesser sanctions. AVCO clearly established its substantial efforts to comply with Judge Spector's orders, and had no notice that dispositive sanctions eliminating all its defenses and imposing liability as a matter of law were possible on the eve of

trial. This Court must reverse the judgment based on the February 5 dispositive sanctions order.

“No person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. art. I, § 3; U.S. Const. amend. XIV, § 1. “The essential requirements of procedural due process are notice and an opportunity for a hearing appropriate to the nature of the case.” *In re C.R.B.*, 62 Wn. App. 608, 614, 814 P.2d 1197 (1991). The opportunity for a hearing must be held “at a meaningful time and in a meaningful manner.” *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

A defendant in a civil lawsuit has a due process right to present its defenses to liability. The February 5 dispositive sanctions order, entered on the first day of trial, 1) prohibited AVCO from presenting any defenses, 2) imposed liability as a matter of law against AVCO as a “manufacturer” of the aftermarket carburetor, 3) declared its “product” defective, 4) decreed that AVCO had failed to warn of its defects and that its actions were “a proximate cause of the crash,” and 5) allowed the imposition of punitive damages contrary to Washington law. (CP 2905) The February 5 dispositive sanctions order violated AVCO’s right to due

process by depriving AVCO of “all right to defend as a mere punishment.” *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351-52 (1909) (describing *Hovey v. Elliott*, 167 U.S. 409 (1987)).

The trial court sanctioned AVCO without notice and without an opportunity to cure alleged discovery violations that had been addressed and resolved in Judge Spector’s July 2011, September 2011, and November 2011 orders. The first two discovery orders, which directed AVCO to produce documents responsive to plaintiffs’ discovery requests, failed to identify any specific deficiency with AVCO’s previous responses. (CP 484-87) The September 2011 contempt orders raised the possibility that AVCO could face the loss of its defenses as sanctions for the failure to provide discovery that addressed those defenses. (CP 755-56, 2028-30) But Judge Spector declined to impose those additional sanctions for AVCO’s earlier non-compliance in November 2011, after AVCO explained its document retention policy, the efforts it made to comply with plaintiffs’ discovery requests, and the tens of thousands of pages of additional documents it made available to plaintiffs. (CP 2057, 2059)

Far from approving the imposition of additional sanctions, Judge Spector in fact struck from the November 2011 orders the proposal by plaintiffs that the court impose more severe sanctions, including preclusion of certain defenses or imposition of punitive damages, which Judge Spector had reserved two months earlier, in September. (CP 756, 2029, 2057, 2059) From that point forward, AVCO had no notice that its demonstration of compliance with previous orders was not acceptable, that it had not purged its contempt, or that there could be any further consequence of its previous failure to comply.

AVCO certainly had no reason to believe it could be subject to sanctions far more onerous than those Judge Spector refused to reserve or impose in the November 2011 order, which would have stricken only AVCO's GARA statute of repose defense and allowed punitive damages. The February 5 dispositive sanctions order went far beyond that, imposing liability as a matter of law against AVCO as a "manufacturer" of the aftermarket carburetor, declaring its "product" defective, and decreeing that AVCO had failed to warn of the product's defects and that its actions were "a proximate cause of the crash." (CP 2906-07)

AVCO's belief that it had complied with the requirements of Judge Spector's 2011 orders was all the more reasonable because the parties continued to litigate remaining discovery disputes before Master Kallas. After Judge Spector's rulings plaintiffs made virtually identical subsequent discovery requests, and then litigated AVCO's responses before Master Kallas, who confirmed that AVCO's responses were adequate. (CP 963-64) Plaintiffs submitted to Master Kallas the issue of the amount of sanctions under Judge Spector's 2011 orders, and received a significant award of fees because, as Master Kallas found, "subsequent discovery orders do not undo the Court's award of fees and costs. Nor does subsequent discovery . . . ." (CP 15447)

The trial court's dispositive sanctions order, entered on the first day of trial, was a "punitive sanction" "imposed to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2). It was not a "remedial sanction" "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform," RCW 7.21.010(3), because the trial court did not intend to coerce further discovery.

Imposition of such punitive sanctions requires constitutional safeguards. *State v. Jordan*, 146 Wn. App. 395, 402, ¶ 8, 190 P.3d 516 (2008). AVCO's conduct must have constituted "a plain violation" of previous orders:

In contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit was brought. The facts found must constitute a plain violation of the order. . . . Although such proceedings are appropriate means to enforce the court's orders, since the results are severe, strict construction is required.

*Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982) (citing *State v. Int'l Typographical Union*, 57 Wn.2d 151, 158, 356 P.2d 6 (1960); 17 C.J.S. Contempt § 12 (1963)).

In determining whether a party is in contempt for violation of a court order, any ambiguity must be resolved in favor of the party that is alleged to have violated an order. If the superior court bases its contempt finding on a court order, "the order must be strictly construed in favor of the contemnor." *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 768, ¶ 83, 271 P.3d 331 (2012) (quotation omitted). "The facts found must constitute a plain violation of the order." *Tiger Oil*, 166 Wn. App. at 768, ¶ 83

(emphasis in original, alteration omitted, quoting *Johnston*, 96 Wn.2d at 713).

In *Johnston*, our Supreme Court reversed an order finding plaintiffs' class counsel in contempt for sending a letter encouraging class members to make claims in a class action settlement. Defendants asserted that the letter violated a protective order prohibiting communication with any class member not a formal party to the action without court order. In reversing the finding of contempt, the Court relied in part on the fact that the judge making the finding of contempt had not presided over the action and entered the orders at issue. *Johnston*, 96 Wn.2d at 715 n.4. Division Two in *Tiger Oil* likewise reversed a finding of contempt based on the alleged failure to comply with a consent decree that did not clearly require the party to operate a particular system as part of a cleanup action plan. 166 Wn. App. at 720, ¶ 92.

Here, the trial court's February 5 dispositive order states that "Judge Spector found that the declaration [of AVCO's counsel] did not comply with the Order of Contempt." (CP 2899) But Judge Spector's November 2011 order says no such thing. Judge Spector only refused to hold that AVCO had not previously failed to provide discovery, **not** that its subsequent discovery efforts failed to comply

with the September orders. As Master Kallas recognized, a finding that AVCO had previously been in contempt does not mean that its subsequent efforts fell short of its discovery obligations. (CP 964, 15447)

Further, contrary to the February 5 finding that AVCO did not supplement or amend discovery after September 2011, extensive additional discovery occurred through 2012. AVCO had produced additional documents at its counsel's Philadelphia offices in February 2012, as required by CR 34(b)(3)(F) (party producing documents "shall produce them as they are kept in the usual course of business"). (CP 2181-95) Based on the showing made by AVCO of its efforts to comply with her July and September 2011 orders, Judge Spector expressly declined to award additional sanctions against AVCO in November 2011, striking out from the order the proposed provision that she impose additional sanctions that in any event were not as severe as those proposed by plaintiffs, and imposed by Judge Benton, on the eve of trial. (CP 2057, 2059)

AVCO was given no notice that it faced any further sanctions for its earlier alleged noncompliance after Judge Spector entered her November 2011 order refusing to impose additional sanctions. The February 5 dispositive sanctions order, entered by a new judge

for alleged violation of ambiguous orders, months after less severe sanctions had been rejected by the judge who had entered those previous orders and the Discovery Master to whom the court had ordered all discovery disputes confirmed the adequacy of AVCO's efforts to comply, violated AVCO's constitutional due process rights.

**B. The trial court failed to impose the least severe sanction necessary to cure any prejudice arising from any discovery violation.**

Even if Judge Spector's November 2011 order left open the possibility of imposition of additional sanctions, the trial court's February 5 dispositive sanctions order far exceeded the permissible range of sanctions necessary to cure the alleged prejudice caused by any previous discovery violation. Finding that AVCO did not produce e-mails relating to other allegations of carburetor failure – documents that plaintiffs obtained from other sources, and used to defend AVCO's motion for summary judgment, but that were not in AVCO's possession – the trial court imposed the most severe sanction, prohibiting AVCO from contesting not only plaintiffs' claim that the plane suffered engine failure due to carburetor flooding caused by a defective Delrin® float, but striking all its defenses, finding as a matter of law that AVCO was a manufacturer of the aftermarket carburetor, that its design was defective, that

engine failure was the sole cause of the accident, that pilot Houston, who was flying in poor visibility in a small plane unequipped for IFR flight, was fault free, and imposing liability for punitive damages.

Our Supreme Court has consistently held (and due process requires) that a sanctions order that prevents a party from submitting evidence at trial must impose the least severe sanction that remedies a specific discovery violation. The trial court's February 5 dispositive sanctions order turned that standard on its head, imposing the most severe sanction possible by entering default judgment against AVCO and prohibiting it from submitting powerful evidence that the fault of pilot Houston, not the aftermarket carburetor, caused the accident. The trial court erred in imposing sanctions that went far beyond curing the prejudice alleged by the plaintiffs for failing to disclose communications concerning other instances of alleged carburetor failure.

- 1. The trial court could not impose the most severe dispositive sanction of default where a lesser sanction would suffice.**

A trial court must order the least severe discovery sanction "that will be adequate to serve the purpose of the particular sanction" to "deter, to punish, to compensate, to educate, and to

ensure that the wrongdoer does not profit from the wrong.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 496, 933 P.2d 1036 (1997). “[W]hen a trial court chooses one of the harsher remedies . . . it must be *apparent from the record* that the trial court *explicitly* considered whether a lesser sanction would probably have sufficed, and . . . that the disobedient party’s refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial.” *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 693-94, 41 P.3d 1175 (2002) (emphasis in original; quotation omitted); *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, ¶ 24, 220 P.3d 191 (2009).

The lesson from these cases is clear: the “punishment must fit the crime,” keeping in mind the primary purpose of a sanctions order – to ensure that the recalcitrant party does not benefit from non-disclosure. The trial court failed to adhere to this requirement that discovery sanctions be narrowly tailored, and instead imposed the most severe sanctions available based upon a finding that AVCO failed to disclose an e-mail that plaintiffs already possessed and had used months earlier in opposing summary judgment and despite AVCO’s explanation that under its document retention policy the e-mail was not in any event in its files and the Discovery Master’s

June 2012 finding that AVCO had in fact complied with its discovery obligations.

In *Burnet*, for instance, the trial court struck the plaintiffs' claim after they failed to specifically identify expert witnesses who would support their allegation that the hospital negligently granted credentials to the co-defendant physicians, as required by the hospital's interrogatories and the trial court's scheduling order. The Supreme Court reversed, holding that the sanction was too severe to alleviate the prejudice caused by the failure to timely disclose the plaintiffs' experts. *Burnet*, 131 Wn.2d at 497-98.

In *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011), the Supreme Court similarly reversed an order striking a personal injury plaintiff's medical experts on the ground that plaintiff failed to timely disclose them and failed to divulge the information required by King County LR 26(b). The Court held that the record did not show that the trial court considered "a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." *Blair*, 171 Wn.2d at 348 (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006)).

In *Magana*, upon which the trial court primarily relied here (CP 2901-04), the plaintiff had recovered an \$8 million judgment

against Hyundai and a co-defendant driver. On Hyundai's appeal, the case was remanded for a new trial on liability only. Before the retrial, the trial court entered an order compelling discovery of seat back failures in similar Hyundai vehicles. Six weeks before trial, Hyundai for the first time revealed nine reports of similar incidents – information that the plaintiff had not and could not have obtained from any other source.

After a four-day evidentiary hearing about the late disclosure, the trial court ordered Hyundai in default. It found that Hyundai had failed without reasonable justification to produce reports of prior incidents, that Magana was substantially prejudiced in preparing for trial because physical evidence underlying these reports was spoiled and forever lost, and that lesser sanctions such as a monetary fine, a continuance, striking counterclaims, and admitting into evidence all or some of the other similar incidents of seat back failure, would not cure that prejudice. *Magana*, 167 Wn.2d at 581-82, 591, ¶¶ 18, 41.

The *Magana* Court affirmed the sanction of default as narrowly tailored to the prejudice plaintiff would suffer in preparing its liability case for trial, because “[o]n remand, the *sole* issue was whether Hyundai was liable for the allegedly defective

occupant restraint system.” 167 Wn.2d at 589, ¶ 35 (emphasis in original, quoting 141 Wn. App. at 531 (Bridgewater, J., dissenting)). Hyundai’s failure to disclose prior defective seat backs prejudiced Magana’s ability to prove Hyundai’s liability for manufacturing a defective product. The sanction preventing Hyundai from contesting its liability under the Washington Product Liability Act was the least severe sanction that would cure that prejudice.

