

No. 70756-6-I

IN THE COURT OF APPEAL  
OF THE STATE OF WASHINGTON  
DIVISION I

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AVCO CORPORATION, et al.,

Appellant.

v.

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.

2014 JUL 10 PM 1:50  
COURT OF APPEALS  
STATE OF WASHINGTON  
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## TABLE OF CONTENTS

INTRODUCTION .....	1
STATEMENT OF THE CASE .....	2
A. Brenda Houston, her 10-year old daughter Elizabeth, and their family friend, Dr. Tory Becker, were killed on July 27, 2008, when a small aircraft piloted by Houston crashed.....	2
B. Houston was a very experienced pilot.....	5
C. Houston's husband Tom Crews alleged that engine failure caused the crash. ....	7
1. The product. ....	7
2. The defendants. ....	9
3. The Avco-approved carburetor was defective by design. ....	11
4. Avco's defective carburetor caused the engine to fail. ....	11
5. As the type-certificate holder, Avco is responsible for the engine and all parts integrated into the complete engine design. ....	13
6. Avco designed and tested the defective Delrin float. ....	15
7. Avco knew the Delrin floats were defective and that the steps it had taken to cure the defect were insufficient. ....	16
D. But in any event, the issue on appeal is Avco's discovery violations in the 16 months leading up to trial. ....	18
1. Avco ignores that the discovery sanctions involve only two out of the three sets of discovery requests.....	18
2. Issues with discovery began within months after plaintiffs filed their complaints and	

	served Avco with their First Requests for Production.....	20
3.	After months of delay, Avco agreed to the narrowed scope of the plaintiffs' First Requests for Production.....	20
4.	Avco breached its discovery agreement, and continued to refuse discovery as to Sanctions Discovery 1 and 2.....	21
5.	Plaintiffs moved to compel on the Sanctions Discovery.....	23
6.	The court granted plaintiffs' motions to compel, but Avco failed to comply, causing further delay. ....	23
7.	After repeated attempts to obtain Avco's compliance, plaintiffs moved for contempt.....	24
8.	Judge Spector found Avco in contempt, ordering compliance, but Avco refused, unsuccessfully moving to vacate the contempt before a different judge.....	25
9.	Leading up to trial, plaintiffs continued to seek compliance with the court's orders, to no avail.....	27
10.	In the midst of the discovery battle, Avco moved for summary judgment and plaintiffs filed their Third Amended Complaints, which Avco never answered.....	28
11.	Plaintiffs sought sanctions, including default, based on Avco's continued contempt.....	29
E.	The court struck Avco's defenses, if any, finding that Avco had wilfully and deliberately withheld discovery, prejudicing plaintiffs, and had failed to cure these defects in the 16 months since Judge Spector's contempt orders. ....	30
F.	Avco focuses on emails, but there are many other prejudicial examples of Avco's discovery violations. ....	34
G.	After sanctioning Avco, the court held a two-phase damages trial.....	38

ARGUMENT .....	40
A. Avco had ample notice that its continued contempt could result in severe discovery sanctions. (BA 38-46).....	40
1. Judge Spector's orders and plaintiffs' sanctions motion gave Avco ample notice that it could face sanctions for continued noncompliance. ....	41
2. Avco's specific arguments lack merit.....	44
B. The trial court imposed the least severe sanction that would cure the prejudice arising from Avco's years-long failure to provide discovery, leading right up to the beginning of trial. ....	47
1. No lesser sanction would have sufficed to cure the prejudice caused by Avco's recalcitrant failures to provide discovery.....	49
2. The trial court properly precluded Avco from arguing pilot error, an affirmative defense that Avco did not preserve.....	56
C. The trial court properly struck Avco's alleged affirmative defenses under GARA, where Avco failed to preserve these alleged defenses, Avco's discovery violations prejudiced plaintiffs' ability to litigate these issues, and Avco is wrong on the law. ....	60
1. Avco failed to preserve its alleged affirmative defenses.....	61
2. Avco's discovery violations badly prejudiced plaintiffs' ability to litigate these alleged defenses, justifying the trial court's order striking them – an order that Avco utterly fails to attack.....	61
3. Avco is wrong on the law regarding its waived and properly stricken alleged affirmative defenses.....	62
a. The trial court ruled only that federal standards of care preempt state standards.....	63

b.	Plaintiffs alleged that Avco violated the applicable federal standards.....	63
c.	GARA would not bar plaintiffs' claims because the GARA exception applies. ....	67
d.	Even if GARA could apply, the relevant 18-year limitation period had not run when plaintiffs filed their action. ....	68
D.	Avco's choice of law arguments are legally incorrect and irrelevant. ....	71
E.	As Avco well knows, Crews long ago agreed that Avco is entitled to an offset. ....	75
	CONCLUSION .....	75

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<b><i>Avco Corp. v. Cherry</i>,</b> No. 3:08 cv 402, 2008 U.S. Dist. LEXIS 100905 (E.D. Va. Dec. 15, 2008) .....	69
<b><i>Blair v. Ta-Seattle E. No. 176</i>,</b> 171 Wn.2d 342, 254 P.3d 797 (2011).....	49, 50, 51
<b><i>Burnet v. Spokane Ambulance</i>,</b> 131 Wn.2d 484, 933 P.2d 1036 (1997).....	<i>passim</i>
<b><i>Erwin v. Cotter Health Ctrs., Inc.</i>,</b> 161 Wn.2d 676, 167 P.3d 1112 (2007).....	71
<b><i>Gilstrap v. United Air Lines, Inc.</i>,</b> 709 F.3d 995 (9th Cir. 2013) .....	63
<b><i>Int'l Union, United Mine Workers of Am. v. Bagwell</i>,</b> 512 U.S. 821, 827, 114 S.Ct. 2552, 129 L. Ed. 2d 642 (1994) .....	43
<b><i>Johnson Forestry v. Natural Res.</i>,</b> 131 Wn. App. 13, 126 P.3d 45 (2005) .....	41
<b><i>Jones v. City of Seattle</i>,</b> 179 Wn.2d 322, 314 P.3d 380 (2013).....	57
<b><i>Lybbert v. Grant Cnty</i>,</b> 141 Wn.2d 29, 1 P.3d 1124 (2000).....	55
<b><i>Magana v. Hyundai Motor Am.</i>,</b> 167 Wn.2d 570, 220 P.3d 191 (2009).....	<i>passim</i>
<b><i>Pappas v. Hershberger</i>,</b> 85 Wn.2d 152, 530 P.2d 642 (1975).....	57, 61

<b><i>Smith v. Behr Process Corp.</i></b> , 113 Wn. App. 306, 54 P.3d 665 (2002) .....	41
<b><i>Stewart Title Guar. Co. v. Sterling Sav. Bank</i></b> , 178 Wn.2d 561, 311 P.3d 1 (2013).....	5, 6, 7, 8
<b><i>Teter v. Deck</i></b> , 174 Wn.2d 207, 274 P.3d 336 (2012).....	49, 50
<b><i>Veit v. Burlington N. Santa Fe Corp.</i></b> , 171 Wn.2d 88, 249 P.3d 607 (2011).....	60
<b><i>Wash. State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i></b> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	49
<b><i>White v. Kent Med. Ctr., Inc.</i></b> , 61 Wn. App. 163, 810 P.2d 4 (1991) .....	41
<b>Statutes &amp; Regulations</b>	
CAR 13.100(a).....	64
CAR 13.101 .....	64
CAR 13.110(a).....	64
C.F.R. ....	65
FAR 21.3.....	64
FAR 21.50 & 33.4 .....	64, 66
General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, § 1-4, 108 Stat. 1552; Pub. L. No. 105-102, § 3(e), 111 Stat. 2215; reprinted in Note, 49 U.S.C. § 40101 .....	<i>passim</i>
RCW 7.21.010(3).....	43
<b>Rules</b>	
CR 12(b)(6).....	28, 29

CR 26.....	48
CR 34(b) .....	21, 25
CR 37(d) .....	49
CR 50(b) .....	40
CR 59(b) .....	26
<b>Other Authorities</b>	
United States Const. Amend. XIV .....	40, 41

## INTRODUCTION

Brenda Houston, her daughter Elizabeth Crews, and family friend Dr. Tory Becker were killed when the rented plane Houston was piloting lost engine power and crashed. As the type-certificate holder on the subject engine, appellant Avco is responsible for the entire engine, including the defective Delrin float that caused the engine failure. Avco knew that its Delrin floats were dangerous.

Discovery became problematic within months after the Crews and Becker families filed suit. Even after orders compelling discovery and finding Avco in contempt, it did little to comply. For 16 months after being held in contempt, Avco did not supplement its contemptuous discovery responses, but repeated its old excuses. In the four months leading up to trial, the parties actively litigated plaintiffs' motion for default or other lesser sanctions.

The court struck Avco's affirmative defenses, if any, and ruled that plaintiffs' allegations against Avco would be deemed admitted. This sanction, and the appeal, is not just about withheld emails, as Avco repeatedly suggests. It is about Avco's recalcitrant and contemptuous failure to provide discovery, including its own tests confirming the Delrin-float defect, and its own report from a fatal plane crash caused by the defective float. This Court should affirm.

## STATEMENT OF THE CASE

Brenda Houston, her 10-year old daughter Elizabeth, and family friend, Dr. Tory Becker, were killed on July 27, 2008, when a 4-person aircraft piloted by Houston crashed near Arlington-CF airport. The Houston/Crews and Becker families (plaintiffs) sued, among others, appellant Avco Corporation, whose Lycoming division manufactured the airplane's engine and holds its type certificate.<sup>1</sup> CP 1, 4131. They alleged that the crash was caused by design defects in the engine's carburetor, causing the engine to flood with fuel and suddenly lose power. CP 7463-64, 7317-18, 7341-45. After 16-months of contemptuous discovery violations, the trial court ruled that it would instruct the jury that Avco was liable. CP 2894-908.<sup>2</sup>

**A. Brenda Houston, her 10-year old daughter Elizabeth, and their family friend, Dr. Tory Becker, were killed on July 27, 2008, when a small aircraft piloted by Houston crashed.**

Houston and Crews were married on September 13, 1994. RP 423, 426. Their son, Tommy, was 12 when his mother and sister

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<sup>1</sup> A type certificate is FAA design approval for a complete aircraft engine. 3/20 RP 168. Type certification is discussed *infra*, Statement of the Case § C.5.

<sup>2</sup> The sanctions order is attached as App. A.

were killed. RP 423. Their daughter, Elizabeth, was just 10 years-old when she died. *Id.*

Crews and Houston met when both were pilots flying for Pan-American. 2/13 RP 428, 431. They flew one or two flights together in 1989, but did not fly together again until about 1991. *Id.* at 431. They started dating soon after. *Id.*

In 1993, Houston began flying for United, where she was a pilot for the rest of her life. *Id.* at 428, 433-34. Crews flew 727s for a charter company until he reached mandatory-retirement age, 60-years old. *Id.* at 428.

Houston was a vivacious, vibrant, happy person, and a tremendous joy to be around. *Id.* at 425. "She made life fun." *Id.* "[E]verybody loved her." *Id.*

Beth "loved to love people, loved helping people." *Id.* at 448. Beth "had high aspirations and goals," Crews thinks she would have achieved. *Id.* at 448-49. Amongst them, Beth "wanted to be a pilot like her mother," whom she "loved dearly." *Id.* at 449.

In the days before the crash, Crews and Tommy went to Boy Scout camp while Houston and Beth vacationed on San Juan Island with Tory, Nancy, and Barbie Becker, close family friends. 2/13 RP 424-25. Houston rented the subject Cessna 172 to fly "the girls" up

on Thursday evening, July 24. *Id.* at 464-65. She flew back Friday evening to pick Tory up after work. RP 435.

On Sunday, July 27, the plan was for Houston to fly Beth and Tory home, and return for Nancy and Barbie, since the plane held only four people. *Id.* at 434-35, 467. Tommy, who enjoyed flying, would fly back with Houston. *Id.* at 467. They would meet at the Auburn Airport at 3:00 pm. *Id.*

The one-hour flight was 15-minutes late. *Id.* at 435. Crews called Nancy to see if the others had left on time. *Id.* Nancy thought they might be sightseeing. *Id.* Crews called back a half-hour later, telling Nancy that something must be wrong. *Id.* at 467.

Around 4:00 p.m., Crews called the Department of Transportation to initiate a search to determine whether the plane had landed at another airport. *Id.* at 435-36. When the FAA and DOT determined that the plane had not landed at any airport, Crews began pushing for a search, afraid the plane had gone down in Puget Sound. *Id.* at 436. Crews and Tommy went home, remaining in constant phone contact with the search team. *Id.*

Crews had to call Nancy and tell her he thought the plane had gone down. *Id.* at 436-37. Nancy and Barbara went straight to

Harborview, figuring someone there might have information. *Id.* at 437, 467. Crews and his family waited for any news. *Id.* at 437.

At around 8:30 p.m., the families received word that the crash had been located. *Id.* At 9:00 p.m., they got word that there were no survivors. *Id.*

**B. Houston was a very experienced pilot.**

Avco's brief reads as though the crash was undisputedly caused by pilot error.<sup>3</sup> BA 7-14. To the contrary, Crews argued below that engine failure was the sole cause of the crash. CP 7463-64, 7341-45, 7433-34, 8713, 15682-83. This dispute is beside the point – the appeal is not about alleged pilot error, but about Avco's willful discovery violations spanning 16 months leading up to trial. *Infra*, Statement of the Case § D.

But Crews must address Avco's one-sided and often inaccurate assertions. Since the facts are taken from summary judgment pleadings (BA 10) this Court takes all facts and reasonable inferences in the Crews' favor. ***Stewart Title Guar. Co. v. Sterling Sav. Bank***, 178 Wn.2d 561, 565, 311 P.3d 1 (2013).

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<sup>3</sup> Avco also argues, in its fact section, that its pilot-error defense was "wholly unrelated" to the withheld discovery. BA 9, 10. This false argument is addressed *infra*, Argument § B 2.

Houston held an FAA Airline Transport Pilot (ATP) multi-engine land certificate, the highest pilot certificate. CP 142. She also held commercial pilot privileges for single-engine land and single-engine sea operations. *Id.* She earned her single-engine rating in 1980, and her instrument rating in February 1981. *Id.* In the weeks before the crash, Houston flew over 60 hours in a Boeing 767. CP 143. She was properly certificated, rated, and current for the flight that ended up being her last. CP 15334.

Avco takes issue with the weather conditions in which Houston flew, essentially claiming that she could not see well enough to maintain Visual Flight Rules ("VFR") conditions. BA 10-14. Despite Avco's unsupported assertions, checking the weather does not mean Houston was "concerned about bad weather." BA 10. The plane was certified for operations in daytime, night time, visual, and instrument meteorological conditions. CP 15334. Houston flew the plane in VFR conditions until after the engine failed. *Id.* She did not violate "VFR minimums," and her flight pattern reflects aircraft maneuvering to maintain VFR conditions. *Id.*

**C. Houston's husband Tom Crews alleged that engine failure caused the crash.**

**1. The product.**

A gasoline-powered airplane engine needs fuel and air in appropriate amounts to produce power. CP 7450. The carburetor is the engine component that, when working properly, provides the correct amounts of fuel and air to the engine. *Id.*

Houston was flying a Cessna 172N aircraft, with a "type certificate[d]" engine manufactured in 1978. CP 408, 712, 2804, 7705. The engine, model number O-320-H2AD, used a float and needle-valve assembly that moves inside a carburetor bowl to maintain the correct fuel-delivery level, and a discharge nozzle that maintains the correct atomized – fine mist – form of fuel delivery for optimal engine combustion. CP 7449-50; 3/12 RP 74-75, 77. As fuel is consumed, the float drops, opening the valve, and allowing fuel to fill the carburetor bowl, raising the float, and closing the valve once the fuel reaches a certain height. CP 7450; 3/12 RP 84-88.

