14-_____

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

JILL SIKKELEE, Individually and as Personal Representative of the ESTATE OF DAVID SIKKELEE, Deceased,

Respondent,

against

AVCO CORPORATION, on Behalf of its Lycoming Engines Division, *et al.*,

Petitioner.

On Appeal from the United States District Court for the Middle District of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b) FROM AN ORDER DENYING, IN PART, SUMMARY JUDGMENT IN FAVOR OF AVCO CORPORATION

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Respondent Jill Sikkelee respectfully opposes AVCO Corporation's (Lycoming's) petition for permission to appeal from the district court's September 10, 2014, order denying Lycoming's motion for summary judgment as it relates to respondent's state tort claim alleging that Lycoming violated 14 CFR § 21.3.

Respondent has requested permission to appeal from the same order, which granted summary judgment to Lycoming on respondent's other tort claims. She continues to advance her contention that this Court should review immediately the district court's order. She further acknowledges that if this Court permits her to appeal, it "may address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court,'" including the question raised by Lycoming's petition. *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 366 (3d Cir. 1999) (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)). However, for the reasons set forth below, this Court should decline to review or reverse the portion of the district court's order denying summary judgment to Lycoming based upon 14 CFR § 21.3.

I. Facts and Proceedings Below.

Respondent's husband died in a fire resulting from a plane crash. The subject Cessna 172N aircraft's Lycoming O-320 engine lost power shortly after takeoff due to an alleged design defect with its fuel metering system, which caused its throttle body to bowl screws to loosen in flight, ultimately causing a crash.

Lycoming knew of this precise defect for years before this crash. (Doc.##234-8; 234-13)

Respondent's lawsuit alleges that Lycoming violated numerous federal aviation safety regulations (*i.e.*, standards of care), which give rise to state tort remedies. Some of the violations alleged in the complaint involve regulations that constitute minimum requirements for Type Certification—a process whereby an aircraft manufacturer can obtain a certificate from the Federal Aviation Administration (Administration) issued by and through representations from the manufacturer that it met minimum federal standards of care. Respondent also brought a state law claim alleging a violation of 14 CFR § 21.3, which requires the holder of a Type Certificate to report certain failures, malfunctions and defects in an engine and its fuel system that either has or could result in a safety risk. This claim alleges that Lycoming knew or should have known of, and yet failed to report pursuant to 14 CFR § 21.3, defects in its design and continued airworthiness instructions, thus violating federal standards of care regarding an enumerated safety risk. Two different district court judges found that respondent's evidence gave rise to a material question of fact as to whether this regulation was violated. (Doc.##299; 359)

This case has been pending in the district court for over seven years. In 2012, the district court (Jones, J.) denied Lycoming's motion for summary

judgment relating to violations of federal regulations, including 14 CFR § 21.3.[1] The court recognized that respondent had put forth substantial evidence that tended to show that Lycoming breached federal standards of care.

Factually, Lycoming admitted in this case that its "factory new" engine was first installed in the Cessna 172N aircraft at issue in 1998. The plane's engine and carburetor had also been overhauled—pursuant to Lycoming's instructions and Type Certificate—in 2004. Lycoming admittedly designed and manufactured the O-320 engine claimed to be defective. Lycoming also was found by the lower court to be a *de facto* manufacturer of the O-320 engine and Lycoming's required MA-4SPA carburetor (having a Lycoming part number) at the time of their overhaul in 2004 pursuant to Lycoming's instructions and Type Certificate.[2]

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[1] (Ex. 2 to Plaintiff's Petition for Interlocutory Appeal, Doc. #299).

