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BY ELECTRONIC FILING

Ms. Marcia M. Waldron
Clerk of Court
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: *Sikkelee* v. *Precision Airmotive Corp.*, No. 14-4193 (argued June 24, 2015)

Dear Ms. Waldron:

Pursuant to the Court's order of June 17, 2015, appellee AVCO Corporation (referred to here as "Lycoming") respectfully submits this letter responding to the letter brief submitted by the Department of Transportation and the Federal Aviation Administration (collectively "FAA"). The FAA's letter brief resoundingly rejects both of plaintiff's contentions to this Court. *See* Pl. Br. 3-5 (stating issues presented). The FAA's letter thus confirms that the district court's order should be affirmed to the extent it granted Lycoming's motion for summary judgment.

First, the FAA rejects plaintiff's contention that state standards of care govern her design-defect claim against Lycoming. *Compare* Pl. Br. 47-57 *with* FAA Br. 6-9. The FAA reaffirms its preexisting view, adopted by this Court in *Abdullah* v. *American Airlines, Inc.*, 181 F.3d 363 (1999), that the Federal Aviation Act preempts the entire field of aviation safety with respect to substantive standards of safety. *See* FAA Br. 6-9. As a result, in order to prevail on a design-defect claim, a plaintiff must prove the violation of a *federal* safety standard. *See id.*

Second, the FAA also rejects plaintiff's contention that a jury may disregard the FAA's certification that a design feature complies with federal safety standards. *Compare* Pl. Br. 36-47 *with* FAA Br. 9-12. According to the FAA, "to the extent that a plaintiff challenges an aspect of an aircraft's design that was expressly approved by the FAA . . . , a plaintiff's state tort suit arguing for an alternative design would be preempted under conflict preemption principles." FAA Br. 10. Although Lycoming's view is that the appropriate analysis here is governed exclusively by field-preemption principles, rather than by a combination of field- and conflict-

preemption principles, the ultimate outcome is the same: because the FAA approved the design feature plaintiff alleges to be defective, plaintiff's design-defect claim is preempted.

1. The FAA's brief confirms that federal safety standards for aircraft design and manufacture preempt state standards of care.

a. Reaffirming its position in *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), the FAA agrees with Lycoming that the Federal Aviation Act "impliedly preempts the field of aviation safety with respect to substantive standards of safety." FAA Br. 2. That position, of course, is consistent with this Court's decision in *Abdullah*, which held that "federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation." 181 F.3d at 367. As this Court more recently recognized in *Elassaad* v. *Independence Air, Inc*., 613 F.3d 119 (2010), the preempted field of air safety necessarily includes "certification and 'airworthiness' requirements for aircraft parts." *Id.* at 128. As the FAA explains, the federal government has occupied the "field of substantive safety standards by establishing an all-encompassing federal regulatory framework and directing the Secretary to issue regulations setting safety standards for every facet of air safety and aircraft design." FAA Br. 7.

b. Responding to this Court's specific questions, the FAA rejects the principal arguments offered by plaintiff for revisiting *Abdullah*'s holding. *First*, the FAA correctly observes that the General Aviation Revitalization Act (GARA), Pub. L. No. 103-298, 108 Stat. 1552 (1994), does not disturb the conclusion that the Federal Aviation Act preempts state standards of care. FAA Br. 13. As the FAA explains, GARA has the "limited effect" of preempting "state limitations periods that exceed the period in the federal statute of repose." *Id.* GARA is thus perfectly consistent with a conclusion that "state tort suits may proceed based on federal standards of care." *Id.*

Second, the FAA correctly states that "[t]he nature of the type certification process should . . . not alter this Court's analysis." FAA Br. 13. In particular, the FAA refutes plaintiff's hyperbolic assertion that "the type certification process is notoriously porous, thoroughly captured by the industry, and incapable of . . . protecting the public." Pl. Reply Br. 8; *see also* Oral Arg. 1:09:08-1:09:10 (stating that "[t]he amount of FAA involvement is marginal"). As the FAA explains, "[t]he type certification process is an exhaustive, iterative process that proceeds through multiple stages, from conceptual design to compliance planning," and "the decision to approve the type design ultimately rests with the FAA." FAA Br. 14-15. For that reason, "[t]here is . . . nothing about the type certification process that undermines the field preemptive scope of the Federal Aviation Act." *Id.* at 15.