The engine was overhauled in 2001, when a rebuilt MA-4SPA carburetor was installed. CP 7452, 7459, 7706. The float in the MA-4SPA carburetor has two float pontoons made of Delrin, a thermo

plastic, or advanced polymer.<sup>4</sup> CP 7451; 3/12 RP 120. Each pontoon is made of two Delrin pieces welded together, a lower hollow piece, and a cap that fits over the top. 3/12 RP 120; 3/19 RP 26-27. The weld seam goes all the way around the top of the pontoons, a design intended to keep the two parts together, and keep liquid from entering the pontoons. 3/12 RP 121.

The Delrin float Avco approved was much larger than any previous float used for the MA-4SPA carburetors, but was installed in the same space. CP 7458. The Delrin float was too large to pass the prior clearance requirement, .081 inches between the carburetor float and the float-bowl wall. CP 7457-58. The purpose of this clearance requirement, in place since 1967, is to prevent “float-to-bowl-rubbing” and interference with proper float movement caused by known variances in the dimensions of the carburetor float and the carburetor bowl. *Id.* In other words, the clearance requirement is designed to prevent “serious and fatal accidents.” CP 7457.

Since the Delrin float was too big, Avco “scrapp[ed]” the .081 clearance requirement, “arbitrarily chang[ing] to .031.” CP 7457-58. “[Avco] failed to perform any analysis into whether the much smaller

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<sup>4</sup> The part number for the Delrin float is 30-804. 3/12 RP 53.

.031 inch clearance requirement . . . was sufficient to prevent the likelihood of float-to-bowl rubbing . . .” CP 7458.

If the float does not properly rise and fall, an improper fuel mixture will result. CP 7450. If the fuel level rises too high, the mixture will become “inordinately” out of balance, flooding the cylinders with unmetered and unatomized liquid fuel, causing loss of engine power. CP 7450; 3/12 RP 74-75, 77, 80-81, 84-89, 110-111.

## **2. The defendants.**

Avco is owned by Textron, an industrial conglomerate with over \$11 billion in annual revenues. CP 2003, 2033, 16979. Lycoming Engines is an unincorporated division of Avco.<sup>5</sup> CP 408. Lycoming has been building engines for general aviation (*i.e.*, non-commercial) aircraft for 80 years, and has built over 325,000 engines. CP 4514; 3/11 RP 86-87, 88. It does most, if not all, of Avco’s business. CP 7324.

Lycoming is the type certificate holder for the suspect engine, including its carburetor component. CP 7325; 3/12 RP 39, 57. Lycoming, which must approve any design changes, issued a change order on March 3, 1998, changing to the Delrin floats. CP

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<sup>5</sup> Except where necessary to avoid confusion, this Brief uses “Avco” to refer to both Avco and Lycoming.

7325; 3/12 RP 46-47, 120; Ex 108. It submitted its approved design change to the FAA the next day. CP 13781, 16979.

Synergy Systems, Inc., molded the plastic to form the Delrin float components.<sup>6</sup> CP 2803, 5499. Forward Technologies Industries, Inc. welded the float together. CP 2803, 7325. Precision Airmotive LLC manufactured and sold carburetors, rebuilding the carburetor at issue and installing the Delrin float in accordance with Avco's specifications. CP 2804, 5473, 5498, 7325. Aviall, Inc., received the rebuilt carburetor from Precision and sold it to Premier.<sup>7</sup> CP 2804, 5473.

Premier overhauled the engine in 2001, installing the rebuilt carburetor (MA-4SPA) with the Delrin float in compliance with Avco's type certificate. CP 433, 2804, 4164, 5743; 3/13 RP 112. Precision's engine-overhaul documents state the "engine was overhauled in accordance with [Avco] Manual . . . ." CP 433.

Crest Airpark, Inc., rented the plane to Houston. CP 7325. Auburn Flight Service, Inc., were the mechanics who last performed maintenance on the plane. CP 4136, 15690.

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<sup>6</sup> Becker sued Synergy but Crews did not. CP 7298, 7324-26.

<sup>7</sup> Aviall was not a party to the lawsuit. CP 2804.

**3. The Avco-approved carburetor was defective by design.**

The subject carburetor with the Avco-approved Delrin float was defective by design. CP 7461. The Delrin float body and lid cannot be reliably welded together to create the hermetic seal necessary to prevent fuel from leaking into the pontoon chamber. *Id.* The result is “an unacceptably high rate of leaking Delrin floats.” *Id.* This was “impossible to remedy absent design change to a different float material.” *Id.*

**4. Avco’s defective carburetor caused the engine to fail.**

Expert Richard McSwain, Ph.D, P.E. performed a materials engineering investigation and failure analysis for the subject carburetor. CP 7704; 3/11 RP 151-53. McSwain found that the right pontoon was filled with liquid to a “near-full condition.” CP 7706. There was evidence of bowl rub marks on the lid edge, and corresponding rub marks on the carburetor bowl, indicating an “in-service float/bowl interference contact condition.” CP 7707. McSwain concluded that the subject carburetor failed when fluid entered the float, caused by: (1) the right pontoon being inadequately sealed; and (2) the float-to-bowl contact being misaligned. *Id.* This will inexorably lead to engine failure. *Id.*; 3/19 RP 109.

Allen Fiedler is an accident investigator/consultant with expertise in aircraft accident investigation, aircraft maintenance, and piloting. CP 10155, 15332. Fiedler opined that the flooded pontoon in the Delrin float caused engine failure, which in turn caused the crash. CP 8540-41. He explained (CP 8541):

Once you introduce the aspect of the flooded pontoon to the rubbing of the pontoon on the bowl wall, the function of the float was diminished to a point where the carburetor could no longer properly meter the fuel to the engine which results in a loss of engine power.

Fiedler's inspection revealed (CP 15335):

- ◆ that the propeller lacked "signatures of rotational energy" at the time of impact, indicating that the engine was producing little or no power;
- ◆ that there was significant blue staining at the carburetor mounting area and the induction tubes leading to the cylinders, indicating "excessive fuel flow from the carburetor to the cylinders"; and
- ◆ that the carburetor airbox heat valve was set to "heat," indicating that Houston was responding to a loss of engine power.

Donald Sommer is a mechanical engineer, a licensed Airframe and Powerplant mechanic with inspection authorization, a pilot, and an expert in aircraft accident reconstruction and failure analysis. CP 7447-48. Sommer concurred with Fiedler's conclusion that the condition of the Cessna's propeller indicated it was not

turning at the time of impact. CP 7463, 7469. This is consistent with low engine power at impact. CP 15331.

Sommer also observed significant fuel staining around the engine's carburetor component, indicating flooding. CP 15331-32. There were rub marks present, indicating that the float bowl was sticking and the pontoon was containing fluid. *Id.* One of the Delrin float pontoons was almost completely filled with aviation fuel. *Id.* Sommer opined that the float leak and rubbing caused the carburetor to overflow, which caused the engine to flood and lose substantial power, in turn causing the crash. CP 7463-64.

Mark Platt, Avco's own employee who investigates plane accidents involving Avco products, investigated the subject accident. CP 5139. Platt did not attempt to determine if the Cessna lost engine power, but agrees that there is no evidence that the propeller was turning at the time of the crash, contradicting Avco's claims regarding causation. *Compare* BA 15 with CP 5140-41.

**5. As the type-certificate holder, Avco is responsible for the engine and all parts integrated into the complete engine design.**

To manufacture and sell aircraft engines, Avco must receive permission from the FAA in the form of a type certificate. 3/12 RP 35. A type certificate is a design approval for a complete aircraft

engine, reflecting the FAA's satisfaction that the engine design meets applicable requirements set forth in federal regulations. 3/12 RP 35; 3/20 RP 168.

Avco eschews responsibility for the defective carburetor, but its type certificate covers all engine parts that are integrated into the complete engine design, including those that Avco does not make itself, but obtains from suppliers. 3/20 RP 169. The type certificate is a convenient way to show that those parts have been approved by the FAA and substantiated by Avco. *Id.* Once Avco receives a type certificate, it sets forth the criteria for the engines and specifications. 3/12 RP 35.

Avco is responsible for the subject carburetor, although it is not the product seller. 03/11 RP 127-29. Avco specified the parts that must be installed in its engines to be "airworthy," so it is not outside the chain of distribution. *Id.* at 129. Indeed, multiple experts agreed that Avco is responsible for the entire engine, including the defective Delrin float:

- ◆ McSwain testified that Avco "controls" the carburetor. 3/19 RP 89, 92. Avco has manufacturing authority over the entire carburetor. *Id.* at 69. Although the FAA approves any changes to the float material, the change is under Avco's direct authority. *Id.* at 89.

- ◆ Sommer testified that as the type certificate holder, Avco “has complete responsibility for the safety [and] continuing airworthiness” of its engines, including the subject carburetor. 3/12 RP 65-66. Where, as here, Avco is aware of a defect and develops a “fix,” it is responsible to notify those who operate the product. *Id.* at 67-68.
- ◆ Fiedler concurred that Avco maintains design control and responsibility for the subject carburetor. CP 15332. If Avco had met its design duties and its obligations to provide critical safety information to the flying public and the FAA, then the crash would not have occurred. CP 15334.

#### **6. Avco designed and tested the defective Delrin float.**

Avco suggests that it cannot be liable for the Delrin float, claiming that Precision, who had a Parts Manufacture Approval (“PMA”) to manufacture carburetor replacement parts, “independently manufactured” the subject carburetor. BA 18-19. The PMA is a red herring. Precision obtained the PMA based on its licensing agreement with Avco. 3/20 RP 187-88. As Avco’s expert admitted, Precision is required to follow Avco’s design even for parts sold under its PMA. *Id.* at 186-188.

Once Avco completes an engine design, it tells a component assembler, here Precision, exactly what kind of carburetor it needs, providing drawings and specifications. 3/12 RP 42-43, 44. In the 1990s, Precision proposed to Avco a product “improvement” involving a float material change – the Delrin float. CP 2100. Contrary to its claim that parts made under Precision’s PMA “did not

go through AVCO's quality system," Precision gave Avco a Delrin float that Avco tested for 150 hours. *Compare* BA 18 *with* CP 2099.

Avco approved use of Delrin floats on March 3, 1998. CP 7678. Avco's Designated Engineering Representative approved the change the next day. *Id.*; 3/13 RP 138-39. Avco then issued an "engineering change notice," giving Precision express permission to use the Delrin float. 3/11 RP 93-94; 3/12 RP 48, 53.

**7. Avco knew the Delrin floats were defective and that the steps it had taken to cure the defect were insufficient.**

In 2002, Avco participated in the National Transportation Safety Board's ("NTSB") investigation of a fatal plane crash involving the Delrin float. 3/13 RP 29-30. On June 2, 2004, the NTSB concluded that the crash occurred when the engine lost power due to the Delrin float rubbing and sticking. *Id.* at 30-31, 33-34. Thus, by June 2004, if not sooner, Avco knew that the defective Delrin float could cause engine failure – and fatal crashes. *Id.* at 30-31, 34.

Avco did not produce the NTSB report, though plaintiffs' expert found it in his investigation. CP 2009, 2143-52. Avco never produced its own report from the 2002 crash. *Id.*

Just over one year later, in December 2005, Avco issued an engineering change order, "ECO" 26305, no longer permitting the

use of Delrin floats. *Id.* at 34-35; 3/11 RP 102, 105. But Avco knew that ECO 26305 would not be effective in addressing the dangerous floats in aircraft already in the field for two reasons: (1) ECOs are internal documents, so provide no notice to aircraft owners and maintenance facilities; and (2) ECO 26035 did not impact the 13,000 defective carburetors already in the field. 3/11 RP 105-06.

Avco never warned the field that the floats were defective, though it plainly should have. 3/13 RP 35-37. The floats were unsafe for flight (*id.* at 37-38):

[I]t's been proven that these floats are dangerous. There's a whole bunch of them out being flown in service. The people that are operating the aircrafts that have these floats installed in them need to be made aware of the dangerous nature of the floats and of the necessity to get the floats changed as quickly as possible before another accident occurs.

After Avco issued ECO 26035 it received reports of Delrin floats leaking, filling with fuel, and causing engine failure. 3/11 RP 106.

Avco put out a service bulletin on July 18, 2008, nine days before the crash. 3/11 RP 101. It was worded incorrectly. *Id.* Avco fixed the wording after the crash, on October 10, 2008. *Id.* at 102. The only reason Sommer could posit for Avco's delay was that it appeared to be waiting for its warranty to expire. *Id.* at 102-03.

**D. But in any event, the issue on appeal is Avco's discovery violations in the 16 months leading up to trial.**

**1. Avco ignores that the discovery sanctions involve only two out of the three sets of discovery requests.**

Although there were three different sets of discovery, the sanctions order implicates only two, which Avco repeatedly ignores. BA 2, 9, 30-34, 36, 42, 44-45, 48-49, 72. "Sanctions Discovery 1" was Crews' First Requests for Production to Avco, served on October 27, 2010, and Becker's First Requests for Production to Avco, served on October 13, 2010. See CP 4309, 4340, 4402, 4409. "Sanctions Discovery 2" was Becker's First Interrogatories to Avco, served on April 29, 2011, and Becker's Second Requests for Production to Avco, served on April 29, 2011. CP 598, 608, 610, 622, 4243. "Special Master Discovery" was Becker's Second Set of Interrogatories and Third Requests for Production to Avco, signed and presumably served on January 20, 2012. CP 2228, 2248. Crews was uninvolved in the Special Master Discovery.<sup>8</sup> *Id.*

Contrary to Avco's claim that plaintiffs filed contempt motions "despite the appointment of [the Special] Master," plaintiffs moved for contempt before the court appointed the Special Master on

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<sup>8</sup> Attached as Appendix B is a copy of Avco's timeline with the irrelevant Special Master Discovery redacted.

September 12, 2011. BA 24; CP 576, 656, 749-50. Avco requested a Special Master during a dispute over physical evidence, and plaintiffs' request to examine the wreckage. BA 24; CP 534-44, 539-40. This dispute was unrelated to the Sanctions Discovery. *Compare id. with* CP 598, 610, 4309, 4340, 4402.

Avco does not challenge the Special Master Discovery on appeal. BA 3-6. Plaintiffs' motions to compel and for contempt before Judge Spector, and their motion for default before Judge Benton, solely involved Sanctions Discovery 1 and 2.<sup>9</sup> CP 2735. The orders compelling discovery, finding contempt, and awarding sanctions, were for Sanctions Discovery 1 and 2. CP 2897, 2903.

Contrary to Avcos' many unsupported claims that the Special Master resolved discovery disputes implicated by the sanctions order, Judge Benton rejected Avco's assertion that the Special Master Discovery duplicated Sanctions Discovery 1 and 2. *Compare* BA 2, 9, 30-34, 36, 42, 44-45, 48-49, 72 *with* CP 2903. Plaintiffs explained below that Avco was intentionally trying to sow confusion by persistently comingling the different discovery issues. CP 2734.