[2] *Sikkelee v. Precision Airmotive LLC*, 876 F. Supp. 2d 479, 487 (M.D. Pa. July 3, 2012) ("[T]he overhaul of the engine itself, admittedly physically accomplished by others but pursuant to the strict requirements and direction of Lycoming's manuals and service bulletins, was, in essence, a Lycoming-controlled remanufacture of the engine and its component parts. Thus, it follows that because Lycoming exercised such control over the MA-4SPA carburetor and the engine overhaul in its entirety, Plaintiff's argument would conclude that Lycoming can fairly be said to be a *de facto* manufacturer of the overhauled engine, rendered defective by the replacement carburetor installed pursuant to its direction."); *Sikkelee v. Precision Airmotive Corp.*, 2013 WL 2393005, *5 (M.D. Pa. June 3, 2013) ("Lycoming asserts that an intervening change in the controlling law (from the application to Restatement 2d to Restatement 3d) and the need to correct a clear error of law (the Court's conclusion that Lycoming could be liable as a *de facto* manufacturer) compel this Court to reconsider the subject Order and grant Lycoming's motion for summary judgment. The Court disagrees."); *Sikkelee v. Precision Airmotive Corp.*,

Lycoming also cannot dispute it had continued airworthiness obligations relative to the engine and its carburetor. (14 CFR 33.4; 21.50)

As holder of the O-320 series engine Type Design Certificate and Production Approval Certificate, Lycoming was and is required by the Administration to resolve service issues involving the MA-4SPA carburetor related to design. Lycoming admitted that the MA-4SPA carburetor (having a Lycoming part number) is part of its engine Type Design.[3] Co-defendant Precision Airmotive admitted in its Trial Memorandum in this case that, "Precision Airmotive may put on evidence to demonstrate Lycoming's role in the design of the carburetor to defeat even an unfounded claim that Lycoming is subject to liability based solely on Precision Airmotive's fault." (Doc.#408, p.3)

This is why the Administration *and* co-defendant Precision Airmotive requested help from Lycoming to solve the ongoing problem/defect of loosening of throttle body to bowl screws on O-320 series engines in Cessna 172 series aircraft

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2013 WL 3456953, *1 (M.D. Pa. July 9, 2013) ("[E]ven were it to predict that Pennsylvania will adopt Section 20 of Restatement 3d, this would not get Lycoming out of the woods. Restatement 3d itself recognizes that its Section 20 does not include all potentially liable defendants. *See, e.g.*, Restatement (Third) of Torts: Prod. Liab. § 14 cmt. d (1998) (trademark licensors who participate substantially in the design of a licensee's product are treated as sellers under the circumstances). That is to say, Restatement 3d recognizes that certain circumstances call for treating a non-'seller' as a 'seller' for liability purposes")

[3] (Doc.#473, Folk Depo., pgs.9-10) (*See also* 14 CFR 21.3(a)-(f); Doc.#234-8, Administration Memo re: MA series carburetors and Lycoming's responsibilities).

years before this aircraft accident. (Doc.##234-8; 234-13, FAA Letters; Doc.#234-14, Precision Letters)[4] Lycoming also knew its field Service Bulletin (SB) 366 regarding the problem of loose throttle to bowl screws on O-320 engines (directed to mechanics and overhaulers) did not alleviate the problem. (Doc.#234, ¶ 33, Dep. of Moffett, pgs.51-52) Various substantially similar Administration Service Difficulty Reports (SDRs), Precision Return Material Authorizations (RMAs), Lycoming Service Information Records (SIRs), warranty records, company emails, memos, letters, post-accident revisions to Lycoming's Service Bulletins, etc.[5] were produced to the lower court to show Lycoming's knowledge/notice of a defect in its throttle body to bowl screw design on its O-320 series engine (as well as its continued airworthiness instructions related to the carburetor) many years before

[4] It is important to note that,

(1) in 1970, **the Administration went to Lycoming** to address "various problems concerning Marvel Schebler carburetors" including problems with the overhaul manual, **asking Lycoming** to "let this office know the status of the Marvel Schebler overhaul manual" (Doc.#320-3, LYCS 5185 (filed under seal as Doc.#317));

(2) in 1971 and 1972, **the Administration went to Lycoming** regarding loose throttle body to bowl screw problems on O-320 series engines—**asking for Lycoming** to "alleviate the problem." (Doc.##234-8, -13; Doc.#448, 1971 FAA Letter to Lycoming, Pl.'s Ex. 10 used at FRE 104 hearing on 11/13/2013)