Third, the FAA rejects the only court of appeals decisions to have come out the other way on field preemption—*Public Health Trust* v. *Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993), and *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993). *See* FAA Br. 9 n.1. As the FAA explains, those decisions are of questionable ongoing validity because they substantially rested on the since-discredited notion that the existence of an express-preemption provision precludes implied preemption (including field preemption). *See Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000); *US Airways, Inc.* v. *O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010).

In short, the FAA's brief confirms that there is no reason for this Court to depart from its holding in *Abdullah* that the Act preempts the "entire field" of "standards of care in the field of air safety." 181 F.3d at 367.

2. The FAA's brief also confirms that the FAA's issuance of a type certificate approving the design at issue here preempts plaintiff's tort claim based on the alleged violation of federal standards.

a. As Lycoming has argued and as the district court held, the FAA's issuance of a type certification for an aircraft engine reflects the FAA's determination that the engine meets all applicable federal standards. *See* Lycoming Br. 43-44; A47. The FAA's type certifications are an essential component of the "uniform and exclusive system of federal regulation," *City of Burbank* v. *Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973), and permitting juries to second-guess whether an aircraft design complies with federal standards would upset the exclusivity of the federal scheme. *See* Lycoming Br. 43-49; A48 (noting that, under a contrary view, "the Administrator would be dethroned as the arbiter of whether the requirements set forth in the design and construction regulations have been met"). Because federal safety standards "are not subject to supplementation by, or variation among, jurisdictions," *Abdullah*, 181 F.3d at 367, juries across the country cannot be permitted to alter or abrogate the FAA's determinations concerning compliance with those standards.

The FAA agrees with Lycoming that the FAA's approval of a design feature preempts a claim that the design feature is defective. *See* FAA Br. 10. The FAA's approval of "an aspect of an aircraft's design" preempts "a plaintiff's state tort suit arguing for an alternative design," *id.*, regardless of whether there is evidence that the FAA considered that alternative design. While the FAA reaches that conclusion applying a combination of field- and conflict-preemption principles, rather than field-preemption principles alone, either analytical approach reaches the same result: a plaintiff cannot maintain a state tort claim alleging that a design feature approved by the FAA as part of the type design is defective.

To the extent that the FAA invokes conflict preemption, it relies on both the "impossibility" and "obstacle" strands of conflict preemption. Under the former, federal law preempts state law, including tort claims, where "it is impossible for a private party to comply with both state and federal requirements" "without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency." *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2577, 2581 (2011) (internal quotation marks and citation omitted). Under the latter, a state tort claim is preempted where the claim "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873 (internal quotation marks and citation omitted).

b. Under federal regulations, an engine manufacturer cannot independently vary the type design approved by the FAA. As the FAA recognizes, "a manufacturer is bound to manufacture its aircraft or aircraft parts in compliance with the type certificate." FAA Br. 10-11. The holder of a production certificate is required to "[e]nsure that each completed product or article for which a production certificate has been issued . . . conforms to its approved design." 14 C.F.R. § 21.146(c). Changes to the approved design—even "minor" ones—require FAA approval. 14 C.F.R. §§ 21.95, 21.97; *see* FAA Br. 4-5.