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<sup>9</sup> Also not at issue on appeal is discovery between plaintiffs and other parties, including Synergy and Auburn. BA 3-6; CP 798, 1977. Avco's Statement of the Case and timeline contain numerous references to the Special Master Discovery and other irrelevant discovery. BA 29, 30, 32.

**2. Issues with discovery began within months after plaintiffs filed their complaints and served Avco with their First Requests for Production.**

Crews filed his First Amended Complaint on September 8, 2010, and Becker served her First Amended Complaint on October 13, 2010. CP 1, 4402. That same day, Becker served her Sanctions Discovery 1, and two weeks later, Crews served his Sanctions Discovery 1. CP 4402, 4409. Together, plaintiffs served 73 Requests for Production. CP 404, 4309-4333. Responding only to Crews on December 7, 2010, Avco objected to 68 of the Requests, in addition to its general objections. CP 4309-33.

On December 20, 2010, Avco filed a 12(b)(6) motion to dismiss Crew's punitive-damages claim. CP 2909. The Court consolidated the Becker and Crews cases while that motion was pending. CP 29-31, 4078.

**3. After months of delay, Avco agreed to the narrowed scope of the plaintiffs' First Requests for Production.**

The parties held a discovery conference on March 15, 2011, at which Avco agreed to provide a written proposal for narrowing the scope of Sanctions Discovery 1 by March 22. CP 404. Avco failed to meet this deadline, seeking two more days, and then "aiming for tomorrow." *Id.* Avco never sent a proposal. *Id.*

The court denied Avco's motion to dismiss on March 28, 2011. CP 384-85. Avco answered the First Amended Complaint two weeks later. CP 4103. On April 28, Crews (on behalf of all plaintiffs) proposed limitations for Sanctions Discovery 1, providing a seven-day deadline for Avco's response, and stating that the plaintiffs would move to compel if Avco continued to delay. CP 404-05, 4334-37. Plaintiffs narrowed many of their requests, but asked for "full production" in 35 requests. CP 4334-4337. The next day, Becker served Avco with her Sanctions Discovery 2. CP 4249.

On May 6, Avco accepted plaintiffs' discovery proposal, promising additional responses by May 20, 2011. CP 405, 4338. On May 10, 2011, plaintiffs each filed a Second Amended Complaint, and a week later Crews answered Avco's cross claims and counter-claims. CP 4131, 4160, 4188, 4194. Avco never directly answered the Second Amended Complaints. 2/5 RP 129-30.

**4. Avco breached its discovery agreement, and continued to refuse discovery as to Sanctions Discovery 1 and 2.**

Avco failed to supplement its answers to Sanctions Discovery 1 by its self-imposed May 20 deadline, and failed to respond to Sanctions Discovery 2, due May 31. CP 405, 4243, 4338; CR 34(b). Becker moved to compel on June 13. CP 4242-43. Avco answered

Sanctions Discovery 2 over the next two days. CP 4273-85, 4286-303. On June 17, Avco supplemented its responses to Sanctions Discovery 1, but maintained 68 objections, failed to provide the agreed-to discovery, and raised a new general objection redefining “engine failure” to exclude “engine power loss” and “engine stoppage.” CP 4338, 4340-79.

Concluding that Avco’s responses to Sanctions Discovery 2 were inadequate, Becker held a discovery conference with Avco on June 21. CP 714, 4262-64, 4272. Avco promised to provide amended answers by June 30. CP 4272. That day, Crews notified Avco that its supplemental responses to Sanctions Discovery 1 violated the discovery agreement, asking Avco to amend. CP 405, 4380. Avco refused to amend its responses. CP 482, 4384.

Becker and Avco had another discovery conference regarding Sanctions Discovery 2 on June 30, after Avco had failed to supplement Sanctions Discovery 2 as promised. CP 714, 4272. Avco again promised to supplement by July 8, but only agreed to slightly change two of its 30 responses to Becker’s Second Requests for Production (both Sanctions Discovery 2). CP 426, 4272. Crews did not participate. CP 714, 4272. On July 5, Crews again asked Avco to comply with the agreement regarding Sanctions Discovery

1. CP 4384. Avco stated that it had accepted and responded to Crews' requests as written. CP 4383.

**5. Plaintiffs moved to compel on the Sanctions Discovery.**

Becker moved to compel regarding Sanctions Discovery 2 on July 6, 2011. CP 4258-66. The next day, plaintiffs filed a joint motion to compel regarding Sanctions Discovery 1. CP 389-99.

Regarding Sanctions Discovery 2, Avco made many excuses, but did not claim that it had produced everything. CP 407-18. Regarding Sanctions Discovery 1, Avco claimed that the motion to compel was premature and that the parties should have yet another discovery conference. CP 4387, 4390-93.

**6. The court granted plaintiffs' motions to compel, but Avco failed to comply, causing further delay.**

On July 20, 2011, the Honorable Julie Spector ordered Avco to respond to Sanctions Discovery 1 within 14 days. CP 484-85. Rejecting Avco's attempt to limit its answers, Judge Spector ruled that "engine failure" included "loss of engine power" and "engine stoppage." CP 485. Judge Spector also ordered Avco to fully respond to Sanctions Discovery 2 within five days, and to Bates stamp each document responsive to the interrogatories; she also allowed the Estate to move to recover costs. CP 486-87.

On August 4, 2011, Avco amended its responses to Sanctions Discovery 1, and supplemented its responses to Sanctions Discovery 2. CP 624-36, 637-52, 670-86. Of the 49 Sanctions Discovery 1 requests subject to the order compelling production, Avco responded to 28 with the stock sentence, "Responsive documents have either been produced and/or are being made available for inspection." CP 2083-91. This was the last time Avco supplemented its Sanctions Discovery. CP 2034, 2734, 2743.

Determining that Avco still had not complied with the court's orders, Crews requested a conference call, set for August 23, 2011. CP 578, 668. Hours before the call, Avco took a "rain check." CP 668, 688. Not hearing back, Crews called and emailed, expressing urgency. CP 669, 687. Avco did not respond. CP 691, 717.

Avco emailed Becker on August 31, offering to make some Sanctions Discovery 2 documents available for inspection in various states. CP 669, 689. Avco then emailed Crews, promising to call shortly. CP 669, 691. Avco did not call. CP 669.

**7. After repeated attempts to obtain Avco's compliance, plaintiffs moved for contempt.**

Becker moved for contempt on August 31, 2011. CP 576-88. On September 2, Avco finally returned Crews' call regarding his

Sanctions Discovery 1, but counsel was unavailable. CP 669. Crews promptly returned the call, but got no answer. CP 669. Plaintiffs then filed a joint motion for contempt. CP 656-66.

Avco did not attempt to comply with the orders to compel, filing a combined response to both contempt motions and seeking yet another discovery conference. CP 692-700, 2034, 2734, 2743. The court appointed retired Judge Kallas as Discovery Master on September 12, 2011. CP 749-50. Plaintiffs replied on the contempt motion the same day. CP 4467-72, 4498-502.

**8. Judge Spector found Avco in contempt, ordering compliance, but Avco refused, unsuccessfully moving to vacate the contempt before a different judge.**

On September 27, 2011, Judge Spector granted Becker's contempt motion, ruling that Avco had twice failed to fully respond to Becker's Sanctions Discovery 2, that Avco's failure was willful, and that the failure was prejudicing Becker's prosecution of the case. CP 751-54. The court ordered that future depositions would be local, and permitted Becker to seek costs and fees. CP 752-53. The court reserved her ruling on all other sanctions. *Id.*

The next day, the court granted plaintiffs' joint contempt motion, ruling that Avco willfully violated the court's order pertaining to Sanctions Discovery 1, continuing to prejudice plaintiffs. CP 755-

57. The court ordered Avco to fully comply within seven days, ordering Avco to submit an affidavit of compliance stating whether “full and complete production has been made, and a detailed description of how documents were identified and located.” CP 756. The court again reserved on sanctions. CP 756.

On October 3, the case was administratively transferred from Judge Spector to the Honorable Patrick Oishi. CP 572. After the deadline for reconsideration passed, Avco moved to vacate and amend before Judge Oishi. CP 758-64; CR 59(b). On October 5, Avco filed the court-ordered declaration of compliance, but failed to provide a “detailed description of how documents were identified and located,” failed to state for each request whether a full and complete production was made, and failed to further supplement its discovery responses. CP 756, 2034, 2734, 2743, 4513-32. Indeed, much of Avco’s declaration just re-argues its previous excuses. *Id.* Judge Spector denied Avco’s motion to amend, allowing plaintiffs to seek fees for responding to the motion. CP 4563-66.<sup>10</sup>

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<sup>10</sup> The record does not explain why the motion was heard before Judge Spector and not Judge Oishi. CP 572, 4538.

**9. Leading up to trial, plaintiffs continued to seek compliance with the court's orders, to no avail.**

In early January 2012, the case was administratively transferred to the Honorable Monica Benton. CP 794. Around the same time, Becker spoke with Avco about its ongoing contempt. CP 2022. Avco said it would get back to Becker, but never did. CP 2022.

In early February 2012, when Becker asked Avco to come into compliance, Avco promised supplemental responses the following week. CP 2022-23. Avco also invited Becker to inspect documents at Avco's Philadelphia offices. CP 2020. Avco never supplemented its Sanctions Discovery 1 and 2 responses. CP 2034, 2734, 2743.

In mid-February, Becker's counsel traveled to Philadelphia to review documents during a deposition. CP 2020, 2025. Avco showed counsel a room full of documents, but refused to let him review anything until after the deposition. CP 2020, 2025-26. Counsel saw two files labeled "Moffett," the former head of Lycoming engineering, and an Avco witness. CP 2020, 2421. When Avco allowed counsel to inspect the documents hours later, the Moffett files were gone. CP 2020, 2025-26. Counsel quickly ascertained that the remaining files were not responsive to plaintiffs' requests for production. CP 2020, 2026.

**10. In the midst of the discovery battle, Avco moved for summary judgment and plaintiffs filed their Third Amended Complaints, which Avco never answered.**

On June 15, 2012, Defendant Forward Technology Industries (FTI) moved for summary judgment, claiming federal preemption and other defenses. CP 807-31. The court granted FTI's motion, dismissing it solely on the basis of federal preemption. CP 1387. Plaintiffs then sought leave to file Third Amended Complaints to add federal claims. CP 5207-17.

Avco moved for summary judgment on federal preemption and other grounds. CP 5453-66. The court granted leave to file the Third Amended Complaints; Becker filed on September 4, 2012, and Crews filed the next day. CP 7293-322, 7323-52. Plaintiffs then jointly responded to Avco's summary judgment motion. CP 7418-46. While its motion was pending, Avco moved to dismiss the Third Amended Complaints under CR 12(b)(6), repeating its preemption argument. CP 10318-26. The court granted Avco's summary judgment motion in part, ruling that the federal standard of care applies to the state-law causes of action, but otherwise denying Avco's motion. CP 1997-98. Avco never answered the Third Amended Complaints, violating the court's orders. CP 2900, 7294.

**11. Plaintiffs sought sanctions, including default, based on Avco's continued contempt.**

On September 28, 2012, plaintiffs jointly responded to Avco's CR 12(b)(6) motion and moved for default based on Avco's continued contempt. CP 2001-14, 10813-19. Avco responded on October 4, arguing that it had fully complied, despite having done nothing since August 4, 2011. CP 2034, 2440-51, 2734, 2743. Plaintiffs jointly replied the next day. CP 2733-39. Avco also moved for reconsideration of the summary judgment order. CP 2802-13. On October 15 and 16, the court denied reconsideration and Avco's CR 12(b)(6) motion.<sup>11</sup> CP 2823-24, 17802-03. Avco never answered plaintiffs' Third Amended Complaint. CP 2900-7294.

On December 4, 2012, the Special Master awarded Becker \$18,683.58 in costs and fees associated with the motions to compel and for contempt. CP 15446-49. On January 18, 2013, plaintiffs filed a Joint Supplemental Reply, updating the court on Avco's continued contempt and outlining the ongoing prejudice. CP 2827-31. Avco moved to strike the supplemental reply, requesting an evidentiary hearing. CP 2864-72.

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<sup>11</sup> A month later, Avco renewed its summary judgment motion, rearguing federal preemption. CP 10961-69. The court granted plaintiffs' motion to strike. CP 11077-80, 13929-30.

The court was set to hear motions *in limine* on January 25, 2013. CP 17263; 1/25 RP 2. Avco claims that plaintiffs abandoned their request for sanctions at this hearing, failing to “tell the trial court, or AVCO, that they thought the issue of additional sanctions was still ‘alive.’” BA 33-34. That is false: Becker reminded the court of the pending sanctions motion. 1/25 RP 109-10.

**E. The court struck Avco’s defenses, if any, finding that Avco had wilfully and deliberately withheld discovery, prejudicing plaintiffs, and had failed to cure these defects in the 16 months since Judge Spector’s contempt orders.**

The Friday before trial, the Judge Benton notified the parties that the court would hear the sanctions motion first thing Monday. CP 17268. Judge Benton ruled on the first day of trial, “having given [Avco] the greatest amount of time to comply with the Contempt Orders issued against them.”<sup>12</sup> CP 2895. After lengthy arguments, the court announced the discovery sanctions. 2/4 RP 56-74. Avco pressed for a written order, wanting to take an immediate appeal. 2/4 RP 79-82. Judge Benton entered the sanctions order the next day, finding that Sanctions Discovery 1 and 2 directly related to

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<sup>12</sup> This Court’s orders use “Lycoming,” but plaintiffs use “Avco” to maintain consistency with Avco’s opening brief and to lessen confusion.

plaintiffs' burden of proof, causes of action, and punitive damages claim. CP 2894-908.

Judge Benton found "substantial evidence that [Avco] has not complied with the Requests for Production." CP 2897. "As one example," the court found "that in December 2005, [Avco] participated in a series of emails discussing the leaking Delrin Float issue, none of which [Avco] produced in discovery." CP 2897-98. These emails would have been sent up Avco's management chain, and numerous Avco employees were included on the emails. *Id.*

In these emails, Avco employees stated: "it is clear the hollow plastic carb floats can leak, allowing fuel to enter the interior of the floats." CP 2898. The email chain reflects Avco's knowledge of a recent in-flight engine stoppage. *Id.* The authors noted "the danger of discussing the defects in writing." *Id.*

Judge Benton found that these emails and documents related to them were responsive to plaintiffs' discovery requests and that Avco's failure to produce the emails and related documents violated Judge Spector's orders. *Id.* Specifically, the emails included "two attachments . . . neither of which was provided by [Avco] or any other party in discovery." CP 2898.

Judge Benton found that as a result of Avco's continued noncompliance, plaintiffs lacked requested documents relevant to deposing Avco's lay and expert witnesses. CP 2900-01. Even immediate disclosure could not cure the prejudice to plaintiffs, who would have to review the wilfully non-produced documents, re-depose key witnesses, and be prepared to use the documents at a trial scheduled to start a day earlier. CP 2901.