(3) the **Administration mandated in a 1972 FAA memo that Lycoming,** as holder of the engine type design, **was responsible** under the regulations for all service problems related to MA-4SPA carburetor design issues. (Doc.#234-8, -13)

[5] (Doc.##430-1, SDRs; 430-3, RMAs; 430-4, SIRs; Doc.#409-5, ¶56, warranty records; Doc##320-4, memos; 320-5, Lycoming emails; Doc.#234-14, Precision Letters, emailsDoc.#234-10, Doc.#431-2, Doc.#431-3, Service Bulletins)

this accident. Plaintiff also produced testimony from various well-known aviation experts (including a former Administration engineer) to support that Lycoming knew a defect existed; however, neither the public nor the Administration were informed by Lycoming about the defect, which was a causal factor in the crash.[6]

Lycoming admittedly did not report any malfunction, failure or defect to the Administration or public related to the O-320 engine fuel system related to loose throttle body to bowl screws.[7] Lycoming admittedly did not research the Service Difficulty Reports brought to its attention from its co-defendant Precision Airmotive eight months before the accident at issue showing a defect unique to the O-320 series engine and Cessna 172 series aircraft.[8] Lycoming Designated Engineering Representative (DER) Ms. Folk stated that she was not provided with the November 2004 letter from Precision to Moffett, and that she would have liked to know about it while working on the post-accident change to Lycoming SB 366.[9]

Judge Jones found this and other evidence sufficient to defeat Lycoming's motion for summary judgment in 2012. (Doc.#299) In March of this year, the

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[6] (Doc.#234-5, Sommer Rule 26 Report; Doc.#234-6, Twa Rule 26 Report) *Abdullah* found that when a jury is considering what constitutes careless and reckless under the federal regulation, "expert testimony on various aspects of aircraft safety may be helpful to the jury." *Id.*, at 371.

[7] (Doc.#234-2, Dep. of Folk, pgs.48-49; Doc.#475-2, Dep. of Folk, pgs.28, 34-35, 44-45)

[8] (Doc.#234-14, Precision Letter; Doc.#234-7, Dep. of Moffett, pgs.75, 86-87)

[9] (Doc.#234-2, pgs.48, 99) A DER is an engineer at Lycoming who certifies to the FAA that the company's product complies with minimum federal regulations.

district court (Brann, J., who took over the case from Judge Jones), ordered a new round of summary judgment briefing, where Lycoming essentially renewed its prior motion. On September 10, 2014—approximately three years after summary judgment practice had closed—the district court granted Lycoming's motion as it relates to several of respondent's claims alleging violations of design and airworthiness regulations—contrary to the law of the case doctrine and the district court's 2012 ruling. In the Memorandum accompanying its order (Mem.), the court reasoned that many of these claims were preempted under this Court's decision in *Abdullah*, which found "federal preemption of the standards of aviation safety," but nevertheless concluded "that the traditional state and territorial law remedies continue to exist for violation of those standards." 181 F.3d at 375.

To reach this result, the district court first held that *Abdullah* can apply to claims against aircraft manufacturers, thus concluding that only a violation of a federal standard of care will suffice to establish liability. It then reasoned after a new judge was assigned that Lycoming is immune from liability based upon design and airworthiness regulations, despite that the prior judge found that respondent created material questions of fact as to violations of the general design and airworthiness regulations. The district court further held that because the Administration had granted Lycoming a Type Certificate, respondent may not seek a contrary finding by a jury. The court thus granted summary judgment to

Lycoming on several of respondent's claims relating to the safety of its design and airworthiness instructions.