Here, in contrast, the trial court granted a default against AVCO even though plaintiffs possessed the claimed undisclosed evidence from another source and the evidence went only to notice and not to defect, causation, or comparative fault. The trial court’s findings of prejudice comparable to *Magana* cannot be sustained here. The trial court found that AVCO did not comply with prior orders because it did not produce discovery concerning AVCO’s notice of defective Delrin® floats, identifying a December 2005 e-mail exchange in which Precision’s employees inform AVCO that it has been rejecting as defective .5% of Delrin® floats for leakage. (FF 5, CP 2897-98; 464-68) Plaintiffs claimed they could not present evidence of knowledge and duty to warn because of this failure. But it was undisputed that plaintiffs had a copy of this e-mail exchange months earlier, when opposing summary judgment

and taking AVCO depositions. (CP 7822-23, 7894-98) Without analyzing how the claimed failure related to the issues in the case and whether prior sanctions remedied the claimed discovery violations, the trial court erred in finding that only the most severe sanctions – striking all of AVCO’s defenses, finding as a matter of law that engine failure was the sole cause of the deaths of Houston and her passengers, and imposing liability for punitive damages – were necessary.

The trial court imposed the most severe sanctions possible when lesser sanctions would have sufficed and indeed had already been imposed. The trial court’s “death sentence” did not fit the alleged discovery crime and must be reversed.

**2. The trial court’s findings of prejudice do not support striking the defense of comparative fault, which was wholly unrelated to allegedly withheld discovery relating to the failure to warn.**

The extreme sanction in this case went far beyond the *Magana* Court’s holding that an order of default was proper where the “sole issue” was the defendant’s liability for its own defective product. 167 Wn.2d at 589, ¶ 35. In this case, unlike in *Magana*, the parties also disputed the issue of comparative fault, including the critical issue of whether pilot error was a proximate cause of the

airplane crash. Even if AVCO's alleged failure to provide discovery affected plaintiffs' failure to warn claims, the trial court's findings of prejudice cannot support its refusal to allow AVCO to try the issue of "any comparative fault of the aircraft's pilot." (CP 2907)

This Court reviews de novo whether the trial court's findings support its conclusions of law. *Ives v. Ramsden*, 142 Wn. App. 369, 382, ¶ 21, 174 P.3d 1231 (2008). The trial court cannot strike a defense that is unrelated to the discovery violation at issue. See *Jones v. City of Seattle*, 179 Wn.2d 322, 338, ¶ 33, 314 P.3d 380 (2013) (trial court's discretion to impose severe sanctions "cabined by this Court's holdings in *Burnet* and its progeny"). The trial court's findings in this case do not support its conclusion that "the sanction of taking certain facts as established" "would serve some of the purposes of imposing sanctions but would still prejudice the plaintiffs in their ability to prove the elements of their case and/or would be the equivalent of . . . striking all of [AVCO]'s defenses, if any, on liability and causation." (CP 2904)

The trial court found that plaintiffs were prejudiced in their ability "to depose the liability lay and expert witnesses of [AVCO]," their inability "to use the documents at trial," and that the documents "go to the heart of the plaintiffs' theories of liability,

proof, causation and damages.” (CP 2904) Leaving aside that in fact plaintiffs fully deposed both lay and expert witnesses while in possession of the supposed withheld documents (RP 7822-23, 7894-98), and then used the documents not only on summary judgment but in both the compensatory and punitive damages trials, the trial court never explained why striking AVCO’s liability experts, or directing a finding that AVCO failed to warn the FAA of defective Delrin® floats, would have been insufficient to alleviate plaintiffs’ claims of prejudice.

Under Washington’s comparative fault scheme, whether the fault of another (including the individual whose estate pursues a claim) contributed to the injury is inextricably tied to the recoverable damages, and not just to any particular defendant’s liability. The jury’s comparative fault assessment involves consideration of “both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.” RCW 4.22.015. The plaintiff is entitled to judgment against each defendant only “in an amount which represents that party’s proportionate share of the claimant’s total damages.” RCW 4.22.070(1). The fault of the plaintiff “diminishes

proportionately the amount awarded as compensatory damages” recoverable by the plaintiff. RCW 4.22.005.

Because “Washington is a pure comparative negligence jurisdiction,” findings relating to negligence are separate and distinct from issues involving the plaintiff’s comparative fault. *Veit ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 117, ¶ 64, 249 P.3d 607 (2011). In *Veit*, the Court held that any error in excluding evidence relating to plaintiff’s failure to stop within the statutorily-prescribed distance from a railroad track was harmless because the jury found the defendant not negligent and failed to reach issue of plaintiff’s comparative fault. 171 Wn.2d at 117, ¶¶ 64-66. The *Veit* Court relied on the distinct and separate nature of factual issues related to a defendant’s liability for a breach of duty of care, and the plaintiff’s contributory fault under RCW ch. 4.22.

The facts in this case illustrate the distinct concepts of a defendant’s breach of a duty in tort and the reduction of that defendant’s liability for damages due to the comparative fault of another party. The trial court found that AVCO’s non-disclosure prejudiced plaintiffs’ “preparation for trial and presentation at trial, on issues of liability, causation, and punitive damages.” (CP 2900)

The trial court concluded that “it would be prejudicial to plaintiff . . . to ask the jury to compare the negligence or liability of the acts of [AVCO] to those of plaintiff Crews [sic-Houston] given the discovery violation in these cases.” (CP 2907) The trial court’s order imposed liability on AVCO for a third party’s aftermarket carburetor, based upon its finding that AVCO failed to disclose in discovery communications and documents relating to “carburetor floats and engine flooding caused by failure of floats.” (CP 2897)

But the trial court utterly failed to find any facts that allegedly undisclosed documents bore in any way on whether Houston was at fault. Instead, the trial court recognized “that the discovery sought by plaintiffs focused on issues surrounding the carburetor floats and engine flooding caused by failure of the floats” (CP 2897), and was not related to the other issues in the case.

AVCO was not arguing that Houston somehow caused the engine to fail. The trial court nevertheless prohibited AVCO from contesting not only plaintiffs’ theory of engine failure (including excluding its evidence that the propeller was still turning under engine power when Houston flew the plane into the side of a mountain), but also prevented AVCO from establishing that Houston was negligent in operating a small airplane in bad

weather, in failing to turn back or land when the weather closed in, and in diverting from her intended flight plan into mountainous terrain.

The trial court's failure to find that AVCO's discovery violation impeded plaintiffs' ability to address AVCO's assertion of pilot negligence is fatal to its February 5 dispositive sanctions order. The trial court failed to impose "the least severe sanction" necessary to cure the prejudice arising from AVCO's alleged discovery violations and to serve the purpose of CR 37. *Blair*, 171 Wn.2d at 348 (quoting *Burnet*, 131 Wn.2d at 495-96). Its order deprived AVCO not only of its right to reduce its damages for comparative fault, but also of its right to recover in contribution a share of AVCO's settlement with the Becker estate. *See* RCW 4.22.050. This Court should reverse the February 5 dispositive sanctions order because AVCO's alleged discovery violations had nothing to do with the defenses to liability that the trial court prevented AVCO from arguing to the court and the jury.

**C. The dispositive sanctions order precluded resolution of AVCO's substantive defenses barring plaintiffs' claims as a matter of federal preemption and under a federal statute of repose.**

Discovery sanctions remedy a party's lack of access to the *facts* required to prepare a case for trial. They do not determine the applicable *law*. Whether or not discovery sanctions were warranted at all, plaintiffs' lack of access to relevant facts cannot justify the imposition of liability that is not warranted by existing law. By striking all of AVCO's defenses, the trial court deprived AVCO of a determination that it had not breached any federally mandated standard of care under the Federal Aviation Act and that any claims against AVCO were in any event barred by the 18-year statute of repose in Section 2 of the General Aviation Revitalization Act of 1994 (GARA). Pub. L. 103-298, § 2(a), 108 Stat. 1552 (1994), codified at 49 U.S.C. § 40101 note, § 2(a). Based on these legal defenses to liability, this Court should vacate the judgment and dismiss plaintiffs' claims against AVCO.

**1. AVCO could not have been liable under the Federal Aviation Act, which preempts the field of aviation safety.**

Before imposing sanctions, the trial court held that federal law, and specifically the Federal Aviation Act, preempted state product liability law and governed the standard of care of an

aircraft engine manufacturer. But the trial court's February 5 dispositive sanctions order found AVCO liable as a matter of law for breach of the FAA regulations that define that standard of care. (CP 2906-07) Contrary to the trial court's dispositive sanctions order, however, AVCO could not be liable to the plaintiffs because none of the federal regulations identified in the trial court's February 5 dispositive sanctions order impose upon AVCO an ongoing duty to warn about a defective carburetor float that AVCO did not itself manufacture and was not part of the engine when it was sold in 1978.<sup>5</sup>

Because the federal government has extensively regulated the field, "federal law generally establishes the applicable standards of care in the field of aviation *safety*," thus preempting any state law standards. *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1005 (9th Cir. 2013) (emphasis in original). Under the doctrine of field preemption, state law still governs available remedies and other tort elements, such as causation, damages, and choice of law, but only if a plaintiff can establish the breach of a standard of care under

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<sup>5</sup> AVCO raised the federal preemption defense in its August 2012 summary judgment motion (CP 5457-62), and in a renewed motion for summary judgment based on plaintiffs' expert's testimony that AVCO did not violate the federal regulations that had been identified in Judge Benton's summary judgment order of September 25, 2012. (CP 10961-69) The trial court never ruled on this renewed motion.

federal law. *See Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 376 (3rd Cir. 1999). The failure to identify a federal standard of care is fatal to an aviation products liability claim. *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 794-95 (6th Cir. 2005) (upholding grant of summary judgment on failure to warn claim because the FAA did not require the manufacturer to maintain a database to track gyroscope malfunctions, as the plaintiff claimed it should have), *cert. denied*, 547 U.S. 1003 (2006).

AVCO breached no federal standard of care as a matter of law. Each of the regulations identified by the trial court (CP 2898, 2906) apply to the design and construction of an engine, *e.g.*, 14 C.F.R. §§ 33.15, 33.35, at the time it is installed, 14 C.F.R. § 33.4, or delivered. 14 C.F.R. § 21.50. Even if these regulations were then in effect,<sup>6</sup> it is undisputed that AVCO's engine was not defective at the time it left AVCO's control in 1978.

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<sup>6</sup> Most of the regulations relied upon plaintiffs below are Federal Aviation Regulations (FARs), codified in volume 14 of the Code of Federal Regulations, applicable to the certification and design of aircraft engines. But the certification basis for the O-320-H2AD engine was not these FARs but CAR 13-4, Part 13 of the Civil Air Regulations, Amendment 4, which predate the FARs. (CP 7878, 7883-87) Wholly apart from the fact that plaintiffs did not identify any non-conformance or variance with any engine design or certification regulation, these later regulations are inapplicable to the Lycoming O-320-D2C model engine manufactured in 1978.

Plaintiffs alleged that AVCO, as the type certificate holder, failed to warn the FAA of defects in the aftermarket Delrin® float that Precision used in rebuilding the carburetor on this engine in 2000. (CP 7300, 7316-17) But here again neither plaintiffs nor the trial court identified a standard of care that could require AVCO to report an allegedly defective aftermarket part that it did not itself manufacture. *See* 14 C.F.R. §§ 21.3, 21.5.

As holder of the type certificate, AVCO “must report any failure, malfunction, or defect in any product or article *manufactured by it . . .*” 14 C.F.R. § 21.3 (emphasis added). As the type certificate holder for the engine, AVCO could not be responsible for reporting a defect in a rebuilt aftermarket carburetor manufactured by Precision that AVCO did not itself manufacture. *See Dalrymple v. Fairchild Aircraft Inc.*, 575 F. Supp. 2d 790, 797 (S.D. Tex. 2008) (14 C.F.R. § 21.3(a) applies only to the type certificate holder that manufactured the subject part or product determined to be defective); *Bain v. Honeywell Int’l, Inc.*, 167 F. Supp. 2d 932, 939-40 (E.D. Tex. 2001) (type certificate holder for helicopter was not the type certificate holder for the engine and was not required to report under 14 C.F.R. § 21.3).

No federal standard of care required AVCO to provide warnings to the FAA regarding a part that it did not manufacture and that someone else installed on an engine over 23 years after the engine left AVCO's control. The trial court erred in refusing to dismiss plaintiffs' claim as a matter of law based on federal preemption. At a minimum, this court should remand for the trial court to determine whether AVCO violated any standard of care mandated by federal aviation safety regulations governed AVCO's duties to plaintiffs.