Avco's noncompliance further hindered plaintiffs' trial preparations, keeping from them documents they would have presented to the jury. *Id.* These documents "go to the heart of plaintiffs' theories of liability, proof of causation, and damages." *Id.*

Judge Benton nonetheless declined to enter a default judgment. CP 2903. She instead stuck Avco's defenses, if any, and ordered that plaintiffs' allegations against Avco would be deemed admitted. *Id.*

Avco repeatedly asserts that the sanctions order refers to only one discovery violation – the withheld emails. BA 35, 46, 48, 51-52. Judge Benton's order refers to an email chain, two attachments, and related documents. CP 2898. This is but "one example." CP 2897. Many more are discussed *infra*, Statement of the Case § F.

Avco complains that “[n]othing . . . had changed” between Judge Spector’s contempt orders and Judge Benton’s sanctions order. BA 31. In a sense nothing had changed: Avco wilfully and deliberately failed to comply with Judge Spector’s orders for 16 months. CP 2900. Judge Benton rejected Avco’s excuses for non-compliance, specifically its claim that its document-retention policy justified “non-production.” *Id.* This policy, provided without affidavit or declaration, was “overly vague.” *Id.* (emphasis in original).

Avco faults Judge Benton for focusing “exclusively” on the contempt orders Judge Spector entered “[w]ithout even acknowledging” the issues before Master Kallas. BA 34. This is false. The sanctions motions and order were unrelated to the discovery matters Master Kallas ruled on. CP 2735, 2897. Judge Spector rejected Avco’s claims to the contrary. CP 2903.

Avco accuses Judge Benton of having been “critical of AVCO for making its insurance policy available for inspection instead of producing a copy” “[a]fter hearing argument only from Becker’s counsel.” BA 34. This is inaccurate. After Avco argued at length about why it had not produced documents sought in discovery, Judge Benton asked whether Avco had produced its insurance policy, recalling that, “at the last hearing [Avco was] still talking about

making that available.” 2/4 RP 21-44. Avco responded that the policy was “sitting in [her] office on Third Avenue [in Philadelphia, Pennsylvania] . . . available for inspection.” *Id.* at 44. Judge Benton then noted, “Production is different than come look.” *Id.* at 45.

Avco also falsely claims that Judge Benton “expanded her ‘sanctions’” the next day. BA 34-35. Judge Benton misspoke, stating that she was striking witnesses when she meant directing a verdict on liability. 2/4 RP 73-74. She clarified her mistake. *Id.*

**F. Avco focuses on emails, but there are many other prejudicial examples of Avco’s discovery violations.**

As discussed above, Avco inaccurately claims that Judge Benton’s sanctions order refers to only one discovery violation. BA 35, 46, 48, 51-52. There are many more examples.

Interrogatory No. 3 asked Avco to “State the date that you first became aware that polymer floats could fail by allowing fuel to leak into an air chamber of a float pontoon, and describe in detail how you first became aware.” CP 626. Avco refused to provide a date, directing Becker to 694 pages of documents and other “business records.” CP 594, 626. Avco produced over 6,000 pages of Bates-stamped discovery. CP 4500-01. Crews assumes that these are the “business records” Avco referred to, though Avco never said. CP

579-80. Avco repeated the same in answering multiple interrogatory questions. CP 626-31.

Interrogatory No. 1 asked Avco to identify all persons with knowledge of the defective floats. CP 625. Avco identified three individuals from other companies, but failed to identify its current or former employees, including Moffett, who testified at his deposition that he knew that the floats could leak. CP 625-26, 2098, 2100-01. Avco again referred Becker to its “business records” – apparently the 6000 pages already produced. CP 578-80, 625-26.

Interrogatory No. 2 asked Avco to identify all documents related to float “concerns, failures, problems, and/or defects” “from 1990 to the present.” CP 603. Avco again referenced the 6,000 pages, most of which had nothing to do with the information requested. CP 626, 4500-01.

Interrogatory No. 6 asked Avco to describe all investigation, testing, review, analysis, and inspection related to polymer floats, performed by Avco or any other known entity. CP 604, 2005-06. Avco again directed plaintiffs to the 6000 pages, nearly all of which dated back decades before the defective Delrin float was even introduced. CP 627, 2006, 2033. Avco’s answers to most of the other “supplement[ed]” interrogatories contained the same broad

identification with no specificity (e.g., answers to Interrogatories 1, 2, 3, 4, 5, 6, 8, 16, & 17). CP 625-31.

Request for Production 52 asked Avco for all documents evidencing its knowledge of potential problems with fuel entering the float. CP 2087. Avco gave its stock answer: "Responsive documents have either been produced and/or are being made available for inspection." *Id.* Although former Avco employee Moffett testified that he may have received reports that the floats leaked, Avco produced no reports. CP 2007, 2100-01.

And although Avco produced a Service Information Record summary listing float incidents, it failed to produce documents underlying each incident listed in the summary that included far more detailed information. CP 2007, 2033, 2105, 2109-10. It appears that Avco did not even ask its employees to search any of the records related to the floats. CP 2007, 2109.

Avco's amended responses failed to address Requests 33, 36-38, violating the court's order. CP 484-85, 2080-91. Avco's responses to requests 1, 11, 29-30, stated that documents were "available for inspection" at often unidentified locations. CP 2081-82, 2084. For five more requests, Avco responded that it had not

“located” anything, but not that it did not have anything. CP 2082-84. Avco did not subsequently supplement. CP 2034, 2734, 2743.

Plaintiffs asked Avco to produce “[a]ll liability insurance policies . . . applicable to any claims . . . set forth in the Complaint.” CP 4310. After repeated failures to do so, the court ordered Avco to produce all insurance policies and declaration pages related to this case. CP 485, 2006, 4310. Avco still refused to produce the policy, protesting that plaintiffs could come inspect the policy at counsel’s office. CP 2006-07, 2081; 2/4 RP 44-45.

Between early 2000 and 2007, Avco and Precision had weekly phone meetings, discussing the leaking floats. CP 2009, 2135-36, 2138-39. Avco maintained a list of meeting topics, provided to Precision in advance. CP 2009, 2142. Avco did not produce these or any documents related to these discussions. CP 2009-10, 2743.

In response to many of the First Requests for Production, Avco simply repeated that it already had produced responsive documents or would make them available for inspection in its Pennsylvania office. CP 2083-2091 (First Requests 25, 26, 42-63, 65, 66, & 72). But again, after reviewing Avco’s Pennsylvania files for 10-15 minutes, it quickly became apparent that they had nothing to do with the discovery at issue in this case. CP 2020. Avco was

just misleading plaintiffs by presenting a room full of files in other cases. CP 2020; *see also*, CP 2025-31.

Finally, plaintiffs' First Request for Production 49 asked Avco to disclose "[a]ny and all documents concerning, reflecting, documenting, studying, or setting forth the cause or probable cause of any problems or issues with the AP floats." CP 2087. In 2004, Precision's Nielson traveled to Avco to discuss the float problems and review Avco's test results. CP 2010, 2119-21, 2171. Nielson subsequently notified other Precision employees that Avco's tests revealed float-to-bowl contact similar to that in the subject carburetor. CP 2010, 2171. Avco never produced anything related to these tests, or Nielson's reports. CP 2010, 2743. And again, Avco failed to produce the 2004 NTSB report concluding that a defective Delrin float caused a fatal plane crash, or its own report from the crash. *Supra*, Statement of the Case § C 7.

**G. After sanctioning Avco, the court held a two-phase damages trial.**

The parties began jury selection two days after the court issued the oral sanctions order. 2/7 RP 191. The court bifurcated the trial, per Avco's request. 02/13 RP 397; CP 16872. The court instructed the phase I jury as follows (CP 16581):

- ◆ Avco violated federal regulations pertaining to the engine and carburetor design, and pertaining to its continuing airworthiness instructions and warning obligations.
- ◆ These violations were a proximate cause of the crash that killed Houston, Beth, and Becker.
- ◆ “The carburetor float leaked, and rubbed, causing the engine float to flood and fail.”
- ◆ Thus, Avco is liable to each plaintiff for damages.

On February 25, the jury returned a verdict for compensatory damages in the amount of \$8.9 million for Becker and \$11.283 million for Crews. CP 16621-23; 2/25 RP 2-7. Becker then settled before the punitive-damages phase began on March 11. 3/11 RP 1-3, 172.

The court instructed the phase 2 jury to determine the amount of punitive damages “if any,” to punish Avco’s “outrageous” conduct and to deter it and others from other similar acts. CP 16872, 16873, 16876, 16877. The jury found punitive damages in the amount of \$6 million on March 21. CP 16885; 3/21 RP 112-16. The court entered a judgment on June 6, finding a reasonable relationship between the compensatory and punitive damages. CP 347-49, 353-54.

Avco falsely claims that, “Over AVCO’s objections, a different jury, including some but not all the same jurors, considered the punitive damages to be imposed on AVCO.” BA 37. In truth, one

alternate juror sat on the punitive damages phase because one juror could not remain. CP 16786; 3/4 RP 4.

Avco moved to reduce the punitive damages award on May 17, claiming that there was no reasonable relationship between compensatory and punitive damages. CP 3086-98. Avco also sought to offset monies Crews obtained in settlement. CP 3018-22. The court denied both motions. CP 347-49, 353-54, 355-56. But Avco omits that Crews agreed to an offset. CP 33, 86, 3427.

One month later, Avco moved for reconsideration, a new trial, and to amend the judgment. CP 3832-45. Avco filed a separate CR 50(b) motion to strike the pain and suffering damages and for a new trial. CP 3998. Judge Benton denied the motions on July 30, 2013. CP 361, 362. Avco appealed.

## **ARGUMENT**

### **A. Avco had ample notice that its continued contempt could result in severe discovery sanctions. (BA 38-46)**

Avco argues that the sanctions order violated the 14<sup>th</sup> Amendment Due Process Clause, claiming that after Judge Spector reserved ruling on sanctions, it had no notice that severe sanctions might be imposed. BA 38-46. Avco's argument incorrectly suggests that notice requires something more than (1) orders compelling discovery; (2) contempt orders attempting to coerce compliance; and

(3) a motion for sanctions, including default, and corresponding litigation. *Id.* No law supports this claim, a “[n]aked casting[] into the constitutional sea.” ***Johnson Forestry v. Natural Res.***, 131 Wn. App. 13, 24, 126 P.3d 45 (2005).

Avco ignores that “[d]ue process is satisfied . . . if . . . the trial court concludes that there was a ‘willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent’s ability to prepare for trial.’” ***Magana v. Hyundai Motor Am.***, 167 Wn.2d 570, 591, 220 P.3d 191 (2009) (quoting ***Smith v. Behr Process Corp.***, 113 Wn. App. 306, 330, 54 P.3d 665 (2002) (quoting ***White v. Kent Med. Ctr., Inc.***, 61 Wn. App. 163, 176, 810 P.2d 4 (1991))). As discussed below, Avco does not contest that it willfully violated its discovery obligations and the court’s contempt orders, prejudicing plaintiffs. The trial court so found, satisfying due process. CP 2900. This Court should affirm.

**1. Judge Spector’s orders and plaintiffs’ sanctions motion gave Avco ample notice that it could face sanctions for continued noncompliance.**

Avco’s argument is baseless for many reasons, chiefly that plaintiffs’ motions for contempt and the contempt orders are sufficient notice that failing to cure the contempt would result in more severe sanctions than had already been imposed. Avco misstates Judge

Spector's orders, arguing that they "resolved" Avco's discovery violations and that Judge Spector "struck" or "declined to impose" proposed sanctions. BA 40-41. Judge Spector's orders did not "resolve" anything, but (1) ordered Avco to fully respond to Becker's Interrogatories 1-8 and 11-17, and to produce all documents responsive to Becker's second request for production 1-30, within 5 days; (2) ordered Avco to produce all documents responsive to plaintiffs' first requests for production 11-12, 17, 25-29, 38, 40-41, and 43-47, as modified by the parties' written discovery agreement, and to produce all documents responsive to plaintiffs' first requests for production 1, 4, 13-16, 30, 33, 36-37, 42, 48-66, 70, and 72-73, within 14 days; (3) defined "engine failure" as including engine stoppage and loss of engine power, rejecting Avco's efforts to limit the scope of its discovery responses; and (4) allowed plaintiffs to seek costs and fees. CP 484-85; 487-88.

When Avco failed to provide the court-ordered discovery, Judge Spector found Avco in contempt, ordering that within 7 days, Avco must (1) fully comply with the orders compelling discovery; and (2) submit an affidavit detailing its efforts to comply, including a statement as to whether full and complete production has been made, and a detailed description of how the documents were

identified and located. CP 756. Judge Spector did not strike proposed sanctions, but reserved ruling, allowing Avco time to come into compliance. *Compare* BA 40-41 *with* CP 752-53, 756. Indeed, Avco acknowledges that the contempt orders “raised the possibility that AVCO could face the loss of its defenses” if it failed to come into compliance. BA 40. Avco’s concession contradicts its argument that it lacked notice.

Avco ignores the purpose of a contempt finding: to coerce future compliance with the court’s order. RCW 7.21.010(3); *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827, 114 S.Ct. 2552, 129 L. Ed. 2d 642 (1994). Reserving ruling on severe sanctions is a tool to coerce compliance.

Plaintiffs’ sanctions motion also gave notice. Judge Spector held Avco in contempt in September 2011. CP 751-53, 755-56. When Avco failed to supplement or amend its discovery responses for a year, plaintiffs moved for default or other sanctions in September 2012. CP 2001, 2899.

Avco still failed to update or amend. CP 2899. In October, Avco responded and plaintiffs replied. CP 2440, 2733. In January 2013, plaintiffs filed a supplemental reply updating the court on Avco’s continued noncompliance. CP 2827-31. Later that month,

Avco moved to strike plaintiffs' supplemental reply, and requested an evidentiary hearing. CP 2864-72.

On January 25th, plaintiffs reminded court and counsel that their sanctions motion was still pending. 1/25 RP 109-10. Days later, plaintiffs responded to Avco's motion to strike. CP 2888. On Friday, February 1, Judge Benton told the parties that they should be ready to address the sanctions motion the following Monday. CP 17268.

In short, the contempt orders and four months of active litigation on the sanctions motion gave Avco ample notice.

## **2. Avco's specific arguments lack merit.**

Avco claims that Judge Spector's orders compelling discovery identified no specific defect. BA 40 (citing CP 484-87). The only reasonable reading of these orders is that prior discovery was insufficient. Judge Spector struck all of Avco's general and preliminary objections, indicating that they were not well taken. CP 487. Judge Spector ordered Avco to "fully respond" to 15 Interrogatories and to produce all documents responsive to 85 requests for production, indicating that prior production was insufficient. CP 484-85, 487. Judge Spector defined "engine failure" to include engine stoppage and loss of power, indicating that Avco

had improperly attempted to limit the scope of its responses. CP 485, 487. No more specificity was required.

Avco claims that it reasonably believed that it had complied with the contempt orders, where “plaintiffs made virtually identical subsequent discovery requests” before the Special Master, who “confirmed that AVCO’s responses were adequate.” BA 42 (citing CP 963-64). Becker – not “plaintiffs” – propounded the discovery Avco refers to. CP 963-64. The phrase “virtually identical” is a gross overstatement – the Special Master’s order addresses 12 Requests for Production from Becker’s Special Master Discovery, not the 104 Requests for Production Crews and Becker propounded as part of Sanctions Discovery 1 and 2. *Compare* CP 961-64 *with* CP 4309-4333, 610-622. Avco also overstates the Special Master’s ruling – granting in part and denying in part Becker’s motion to compel is not confirming the adequacy of Avco’s responses. *Compare* CP 961-64 *with* BA 42. The trial court rejected Avco’s assertion that the Special Master Discovery duplicated the Sanctions Discovery. CP 2903.