However, the district court denied summary judgment to Lycoming on respondent's claim under 14 CFR § 21.3, which requires Lycoming to report certain malfunctions, failures, and defects to the Administration—including the defect here at issue. Thus, Judges Jones and Brann each held that there was sufficient evidence to create a genuine issue of material fact as to whether Lycoming had determined that its design was unsafe, but nevertheless hid that information from the Administration. (Mem. 61)

The district court recognized that its September 10, 2014 order granting summary judgment to Lycoming rests on shaky ground. It explained that its reconciliation of *Abdullah* "with the federal regulatory scheme that governs aviation design and manufacturing" had resulted in "holdings that [the court] imagines have little to do with Congressional intent." (Mem. 63-64) The district court thus expressly invoked this Court's authority to review the question. *Id*. 64. In the order accompanying the memorandum, the district court likewise noted that its application of *Abdullah* involves a controlling issue of federal law as to which there is substantial ground for difference in opinion. It therefore certified that question for immediate appeal to this Court. (Doc.#306)

On September 20, 2014, respondent filed a petition seeking permission to

appeal from the district court's order. Her petition argues that the district court's decision granting summary judgment to Lycoming constitutes a radical extension of *Abdullah*. The petition notes that the district court's decision granting summary judgment to Lycoming involves a controlling question of law on which there is substantial ground for a difference of opinion. The district court's decision not only conflicts with this Court's holding in *Abdullah*, but also with decisions of other courts that have permitted claims similar to respondent's to proceed. Indeed, to respondent's knowledge, this is the first case to ever create immunity for an aviation manufacturer simply because it obtained a Type Certificate based upon its representations to the Administration. The petition further argued that this Court's immediate review is warranted because respondent will otherwise be forced to try her case twice.

Lycoming filed its own petition ("Lycoming Pet.") later on the same day, presenting the question whether the district court "erroneously created a federal tort remedy, under 14 CFR § 21.3, for failure to report an alleged design defect to the FAA." (Lycoming Pet. 7) Lycoming does not identify any decision holding that claims alleging violations of 14 CFR § 21.3 are preempted under *Abdullah*. Instead, it contends that there is a substantial ground for difference of opinion because the district court's decision allegedly conflicts with *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), a preemption case relating to the

Food and Drug Administration's regulation of medical devices; and also because, in Lycoming's view, the district court implied a federal tort remedy for a regulatory violation. (Lycoming Pet. 16-17)

II. This Court Should Refuse to Review the District Court's Denial of Summary Judgment.

Although this Court would have discretion to consider the district court's denial of summary judgment related to 14 CFR § 21.3 in connection with respondent's appeal, it should decline to review that issue. Lycoming has failed to show that there is a "substantial ground for difference of opinion" over whether a claim based upon the standard of care contained in Section 21.3 is precluded by *Abdullah*. *See* 28 U.S.C. § 1292(b). As Lycoming concedes, this standard requires it to show that district courts have reached conflicting and contradictory decisions, or that controlling authority has not resolved the question. *See* Lycoming Pet. 16. On the other hand, "[a] party's strong disagreement with the Court's ruling is not sufficient for there to be a 'substantial ground for difference.'" *Couch v. Telescope Inc.*, 611 F.3d 629 (9th Cir. 2010). Moreover, "[t]hat settled law might be applied differently does not establish a substantial ground for difference of opinion." *Id*. Here, Lycoming cites no disagreement among the courts regarding whether claims alleging violations of 14 CFR § 21.3 are precluded by federal law, and controlling authority actually establishes that Lycoming is not entitled to summary judgment. Lycoming's mere disagreement with the district court's ruling is insufficient to

justify interlocutory review.

A. On Its Face, *Abdullah* Authorizes Respondent's Claim.

In *Abdullah*, this Court expressly held that "traditional state and territorial law remedies continue to exist for violation of [federal] standards." 181 F.3d at 375. Evaluating Congress's intent, the Court reasoned that state remedies remain available because "it is evident in both the savings and the insurance clauses of the [Federal Aviation Act (FAA)] that Congress found state damage remedies to be compatible with federal aviation safety standards." *Id*. The Court relied on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), which held that a state-law damages remedy was consistent with federal regulation of atomic energy for similar reasons.