**2. A federal 18-year statute of repose bars plaintiffs' claims against AVCO.**

GARA's statute of repose bars claims against an aircraft manufacturer arising from an accident occurring more than 18 years after the aircraft was delivered to its first purchaser:

No civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred . . . [18 years] after . . . the date of delivery of the aircraft to its first purchaser or lessee . . . .

GARA § 2(a)(1).<sup>7</sup> See also *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1112 (9th Cir. 2002). “A statute of repose proceeds on the basis that it is unfair to make someone defend an action long after a product is sold; it declares that ‘nobody should be liable at all after a certain amount of time has passed, and that it is unjust to allow an action to proceed after that.’” *Tillman v. Raytheon Co.*, 2013 Ark. 474, \*4 (2013) (quoting *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002)). Congress enacted GARA to address “enormous product liability costs,” which it found had caused “a serious decline in the manufacture and sale of general aviation aircraft by United States companies.” *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 213, ¶ 18, 254 P.3d 778 (2011).

GARA’s statute of repose starts to run anew only where the defendant manufacturer has itself produced a new component or part that is added to the aircraft, and only if that part causes injury or death. GARA § 2(a)(2). This “rolling provision” applies only to the actual physical manufacturer of replacement parts claimed to

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<sup>7</sup> AVCO raised the GARA statute of repose defense in its answer. (CP 4120-21) Plaintiffs clearly anticipated the defense, and Judge Spector expressly declined plaintiffs’ request to strike AVCO’s GARA defense in the September and November 2011 orders. (CP 755-56, 2056-59)

have played a causal role in the injury or death. *Pridgen v. Parker Hannifin Corp.*, 588 Pa. 405, 427-29, 905 A.2d 422, 437 (2006), *adhered to on reargument*, 591 Pa. 305, 916 A.2d 619 (2007); *Campbell v. Parker-Hannifin Corp.*, 69 Cal. App. 4th 1534, 1545-46, 82 Cal. Rptr. 2d 202, 209 (1999).

AVCO manufactured the engine in 1978 and is entitled to repose under Section 2(a)(1) of GARA for any products liability claims made against the engine. AVCO did not manufacture the rebuilt carburetor or the Delrin® float that allegedly caused the engine failure, so no new repose period restarts against AVCO under Section 2(a)(2) of GARA for products liability claims made against replacement parts manufactured by others.<sup>8</sup>

GARA's statute of repose protects AVCO, which did not supply any engine part since the engine's original manufacture in 1978. This Court should reverse and dismiss plaintiffs' claims

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<sup>8</sup> GARA contains an exception to the general rule of repose, known as the "fraud exception," that relieves a manufacturer of its statutory repose if a claimant pleads with specificity and proves a knowing misrepresentation, concealment, or withholding of required information from the Federal Aviation Administration that is causally related to the harm suffered. GARA, § 2(b)(1). "GARA places the burden on [the claimant] to plead facts with specificity and to prove the fraud exception applies." *Tillman v. Raytheon Co.*, 2013 Ark. 474, \*8 (2013) (citing *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 222, ¶ 37, 254 P.3d 778 (2011)). The GARA-protected part in this case is the engine manufactured by AVCO in 1978. Plaintiffs did not plead with specificity, much less prove, the exception as it relates to the GARA-protected engine.

because AVCO may not be held liable for an accident involving an engine it manufactured 30 years before the accident and for which it did not supply any replacement parts. At a minimum, this Court should remand with directions to consider AVCO's GARA statute of repose and federal preemption defenses on the merits.

**D. The trial court erred in imposing product liability and punitive damages without determining which state's law had the most significant relationship to plaintiffs' claims.**

The trial court's dispositive sanctions order also precluded any choice of law determination. Although federal law governs the standard of care, state law governs the remedies for breach of the standard of care. But the trial court failed to determine which state's law had the most significant relationship to such issues as liability and compensatory and punitive damages, summarily concluding that AVCO's "product was defective as designed and as manufactured under Federal standards, Pennsylvania and

Washington law . . .”<sup>9</sup> and that “[p]unitive damages are recoverable” as a matter of law in its February 5 dispositive sanctions order. (CP 2905) Even if AVCO was not entitled to judgment as a matter of law under applicable federal standards, the trial court erred in making these liability determinations without resolving the threshold choice of law issues presented by plaintiffs’ claims.

This Court reviews de novo the trial court’s choice of law determination. *Erwin v. Cotter Health Centers, Inc.*, 161 Wn.2d 676, 691, ¶ 26, 167 P.3d 1112 (2007). Where the claims are based on events that occur both in and outside the state of Washington, a Washington court must initially determine the applicable law by identifying the state that has the most significant relation to the issues presented. *See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 856, ¶ 30, 309 P.3d 555 (2013) (where “transactions at issue did not all occur in Washington, we must first determine the law applicable to each

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<sup>9</sup> In its September 25, 2012 summary judgment order, the trial court addressed only federal preemption and failed to identify which state’s remedial law would apply to plaintiffs’ claims. (CP 1997-98) On reconsideration of that order, AVCO argued that it was entitled to judgment as a matter of Pennsylvania law (if it applied), because it had not placed the rebuilt carburetor into the stream of commerce, and under Washington and Pennsylvania law because plaintiffs’ experts had identified no defect in the engine when AVCO placed it into the stream of commerce in 1978. (CP 2805-12) The trial court denied AVCO’s motion for reconsideration without explanation. (CP 17802-03)

claim.”), *rev. granted*, 179 Wn.2d 1008 (2014). See *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn. App. 823, 829, 61 P.3d 1196, *rev. denied*, 149 Wn.2d 1033 (2003); *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580-81, 555 P.2d 997 (1976); Restatement (2d) Conflicts of Laws § 145. Such a conflict of law analysis is necessary where there is a difference between two states’ applicable laws. See *Martin*, 114 Wn. App. at 828-29.

Here, plaintiffs’ product liability claims concerned a carburetor and engine that were rebuilt in Washington and installed on an aircraft owned in Washington that ultimately crashed in Washington. Plaintiffs asserted AVCO’s liability for design defects as the type certificate holder that approved the engine design and made decisions about warnings that it claimed were made at AVCO’s plant in Pennsylvania.

Although the complaint alleged conduct occurring in both Washington and Pennsylvania, the trial court held as a matter of law in its dispositive sanctions order both 1) that AVCO, and AVCO alone, was liable for compensatory damages as the manufacturer of a defective product, without determining which state’s product liability law provided a remedy to plaintiffs, and 2) that AVCO was liable for punitive damages, without identifying the state that had

the most significant relationship to the conduct at issue. By refusing to engage in any choice of law analysis, the trial court offended the public policy of each state.

**1. AVCO was neither a product manufacturer under Washington’s Product Liability Act nor a product seller under Pennsylvania common law.**

Only a product “manufacturer,” as defined by statute, may be subject to liability under Washington’s Product Liability Act. RCW 7.72.010(2). Only a product “seller” may be liable under the common law of products liability in Pennsylvania. *Davis v. Berwind Corp.*, 547 Pa. 260, 690 A.2d 186, 190 (1997). Here, AVCO manufactured and sold an aircraft engine in 1978. But AVCO did not manufacture, sell, or supply the replacement part installed on its engine when the Precision carburetor was rebuilt 22 years later.

Neither Washington nor Pennsylvania products liability law has been extended to cover products that “were not designed, manufactured, specified or supplied” by a defendant, and which the defendant did not place in the stream of commerce. *See Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 396, ¶ 34, 198 P.3d 493 (2008); *Cafazzo v. Central Med. Health Servs., Inc.*, 542 Pa. 526,

519-30, 668 A.2d 521, 523-24 (1995) (strict liability under Restatement (2d) Torts, § 402A, which applies “only where the product is at the time it leaves the seller’s hands, defective” (comment g)). The trial court’s February 5 dispositive sanctions order ignored both states’ substantive product liability law, holding AVCO solely liable as a manufacturer for a defective product that it did not make *or* sell. The dispositive sanctions order also deprived AVCO of its right under Washington law to allocate fault to the actual manufacturer, sellers, and suppliers of the allegedly defective aftermarket carburetor. *See* RCW 4.20.015; *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 936, 15 P.3d 188 (2000), *rev. denied*, 144 Wn.2d 1004 (2001).

AVCO cannot be liable to plaintiffs unless applicable state law provides plaintiffs a remedy. This Court should direct the trial court on any remand to make a definitive choice of law determination by analyzing whether Washington or another state has the most significant relationship with the conduct alleged by plaintiffs and to determine whether that state’s applicable law provides a remedy where AVCO neither manufactured nor sold a defective product.

**2. The trial court failed to determine that another state had the most significant relationship, which is essential to overcome Washington's prohibition against punitive damages.**

While the trial court's authorization of punitive damages must be reversed along with its other sanctions, its refusal to engage in any choice of law analysis on the issue of damages in particular offended Washington's long-standing public policy prohibiting punitive damages. *See Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 50-56, 25 P. 1072 (1891). The trial court could not impose punitive damages absent a determination that Pennsylvania, and not Washington, has the most significant relationship to the conduct for which punitive damages are sought. *Compare Barr v. Interbay Citizens Bank of Tampa*, 96 Wn.2d 692, 635 P.2d 441, 649 P.2d 827 (1981) (punitive damages under law of Florida not available where Washington was the state with the most significant relationship with conduct for which punitive damages were sought), *amended*, 96 Wn.2d 692 (1982), *with Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 146-48, ¶¶ 17-19, 210 P.3d 337 (2009) (California had most significant interest in punitive damages for defective product manufactured in California, causing injury in Washington).

Here, plaintiffs sought to hold AVCO liable as the original engine manufacturer and holder of the type certificate that authorized the use of an allegedly defective Delrin® float based upon specifications provided by Precision, a Washington company. The trial court erred in authorizing punitive damages without engaging in any choice of law analysis. This Court should strike the claim of punitive damages or direct the trial court on remand to make a choice of law determination regarding whether Pennsylvania, Washington, or another state has the most significant relationship to the conduct at issue.

**E. In addition, AVCO is entitled to an offset for the reasonable value of plaintiffs' settlements with other defendants.**

The parties agreed that AVCO is entitled to an offset for amounts received in settlement from other defendants. Offset is required under RCW 4.22.060(2) to prevent a double recovery. See *Vanderpool v. Grange Ins. Ass'n*, 110 Wn.2d 483, 489, 756 P.2d 111 (1988) (“the amount paid under a release must be credited to the second tortfeasor . . .”). Offset is also required because the parties stipulated that it was appropriate. CR 2A. If this Court does not dismiss the claims against AVCO outright based on the substantive defenses the trial court refused to entertain, this Court must

confirm that the denial of offset is contrary to law, and remand with directions that any judgment entered after retrial must be reduced by amounts received in settlement from other defendants. In addition, because the \$600,000 received in settlements with other defendants has never been subjected to reasonableness hearings, AVCO reserves the right to argue the amount of the appropriate offset on any judgment.

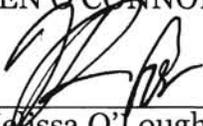
## **VI. CONCLUSION**

This Court should reverse the judgment and dismiss the claims against AVCO, which could not be liable under the applicable federal aviation standards because it did not manufacture the aftermarket carburetor that plaintiffs allege caused the accident and the federal statute of repose has long run. At a minimum, this Court should reverse the judgment and remand for a decision on the merits. The trial court violated AVCO's due process rights by imposing dispositive sanctions that were inconsistent with a prior judge's orders, the Discovery Master's findings, and unwarranted by the facts, and failed to impose the least severe sanction necessary to cure any prejudice arising from any discovery violation. This Court also should confirm that in any judgment entered against it AVCO

is in any event entitled to an offset for the reasonable value of Houston/Crews' settlements with other defendants.

Dated this 31<sup>st</sup> day of March, 2014.

COZEN O'CONNOR

By: 

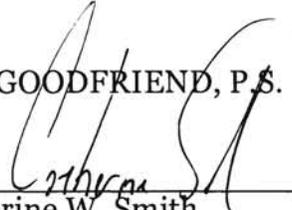
\_\_\_\_\_  
Melissa O'Loughlin White  
WSBA No. 27668

GORDON & REES LLP

By: 

\_\_\_\_\_  
Catherine Slavin

SMITH GOODFRIEND, P.S.