But in any event, this order was entered in June 18, 2012, over six months before the sanctions ruling. CP 961. During that six-month period, the parties actively litigated the sanctions motion,

providing Avco ample notice regardless of its purported beliefs about the Special Master's order.

Avco claims that Judge Benton mistakenly ruled that Judge Spector found that Avco's declaration of compliance did not satisfy the contempt orders. BA 44 (citing CP 2899). Judge Spector's November 2011 order denied Avco's motion to amend or vacate the contempt orders, providing that Becker may seek fees and costs. CP 4563-64. Avco had not come into compliance.

Finally, Avco claims that there was "extensive discovery" in 2012, contrary to Judge Benton's finding that Avco did not supplement its discovery after Judge Spector's 2011 orders. CP 2899; BA 45. The only Sanctions "Discovery" in 2012 was Becker's January 4 discussion with Avco about its continued failure to comply. CP 2022. Becker then followed up in writing. CP 2019, 2022. Avco's only response was to make documents available in its Philadelphia office, which proved unrelated and unresponsive to plaintiffs' Sanctions-Discovery requests. CP 2020, 2023-24.

Indeed, Avco's only example of "extensive discovery" is the documents it made available in Philadelphia. BA 45. Avco does not claim that it actually produced anything. *Id.* As the trial court correctly ruled, "production is different than come look." 2/4 RP 45.

The other “discovery” in 2012 all related to Becker’s Second Set of Interrogatories and Third Requests for Production – the Special Master Discovery. CP 961-64, 2253-84, 2425-28, 2735-36, 17034-42, 17047, 17069-92. The only Sanctions-Discovery issue the Special Master decided was Becker’s fee award related to the motions to compel and for sanctions. CP 15446-49.

In sum, Avco’s due process claim lacks legal and factual support. This Court should disregard it and affirm.

**B. The trial court imposed the least severe sanction that would cure the prejudice arising from Avco’s years-long failure to provide discovery, leading right up to the beginning of trial.**

Avco introduces this argument with multiple misstatements about the orders relevant to the appeal, claiming, for example, that the only discovery it withheld was “an e-mail that plaintiffs already possessed.” BA 46, 48. Again, Avco withheld a series of crucial emails detailing the product defect, their attachments (which were not produced by any party) and related documents.<sup>13</sup> CP 2898. And again, Avco committed many other discovery violations, most of

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<sup>13</sup> Avco also claims that the Discovery Master found “that AVCO complied with its discovery obligations.” BA 48-49. The Discovery Master never addressed the missing emails or other withheld discovery. *Supra*, Statement of the Case § D 1.

which are fairly summarized as refusing to answer interrogatories, and instead directing plaintiffs to over 6000 pages of irrelevant business records. *Supra*, Statement of the Case § F.

Avco again mischaracterizes Judge Spector's November 2011 order, questioning "if" it "left open the possibility of imposition of additional sanctions." BA 46. There is no "if" – Judge Spector "reserved" sanctions, trying to coerce compliance with the contempt order under the threat of additional sanctions. CP 752-53, 756.

Avco claims that the sanctions "far exceeded the permissible range of sanctions necessary to cure the alleged prejudice caused by any previous discovery violation." BA 46. But the sanctions order addresses both "previous" and continuing discovery violations. CP 2894-907. Again, Judge Spector reserved ruling on sanctions, leaving open that the failure to purge would result in greater sanctions for Avco's contemptuous conduct. CP 752-53, 756. Avco failed to purge, violating the contempt orders and orders to compel for another 16 months. CP 2900. These are new contempts, not "previous" ones. BA 46.

Finally, Avco ignores its discovery obligations. Civil Rule 26 permits "broad discovery." *Magana*, 167 Wn.2d at 584. If a party does not respond or object to a discovery request, it must seek a

protective order. 167 Wn.2d at 584. Avco did not do so, so had to respond. *Id.* An evasive, misleading answer is treated as a failure to answer. *Id.*; CR 37(d).

**1. No lesser sanction would have sufficed to cure the prejudice caused by Avco's recalcitrant failures to provide discovery.**

This Court reviews the discovery sanctions for an abuse of discretion. ***Teter v. Deck***, 174 Wn.2d 207, 216, 274 P.3d 336 (2012) (citing ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)); ***Blair v. Ta-Seattle E. No. 176***, 171 Wn.2d 342, 348, 254 P.3d 797 (2011); ***Magana***, 167 Wn.2d at 582. While it can be the appellate courts' "natural tendency" to be swayed by the severity of a sanction, "since the trial court is in the best position to decide an issue, deference normally should be given to the trial court's decision." ***Magana***, 167 Wn.2d at 583 (citing ***Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.***, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

A court should impose "the least severe sanction that will be adequate to serve the purpose" of the particular sanction, while avoiding sanctions so minimal that they undermine the purpose of discovery. ***Teter***, 174 Wn.2d at 216; ***Burnet***, 131 Wn.2d at 495-96. "[T]he purpose[s] of sanctions generally are to deter, to punish, to

compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong.” **Burnet**, 131 Wn.2d at 496. A court may impose the most severe discovery sanctions (1) upon finding (a) that the discovery violation was willful or deliberate, and (b) that the violation substantially prejudiced the opponent’s ability to prepare for trial; and (2) after “explicitly” considering lesser sanctions “that could have advanced the purposes of discovery” while compensating a party prejudiced by the opposition’s “discovery failings.” **Teter**, 174 Wn.2d at 216-17; **Burnet**, 131 Wn.2d at 494-497. Where, as here, the court explicitly considers the **Burnet** factors, the appellate court can reverse the sanction “only if it is clearly unsupported by the record.” **Magana**, 167 Wn.3d at 583; **Teter**, 174 Wn.2d at 216-17.

Avco focuses on the sanction the court imposed, never seriously contesting that the discovery violations were willful and substantially prejudiced plaintiffs. BA 46-57. Avco draws comparisons to **Burnet**, **Blair**, and **Magana**, *infra*, but each is easily distinguished. BA 49-52. **Burnet** involves one discovery violation committed 16-months before trial, not (as here) a persistent pattern of violations, contempts, and continued violations leading up to the start of trial. 131 Wn.2d at 490-91, 501-02. There, the Supreme Court reversed the exclusion of witness testimony, holding that the

sanction imposed was “too severe in light of the length of time to trial.” *Id.* at 497-98

**Blair** too is inapposite. There, the trial court struck plaintiff’s only medical experts, ruling that adding them violated the court’s prior orders limiting plaintiff’s witnesses as a sanction for missed discovery deadlines. 171 Wn.2d at 346-47. The court then granted defendant’s motion to dismiss with prejudice, ruling that plaintiff could not prove causation without the medical experts. *Id.* Thus, a default judgment became the sanction for a missed discovery deadline. *Id.* The Supreme Court reversed, holding that neither the court’s orders, nor oral argument, nor “colloquy between the bench and counsel,” reflected any consideration of **Burnet**. *Id.* at 348-49.

**Magana** does not help Avco either. Plaintiff Jesse Magana was rendered a paraplegic after a violent car crash. **Magana**, 167 Wn.2d at 577. Magana, a passenger, sued the drivers of both vehicles, and the manufacturer of the vehicle he was riding in, Hyundai, alleging negligent design. 167 Wn.2d at 577. The jury awarded \$8 million in damages, attributing 60 percent of the fault to Hyundai. *Id.* at 578-79.

Due to an evidentiary error, the appellate court reversed and remanded for a new trial on liability only. *Id.* On remand, Magana

sought to update discovery, and Hyundai produced, for the first time, significant new evidence of other similar incidents, less than two months before retrial was set to begin. *Id.* at 579-80. Magana moved for a default judgment, arguing that it could not properly prepare for trial with the late-produced OSI evidence. *Id.* at 580. The trial court granted Magana's motion after an evidentiary hearing, entering numerous findings on the **Burnet** factors. *Id.* at 581-82, 591. The Supreme Court affirmed. *Id.* at 594.

Avco attempts to distinguish **Magana**, claiming that plaintiffs here had the discovery Avco withheld from other sources. BA 51. Again, Avco's persistent claim that it only withheld an email is false. BA 35, 46, 48, 51. Plaintiffs never received, from any source, the email attachments or related documents, or any of the following documents (CP 2898; *supra*, Statement of the Case § F):

- ◆ The records underlying Avco's SIR summary;
- ◆ The reports about leaking Delrin floats to which Moffett refers;
- ◆ Avco's insurance policy;
- ◆ Avco's warranty documents;
- ◆ The April 2002 letter from the FAA, in Avco employee Jay Mankad's file, addressing a Service Difficulty Report ("SDR") regarding a Delrin float rubbing incident;
- ◆ The list of topics from Avco's weekly meetings with Precision addressing the defective Delrin float;

- ◆ Avco's tests revealing float-to-bowl contact, and related documents; and
- ◆ Avco's report from the investigation of the 2002 fatal plane crash caused by the defective Delrin float.

*Supra*, Statement of the Case §§ C 7, F; CP 2008, 2009, 2111.

Plaintiffs have every reason to believe that much more is still out there. 2/4 RP 15-16. Avco cites no case in which the sanctioned party continues to withhold court-ordered discovery.

Avco also inaccurately claims that, unlike **Magana**, the withheld discovery went only to notice, not to product defect, causation, or comparative fault. BA 51. Since Avco never produced much of the court-ordered discovery, it should not be permitted to benefit from its contempt by making unsupported assertions about the content of the documents it continues to withhold. But in any event, Avco is incorrect.

The withheld email attachments and related documents appear to elucidate the nature of the product defect, where the emails refer to an "attached file," never produced, that makes "clear" that the Delrin floats leak. CP 465; 2/4 RP 7-8. And the tests and investigation reports Avco withheld are relevant to the nature of the carburetor's defect, its causal connection to the engine failure, and

the depths of Avco's fault. *Compare* BA 51 *with supra*, Statement of the Case §§ C 7, F.

Avco's willfulness is far greater than in ***Magana***. Unlike the defendants in ***Magana***, who finally produced two months before trial, Avco was ordered to produce and held in contempt for failing to do so, after which it still failed to comply for 16 more months, never producing much of the discovery plaintiffs sought. CP 2845, 2900-02. This is not a matter of receiving the court-ordered discovery late, but rather of never receiving it at all. *Id.*

The prejudice caused by Avco's non-disclosure also far surpasses that in ***Magana***. Plaintiffs still do not have from Avco, or any other source, documents going to "the heart" of plaintiffs' case on liability, proof, causation, and damages. CP 2901. This is not about an email. It is about Avco's failures to respond to the majority of plaintiffs' discovery requests while in contempt of court.

It is no excuse that plaintiffs obtained some discovery from other defendants. BA 51-52. Plaintiffs needed discovery from Avco to meet its burden of proving Avco's notice and knowledge of the product defect and its propensity to cause harm. And where Avco was the only defendant at trial, using documents provided by other defendants would have severely prejudiced plaintiffs' ability to

authenticate documents and satisfy other evidence rules. Finally, without the ability to compare related defendants' productions, there is no way to be sure plaintiffs have received all relevant documents.

In short, plaintiffs could not have adequately deposed lay and expert witnesses or otherwise prepared their case, presented their case to the jury, or countered any affirmative defenses. CP 2901. Washington does not permit "trial by ambush," but even that would require Avco to have produced at some point – they still have not done so. ***Lybbert v. Grant Cnty***, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000). But again, Avco does not deny the prejudice it caused.

The trial court considered and rejected lesser sanctions, including monetary sanctions, striking certain witnesses, taking certain facts as established, limiting cross-examinations, striking certain arguments, and default. CP 2904. The court ruled it sufficient to deem all of each plaintiffs' allegations admitted, and all defenses stricken. *Id.* This was a lesser sanction.

The trial court did not have to "tolerate [Avco's] deliberate and willful discovery abuse." CP 2901 (quoting ***Magana***, 167 Wn.2d at 576.) There is no lesser sanction that could have cured Avco's recalcitrant refusals to disclose. Avco had long proven it would defy the court's discovery and contempt orders. Nothing could force it to

produce documents it had withheld for 16 months after being held in contempt for ongoing discovery violations. Avco cannot reasonably suggest that plaintiffs should have had to try this case without scads of documents it deemed important enough to hide.

**2. The trial court properly precluded Avco from arguing pilot error, an affirmative defense that Avco did not preserve.**

Avco next claims that the trial court erroneously struck its pilot-error defense, contending that pilot error was “unrelated” to the withheld discovery. BA 52-57. This argument too begins with false or misleading statements. BA 52-54.

First, Avco ignores that it failed to preserve any affirmative defenses, where it failed to answer Crews’ Third Amended Complaint, despite the trial court’s specific order to do so within 10 days (CP 2900):

[T]he Court also finds that defendant [Avco] has failed to Answer plaintiffs’ Third Amended Complaints, despite this Court issuing an Order on August 24, 2012 [see CP 7294] requiring defendants to file Answers to plaintiffs’ Third Amended Complaints within 10 days.

Thus, Avco asserted no affirmative defenses (CP 2906 n.1):

[Avco] 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 . . . .

Avco thus failed to preserve any affirmative defenses. Avco has failed to challenge this dispositive ruling. See, e.g., **Pappas v. Hershberger**, 85 Wn.2d 152, 154, 530 P.2d 642 (1975) (court will not address unpreserved issues). This Court may and should affirm on this independently sufficient ground.

Avco claims that a court cannot strike a defense that is “unrelated” to the discovery violation. BA 53 (citing **Jones v. City of Seattle**, 179 Wn.2d 322, 338, 314 P.3d 380 (2013)). **Jones** is inapposite – it involves excluding late-disclosed witnesses, not precluding a defendant from raising a defense. 179 Wn.2d at 338, 343. More importantly, the withheld discovery was related to Avco's defenses. BA 51. Avco concedes that the withheld discovery was dispositive of notice, which is relevant to the degree of its fault. *Id.* The withheld discovery is also relevant to causation: again, Avco withheld test results and other discovery confirming the Delrin float defect and its propensity to cause engine failure, as well as its own investigation report from a fatal crash caused by the defective Delrin float. *Supra*, Statement of the Case §§ C 7, F.

Avco has still failed to produce, so there is no telling what it is hiding. But discovery from other defendants reveals that the withheld discovery likely supports plaintiffs' claim that the product defect was

the sole cause of the plane crash, eliminating all other alleged causes, including pilot error. CP 2006, 2007-09, 2075-76, 2125-26, 2143-52. Further, while Avco focuses exclusively on pilot error here, but for the sanctions order, Avco said it would have contested at trial whether the Delrin float caused the crash. CP 344-45, ¶ 13. The withheld discovery went to the heart of the plaintiffs' case.

Avco also misleadingly claims that plaintiffs "fully deposed both lay and expert witnesses while in possession of the supposedly withheld documents." BA 54. Plaintiffs obtained the emails, apparently from Precision, sometime before July 2011, and used them in lay witness depositions. CP 452, 464-68, 2077-78, 2117, 2122, 7848, 7850, 7872, 8017, 8021. But plaintiffs did not have related documents or the attachments. CP 465; 2/4 RP 7-8. Plaintiffs also did not have all of other requested discovery that Avco continues to ignore. *Supra*, Statement of the Case § F.