As noted above, 14 CFR § 21.3 sets forth the federal standard of care mandating that Lycoming investigate and report failures, malfunctions and defects in the engine and its fuel system for which it held the Type Certificate. Courts have held in similar general aviation cases that this regulation creates an ongoing and continuous obligation for Type Certificate holders to both investigate and report defects promptly. *See, e.g.*, *Robinson v. Hartzell Propeller Inc.*, 326 F.Supp.2d 631, 659 (E.D. Pa. 2004); *Moore v. Hawker Beechcraft Corp*. 2011 WL 6400670, *3 (Del. Super. Dec. 15, 2011); *Godfrey/Grace v. Precision Airmotive,* 2010 WL 3515464, at *2 (Fla. App. 5 Dist. Sep. 10, 2010); *Stewart v. Precision*

Airmotive, LLC, 7 A.3d 266, 273 (Pa. Super. 2010); *Hetzer-Young v. Precision Airmotive Corp.*, 921 N.E.2d 683, 698 (Ohio App. 8 Dist. 2009).

In fact, Lycoming has already admitted, in this very litigation, that Section 21.3 imposes "specific reporting requirements" upon it to report any defect, when it joined in co-defendant Precision Airmotive's brief in the lower court expressly stating as much (Doc.#108, p.16). Lycoming has further admitted that a violation of 14 CFR § 21.3 would give rise to state law remedies under *Abdullah*: according to Lycoming, "[i]f a violation of a federal standard of care is established, a plaintiff may seek whatever damages are permitted by the applicable states' laws." (Doc.#111, p.9, n.2).

Because respondent seeks only state law remedies for a violation of federal standards of care, her claim is not precluded by *Abdullah*. Indeed, *Abdullah* expressly authorizes respondent to seek such a remedy. And because Section 21.3 does not implicate the Administration's determination that Lycoming was eligible for a Type Certificate, even the district court's erroneous expansive reading of *Abdullah* could not compel preclusion here.

B. Lycoming's Position is Unpersuasive.

Tellingly, Lycoming does not produce any authority to the contrary. Instead, it essentially makes two arguments: (1) that the district court's decision is inconsistent with *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341

(2001); and (2) that the district court created an implied federal tort. Neither argument is persuasive.

1. *Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341 (2001), Does Not Warrant Preemption of Respondent's Claim.

In *Buckman*, the Supreme Court interpreted the Federal Food, Drug, and Cosmetic Act (FDCA), and held that the statute preempted state law claims alleging that a medical device manufacturer misrepresented the intended use of a medical device to the Food and Drug Administration (FDA) in order to secure approval for the device. *See* 531 U.S. at 347. The Court reasoned that permitting private lawsuits alleging fraud on the agency conflicted with the federal regulatory scheme, which "amply empowers the FDA to punish and deter fraud against the Administration," and which the FDA had used "to achieve a somewhat delicate balance of statutory objectives." *Id*. at 348. The Court emphasized that the FDCA included "clear evidence that Congress intended the MDA be enforced *exclusively* by the Federal Government." *Id*. at 352 (citing 21 U.S.C. § 337(a)).

Buckman is clearly distinguishable. The FDCA bears no resemblance to the federal aviation regulations at issue here, nor to the FAA (with its express savings clause, *see* 49 U.S.C. § 40120(c)); the General Aviation Revitalization Act of 1994, Pub. L. 103-298 (Aug. 17, 1994) (GARA) amendment to the FAA related to general aviation (making clear that state law claims remain available in general

aviation cases);[10] and/or the FAA's 2001 September 11th Victim Compensation Fund amendment, 115 Stat. 237, 49 U.S.C. § 40101 (2001) (showing no preemption absent a conflict with federal law). These laws all establish that general aviation products liability claims are consistent with federal aviation law. Because preemption is highly context-sensitive, Lycoming errs by attempting to import, wholesale, the reasoning of the Supreme Court's medical device cases to the field of general aviation products liability.

Other courts have so held. In the general aviation case *Morris v. Cessna Aircraft Co.*, 833 F. Supp. 2d 622, 630 (N.D. Tex. 2011), the court distinguished *Buckman* and found the FAA did not preempt the common law standard of care applicable to product liability claims:

> Here, the presumption against finding preemption applies, because state tort law has long been concerned with securing compensation for its citizens who sustain injuries caused by defective products. … Just as the federal government's long history of regulating pharmaceutical drugs did not dictate preemption in *Wyeth [v. Levine*, 555 U.S. 555 (2009)], the history of federal regulation over air transportation does not detract from the states' long-standing role in ensuring product safety.