By: 

\_\_\_\_\_  
Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA No. 14355

*Admitted Pro Hac Vice*

Attorneys for Appellant AVCO

### DECLARATION OF SERVICE

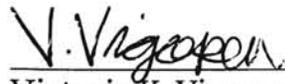
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 31, 2014, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Melissa O'Loughlin White Robert L. Bowman Cozen O'Connor 1201 Third Avenue, Suite 5200 Seattle, WA 98101-3071	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Catherine Slavin Gordon & Rees LLP One Commerce Square 2005 Market Street, Suite 2900 Philadelphia, PA 19103	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Thane W. Tienson Jennifer L. Gates Matthew K. Clarke Robert B. Hopkins Landye Bennett Blumstein, LLP 1300 S.W. 5th Ave., Suite. 3500 Portland, OR 97201-5641	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Mark S. Northcraft Andrew T. Biggs Northcraft Bigby & Biggs PC 819 Virginia St., Suite C-2 Seattle, WA 98101-4421	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

Kenneth W. Masters Masters Law Group PLLC 241 Madison Ave N Bainbridge Island, WA 98110-1811	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
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**DATED** at Seattle, Washington this 31st day of March, 2014.

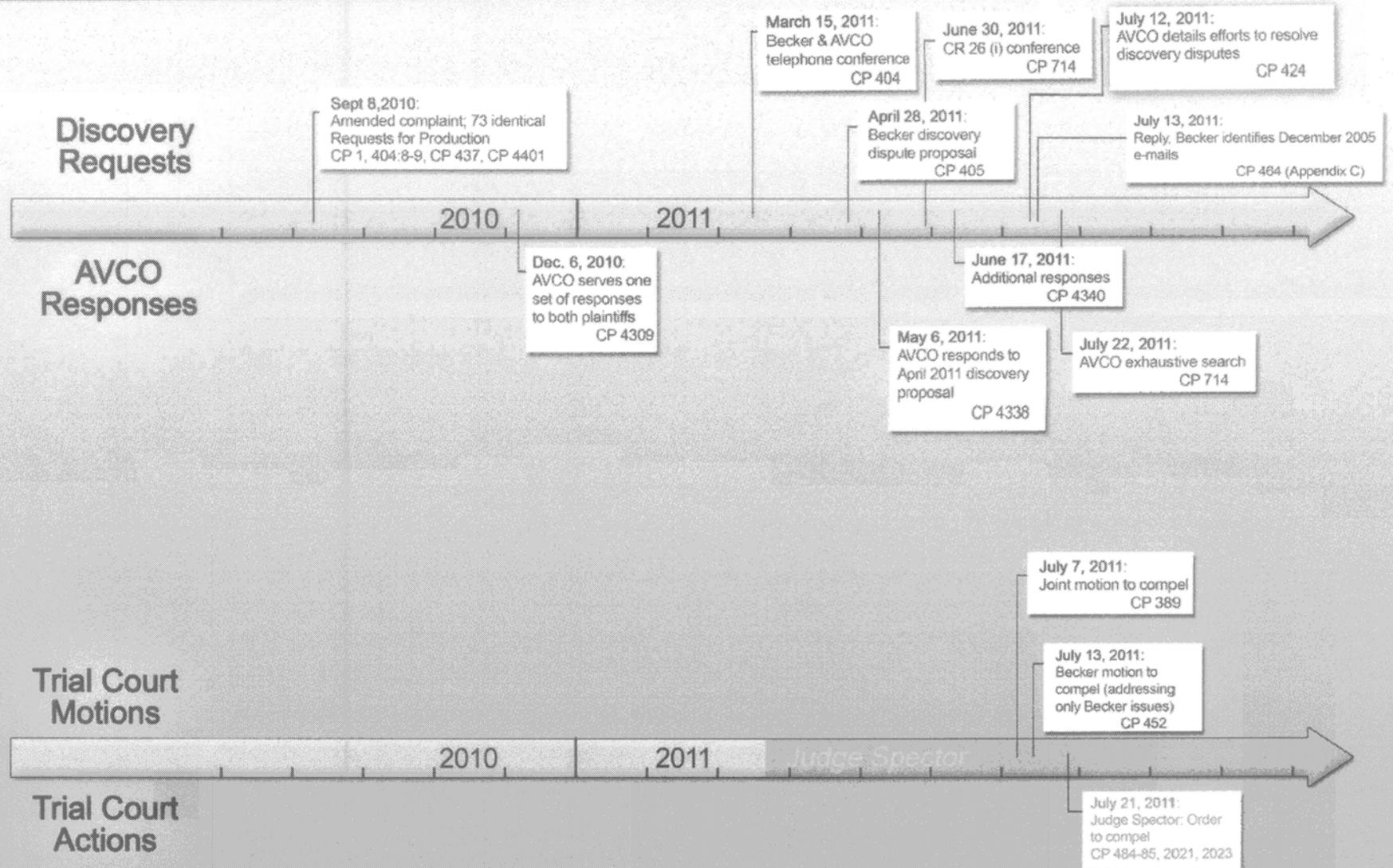
  
\_\_\_\_\_  
Victoria K. Vigoren



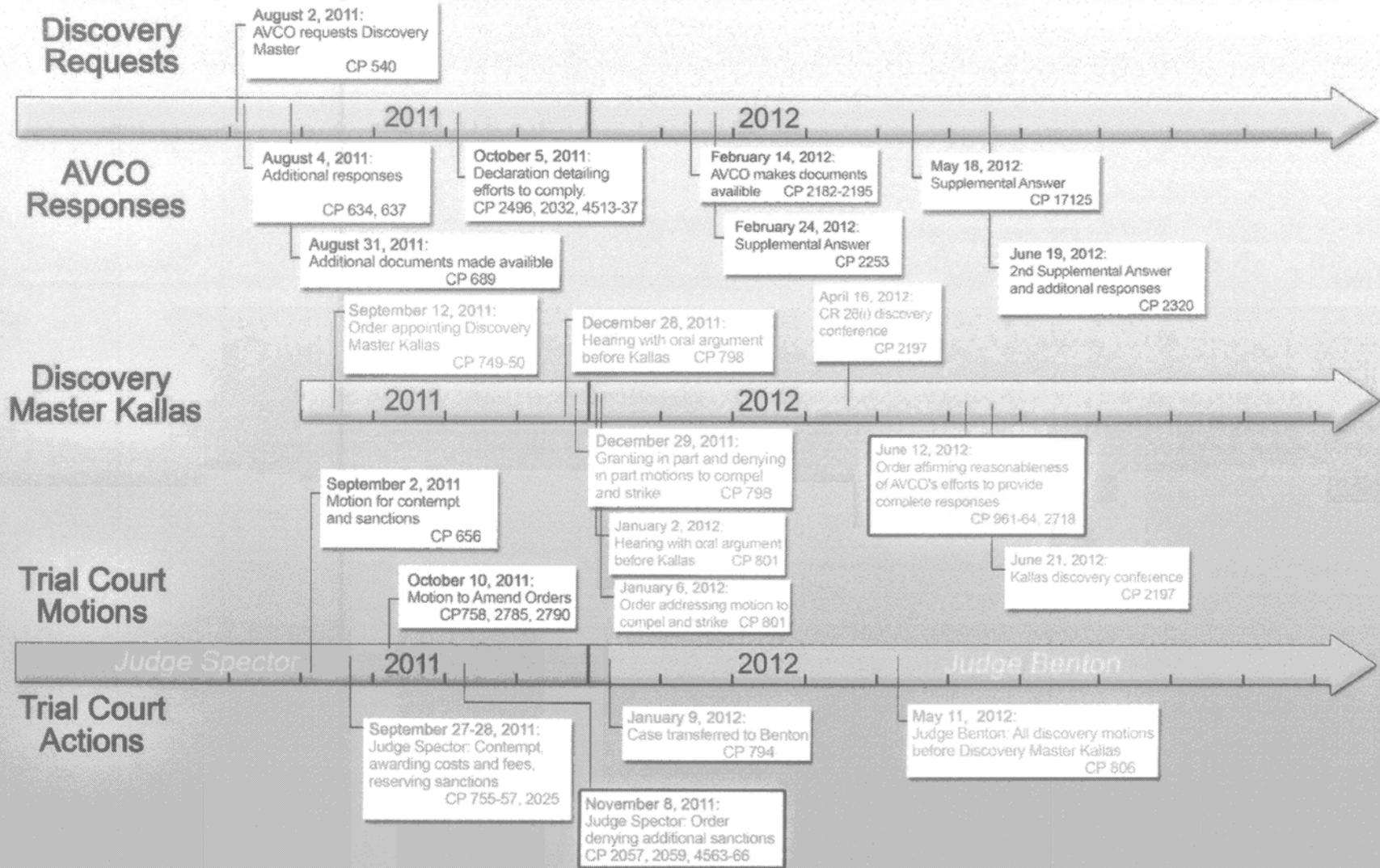
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 Image U.S. Geological Survey

Appendix A  
 (CP 125)

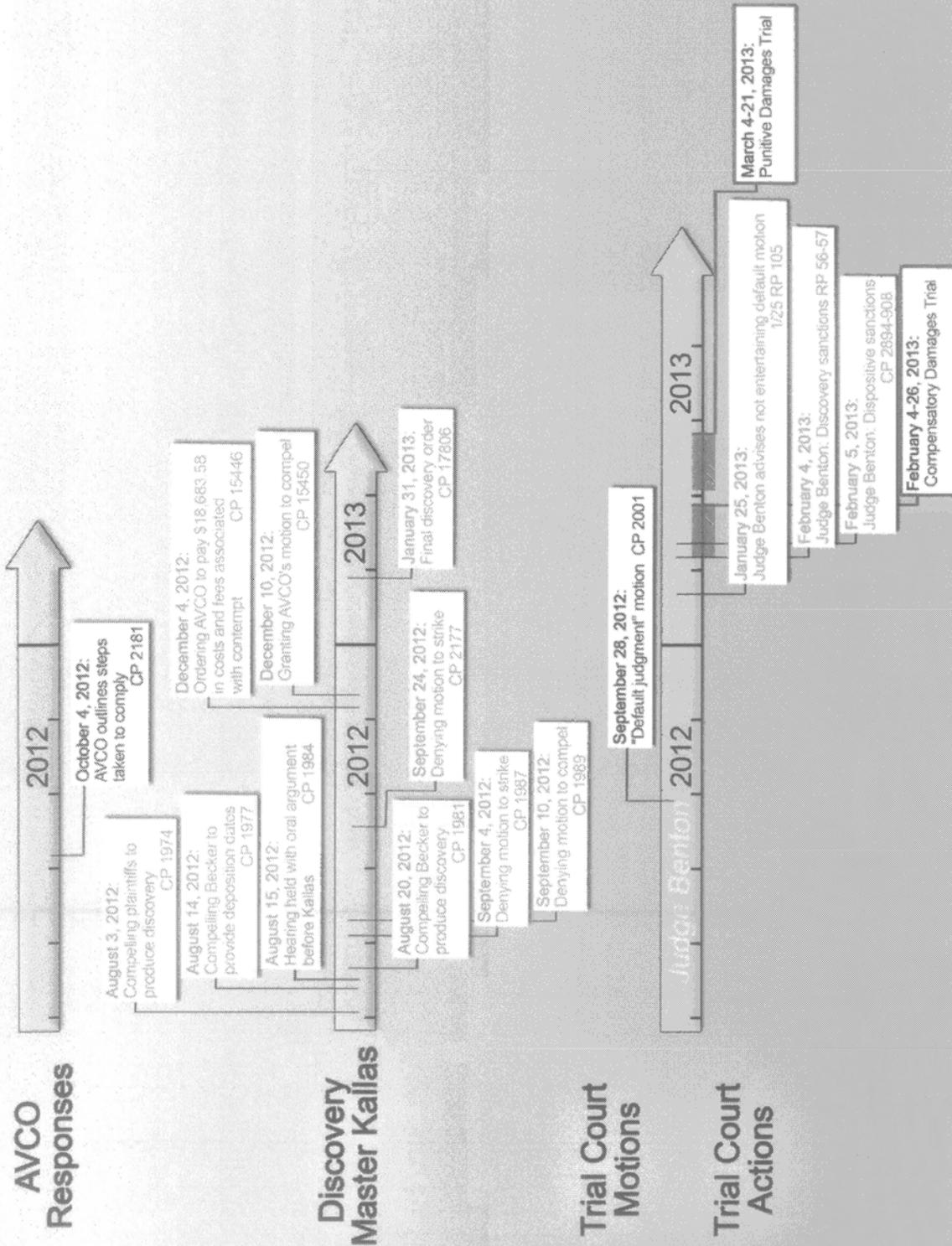
# Timeline of Proceedings: Houston/Crews v. AVCO



# Timeline of Proceedings: Houston/Crews v. AVCO



# Timeline of Proceedings: Houston/Crews v. AVCO



**From:** Harris, Noel <NjHarris@lycoming.textron.com>  
**Sent:** Wednesday, December 21, 2005 12:23 PM  
**To:** Roger Hall <rogerh@precisionairmotive.com>  
**Cc:** Wright, Trent <TWright@lycoming.textron.com>; Paul Kallgren <paulk@precisionairmotive.com>  
**Subject:** RE: Plastic Float Leaking - Concerns

---

Roger:

Thank you for your response to this issue.