Avco argues that the trial court erroneously excluded pilot-error because it relates to the damages calculation. BA 54-57. The trial court properly exercised its discretion, where plaintiffs would have been severely prejudiced by allowing the jury to apportion fault between Houston and Avco based on a trial solely about Houston's alleged negligence and a one-page instruction that Avco was liable.

CP 16581; 2/6 RP 172. That is, the jury was instructed (1) that Avco's violations of federal regulations were a proximate cause of the crash; (2) that the carburetor caused the engine to flood and fail; and (3) that Avco was liable for damages. CP 16581. The jury was not instructed on Avco's negligence or fault in the compensatory-damages phase, including that:

- ◆ Avco knew that its carburetors were defective;
- ◆ Avco participated in tests proving the product defect;
- ◆ Avco knew that its engines were flooding and stopping;
- ◆ Avco knew about at least one other fatal crash;
- ◆ Avco was responsible for the continued safety of its carburetor design;
- ◆ Avco was responsible for the continued safety of its engines;
- ◆ Avco failed to warn or take any other precaution regarding engines already in the field;
- ◆ Avco was apparently waiting for its warranties to expire.

*Supra*, Statement of the Case § C.

The jury could not have compared Avco's fault to Houston's alleged fault, where it did not determine Avco's fault in the first instance. Comparative fault is comparative. Avco's discovery violations prevented plaintiffs from demonstrating just how bad Avco really was. 2/6 RP 172.

Finally, Avco misplaces reliance on *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 117, 249 P.3d 607 (2011). BA 55. *Veit* holds only that an instructional error as to plaintiff's comparative fault was harmless, where the jury found the defendant non-negligent, so did not reach the issue of comparative fault. 171 Wn.2d at 117. *Veit* is inapposite.

In short, the trial court carefully considered the *Burnet* factors, documented in extensive written findings. App. A. Avco does not even argue willfulness or prejudice, they are so obvious. The sanction is well within the court's discretion, where Avco's recalcitrant non-disclosure deprived plaintiffs of the opportunity to prepare for trial and present the truth. This Court should affirm.

**C. The trial court properly struck Avco's alleged affirmative defenses under GARA, where Avco failed to preserve these alleged defenses, Avco's discovery violations prejudiced plaintiffs' ability to litigate these issues, and Avco is wrong on the law.**

Avco correctly acknowledges that the sanctions order precluded resolution of its affirmative defenses under the General Aviation Revitalization Act of 1994 (GARA).<sup>14</sup> BA 58. This is true

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<sup>14</sup> Pub. L. No. 103-298, § 1-4, 108 Stat. 1552; Pub. L. No. 105-102, § 3(e), 111 Stat. 2215; reprinted in Note, 49 U.S.C. § 40101. A copy of GARA is App. D.

because the trial court specifically determined that Avco's discovery violations prejudiced the plaintiffs' ability to prove violations of numerous federal regulations, including whether Avco knowingly withheld, concealed, or misrepresented information to or from the FAA (which would deprive Avco of any GARA defense, as discussed *infra*). CP 2898. Yet Avco argues that these defenses should not have been stricken. BA 65. Avco is incorrect, for numerous reasons.

**1. Avco failed to preserve its alleged affirmative defenses.**

First, as explained above, Avco never answered plaintiffs' Third Amended Complaints, so the trial court ruled that it had asserted no affirmative defenses. *Supra* Argument § B 2 (citing CP 2900, 2906 n.1). Avco failed to preserve its alleged GARA affirmative defense, so the Court need not reach it. *Pappas*, 85 Wn.2d at 154.

**2. Avco's discovery violations badly prejudiced plaintiffs' ability to litigate these alleged defenses, justifying the trial court's order striking them – an order that Avco utterly fails to attack.**

The trial court struck Avco's alleged affirmative defenses due to its discovery violations:

. . . all of [Avco's] defenses, if any, are stricken.

CP 2903. It did so as an alternative, lesser sanction, rather than simply defaulting Avco:

The sanction of default would serve every one of the purposes of imposing sanctions for discovery violations and would be justified, but the Court, in its discretion, believes that deeming all of each plaintiff's allegations in their respective operative Complaints against defendant [Avco] admitted, and all of [Avco's] defenses, if any, stricken, is sufficient.

CP 2904. And this was justified because plaintiffs were severely prejudiced by Avco's refusal to produce court-ordered discovery regarding the cause of the crash, Avco's knowledge that the float was defective and causing engine failures, and Avco's candor to the FAA. *See, e.g.*, Argument § B; CP 577, 585-87, 661-63.

Avco fails to challenge the trial court's dispositive rulings on this issue, instead arguing the merits of its alleged affirmative defenses. BA 58-65. Since the trial court's sanctions were fully justified for all of the reasons stated above, this Court need not – and should not – reach the merits of its alleged defenses. This too is an independently sufficient ground to affirm on this issue.

**3. Avco is wrong on the law regarding its waived and properly stricken alleged affirmative defenses.**

Should the Court nonetheless reach the merits, Avco is wrong on the law. It first argues that the Federal Aviation Act preempts state law in this area. It goes even further,

misrepresenting the trial court as earlier ruling that the Act “preempted state product liability law and governed the standard of care of an aircraft engine manufacturer.” BA 58-59 (no record cite in original). Avco overstates.

**a. The trial court ruled only that federal standards of care preempt state standards.**

In fact, the trial court had earlier ruled only that “federal aviation law and concomitant federal regulations preempt state law standards of care.” CP 1387. Thus, on summary judgment, the trial court ruled that “state law standards of care are preempted” by the federal standard of care, while plaintiffs’ “state law remedies remain unchanged, although federal law standard[s] of care are applicable.” CP 1998. The trial court did not otherwise rule that federal law preempts state product liability law. Indeed, Avco admits that the type of preemption applicable here, implied field preemption, preempts only the state law standard of care. BA 59 (citing *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1005 (9<sup>th</sup> Cir. 2013)).

**b. Plaintiffs alleged that Avco violated the applicable federal standards.**

Although Avco admits that “plaintiffs identified various federal regulations relating to engine design and certification,” it nonetheless

argues that “they did not identify any failure to conform to those regulations.” BA 17; *see also* BA 58-62. This is false. Plaintiffs asserted Avco’s breach of the applicable federal standards of care, in detail. *See, e.g.*, CP 7432-34.

For example, FAA regulatory expert Ray Twa opined that

the overhauled Avco engine, as equipped with the Avco-specified replacement MA-4SPA carburetor and the Avco-approved Delrin float, did not meet CAR 13.110(a) standards;

the engine equipped with the Avco-approved Delrin float did not meet CAR 13.100(a) standards;

the engine equipped with the Avco-approved Delrin float did not meet the CAR 13.101 standards;

the design defect that made the Delrin float overly prone to leaking violated CAR 13.100(a), 13.101, & 13.110(a);

the design defect that made the float overly prone to rubbing and sticking due to its size violated CAR 13.110(a);

despite learning of the above dangerous defects in the Delrin floats long before the July 2008 plane crash, and despite even prohibiting their installation in new engines in 2005, Avco failed to properly report the issue to the FAA under FAR 21.3, and failed to issue proper warnings. Avco was required to issue such warnings under its ICA obligations, pursuant to FAR 21.50 & 33.4, and Part 33 Appx. A, a33.1(b).

CP 7432-34, 7676-82. Moreover, Moffett (Avco’s former head of engineering) admitted that Avco is obligated to issue Instructions for Continued Airworthiness (ICAs) as to the O-320-H2AD engine and that all Avco Service Bulletins applicable to this engine are ICAs. CP

7852-54, 7872. Nevertheless, Avco failed to issue Service Bulletin 582, Rev. A regarding replacement of Delrin floats in the field until October 10, 2008 – months after this tragedy. CP 469, 9141.

In sum, Avco is less than candid in asserting to this Court that plaintiffs did not provide evidence that it violated applicable federal regulations. Similarly misleading are its repeated assertions regarding the trial court's citation to Federal Air Regulations (C.F.R.s) in its order denying summary judgment (CP 1998), rather than to the CARs cited above. See, e.g., BA 60 n.6. Plaintiffs dispelled this deceptive argument (in great detail) in their response to Avco's "renewed" summary judgment. CP 13767-73. To oversimplify, the relevant C.F.R.s and CARs are virtually identically worded, so expert Twa (for example) opined that there is "no material difference" between them. CP 13772-73. That is, if Avco violated one set of these federal regulations, it also violated the other set.

Similarly false is Avco's claim that 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." BA 62. On the contrary, expert Twa specifically opined (CP 9141):

As an FAA regulatory expert, I have concluded that, had the appropriate personnel at the FAA been specifically informed by [Avco] as to the manufacturing defects and the service defects of the 30-804 Delrin floats in the field, and the numerous engine failures, flooding, and fires, resulting from these defects, the FAA most probably would have issued an Airworthiness Directive requiring their removal and replacement with the solid blue epoxy float that [Avco] approved for its MA-4SPA floats in 2005.

[Avco] was also required to issue appropriate warnings regarding the defects, and the high propensity for sudden engine failure associated with the 30-804 Delrin floats under its Instructions for Continued Airworthiness (ICA) obligations, pursuant to FAR 21.50, and 33.4, and Part 33 Appx. A, a33.1(b). [Avco]'s former head of engineering, Moffett, admitted [Avco] is obligated to issue ICAs as to the O-320-H2AD engine, and that all [Avco] Service Bulletins applicable to this engine are ICAs. Nevertheless, as set forth above, [Avco] failed to issue Service Bulletin 582, Rev. A regarding replacement of Delrin floats in the field until October 10, 2008, after the accident.

Of course, the sanctions order relieved plaintiffs of any duty to present this evidence at trial. Nonetheless, Avco's own FAA regulatory expert, Robert Wojnar, testified on cross examination that Avco was required by FAR Part 33, App. A, and FAA Order 8110.54, to issue ICAs, furnishing them to all Avco engine owners, if it changed carburetor float material because the prior float was dangerous. 3/20 RP 181-185. He further testified that Avco had a duty to issue ICAs to owners of its engines, informing them of the design change in its engines' carburetors (from plastic floats to epoxy floats) because that changes Avco's type design for its engine:

Q. Yes. [Avco] is obligated under the regulations to inform the field about the new float change right?

A. When there's a type design change, that's correct.

Q. And that happens any time there's a change in the float material, right?

A. Correct.

3/20 RP 186. Avco fails to disclose this testimony to this Court.

**c. GARA would not bar plaintiffs' claims because the GARA exception applies.**

Avco is no more candid in arguing that GARA's 18-year statute of repose would apply if the trial court had not stricken all of its defenses. BA 62-65. First and foremost, Avco relegates to a footnote the exception precluding GARA's application here. BA 64

n. 8. The exception reads as follows (App. C):

Subsection (a) does not apply –

(1) if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered;

As relevant here, the exception parses as follows (GARA § 2(b)(1)):

GARA does not apply if the plaintiffs plead and prove

that Avco (with respect to the type certificate for the airplane, or to its obligations regarding the continuing airworthiness of the airplane, or of a component, system, subassembly, or other part of the airplane)

knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration,

required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part,

that is causally related to the harm which the claimant allegedly suffered.

Plaintiffs met these requirements: they pled (CP 7329, ¶ 6.15) and alleged (as discussed above; see *e.g.*, CP 7676-82) that Avco, as the type-certificate holder, was required – but failed – to inform the FAA regarding the dangerously defective float system in its engine, which directly caused the crash and the tragic deaths. If Avco had not failed to preserve, or to challenge dismissal of, its alleged GARA defense, this exception would bar GARA's application.

**d. Even if GARA could apply, the relevant 18-year limitation period had not run when plaintiffs filed their action.**

Assuming *arguendo* that the above reasons do not obviate GARA's application here, the relevant 18-year limitations period had not run when plaintiffs filed their original complaint. "GARA sets forth

“two separate and mutually exclusive 18-year periods of repose.”  
**Avco Corp. v. Cherry**, No. 3:08 cv 402, 2008 U.S. Dist. LEXIS 100905, at \*16 (E.D. Va. Dec. 15, 2008). A manufacturer seeking GARA’s protection must therefore prove that one of the two mutually exclusive 18-year periods applies and that the 18 years expired before the crash (GARA § 2):

TIME LIMITATIONS ON CIVIL ACTIONS AGAINST AIRCRAFT MANUFACTURERS.

(a) IN GENERAL.

Except as provided in subsection (b) [the exception discussed above], no civil action for damages for death or injury to persons . . . 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 –

(1) after the applicable limitation period<sup>15</sup> beginning on

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

(2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the

---

<sup>15</sup> GARA § (3) defines the “applicable limitation period” as 18 years.

applicable limitation period beginning on the date of completion of the replacement or addition.

Parsing ¶ 2(a), it is clear that a damages action “may be brought against the manufacturer of the aircraft” **or** “the manufacturer of any new component . . . .” Under the two subsections, such an action will be barred only if it is brought more than (1) 18 years after delivery of the aircraft to its first purchaser or seller, **or** (2) “with respect to any new component . . . which replaced another component . . . originally in, or which was added to the aircraft,” 18 years “beginning on the date of completion of the replacement or addition.” GARA §§ 2(a)(1) & (2).

GARA’s plain language thus states that the subsection (1) 18-year period running from the first sale applies to claims against the aircraft manufacturer, where the part alleged to have caused the crash is not a replacement part. This limitation period does not apply here because the defective float was a replacement part.

And the subsection (2) 18-year period had not expired when the plaintiffs filed suit. The Delrin float was inserted into the aircraft in 2001. CP 433, 4164; 3/13 RP 112. As discussed *supra*, Avco issued a change order for new engines in 2005, but failed to warn owners of existing engines. The crash occurred in July 2008. The

plaintiffs filed suit in September 2008, roughly seven years after the new component was added to the aircraft. CP 1, 433, 4164; 3/13 RP 112. Even if this limitation period could apply, it had not run.

**D. Avco's choice of law arguments are legally incorrect and irrelevant.**

Avco raises two issues regarding choice of law. BA 65-71. First, Avco argues that in either Washington or Pennsylvania, it cannot be liable under state product liability laws, but the trial court nonetheless erred in failing to conduct a conflict of laws analysis. BA 68-69. On its face this claim is legally incorrect because, if Avco cannot be liable under either state's laws, then there is no conflict of laws. See, e.g., *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007) ("When parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis" (citations omitted)). Avco raises no appealable issue.

But in any event, this claim is legally irrelevant because the trial court determined Avco's liability as a matter of law in its sanctions order. There was no point in engaging in a conflicts of law analysis because Avco was liable as a matter of law under

Washington's law governing willful and deliberate discovery abuse. The product liability laws of either state are simply irrelevant.

Second, Avco argues that the trial court erred in failing to conduct an on-the-record conflict of laws analysis regarding punitive damages. BA 70-71. It is undisputed that Washington bars punitive damages, while Pennsylvania allows them. The trial court instructed the jury on punitive damages under Pennsylvania law. It obviously chose Pennsylvania punitive-damages law.

Yet Avco does not argue the merits under Pennsylvania law, rendering this issue immaterial. And underlying its brief argument on this immaterial issue is its oft-repeated fallacy that it did not "manufacture" the float, so it cannot be held liable for punitive damages. Yet Avco fails to disclose that its own expert, Robert Wojnar, testified to the contrary on cross-examination:

Q. All right. Let's talk about PMA [Parts Manufacture Approval] now. Can PMA be established on the basis of identity?

A. Yes.

Q. Okay. And can identity be established by a letter of authorization from an engine type certificate holder such as [Avco] authorizing the manufacturer to sell carburetors pursuant to its type design data?