The *Morris* court later explained:

> [T]he Third Circuit explained [in *Abdullah*] that its conclusion was simply a logical extension of the reasoning of those "decisions in

[10] GARA's 18 year statute of repose also has an exception for the manufacturer's knowledge of a defect and failing to report or remedy same to the FAA, and a re-tolling provision for the installation of new components within the repose period.

> which courts found federal preemption of discrete, safety-related matters, such as airspace management, flight operations, and aviation noise." . . . [T]he court concluded that even in safety-related matters where Congress or the FAA had not prescribed specific rules or regulations, there was no gap in the federal standards to fill with a state common law standard of care. *Id.* at 374. Even so, the court held that the savings clause limited the FAA's preemptive effect to state standards of care, concluding that state tort remedies were left in place, and that, therefore, "plaintiffs, who are injured during a flight as a result of the violation of federal air safety standards, may have a remedy in state . . . law." *Id.* at 376."

Id. at 632.[11]

The reasoning of *Buckman* also supports respondent. In that case, the Supreme Court found, based upon conflict preemption principles, that "the plaintiffs' state-law fraud-on-the-FDA claims conflict with**,** and are therefore impliedly pre-empted by, federal law." 531 U.S. at 348. Here, there is no conflict between respondent's claim and Section 21.3, or any other federal regulation. As the authorities cited in respondent's petition for interlocutory appeal demonstrate,

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[11] *Cf. Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1009-10 (9th Cir. 2013) (distinguishing the regulation of medical devices in *Buckman* from the regulation of air carriers under the FAA and concluding that aviation regulation permits certain state law claims); *Sheesley v. The Cessna Aircraft Co.,* 2006 WL 1084103, 22 (D.S.D. April 20, 2006) (*Abdullah* does not mention GARA and its narrow preemption of state tort law affecting aviation safety. In adopting GARA, Congress went to great lengths limiting its preemption of state tort law in a narrow set of circumstances. This would have been unnecessary if Congress had already preempted all state tort actions affecting aviation safety when it adopted the Act. Instead, as indicated above, Congress did not intend the Act to preempt the entire field of aviation safety. After considering both *Cleveland* and *Abdullah*, this court finds *Cleveland* more persuasive and adopts it here.")

her claim is, in fact, entirely consistent with the federal regime because "the [Administration] cannot fulfill its obligation to promote civil aircraft safety if information which may be highly relevant to safety is withheld in the first instance." *Butler v. Bell Helicopter Textron* (2003), 109 Cal.App.4th 1073, 1086, 135 Cal.Rptr.2d 762. *See also Pease v. Lycoming Engines*, 2011 WL 6339833, at *23 (M.D. Pa. Dec. 19, 2011) (explaining that permitting private suits for damages would have a "salutary effect" because "[a]n inquiry . . . into whether the manufacturer in fact complied with the regulations . . . would assist the [Administration] in policing a manufacturer's compliance rather than hampering the agency in this regard.") (citation omitted).

Moreover, as the Supreme Court has explained, the Type Certification process is not nearly as comprehensive as the approval process for drugs and medical devices:

> [B]ecause [Administration] engineers cannot review each of the thousands of drawings, calculations, reports, and tests involved in the type certification process, the agency must place great reliance on the manufacturer . . . . [I]n most cases the [Administration] staff performs only a cursory review of the substance of th[e] overwhelming volume of documents submitted for its approval.

United States v. Varig Airlines, 467 U.S. 797, 818 n.14 (1984) (quotation marks omitted). And of course, the entire point of Section 21.3 is to place the burden on the manufacturer to report defects as they are discovered—as the Administration has insufficient resources and authority to find those defects on its own. To read

Buckman as precluding a claim by a person killed by a defective aircraft component product, known by an aviation manufacturer to be defective long before a catastrophic aircraft accident—yet hidden from the Administration, pilots and the public due to the nature of the certification system which relies upon the manufacturers—would be contrary to the preemption principles upon which *Abdullah* is based.