With regard to item 5, I agree that a service letter would be a good precautionary measure. Lycoming would like Precision Airmotive to publish a service letter covering the float information, and then Lycoming will follow up with a duplicate publication.

-Noel

-----Original Message-----

**From:** Roger Hall [mailto:rogerh@precisionairmotive.com]  
**Sent:** Tuesday, December 20, 2005 4:19 PM  
**To:** njharris@lycoming.textron.com  
**Cc:** Wright, Trent; Tina Ross; "Scott Grafenauer"@srv2.dc1.textron.com; Jeffrey Sitter; Paul Kallgren; Peter Nielson  
**Subject:** Plastic Float Leaking - Concerns

Noel,

We have been monitoring the performance Delrin floats since their incorporation into production. We have, on several occasions, discussed the situation with leaking floats with personnel at Lycoming. Below you will find the answers to your questions.

The rejection rate for leaking Delrin floats is somewhere in the 0.5% range, and we have seen approximately 60 warranty claims for leaking floats in the last 3 years. This is out of over 13,000 floats delivered. We believe that this rejection rate is consistent with that seen in past years with brass floats. Both designs have always had some percentage of leaks which are not evident until after put into service. This is one of the reasons we undertook the design of a new float, which is now in production in the small MA carburetors.

Field complaints for leaking floats should always become warranty claims, as it is Precision's policy to replace all leaking floats regardless of time in service.

We have monitored the complaints associated with leaking floats and have found them to be relatively benign. In some cases the complaint is rough idle, in other cases, the carburetor drips fuel onto the ground after shutdown. There have been no accidents linked to a leaking float (of any design) that we are aware of. There have been reports of engine stoppages on rollout, and one recent in-flight stoppage. We have been unable to get any further information on the in-flight stoppage, but will continue to try.

As mentioned above, the situation will generally present itself as a rough idle, or by fuel dripping after shutdown.

We believe that the Delrin floats have a similar incidence of leaking as the previous brass float, and that no additional action is necessary. The Seattle ACO has recently reviewed the situation as a result of a report from one of the regional FSDO's and has come to the same conclusion. As a precautionary measure, a service letter could be written to remind operators to pay attention to idle performance and fuel leaks, and to investigate as soon as a problem is noted.

Precision will comply with this request.

## ***Roger Hall***

Operations Manager  
Precision Airmotive LLC  
rogerh@precisionairmotive.com  
(360)658-9926 ext 6750  
(360)651-8080 (fax)

**App. C**

**From:** Harris, Noel [mailto:NJHarris@lycoming.textron.com]  
**Sent:** Monday, December 19, 2005 4:47 AM  
**To:** Paul Kallgren  
**Cc:** Tina Ross; Wright, Trent  
**Subject:** Plastic Float Leaking - Concerns

Paul:

Per the attached file and our previous conversations, it is clear that the hollow plastic carb floats can leak, allowing fuel to enter the interior of the floats. Lycoming is concerned that this condition will lead to functional issues on engine installations. Please respond to the following specific concerns:

- 1) How many times has Precision found plastic floats with leaks?
- 2) How many field complaints has Precision received regarding leaking floats?
- 3) What affects will a leaking float have on the function of a carburetor?
- 4) What indications will an operator have when a float leaks?
- 5) What action needs to be taken to address the plastic floats currently in service (inspection, repair, replacement)?
- 6) Lycoming needs to be assured that any new reports of leaking floats will be communicated without delay.

-Noel

-----Original Message-----

**From:** Harris, Noel  
**Sent:** Tuesday, December 13, 2005 10:27 AM  
**To:** Paul Kallgren (E-mail); Tina Ross (E-mail)  
**Cc:** Wright, Trent; Zondory, Vicki; Kocher, Rick  
**Subject:** Plastic Float Leaking

Paul & Tina:

Please review attached file for details.

Noel Harris  
*Supplier Quality Engineer - Lycoming Engines*  
Tel: (570) 327-7263  
Fax: (570) 327-7287  
[njharris@lycoming.textron.com](mailto:njharris@lycoming.textron.com)

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**From:** Jeffrey Sitter <jeffs@precision>  
**Sent:** Tuesday, December 20, 2005 8:40 AM  
**To:** Roger Hall <rogerh@precision airmotive corporation.com>; Paul Kallgren <paulk@precision airmotive corporation.com>; Tina Ross <tinar@precision airmotive corporation.com>; Peter Nielson <petern@precision airmotive corporation.com>; Scott Grafenauer <scottg@precision airmotive corporation.com>  
**Subject:** RE: Plastic Float Leaking - Concerns

---

It is too bad that we have to answer in writing on such a touchy issue.  
All the info looks good from an engineering stand point.

JSS

Paul/Peter/Tina/Jeff/Scott,  
Here is my proposed response to Lycoming's questions. Please read through it and let me know what you think.

Noel,  
We have been monitoring the situation with leaking Delrin floats since their incorporation into production. We have, on several instances discussed the situation with personnel at Lycoming. Below you will find the answers to your questions.

We see a fairly steady rejection rate for leaking floats. The rate is somewhere in the 0.5% range, and we have seen approximately 60 warranty claims for leaking floats in the last 3 years. This is out of over 13,000 floats delivered. We believe that this rejection rate is consistent with that seen in past years with brass floats. Both designs have always had some percentage of leaks which are not evident until after put into service.

Field complaints for leaking floats should always become warranty claims, as it is Precision's policy to replace all leaking floats regardless of time in service.

We have monitored the complaints associated with leaking floats and have found them to be relatively benign. In some cases the complaint is rough idle, in other cases, the carburetor drips fuel onto the ground after shutdown. There have been no accidents linked to a leaking float (of any design) that we are aware of. There have been reports of engine stoppages on rollout, and one recent in-flight stoppage. We have been unable to get any further information on the in-flight stoppage, but will continue to try.

As mentioned above, the situation will generally present itself as a rough idle, or by fuel dripping after shutdown. We believe that the Delrin floats have a similar incidence of leaking as the previous brass float, and that no additional action is necessary. The Seattle ACO has recently reviewed the situation as a result of a report from one of the regional FSDO's and has come to the same conclusion. As a precautionary measure, a service letter could be written to remind operators to pay attention to idle performance and fuel leaks, and to investigate as soon as a problem is noted. Precision will comply with this request.

## ***Roger Hall***

Operations Manager  
Precision Airmotive LLC  
[rogerh@precisionairmotive.com](mailto:rogerh@precisionairmotive.com)  
(360)658-9926 ext 6750  
(360)651-8080 (fax)

**From:** Harris, Noel [mailto:NJHarris@lycoming.textron.com]  
**Sent:** Monday, December 19, 2005 4:47 AM  
**To:** Paul Kallgren  
**Cc:** Tina Ross; Wright, Trent  
**Subject:** Plastic Float Leaking - Concerns

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**Sent:** Tuesday, December 13, 2005 10:27 AM  
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**Subject:** Plastic Float Leaking

Paul & Tina:

Please review attached file for details.

Noel Harris  
*Supplier Quality Engineer - Lycoming Engines*  
*Tel: (570) 327-7263*  
*Fax: (570) 327-7287*  
*njharris@lycoming.textron.com*

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

ESTATE OF VIRGIL VICTOR BECKER, JR.,  
by its Personal Representative, Jennifer L. White,

Plaintiff,

vs.

AVCO CORPORATION, et al.,

Defendants.

Case No. 10-2-26593-7 SEA

~~Proposed~~ **ORDER DENYING  
DEFENDANT AVCO'S MOTION TO  
AMEND CONTEMPT ORDER**

PAUL THOMAS CREWS, as Personal  
Representative of the ESTATE OF BRENDA  
HOUSTON, and as Personal Representative of  
the ESTATE OF ELIZABETH CREWS, and in  
his individual capacity,

Plaintiff,

vs.

AVCO CORPORATION, et al.,

Defendants.

Case No. 10-2-26602-0 SEA

THIS MATTER having come on regularly for hearing before the undersigned judge of the above court upon the motion of Avco, Inc. to amend Orders for Sanctions and Contempt against it, and the court having fully considered the materials filed in favor and in opposition to the motion, including all briefs, all evidence submitted by the parties, all declarations,

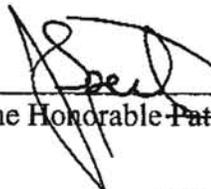
**ORIGINAL**

1 attachments, and exhibits; including all pleadings, declarations on file with the Court, it is  
2 hereby:

3  
4 ORDERED, ADJUDGED AND DECREED that Avco's motion to amend the contempt orders  
5 against it is DENIED.

6 Plaintiff Becker is entitled to costs and attorney fees in opposing Avco's motion, and may  
7 submit the same to the Court. ~~In addition, this court will supplement the reserved sections of~~  
8 ~~Judge Spector's Contempt Orders Dated September 27, 2011.~~ 

9  
10 DATED this 8 day of <sup>Nov</sup> October, 2011.

11  
12  
13   
14 The Honorable ~~Patrick Oishi~~

15 **JULIE SPECTOR**

16 Presented by:

17 AVIATION LAW GROUP PS

18  
19 /s/ Robert F. Hedrick  
20 Robert F. Hedrick, WSBA #26931  
21 James T. Anderson III, WSBA # 40494  
22 Attorneys for Plaintiff Estate of Virgil Victor Becker  
23  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

ESTATE OF VIRGIL VICTOR BECKER,  
JR., by its Personal Representative, Jennifer  
L. White,

Plaintiff,

v.

AVCO CORPORATION, et al.,

Defendants.

Case No. 10-2-26593-7 SEA

ORDER DENYING DEFENDANT  
AVCO'S MOTION TO AMEND  
CONTEMPT ORDER

PAUL THOMAS CREWS, as Personal  
Representative of the ESTATE OF BRENDA  
HOUSTON, and as Personal Representative  
of the ESTATE OF ELIZABETH CREWS,  
and in his individual capacity,

Plaintiff,

v.

AVCO CORPORATION, et al.,

Defendants.

Case No. 10-2-26602-0 SEA

THIS MATTER having come on regularly for hearing before the undersigned judge of the  
above court upon the motion of Avco, Inc. to amend Orders for Sanctions and Contempt against it,  
and the court having fully considered the materials filed in favor and in opposition to the motion,

Page | 1

ORDER DENYING  
DEFENDANT AVCO'S MOTION  
TO AMEND CONTEMPT ORDER

**ORIGINAL**

Judge Julie A. Spector  
King County Superior Court  
516 Third Ave, Seattle, WA 98104

1 including all briefs, all evidence submitted by the parties, all declarations, attachments, and exhibits;  
2 including all pleadings, declaration on filed with the Court, it is hereby:

3 ORDERED, ADJUDGED AND DECREED that Avco's motion to amend the contempt  
4 orders against it is DENIED.

5 Plaintiff Crews is entitled to costs and attorney fees in opposing Avco's motion, and may  
6 submit the same to the Court. ~~In addition, this court will supplement the reserved sections of Judge  
7 Spector's Contempt Order Dated September 27, 2011.~~ 

8  
9 Dated this 8th day of November, 2011.

10  
11   
12 \_\_\_\_\_  
13 Judge Julie A. Spector  
14  
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**Comparison of Houston/Crews' First RFPs addressed in Judge Spector's Orders to  
Becker's Third RFPs addressed in Discovery Master Kallas' June 12, 2012 Order**

<b>Houston/Crews' First RFPs (CP 4340-75) addressed in Judge Spector's Orders (CP 2021-24, 755-56, 2028-30)</b>		<b>Becker's Third RFPs (CP 17069-89) addressed in Master Kallas' June 12, 2012 Order (CP 961-64) ruling on motion to compel (CP 17034)</b>	
<b>REQUESTS RELATED TO REPORTS AND COMMUNICATIONS WITH FAA</b>			
27	All 14 C.F.R. § 21.3 reports to the FAA regarding the subject engine model, or any carburetor equipped with the AP float. <sup>[1]</sup> (CP 4353)	14	Identify all 14 CFR 21.3 reports that you made to the FAA related in any manner to polymer floats. (CP 17080)
28	Any and all communications, internal memoranda, or any other documents concerning, constituting, reflecting or relating to any consideration as to whether to make a report to the FAA under 14 C.F.R. § 21.3, or the FAA or NTSB pursuant to any other reporting requirements regarding the subject engine model, or any carburetor equipped with the AP float, even if it was ultimately decided not to make such report. (CP 4353)	20	All documents related to any consideration, review, any/or [sic] analysis of any type of reporting pursuant to 14 CFR 21.3, related to polymer float <sup>[2]</sup> problems or concerns, even if such report was not made. (CP 17082)
53	Any and all communications with the FAA regarding any problems with the AP floats utilized on MA-Series carburetors, or otherwise on carburetors on Lycoming engines, including, but not limited to, problems with their molding, the weld seam, and/or problems with fuel entering the float chamber or having the potential to enter the float chamber. (CP 4365)	27	All correspondence, documents, and all information provided to the FAA in response to or as part of, Airworthiness Concern sheets related in any manner to polymer floats. (CP 17083)

Appendix E-1

<sup>1</sup> Houston/Crews' First RFPs defined "AP float" as "the float made of 'advance polymer', 'Delrin', or 'plastic' material, or otherwise the float that is made of a white hollow material, or otherwise the 30-804 floats, or otherwise floats made of the same or substantially the same material as the subject float.