A. It will actually be – to use that FAA approved data to obtain a PMA.

- Q. Okay. And so that –
- A. Only the PMA authorizes the manufacturer to sell those parts.
- Q. Those are called licensing agreements, right? Based on licensing agreement?
- A. A licensing agreement is one way to show identity, that's correct.
- Q. Licensing agreement with the engine type certificate holder, right?
- A. With whoever has the FAA approved data, yes.
- Q. And that's what Precision had with [Avco], right?
- A. Yes.
- Q. You talked about the possibility of a PMA holder being able to deviate from the float material required by the type design if they can substantiate that to the FAA, right?
- A. (No response.)
- Q. Do you recall doing that?
- A. Correct.
- Q. How long [*sic*] would they do that?
- A. Through the same kind of test and computation that the [Avco] company did.
- Q. Okay. Absent doing that, the PMA holder must follow the [Avco] type design even for parts they sell directly under their PMA if they have a licensing agreement, right?
- A. Correct.

3/20 RP 186-188. In other words, Avco controlled and approved the manufacturing and installation of the defective Delrin float that killed Dr. Becker, Brenda Houston, and Elizabeth Crews.

Notwithstanding Avco's irrelevant and immaterial arguments, it is worth remembering that the court did not order the jury to award punitive damages. Rather, plaintiffs were required to prove that Avco's conduct was "outrageous" – that is, malicious, wanton, willful, or oppressive – in order to recover punitive damages, "if any":

Plaintiff has the burden of proof as to the amount of punitive damages, if any to be awarded.

CP 16876 (emphasis added).

It is your job to fix the amount of punitive damages, if any to be awarded against defendant AVCO Corporation (AVCO/Lycoming). . . .

The sole purpose of punitive damages is to punish the defendant's outrageous conduct and to deter the defendant and others from similar acts.

Conduct is outrageous when it is malicious, wanton, willful, or oppressive, or shows reckless indifference to the interests of others.

CP 16877 (emphasis added; paragraphing altered). Avco does not argue that the plaintiffs failed to meet this very high standard of proof. In light of the jury's unchallenged determination that Avco's conduct was outrageous, its technical, immaterial arguments are meritless.

**E. As Avco well knows, Crews long ago agreed that Avco is entitled to an offset.**

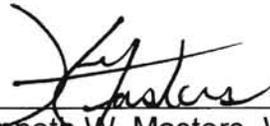
Crews long ago told Avco that it would agree to an offset. Indeed, Crews told the trial court this too. CP 3386, 3427. It is troubling that Avco once again fails to disclose the truth to this court.

### **CONCLUSION**

For the reasons stated above, this Court should affirm.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of July, 2014.

MASTERS LAW GROUP, P.L.L.C.



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### CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENTS**, postage prepaid, via U.S. mail on the 17<sup>th</sup> day of July, 2014, to the following counsel of record at the following addresses:

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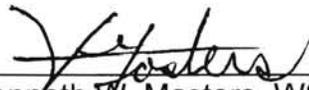
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ORIGINAL

**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,

Plaintiff,

vs.

AVCO CORPORATION, et al.,

Defendants.

Case No. 10-2-26593-7 SEA

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

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 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:

1 **I. INTRODUCTION**

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

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

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

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

- 15 • Plaintiffs' Joint Motion to Compel Against Defendant Lycoming, and all motion papers  
16 therein, including Lycoming's Opposition, and Plaintiffs' Reply.
- 17 • Plaintiff Becker's Motion to Compel Against Defendant Lycoming, and all motion papers  
18 therein, including Lycoming's Opposition, and Plaintiff Becker's Reply
- 19 • Judge Spector's July 20, 2011 Order to Compel Defendant Lycoming Re; Plaintiffs' Joint  
20 Motion to Compel;
- 21 • Judge Spector's July 20, 2011 Order to Compel Defendant Lycoming Re; Plaintiff Becker's  
22 Motion to Compel
- 23 • Plaintiffs' Joint Motion for Contempt Against Defendant Lycoming, and all motion papers  
24 therein, including Lycoming's Opposition, and Plaintiffs' Reply.
- 25 • Plaintiff Becker's Motion for Contempt Against Defendant Lycoming, and all motion papers  
26 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.

15 **A. Discovery Sought**

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

16  
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*

26

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.  
25  
26

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.

15  
16 **III. CONCLUSIONS OF LAW**

17  
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.  
25  
26

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  
26

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.

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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.

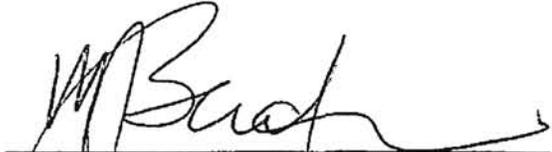
1 warning obligations, was a proximate cause of the crash resulting in the death of the three  
2 occupants. The carburetor float leaked, and rubbed, causing the engine to flood and fail;  
3 and therefore direct the jurors to find that the defendant Lycoming is liable to each plaintiff for  
4 damages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

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26  
  
The Honorable Monica J. Benton

1 Presented by:

2 AVIATION LAW GROUP PS

3 /s/ Robert F. Hedrick

4 /s/ James T. Anderson

5 Robert F. Hedrick, WSBA No. 26931

6 James T. Anderson III, WSBA No. 40494

7 Attorneys for Plaintiff Estate of Virgil Victor Becker

8 LANDYE BENNETT BLUMSTEIN LLP

9  
10 /s/ Robert B. Hopkins

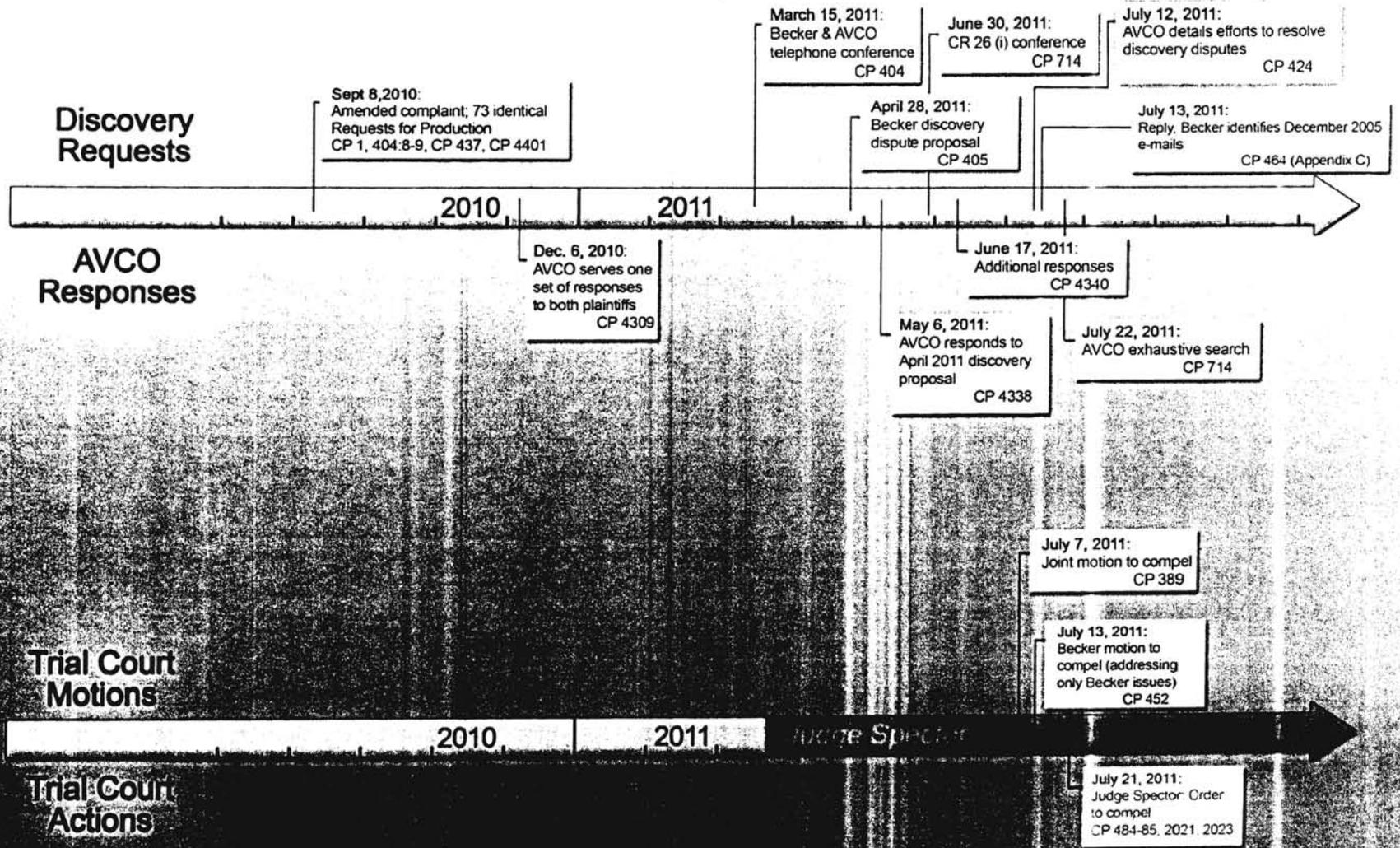
11 /s/ Matthew K. Clarke

12 Robert B. Hopkins, *pro hac vice*

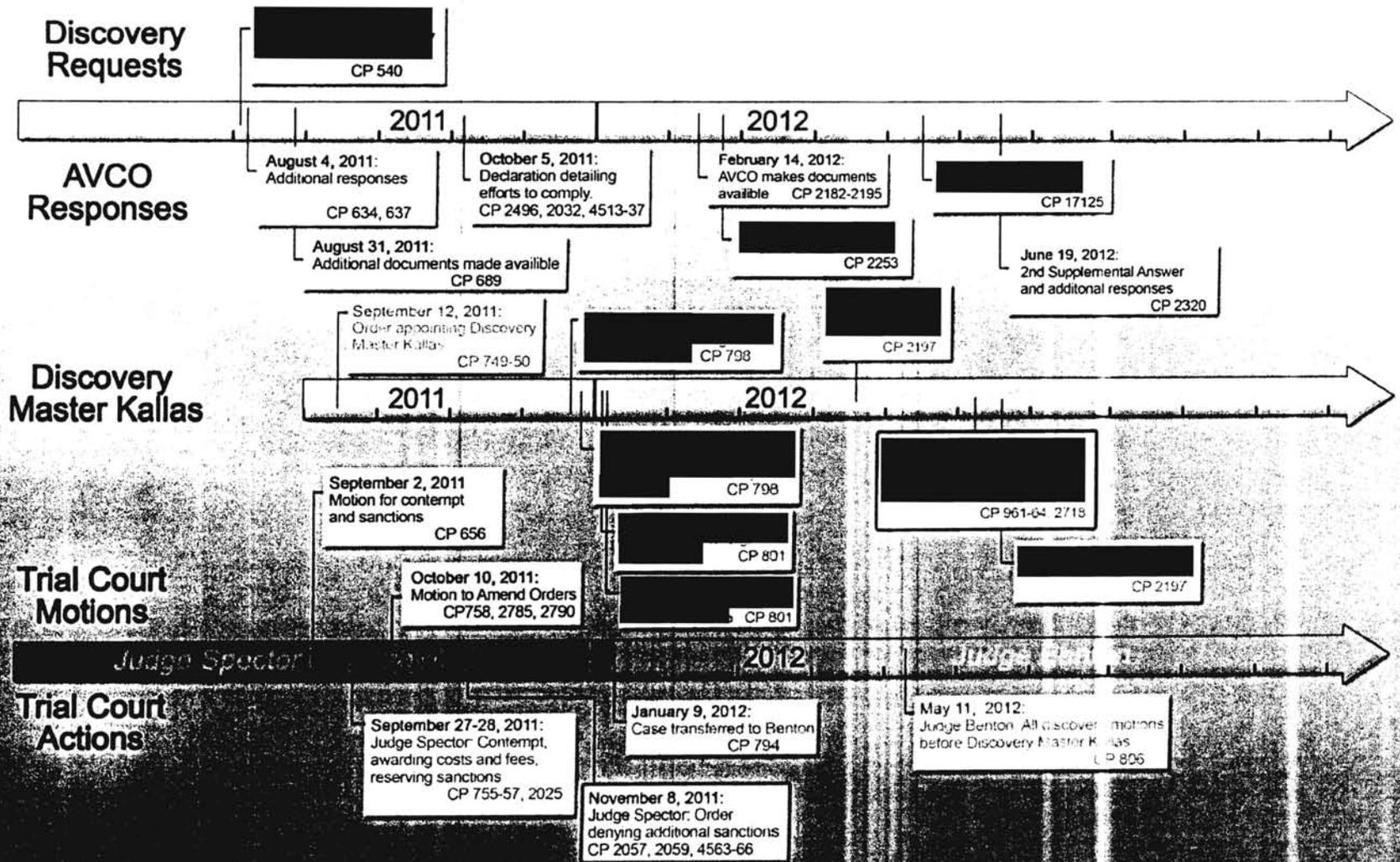
13 Matthew K. Clarke, *pro hac vice*

14 Of Attorneys for Plaintiff Paul Thomas Crews

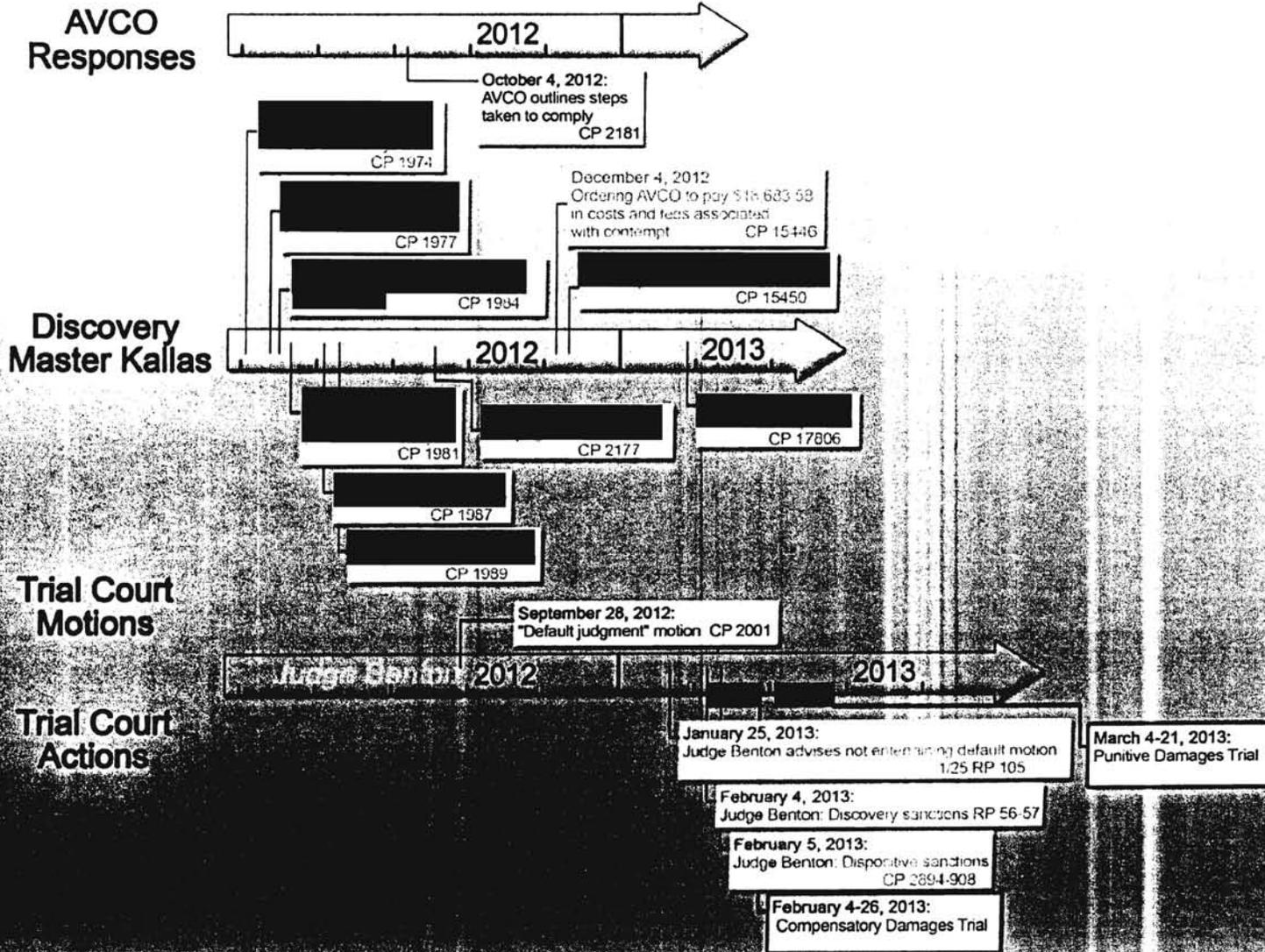
# Timeline of Proceedings: Houston/Crews v. AVCO