Lycoming's reliance on *Buckman* is further undermined by the Supreme Court's subsequent holding in *Wyeth,* 555 U.S. 555, that products liability claims were not preempted merely because a drug's warning label was FDA-approved. Contrasting the regulation of drugs, where Congress never enacted an express preemption provision, with the regulation of medical devices, where Congress did, the Court found no preemption. *See id.* at 574-75. As explained in respondent's petition for an interlocutory appeal, *Wyeth* stands clearly for the proposition that mere agency approval (in this case, issuance of a Type Certificate and Production Approval Certificate) does not warrant preemption when manufacturers have the power and the obligation to do more than meet minimum standards, *i.e.*, when, as here, they also have the duty to investigate and report likely defects.

Finally, whatever Lycoming's opinion about the meaning of *Buckman*, it is beyond dispute that *Buckman* did not overrule contrary circuit precedent, including *Abdullah*, which expressly preserves respondent's right to seek state law remedies

for violations of federal standards. This Court has held that if "there has been no determinative ruling by the Supreme Court on [a] question, we are bound by [our prior opinions]." *Brown v. United States*, 508 F.2d 618, 625 (3d Cir. 1974). "Obedience to a Supreme Court decision is one thing, [but] extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit precedent law is another thing." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007). In light of this Court's holding in *Abdullah* that state law remedies are compatible with federal aviation regulations, *Buckman* furnishes no basis for further review.

2. The District Court Did Not Create A Federal Tort Remedy For Violations Of 14 CFR § 21.3.

In this case, two district court judges held repeatedly that respondent could pursue a state law remedy for violations of the federal standard of care at issue in Lycoming's Petition, 14 CFR § 21.3.[12] Those judges never purported to create a new federal right of action, and Lycoming's attempt to skew the district court's prior rulings into a "federal tort remedy" is disingenuous. It is revealing that Lycoming never filed a petition for an interlocutory appeal with respect to 14 CFR § 21.3 after Judge Jones' July 2012 ruling. Moreover, Lycoming's "federal tort remedy" argument falls outside of the district court's certification for interlocutory

[12] (*See* Ex. 1, Ex. 2 and Ex. 3 to Plaintiff's Petition for an Interlocutory Appeal).

appeal in this case, which concerns only whether *Abdullah* precludes respondent's claims.

In support of its argument, Lycoming misleadingly cites *Rauch v. United Instruments, Inc.*, 548 F.2d 452 (3d Cir. 1976), for the proposition that there is no private right of action under the FAA. *Rauch* has no bearing on this case. The plaintiff in *Rauch* sought federal question jurisdiction alleging an implied right of action under the FAA, and the court merely held that such a right did not exist under the framework of *Cort v. Ash*, 422 U.S. 66 (1975). *See* 548 F.2d at 460. This case, however, does not rest on federal question jurisdiction or an implied right of action because respondent's claims involve diversity jurisdiction and state law claims alleging violations of federal standards of care.

Lycoming appears to base its characterization on the belief that the district court "did not discuss the threshold issue whether 14 CFR § 21.3 could be considered a standard of care for the design and warning claims against Lycoming as design service provider, but, instead, framed the issue as one of 'duty.'" (Lycoming Pet. 14) But to make that argument, Lycoming must ignore the entire procedural history of this case, as well as its own prior admissions. Four years ago, Judge Jones held that *Abdullah* requires respondent to state all of her claims as claims for state law remedies arising from violations of federal standards of care. In response to that ruling, respondent filed the operative complaint in this case.

Every subsequent proceeding, including both orders holding that respondent's claim survived summary judgment, were premised on that earlier ruling. In that context, it is disingenuous for Lycoming to read the district court's use of the word "duty" as implying anything other than a standard of care under *Abdullah*.

III. Conclusion.

For the foregoing reasons, if and when this Court grants respondent's petition for interlocutory review from the district court's order of September 10, 2014, it should not revisit or reconsider the portion of the district court's order denying summary judgment to Lycoming pertaining to 14 CFR § 21.3.

Respectfully submitted on this 2nd day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2014, a true and correct copy of the foregoing was served by federal express overnight delivery upon the following:

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