<sup>2</sup> Becker's Third RFPs define "polymer float" as "carburetor floats made of any of the following: DuPont™ Delrin® material, advanced polymer, polymer, plastic or similar material, including but not limited to floats that are made of a white hollow plastic type material of the same or substantially the same material as the subject 30-804 float."

<b>Houston/Crews' First RFPs (CP 4340-75) addressed in Judge Spector's Orders (CP 2021-24, 755-56, 2028-30)</b>		<b>Becker's Third RFPs (CP 17069-89) addressed in Master Kallas' June 12, 2012 Order (CP 961-64) ruling on motion to compel (CP 17034)</b>	
56	Any and all communications with the FAA regarding the potential for any problems with the AP floats utilized on MA-Series carburetors, or otherwise on carburetors on Lycoming engines, including, but not limited to, problems with their molding, the weld seam, and/or problems with fuel entering the float chamber or having the potential to enter the float chamber, to result in loss of engine power, engine failure, and/or an aircraft accident. (CP 4367)	28	All documents related to all communications, correspondence, and/or passing of information, between you and the FAA related in any manner to Epoxy floats. (CP 17084)
<b>REQUESTS RELATED TO WARNINGS AND OTHER COMMUNICATIONS WITH CUSTOMERS AND/OR MECHANICS</b>			
18	Any and all current and historical Marvel Schebler, Facet, Precision, or Volare service literature, including, but not limited to service bulletins, service alerts, and service letters applicable to the subject engine model. (CP 4350)	31	Your complete file, including all correspondence and communications, related in any manner to what ultimately was called SIL MS-11. (CP 17084)
		32	Your complete file, including all correspondence and communications, related in any manner to what ultimately was called SIL MS-12. (CP 17084)
		33	Your complete file, including all correspondence and communications, related in any manner to what ultimately was called MSA-13. (CP 17085)
		35	All documents related in any manner to any consideration given as to what the effect might be on warranty claims of any type of service instruction letter, service bulletin and/or airworthiness directive involving polymer floats. (CP 17085)
23	Any and all warranty claims, customer complaints, airframe manufacturer complaints or returns, or Service Difficulty Reports regarding MA-Series carburetors installed on Lycoming engines. (CP 4351)	16	All documents related to all communications, correspondence, and/or exchange of information with any foreign accident investigation agency or board related in any manner to polymer floats, including but not limited to leaking and/or float rubbing. (CP 17081)
24	Any and all warranty claims, customer complaints, airframe manufacturer complaints or returns, or Service Difficulty Reports regarding MA-4SPA carburetors installed on Lycoming engines. (CP 4352)	19	All documents related to any engine failure including engine stoppage caused by, or suspected to be caused by, the failure of polymer floats, including but not limited to leaking and/or float rubbing, whether in flight or on the ground. (CP 17081)

<b>Houston/Crews' First RFPs (CP 4340-75) addressed in Judge Spector's Orders (CP 2021-24, 755-56, 2028-30)</b>		<b>Becker's Third RFPs (CP 17069-89) addressed in Master Kallas' June 12, 2012 Order (CP 961-64) ruling on motion to compel (CP 17034)</b>	
25	Any and all warranty claims, customer complaints, airframe manufacturer complaints or returns, or Service Difficulty Reports regarding any malfunction, failure, or nonconformity of any AP float on any carburetor installed on a Lycoming engine, including, but not limited to any weld seam problems with the float, or fuel leaking into the float. (CP 4352)	21	All documents reflecting or relating to warning users of carburetors with polymer floats about dangers, including but not limited to the danger of fuel leaking into a float pontoon, and float rubbing. (CP 17082)
26	All documents, or communications with anyone, relating to any actual, reported or suspected malfunctions, defects, misoperation, complaints, or other problems with the MA-Series carburetors, or with any AP float on any carburetor installed on a Lycoming engine. (CP 4352)	35	All documents related to any engine failure including engine stoppage caused by, or suspected to be caused by, the failure of polymer floats, including but not limited to leaking and/or float rubbing, whether in flight or on the ground. (CP 17081)
40	Any and all documents which in any manner relates to warnings with respect to the propensity or likelihood of carburetor malfunctions and/or failures on Lycoming engines, or loss of engine power or engine failure occurring in Lycoming engines as a result of the malfunction or failure of an MA-Series carburetor. (CP 4358)	42	All documents related in any manner to any consideration given as to what the effect might be on warranty claims of any type of service instruction letter, service bulletin and/or airworthiness directive involving polymer floats. (CP 17085)
44	Any and all documents that refer and/or relate to communications between Precision or Lycoming, and any and all owners, operators, maintenance shops, the FAA, the NTSB, aircraft engine manufacturers, aircraft manufacturers, Precision, Volare, Facet, Marvel Schebler, Lycoming, or Teledyne that refer and/or relate to malfunctions of MA-Series carburetors, or to any engine malfunction or failure, or loss of engine power, as a consequence of any malfunction or defect in any MA-Series carburetors. (CP 4360)	43	All documents related to any procedures or policies AVCO has or had in place with respect to any malfunction reporting system related to any noted malfunction in field operations or testing of their engines and/or engine component parts. (CP 17087) All documents related to any data banks, either hard copy or computer based, that AVCO operates or operated to track field incidents or accidents. (CP 17087)
45	Any and all documents constituting, concerning, or related to correspondence or reports from operators and mechanics whose engines failed to obtain rated power, ran rough, or experienced power loss in aircraft with Lycoming engines utilizing MA-Series carburetors. (CP 4361)		
54	Any and all communications with anyone else, including aircraft owners, operators, mechanics, or the flying public regarding any problems with the AP floats utilized on MA-Series carburetors, or otherwise on carburetors on Lycoming		

<b>Houston/Crews' First RFPs (CP 4340-75) addressed in Judge Spector's Orders (CP 2021-24, 755-56, 2028-30)</b>		<b>Becker's Third RFPs (CP 17069-89) addressed in Master Kallas' June 12, 2012 Order (CP 961-64) ruling on motion to compel (CP 17034)</b>	
57	engines, including but not limited to, problems with their molding, the weld seam, and/or problems with fuel entering the float chamber or having the potential to enter the float chamber. (CP 4366) Any and all communications with anyone else, including aircraft owners, operators, mechanics, or the flying public regarding the potential for any problems with the AP floats utilized on MA-Series carburetors, or otherwise on carburetors on Lycoming engines, including, but not limited to, problems with their molding, the weld seam, and/or problems with fuel entering the float chamber or having the potential to enter the float chamber, to result in loss of engine power, engine failure, and/or an aircraft accident. (CP 4367)		
60	Any and all communications with anyone else, including aircraft owners, operators, mechanics, or the flying public as to the effect of float weights on aircraft engine performance, or the effect of an AP float pontoon becoming filled with fuel, on aircraft performance. (CP 4368-69)		
69	Any and all communications with anyone else, including aircraft owners, operators, mechanics, or the flying public regarding any other carburetor defects, malfunctions, or potential malfunctions, or their effect on engine performance. (CP 4372)		
<b>REQUESTS RELATED TO CARBURETORS AND CARBURETOR FLOATS</b>			
12	Any and all design specifications, engineering drawings, engineering orders, engineering change orders, and parts designations and specifications for the subject engine model, or for the MA-4SPA carburetor on any Lycoming engine. (CP 4347)	25	All documents related in any manner to all inspection, investigation, correspondence, testing, review, analysis, responsive and/or remedial steps performed or taken by you, or by others of which you are aware of, related in any manner to epoxy floats. (CP 17083)
13	Any and all materials specifications for MA-4SPA carburetors installed on Lycoming engines, including any and all revisions thereto. (CP 4347)	30	All documents related to development, design, and testing of the Epoxy floats from 1995 to 2005. (CP 17084)

<b>Houston/Crews' First RFPs (CP 4340-75) addressed in Judge Spector's Orders (CP 2021-24, 755-56, 2028-30)</b>		<b>Becker's Third RFPs (CP 17069-89) addressed in Master Kallas' June 12, 2012 Order (CP 961-64) ruling on motion to compel (CP 17034)</b>	
14	Any and all manufacturing specifications for MA-4SPA carburetors installed on Lycoming engines, including any and all revisions thereto. (CP 4348)		
15	Any and all documents constituting any changes in the MA-Series carburetors manufacturing process or standards, materials utilized, or design, as a result of any reported malfunctions or failures. (CP 4348 )		
42	Any and all documents constituting, concerning, or relating to the incorporation of brass floats, composite floats, or AP floats in MA-Series carburetors. This request shall include, but not be limited to, engineering drawings and revisions thereto, engineering change notices, and correspondence and inter-departmental memorandum relating thereto, and any approval or rejection of such changes by Lycoming. (CP 4359)		
49	Any and all documents concerning, reflecting, documenting, studying, or setting forth the cause or probable cause of any problems or issues with the AP floats, including any problems with the molding, any problems with the welding or the weld seam, or any problems with fuel entering the float chamber. (CP 4363)	12	Identify all steps taken by you to warn owners and/or users of polymer floats about float rubbing. (CP 17079)
52	Any and all documents evidencing Lycoming's knowledge that the AP floats utilized on MA-Series carburetors, or otherwise on carburetors on Lycoming engines, had problems with their molding, the weld seam, and /or problems with fuel entering the float chamber or having the potential to enter the float chamber. (CP 4365)	13	Do you agree that a leaking polymer float can cause float rubbing and engine failure in flight? If not, state in detail all facts, and identify all documents and witnesses that support this contention. (CP 17079)
55	Any and all documents evidencing Lycoming's knowledge that any problems with the AP floats utilized on MA-Series carburetors, or otherwise on carburetors on Lycoming engines, including, but not limited to, problems with their molding, the weld seam, and/or problems with fuel entering the float chamber or having the potential to enter the float chamber, could result in loss of engine power, engine failure, and/or an aircraft accident. (CP 4366)	14	All documents related in any manner to all investigation, study, testing, and analysis, of float rubbing. (CP 17080)
		15	All documents related in any manner to all efforts to remedy float rubbing. (CP 17080)
		17	All documents related to any and all aircraft incidents and/or accidents caused by, or suspected to be caused by, the failure of polymer floats, including but not limited to leaking and/or float rubbing. (CP 17081)
		18	All reports submitted by you related in any manner to actual, possible or potential failure of polymer floats. (CP 17081)
		19	All documents related to any engine failure including engine stoppage caused by, or suspected to be caused by, the failure of polymer floats, including but not limited to leaking and/or float rubbing, whether in flight or on the ground. (CP 17081)
		26	All documents related in any manner to all investigation,

<b>Houston/Crews' First RFPs (CP 4340-75) addressed in Judge Spector's Orders (CP 2021-24, 755-56, 2028-30)</b>		<b>Becker's Third RFPs (CP 17069-89) addressed in Master Kallas' June 12, 2012 Order (CP 961-64) ruling on motion to compel (CP 17034)</b>	
58	Any and all documents evidencing Lycoming's knowledge as to the effect of float weights on aircraft engine performance, or the effect of a AP float pontoon becoming filled with fuel, on aircraft performance. (CP 4368)		correspondence, testing, review, analysis, related in any manner to possible or potential engine flooding caused or contributed to by polymer floats, including but not limited to float leaking and float rubbing. (CP 17083)
67	Any and all documents evidencing Lycoming's knowledge of any other carburetor defects, malfunctions, or potential malfunctions, or their effect on engine performance. (CP 4371)		

ORIGINAL

**FILED**  
KING COUNTY, WASHINGTON

FEB 05 2013

SUPERIOR COURT CLERK  
BY Susan Bone  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

ESTATE OF VIRGIL VICTOR BECKER, JR.,  
by its Personal Representative, Jennifer L.  
White,

Case No. 10-2-26593-7 SEA

Plaintiff,

**ORDER GRANTING DISCOVERY  
SANCTIONS AGAINST DEFENDANT  
AVCO CORPORATION ("LYCOMING")**

vs.