# Timeline of Proceedings: Houston/Crews v. AVCO



# Timeline of Proceedings: Houston/Crews v. AVCO



*103 P.L. 298, \*; 108 Stat. 1552, \*\*;  
1994 Enacted S. 1458; 103 Enacted S. 1458*

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103rd Congress -- 2nd Session  
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PUBLIC LAW 103-298 [S. 1458]  
AUGUST 17, 1994  
GENERAL AVIATION REVITALIZATION ACT OF 1994

103 P.L. 298; 108 Stat. 1552; 1994 Enacted S. 1458; 103 Enacted S. 1458

BILL TRACKING REPORT: 103 Bill Tracking S. 1458  
FULL TEXT VERSION(S) OF BILL: 103 S. 1458  
CIS LEGIS. HISTORY DOCUMENT: 103 CIS Legis. Hist. P.L. 298

An Act

To amend the Federal Aviation Act of 1958 to establish time limitations on certain civil actions against aircraft manufacturers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**[\*1]** SECTION 1. <<NOTE: 49 USC 40101 note>> SHORT TITLE.

This Act may be cited as the "General Aviation Revitalization Act of 1994".

**[\*2]** SEC. 2. <<NOTE: 49 USC 40101 note>> TIME LIMITATIONS ON CIVIL ACTIONS AGAINST AIRCRAFT MANUFACTURERS.

(a) In General.--Except as provided in subsection (b), 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--

(1) after the applicable limitation period beginning on--

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

(2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition.

(b) Exceptions.-- Subsection (a) does not apply--

(1) if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, **[\*\*1553]** or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered;

(2) if the person for whose injury or death the claim is being made is a passenger for purposes of receiving treatment for a medical or other emergency;

(3) if the person for whose injury or death the claim is being made was not aboard the aircraft at the time of the accident; or

(4) to an action brought under a written warranty enforceable under law but for the operation of this Act.

(c) General Aviation Aircraft Defined.--For the purposes of this Act, the term "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations as defined under regulations in effect under the Federal Aviation Act of 1958 (49 U.S.C. App. 1301 et seq.) at the time of the accident.

(d) Relationship to Other Laws.--This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a).

**[\*3]** SEC. 3. <<NOTE: 49 USC 40101 note>> OTHER DEFINITIONS.

For purposes of this Act--

(1) the term "aircraft" has the meaning given such term in section 101(5) of the Federal Aviation Act of 1958 (49 U.S.C. 1301(5));

(2) the term "airworthiness certificate" means an airworthiness certificate issued under section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(c)) or under any predecessor Federal statute;

(3) the term "limitation period" means 18 years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft; and

(4) the term "type certificate" means a type certificate issued under section 603(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(a)) or under any predecessor Federal statute.

**[\*\*1554]** **[\*4]** SEC. 4. <<NOTE: 49 USC 40101 note>> EFFECTIVE DATE; APPLICATION OF ACT.

(a) Effective Date.-- Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.

(b) Application of Act.-- This Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

**DESCRIPTORS:** LIMITATION OF ACTIONS; AIRCRAFT; AIRCRAFT INDUSTRY; PRODUCT LIABILITY; GENERAL AVIATION; AVIATION ACCIDENTS AND SAFETY; CIVIL PROCEDURE

the United States are harmful to the health of airline passengers and crew, as indicated by physical symptoms such as headaches, nausea, fatigue, and lightheadedness; and

"(2) the risk of airline passengers and crew contracting infectious diseases during flight.

"(b) **CONTRACT WITH CENTER FOR DISEASE CONTROL.**—In carrying out the research program established under subsection (a), the Administrator and the heads of the other appropriate Federal agencies shall contract with the Center for Disease Control [now Centers for Disease Control and Prevention] and other appropriate agencies to carry out any studies necessary to meet the goals of the program set forth in subsection (c).

"(c) **GOALS.**—The goals of the research program established under subsection (a) shall be—

"(1) to determine what, if any, cabin air conditions currently exist on domestic aircraft used for flights within the United States that could be harmful to the health of airline passengers and crew, as indicated by physical symptoms such as headaches, nausea, fatigue, and lightheadedness, and including the risk of infection by bacteria and viruses;

"(2) to determine to what extent, changes in, cabin air pressure, temperature, rate of cabin air circulation, the quantity of fresh air per occupant, and humidity on current domestic aircraft would reduce or eliminate the risk of illness or discomfort to airline passengers and crew; and

"(3) to establish a long-term research program to examine potential health problems to airline passengers and crew that may arise in an airplane cabin on a flight within the United States because of cabin air quality as a result of the conditions and changes described in paragraphs (1) and (2).

"(d) **PARTICIPATION.**—In carrying out the research program established under subsection (a), the Administrator shall encourage participation in the program by representatives of aircraft manufacturers, air carriers, aviation employee organizations, airline passengers, and academia.

"(e) **REPORT.**—(1) Within six months after the date of enactment of this Act [Aug. 23, 1994], the Administrator shall submit to the Congress a plan for implementation of the research program established under subsection (a).

"(2) The Administrator shall annually submit to the Congress a report on the progress made during the year for which the report is submitted toward meeting the goals set forth in subsection (c).

"(f) **AUTHORIZATION OF APPROPRIATIONS.**—Of amounts authorized to be appropriated for fiscal years 1995 and 1996 under section 48102(a) of title 49, United States Code, as amended by section 302 of this title, there are authorized to be appropriated for fiscal years 1995 and 1996, respectively, such sums as may be necessary to carry out this section."

#### INFORMATION ON DISINSECTION OF AIRCRAFT

Pub. L. 103-305, title V, §507, Aug. 23, 1994, 108 Stat. 1595, provided that:

"(a) **AVAILABILITY OF INFORMATION.**—In the interest of protecting the health of air travelers, the Secretary shall publish a list of the countries (as determined by the Secretary) that require disinsection of aircraft landing in such countries while passengers and crew are on board such aircraft.

"(b) **REVISION.**—The Secretary shall revise the list required under subsection (a) on a periodic basis.

"(c) **PUBLICATION.**—The Secretary shall publish the list required under subsection (a) not later than 30 days after the date of the enactment of this Act [Aug. 23, 1994]. The Secretary shall publish a revision to the list not later than 30 days after completing the revision under subsection (b)."

#### GENERAL AVIATION REVITALIZATION ACT OF 1994

Pub. L. 103-298, Aug. 17, 1994, 108 Stat. 1552, as amended by Pub. L. 105-102, §3(e), Nov. 20, 1997, 111 Stat. 2215, provided that:

#### "SECTION 1. SHORT TITLE.

"This Act may be cited as the 'General Aviation Revitalization Act of 1994'.

#### "SEC. 2. TIME LIMITATIONS ON CIVIL ACTIONS AGAINST AIRCRAFT MANUFACTURERS.

"(a) **IN GENERAL.**—Except as provided in subsection (b), 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—

"(1) after the applicable limitation period beginning on—

"(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

"(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

"(2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition.

"(b) **EXCEPTIONS.**—Subsection (a) does not apply—

"(1) if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered;

"(2) if the person for whose injury or death the claim is being made is a passenger for purposes of receiving treatment for a medical or other emergency;

"(3) if the person for whose injury or death the claim is being made was not aboard the aircraft at the time of the accident; or

"(4) to an action brought under a written warranty enforceable under law but for the operation of this Act.

"(c) **GENERAL AVIATION AIRCRAFT DEFINED.**—For the purposes of this Act, the term 'general aviation aircraft' means any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations as defined under regulations in effect under part A of subtitle VII of title 49, United States Code, at the time of the accident.

"(d) **RELATIONSHIP TO OTHER LAWS.**—This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a).

#### "SEC. 3. OTHER DEFINITIONS.

"For purposes of this Act—

"(1) the term 'aircraft' has the meaning given such term in section 40102(a)(6) of title 49, United States Code;

"(2) the term 'airworthiness certificate' means an airworthiness certificate issued under section 44704(c)(1) of title 49, United States Code, or under any predecessor Federal statute;

"(3) the term 'limitation period' means 18 years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft; and

"(4) the term 'type certificate' means a type certificate issued under section 44704(a) of title 49, United States Code, or under any predecessor Federal statute.

**"SEC. 4. EFFECTIVE DATE; APPLICATION OF ACT.**

"(a) **EFFECTIVE DATE.**—Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act [Aug. 17, 1994].

"(b) **APPLICATION OF ACT.**—This Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act."

**NATIONAL COMMISSION TO ENSURE A STRONG COMPETITIVE AIRLINE INDUSTRY**

Pub. L. 102-581, title II, §204, Oct. 31, 1992, 106 Stat. 4891, as amended Pub. L. 103-13, §1, Apr. 7, 1993, 107 Stat. 43, provided for establishment of National Commission to Ensure a Strong Competitive Airline Industry to make a complete investigation and study of financial condition of the airline industry, adequacy of competition in the airline industry, and legal impediments to a financially strong and competitive airline industry, to report to President and Congress not later than 90 days after the date on which initial appointments of members to the Commission were completed, and to terminate on the 30th day following transmission of report.

**EX. ORD. NO. 13479. TRANSFORMATION OF THE NATIONAL AIR TRANSPORTATION SYSTEM**

Ex. Ord. No. 13479, Nov. 18, 2008, 73 F.R. 70241, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

**SECTION 1. Policy.** It is the policy of the United States to establish and maintain a national air transportation system that meets the present and future civil aviation, homeland security, economic, environmental protection, and national defense needs of the United States, including through effective implementation of the Next Generation Air Transportation System (NextGen).

**SEC. 2. Definitions.** As used in this order the term "Next Generation Air Transportation System" means the system to which section 709 of the Vision 100—Century of Aviation Reauthorization Act (Public Law 108-176) (Act) refers.

**SEC. 3. Functions of the Secretary of Transportation.** Consistent with sections 709 and 710 of the Act and the policy set forth in section 1 of this order, the Secretary of Transportation shall:

(a) take such action within the authority of the Secretary, and recommend as appropriate to the President such action as is within the authority of the President, to implement the policy set forth in section 1 of this order and in particular to implement the NextGen in a safe, secure, timely, environmentally sound, efficient, and effective manner;

(b) convene quarterly, unless the Secretary determines that meeting less often is consistent with effective implementation of the policy set forth in section 1 of this order, the Senior Policy Committee established pursuant to section 710 of the Act (Committee);

(c) not later than 90 days after the date of this order, establish within the Department of Transportation a support staff (Staff), including employees from departments and agencies assigned pursuant to subsection 4(e) of this order, to support, as directed by the Secretary, the Secretary and the Committee in the performance of their duties relating to the policy set forth in section 1 of this order; and

(d) not later than 180 days after the date of this order, establish an advisory committee to provide advice to the Secretary and, through the Secretary, the Commit-

tee concerning the implementation of the policy set forth in section 1 of this order, including aviation-related subjects and any related performance measures specified by the Secretary, pursuant to section 710 of the Act.

**SEC. 4. Functions of Other Heads of Executive Departments and Agencies.** Consistent with the policy set forth in section 1 of this order:

(a) the Secretary of Defense shall assist the Secretary of Transportation by:

(i) collaborating, as appropriate, and verifying that the NextGen meets the national defense needs of the United States consistent with the policies and plans established under applicable Presidential guidance; and

(ii) furnishing, as appropriate, data streams to integrate national defense capabilities of the United States civil and military systems relating to the national air transportation system, and coordinating the development of requirements and capabilities to address tracking and other activities relating to non-cooperative aircraft in consultation with the Secretary of Homeland Security, as appropriate;

(b) the Secretary of Commerce shall:

(i) develop and make available, as appropriate, the capabilities of the Department of Commerce, including those relating to aviation weather and spectrum management, to support the NextGen; and

(ii) take appropriate account of the needs of the NextGen in the trade, commerce, and other activities of the Department of Commerce, including those relating to the development and setting of standards;

(c) the Secretary of Homeland Security shall assist the Secretary of Transportation by ensuring that:

(i) the NextGen includes the aviation-related security capabilities necessary to ensure the security of persons, property, and activities within the national air transportation system consistent with the policies and plans established under applicable Presidential guidance; and

(ii) the Department of Homeland Security shall continue to carry out all statutory and assigned responsibilities relating to aviation security, border security, and critical infrastructure protection in consultation with the Secretary of Defense, as appropriate;

(d) the Administrator of the National Aeronautics and Space Administration shall carry out the Administrator's duties under Executive Order 13419 of December 20, 2006, in a manner consistent with that order and the policy set forth in section 1 of this order;

(e) the heads of executive departments and agencies shall provide to the Secretary of Transportation such information and assistance, including personnel and other resources for the Staff to which subsection 3(c) of this order refers, as may be necessary and appropriate to implement this order as agreed to by the heads of the departments and agencies involved; and

(f) the Director of the Office of Management and Budget may issue such instructions as may be necessary to implement subsection 5(b) of this order.

**SEC. 5. Additional Functions of the Senior Policy Committee.** In addition to performing the functions specified in section 710 of the Act, the Committee shall:

(a) report not less often than every 2 years to the President, through the Secretary of Transportation, on progress made and projected to implement the policy set forth in section 1 of this order, together with such recommendations including performance measures for administrative or other action as the Committee determines appropriate;

(b) review the proposals by the heads of executive departments and agencies to the Director of the Office of Management and Budget with respect to programs affecting the policy set forth in section 1 of this order, and make recommendations including performance measures thereon, through the Secretary of Transportation, to the Director; and

(c) advise the Secretary of Transportation and, through the Secretary of Transportation, the Secretar-