AVCO CORPORATION, et al.,

Defendants.

Case No. 10-2-26602-0 SEA

PAUL THOMAS CREWS, as Personal  
Representative of the ESTATE OF BRENDA  
HOUSTON, and as Personal Representative of  
the ESTATE OF ELIZABETH CREWS, and in  
his individual capacity,

Plaintiff,

vs.

AVCO CORPORATION, et al.

Defendants.

THIS MATTER having come on for hearing on February 4, 2013 before Judge Monica J. Benton of the above Court upon Plaintiffs' Joint Motion for Default against defendant AVCO Corporation (hereinafter "Lycoming"), this Court hereby makes the following findings of Fact and Conclusions of Law in granting Plaintiffs discovery sanctions against defendant Lycoming:

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**I. INTRODUCTION**

This Court is familiar with the facts of this accident, plaintiffs' theories of liability and causation, and defenses presented by all of the parties, having presided over hearings on Motions for Summary Judgment by each of the parties currently in the case, including defendant Lycoming. The Court notes that this motion is being decided on the first day of scheduled trial, February 4, 2013 having given Lycoming the greatest amount of time to comply with the Contempt Orders issued against them.

**II. FINDINGS OF FACT: STATEMENT OF DISCOVERY SOUGHT,  
PRIOR ORDERS AND PROCEEDINGS**

1. With respect to this Ruling, the Court reviewed the pleadings on file with the Court, heard oral argument, examined pre-trial exhibits, and prepared to rule on Plaintiffs' Joint Motion for Default Judgment against Defendant Lycoming.

In addition the Court reviewed the following motions and their attached declarations and exhibits:

- Plaintiffs' Joint Motion to Compel Against Defendant Lycoming, and all motion papers therein, including Lycoming's Opposition, and Plaintiffs' Reply.
- Plaintiff Becker's Motion to Compel Against Defendant Lycoming, and all motion papers therein, including Lycoming's Opposition, and Plaintiff Becker's Reply
- Judge Spector's July 20, 2011 Order to Compel Defendant Lycoming Re; Plaintiffs' Joint Motion to Compel;
- Judge Spector's July 20, 2011 Order to Compel Defendant Lycoming Re; Plaintiff Becker's Motion to Compel
- Plaintiffs' Joint Motion for Contempt Against Defendant Lycoming, and all motion papers therein, including Lycoming's Opposition, and Plaintiffs' Reply.
- Plaintiff Becker's Motion for Contempt Against Defendant Lycoming, and all motion papers therein, including Lycoming's Opposition, and Plaintiffs' Reply.
- Judge Spector's September 28, 2011 Order Finding Contempt as to Defendant Lycoming On

1 Plaintiffs' Joint Motion For Contempt;

- 2 • Judge Spector's September 28, 2011 Order Finding Contempt as to Defendant Lycoming On  
3 Plaintiff Becker's Motion For Contempt
- 4
- 5 • Defendant Lycoming's Motion to Vacate Contempt Orders and all motion papers therein,  
6 including the previously filed Declaration of Catherine Slavin, and also including Plaintiffs'  
7 Opposition, and Lycoming's Reply.
- 8 • Plaintiffs' Joint Motion for Default Judgment Against Defendant Lycoming for Continued  
9 Failure to Comply with the Court's Discovery Orders and Contempt Orders (Or Alternative  
10 Relief as the Court Deems Just) and all motion papers therein, including Lycoming's  
11 Opposition, and Plaintiffs' Reply and Supplemental Reply;
- 12 • The Court reviewed but did not rely on the Declaration of Michael Withey.
- 13 • Defendant Lycoming's Motion to Strike the declaration of Michael E. Withey, and Plaintiffs'  
14 Joint Opposition thereto.

13 **A. Discovery Sought**

14 2. This case arises from an airplane accident that occurred on July 27, 2008 near McMurray,  
15 Washington. Central to plaintiffs' Complaints is the failure of the carburetor component of the  
16 aircraft's Lycoming engine, which plaintiffs allege was designed, tested and approved by  
17 Lycoming, who holds the FAA Type Certificate for the subject engine, which includes the  
18 carburetor. Plaintiffs allege that Lycoming is physically located in Williamsport, Pennsylvania,  
19 manufactures and designs Lycoming engines in Pennsylvania, and otherwise conducts its  
20 business pertaining to Lycoming engines in Pennsylvania, including carburetor design changes  
21 and continuing service information. Plaintiffs allege that the carburetor contained a polymer  
22 (also known as "Delrin") float, which, though it is not supposed to contain any liquids, contained  
23 fuel in one of its pontoons, and the float has also rubbed against the carburetor bowl wall,  
24 causing the Lycoming engine to fail. Plaintiffs' claims against Lycoming include design defect,  
25 in that the polymer float was defectively designed and approved, did not comply with  
26 fundamental safety features set forth in its patent to prevent an entire float pontoon from filling

1 with fuel, was designed too large to fit properly in carburetor bowls, the dimensions of which  
2 were known by Lycoming to vary and contain casting irregularities, and was designed in such a  
3 manner as to be susceptible to failing and causing in-flight engine flooding and failure. Plaintiffs  
4 also claim that Lycoming violated numerous Federal Aviation Regulations, and failed to warn  
5 the FAA and flying public of the safety issues and problems with the float. Plaintiffs also claim  
6 that Lycoming replaced the subject type Delrin float in 2005 with a superior epoxy float on all  
7 new, overhauled and rebuilt Lycoming engines due to safety issues, but did not take any steps to  
8 warn aircraft owners or operators in the field using the Delrin float of the design change or the  
9 reason for the change, or mandate that the same change be made to aircraft already using the  
10 Delrin Float, and failed to take steps to make the change.

11 3. This Court finds that plaintiffs sought discovery from Lycoming through the following  
12 documents at issue in this Order:

- 13 • Plaintiffs Becker's and Plaintiff Crew's First Requests for Production to Lycoming
- 14 • Plaintiff Becker's First Interrogatories to Lycoming
- 15 • Plaintiff Becker's Second Requests for Production to Lycoming

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17 **B. Subject Matter Areas of the Discovery**

18 4. This Court has fully reviewed the discovery at issue and finds that the discovery sought  
19 by plaintiffs focused on issues surrounding the carburetor floats and engine flooding caused by  
20 failure of the floats. It sought all information related to Delrin float leaking, rubbing, failure,  
21 flooding, and Lycoming's knowledge, review, communications, and response to these issues. The  
22 discovery also sought information about past failures to be considered in the context of  
23 Plaintiffs' underlying accident, and the likelihood of failure.

24 5. More specifically, this Court finds that there is substantial evidence that Lycoming has  
25 not complied with the Requests for Production:

- 26 1. As one example this Court finds that in December 2005, Lycoming participated in a

1 series of emails discussing the leaking Delrin Float issue, none of which Lycoming produced in  
2 discovery. The series of exchanged emails informs Lycoming of the significance of the Delrin  
3 float leaking problem. In the emails, Lycoming employees state that it is clear that the hollow  
4 plastic carb floats can leak, allowing fuel to enter the interior of the floats. The emails reflect that  
5 there was also a recent in-flight [engine] stoppage. The email also recognizes the danger of  
6 discussing the defects in writing: "It is too bad that we have to answer in writing on such a  
7 touchy issue." Mr. Kocher of Lycoming, who is on the email list, testified that the email chain  
8 would have been sent "up the [Lycoming] management chain to notify his superiors." Numerous  
9 Lycoming persons are listed on this email.

10 2. This Court finds that, even though this information was both requested in discovery  
11 and ordered to be produced, and was the subject of the contempt order, Lycoming has failed to  
12 produce any documents related to this email chain or the issues contained in it. This includes  
13 two attachments to the emails – neither of which was provided by Lycoming or any other party  
14 in discovery.

15 **C. Relation of Subject Matter to the Plaintiffs' Claims**

16 6. This Court finds that the discovery sought tied directly to Plaintiffs' burden of proof  
17 regarding Plaintiffs' allegation that Lycoming violated numerous federal regulations including:  
18 Civil Air Regulations 13.100, 113.101, 13.110, 14 CFR 21.3, 21.5, 33.4, 33.15, 33.35, and 33  
19 App. A. The discovery directly related to Plaintiffs' causes of action for Knowing  
20 Misrepresentation and Concealment of Required Information from the FAA, Negligence, Breach  
21 of Warranty and Lycoming's conduct to which plaintiffs' are seeking punitive damages under  
22 Pennsylvania law, where Lycoming is physically located, designs and manufactures Lycoming  
23 engines, and otherwise conducts its business activities pertaining to Lycoming engines.

24 **D. Prior Rulings by the Court Finding Willful and Prejudicial Contempt**

25 *Orders Granting Motions to Compel*

1 7. On July 20, 2011, Judge Spector of this Court granted plaintiffs' Joint Motion to Compel  
2 Against Lycoming as well as plaintiff Becker's Motion to Compel. The Court ordered  
3 Lycoming to fully respond to the discovery, and in with regard to the Becker motion, to "identify  
4 all documents by bate stamp, and to identify in each specific discovery request each responsive  
5 document by bate stamp."

6 ***Orders Granting Motions for Contempt***

7 8. Though Lycoming served Supplemental Discovery Responses, on September 28, 2011,  
8 Judge Spector found that Lycoming's Supplemental Responses did not comply with her previous  
9 Orders to Compel. The Court found, in each of the two contempt orders, that Lycoming was in  
10 willful contempt of the Orders to Compel, and that Lycoming's willful violation of the court's  
11 July 20, 2011 Orders had prejudiced and continued to prejudice the plaintiffs in their prosecution  
12 of the case against Lycoming.

13 9. In response to Lycoming's willful violation of Court Order, the Court ordered sanctions,  
14 including costs and fees related to the motion, and reserved ruling on more serious sanctions.  
15 With regard to Plaintiffs' Joint Motion, Lycoming was also ordered to respond with an affidavit  
16 of counsel detailing all efforts made to comply with the Order to Compel including, for each  
17 ordered request, a statement as to whether full and complete production has been made, and a  
18 detailed description of how the documents were identified and located.

19 ***Order Denying Lycoming's Motion to Amend the Contempt Order***

20 10. Lycoming's counsel filed a declaration as ordered, and Lycoming then filed a motion to  
21 vacate the Orders of Contempt against it. The motion was denied with an award of costs and fees  
22 to the plaintiffs. Judge Spector found that the declaration did not comply with the Order of  
23 Contempt on Plaintiffs' Joint motion. Lycoming did not supplement or amended its answers  
24 following the September 28, 2011 Contempt Orders.  
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1 **E. Lycoming Remains Non-Compliant With the Contempt Orders**

2 11. This Court finds that Lycoming continues to violate the Orders to Compel and Orders  
3 finding Lycoming in Contempt. Counsel for Lycoming was given opportunity to address these  
4 issues: (1) in responses to discovery; (2) in responses to Motions to Compel; (3) in responses to  
5 Motions for Contempt; (4) in its Motion to Amend Contempt Orders; (5) in its Opposition to  
6 Plaintiffs' Motion for Default, and (6) at hearing on February 4, 2013. Lycoming has had more  
7 than 16 months to comply with these discovery and contempt orders, and has willfully failed to  
8 do so.

9 12. This Court finds that Lycoming's justifications for non-production of relevant documents  
10 insufficient. For example, at oral argument, Lycoming broadly argued that its non-production of  
11 documents was justified under its document management policy, an exhibit which was not  
12 attached to any of its numerous oppositions. The Court examined the document, which was  
13 provided without affidavit or declaration and here finds the categories within it, combined with  
14 counsel's assignment of documents to the categories within it, to be overly vague.

15 13. This Court finds that Lycoming's continued disregard and violation of the discovery and  
16 contempt orders is without reasonable excuse and is willful. Lycoming deliberately failed to  
17 comply with the discovery at issue.

18 13. This Court further finds, consistent with Judge Spector, that Lycoming's non-compliance  
19 has and continues to substantially prejudice plaintiffs' preparation for trial and presentation at  
20 trial, on issues of liability, causation, and punitive damages.

21 14. Unaddressed at Oral Argument, though noted by Plaintiffs' in their Proposed Order, the  
22 Court also finds that defendant Lycoming has failed to Answer plaintiffs' Third Amended  
23 Complaints, despite this Court issuing an Order on August 24, 2012 requiring defendants to file  
24 Answers to plaintiffs' Third Amended Complaints within 10 days.

25 **F. Lycoming has Failed to Produce Documents Even as of The Time of Trial, Making a**  
26 **Fair Trial of the Case Impossible**

15. This Court finds that due to the non-production of relevant documents:

- 1 a. Plaintiffs have not had, and do not have, the requested relevant documents to depose the  
2 liability lay and expert witnesses of Lycoming. As of this late date, even if immediately  
3 disclosed, it would be unfairly and substantially prejudicial to require the Plaintiffs to  
4 review the willfully non-produced documents and re-depose the key witnesses and be  
5 prepared to use the documents at trial, which was scheduled to commence on February 4,  
6 2013, after a continuance on November 2, 2012.
- 7 b. Plaintiffs have not had and do not have do not have these documents to present at trial of  
8 this case which causes them significant prejudice.
- 9 c. That the documents sought go to the heart of plaintiffs' theories of liability, proof of  
10 causation, and damages.
- 11 d. That the prejudice to the plaintiffs, which was present when Judge Spector found that the  
12 willful violation of discovery obligations was prejudicial to plaintiffs, is even more  
13 pronounced now due to Lycoming's continued contempt over the more than 16 months  
14 since the Court's Orders.

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16 **III. CONCLUSIONS OF LAW**

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18 *Magana v. Hyundai Motor Am.*, 167 Wash. 2d 570, 220 P.3d 191 (2009) (*en banc*);  
19 *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 858 P.2d  
20 1054 (1993) (*en banc*); and, *Smith v. Behr Process Corp.*, 113 Wash. App. 306, 54 P.3d 665  
21 (2002) provide this Court with considerable guidance:

22 As stated in *Magana*, "Trial courts need not tolerate deliberate and willful discovery  
23 abuse." *Id.* at 576. Discovery sanctions should be proportional to the discovery violation and  
24 circumstances of the case. *Id.* at 590. The purpose of a sanction order is "to deter, to punish, to  
25 compensate and to educate." *Fisons* at 356.

26 As discussed in *Magana*, "The right of trial by jury shall remain inviolate." Const. art. I,

1 § 21; *see also* CR 38. “Due process is satisfied, however, if, before entering a default judgment  
2 or dismissing a claim or defense, the trial court concludes that there was ‘a willful or deliberate  
3 refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to  
4 prepare for trial.’ *Magana* at 591. When a trial court imposes one of the harsher remedies under  
5 CR 37(b), the record must clearly show that (1) one party willfully or deliberately violated the  
6 discovery rules and orders, (2) the violation substantially prejudiced the opposing party's ability  
7 to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would  
8 have sufficed. *Magana* at 584.

9 A trial should be based upon the truth and the evidence provided, not upon a fiction  
10 imposed by any party. As such:

11 Conclusions

- 12 A. The Court concludes defendant Lycoming’s discovery violations were willful as found by  
13 Judge Spector and have continued to be willful since her ruling has not been complied with.  
14 The Court’s prior Orders finding Lycoming in Contempt have already found willful  
15 violation, moreover, “A party's disregard of a court order without reasonable excuse or  
16 justification is deemed willful.” *Magana* at 584. Further the court finds that Lycoming has  
17 not presented a reasonable excuse or justification for its non-compliance, and has been in  
18 continuing contempt of Court since the original Orders finding Contempt in 2011.  
19 B. The Court concludes that the discovery violations caused the Plaintiffs substantial prejudice  
20 in conducting discovery of this case, in preparation for trial and for the trial of this case. The  
21 Court’s prior Orders already found that Lycoming’s non-compliance has substantially  
22 prejudiced and continues to substantially prejudice the plaintiffs in their prosecution of the  
23 case. The Court finds that Lycoming’s continued non-compliance continues and enhances  
24 that substantial prejudice.  
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1 C. The Court concludes that a fair trial of this case could not be held on the trial date set  
2 because of Lycoming's conduct and because the Plaintiffs have been deprived of the  
3 evidence, in the custody and control of the defendant material or central to Plaintiffs'  
4 liability theories and not collateral. The prejudice prong of the test looks to whether the  
5 aggrieved party was prejudiced in preparing for trial, not obtaining a fair trial. *Magana at*  
6 *589*. Responses to Interrogatories and production of the documents would have been  
7 demonstrably useful in the discovery stage, including the depositions taken of Defendant's  
8 lay witnesses, liability witnesses and experts, and could have been used at trial. That the  
9 *discovery master addressed other subsequent requests for production and interrogatories*  
10 *is incidental and not confusing as Lycoming propounds*. The purported overlapping of  
11 evidence produced as a result of the second submissions was disputed by the Plaintiffs' and  
12 the record does not support this assertion by Lycoming.

13 D. Court Rule 37(b)(2) outlines potential remedies available for the violations by Lycoming,  
14 "which range from exclusion of evidence to granting default judgment when a party fails to  
15 respond to interrogatories and requests for production." *Magana v. Hyundai Motor Am.*, 167  
16 Wash. 2d 570, 583-84, 220 P.3d 191, 197 (2009) (*citations omitted*).

17 Possible sanctions include: (1) ordering the facts subject to discovery established for  
18 purposes of plaintiffs' claim; (2) prohibit the disobedient party from asserting defenses (or  
19 claims), or prohibiting introduction of certain evidence, (3) striking pleadings or rendering  
20 default judgment. The Court has considered all of the discovery sanctions authorized by CR  
21 37(b)(2) and CR 26 as well as those propounded by the parties, and have concluded that only  
22 the sanction that suffices is as follows:

23 All of each plaintiff's allegations in their respective operative Complaints against  
24 defendant Lycoming are deemed admitted, and all of Lycoming's defenses, if any, are  
25 stricken. Lesser sanctions need to be considered by the court before entering default  
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1 judgment. Judge Spector did this and in the ensuing time period from the filing of this  
2 motion and ruling upon it, this Court considered that the weighty nature of the remedy  
3 together with the impact of the failure to comply with the Court's own contempt orders as  
4 required by case law. *Magana* at 584.

- 5 1. The sanction of monetary damages alone was considered by the Court. Such sanction,  
6 although it serves the purposes of compensation, does not adequately punish, deter or  
7 educate and is thus not ordered.
- 8 2. The sanction of striking certain witnesses, including Lycoming's expert witnesses was  
9 considered by the Court but the discovery violations would still prejudice the Plaintiffs in  
10 their ability to meet their burden of proving the elements of their causes of action,  
11 including causation and punitive damages.
- 12 3. The sanction of taking certain facts as established was also considered by this Court.  
13 Such sanction would serve some of the purposes of imposing sanctions but would still  
14 prejudice the plaintiffs in their ability to prove the elements of their case and/or would be  
15 the equivalent of deeming all plaintiffs' allegations in each of their respective Complaints  
16 admitted and striking all of Lycoming's defenses, if any, on liability and causation.
- 17 4. The sanction of default would serve every of the purposes of imposing sanctions for  
18 discovery violations and would be justified but the Court, in its discretion, believes that  
19 deeming all of each plaintiff's allegations in their respective operative Complaints against  
20 defendant Lycoming admitted, and all of Lycoming's defenses if any are stricken, is  
21 sufficient.
- 22 5. Other lesser sanctions, including limiting cross examination of Lycoming witnesses, not  
23 allowing arguments by counsel, would similarly allow Lycoming to profit from its own  
24 wrong because Plaintiffs would still be prejudiced in their preparation and trial of this  
25 case.  
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6. Given that any lesser sanction would be inadequate to satisfy the goals of discovery sanctions set forth in *Fisons* and *Magana*, the sanction which this court, in its discretion, imposes is to instruct the jury that:

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- a. Lycoming is the manufacturer of the subject Lycoming Engine including its carburetor and component parts, and is responsible for the continued airworthiness of these products;
  - b. Lycoming's product was defective as designed and as manufactured under Federal standards, Pennsylvania and Washington law, and was not airworthy and is unreasonably dangerous;
  - c. Lycoming violated CARs and FARs, including as CAR 13.100, 113.101, 13.110, FAR 21.5, 33.4, 33.15, 33.35, and 33 App. A.;
  - d. Lycoming failed to adequately warn ultimate users of its product of the design defects as alleged;
  - e. Lycoming's violations of the FARs, CARs and failure to warn was a proximate cause of the crash resulting in the death of the three occupants. The carburetor float leaked, and rubbed, causing the engine to flood and fail.
  - f. Punitive damages are recoverable, subject to further consideration, pre-trial.

The Court, therefore, will establish liability and causation in favor of the plaintiffs and against Lycoming, and leaves to the jury to determine the amount of compensatory and punitive damages to be awarded, pursuant to the instructions of this court. The Court will not order a finding for punitive damage value, but will allow the jury to hear evidence that two judges have found that Lycoming is in contempt and has failed to provide discovery identified above in violation of the Court Orders. This will be in addition to evidence Plaintiffs have been able to obtain related to this issue.

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3 **IV. ORDER**

4 Now, Therefore, the Court ORDERS AS FOLLOWS:

5 1. All plaintiffs' claims in their respective Complaints are deemed admitted as to  
6 Lycoming and Lycoming's defenses would be stricken even if it had asserted any.<sup>1</sup> This will  
7 serve to advance the important due process goals of insuring fair trials for all parties litigants, of  
8 punishing a party for violations of long standing court orders, of deterring other parties from  
9 acting as Lycoming has in this case, of educating the party litigants, bench, bar and the public  
10 about the importance of complying with discovery obligations and court orders, and in  
11 compensating the parties who are prejudiced by this conduct.

12 2. The trial of this case against Lycoming will be limited to a jury trial on the amount of  
13 compensatory and punitive damages suffered by the families of each plaintiff. This court will  
14 instruct the jury that:

15 a. Lycoming is the manufacturer of the subject Lycoming Engine including its carburetor  
16 and component parts, and is responsible for the continued airworthiness of these  
17 products;

18 b. Lycoming's product was defective as designed and as manufactured under federal  
19 regulations, Pennsylvania and Washington law, and was not airworthy and is  
20 unreasonably dangerous;

21 c. Lycoming violated federal regulations, including as Civil Air Regulations 13.100,  
22 113.101, 13.110, Federal Aviation Regulations (FARs) 21.5, 33.4, and Part 33 App. A.;

23 d. Lycoming, in violation of its continuing airworthiness instructions and warning  
24 obligations, FARs 21.5, 33.4, and Part 33, App. A, failed to adequately warn ultimate  
25 users of its product of the design defects as alleged;

26 e. Lycoming's violations of the federal regulations pertaining to its engine and its  
carburetor's design, and pertaining to its continuing airworthiness instructions and

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<sup>1</sup> Lycoming has not complied with the Court's August 24, 2012 Order requiring its Answer to be filed within 10 days, and has not asserted any defenses or denied any of plaintiffs allegations.

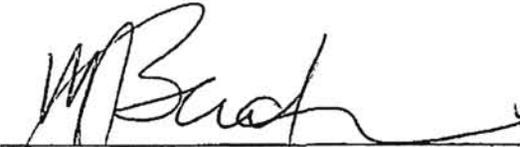
1 warning obligations, was a proximate cause of the crash resulting in the death of the three  
2 occupants. The carburetor float leaked, and rubbed, causing the engine to flood and fail;  
3 and therefore direct the jurors to find that the defendant Lycoming is liable to each plaintiff for  
4 damages in this case.

5 3. The Court will not instruct the jury on any comparative fault of the aircraft's pilot  
6 since it would be prejudicial to plaintiff Crews to ask the jury to compare the negligence or  
7 liability of the acts of Lycoming to those of plaintiff Crews given the discovery violation in these  
8 cases.

9 4. The Court will not instruct the jury that they are to determine whether any other parties  
10 are "at fault" in this case and allow Lycoming to argue that those other parties should be held  
11 liable for the plaintiffs' damages. Allowing Lycoming to try other parties at fault, in light of the  
12 discovery violations found here would prejudice plaintiffs' ability to prove that that Lycoming is  
13 solely liable for their injuries and damages. In addition, Lycoming is also precluded from  
14 presenting any liability experts at trial, as trial is solely on damages.

15 5. The Court will instruct the jury that it is to determine the amount of punitive damages  
16 to each plaintiff, based upon the instructions of the Court, and will also allow plaintiffs to  
17 introduce evidence, in a form to be provided by them and approved by this Court, that defendant  
18 Lycoming has violated the discovery orders of this court in the manner set forth above, that such  
19 violations were willful and prejudicial and has been held in contempt. Plaintiffs may also put on  
20 what evidence they do have of Lycoming's conduct to support the value of their punitive damage  
21 claim.

22 DATED this 5<sup>th</sup> day of February, 2013.

23  
24   
25 \_\_\_\_\_  
26 The Honorable Monica J. Benton

1 Presented by:

2 AVIATION LAW GROUP PS

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13 Matthew K. Clarke, *pro hac vice*

14 Of Attorneys for Plaintiff Paul Thomas Crews