By regulation, the type certificate "include[s] the *type design*, the operating limitations, the certificate data sheet, the applicable regulations of this subchapter with which the FAA records compliance, and any other conditions or limitations prescribed for the product in this subchapter." 14 C.F.R. § 21.41 (emphasis added). The type design includes, *inter alia*, "[t]he drawings and specifications . . . necessary to define the configuration and the design features of the product shown to comply with the requirements of that part of this subchapter applicable to the product." 14 C.F.R. § 21.31. Because aircraft engines must conform to the type certificate, including the type design, a manufacturer cannot vary from the type design without FAA approval. *See* FAA Br. 10-11.

c. Under the FAA's preemption test, the FAA's approval of the O-320 engine type design preempts plaintiff's tort claim alleging that federal safety standards required Lycoming to use an alternative design. As is relevant to this appeal, plaintiff's claim is that, due to a defective design, "the screws that attach the throttle body to the carburetor bowl on Lycoming O-320 series engines have a tendency to loosen due to vibration in the engine." Pl. Br. 21; *see also id.* at 25, 52. In response to Lycoming's motion for summary judgment, plaintiff acknowledged that the "defective method of throttle body to bowl attachment for the O-320 series engines"—*i.e.*, the use of "throttle body to bowl screws and lock tab washers"—"was part of the O-320 engine type design." A640, A642. Indeed, when the FAA approved Lycoming's type design in 1966, it had already considered the safety of the attachment method about which plaintiff complains, concluding that the method "may be substituted for screws and safety wire . . . without adversely affecting safety." 30 Fed. Reg. 8034 (1965); *but see* Pl. Br. 52 (arguing that "[v]arious feasible alternatives . . . including a safety lock wire . . . would have been safer"). Because the throttle-body-to-bowl attachment method is part of the type design approved by the FAA in the type certificate, Lycoming was not permitted to vary from that attachment method without FAA approval. S*ee* FAA Br. 10-11. As a result, under the FAA's proposed framework for analyzing the preemptive effect of type certification, as under Lycoming's, plaintiff's state-law claim is preempted.

The FAA advocates a narrow exception to preemption in situations where "the FAA has not made an affirmative determination with respect to the challenged design aspect, and the agency has left that design aspect to the manufacturer's discretion." FAA Br. 11. But the Court need not determine whether to recognize such an exception in this case, because plaintiff does not claim that the FAA left the throttle-body-to-bowl attachment method to Lycoming's discretion. To the contrary, as just discussed above, plaintiff has conceded that the throttle-body-to-bowl attachment method was part of the type design, and the FAA had expressly concluded before approving Lycoming's type design that the method at issue was safe.

Finally, it bears emphasis that the issuance of a type certificate does not relieve a manufacturer of safety-related obligations. Federal regulations require a manufacturer to report any "failure, malfunction, or defect" that results in enumerated safety events. 14 C.F.R. § 21.3. As the FAA acknowledges (and Lycoming has conceded), the issuance of a type certificate would not preempt a claim that a manufacturer failed to comply with this distinct federal-law obligation, assuming that such a claim were otherwise permissible under state law. *See* FAA Br. 12 n.2 (recognizing the possibility of a claim based on "actions taken on the part of the manufacturer

that post-date the issuance of the type certificate"); Lycoming Br. 50, 60 n.25.[1] As to plaintiff's claim that Lycoming's design was defective at the time the FAA issued the type certificate, however, the FAA's analysis confirms that the FAA's issuance of a type certificate approving the design preempts that claim.

* * * * *

For the reasons set forth in Lycoming's original brief and the FAA's letter brief, the district court's order should be affirmed to the extent it granted Lycoming's motion for summary judgment.[2] Lycoming believes the application of the FAA's preemption test to plaintiff's claims is straightforward. In the event the Court has any doubt on that score, however, it should set the case for reargument and invite the FAA to participate in that argument.

Respectfully submitted,

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam

[1] The FAA also suggests that "negligence with respect to a service bulletin issued to correct an issue that has come to the manufacturer's attention" would not be preempted. FAA Br. 12 n.2. The FAA, however, does not identify a federal standard of care that would govern such a claim. In any event, this appeal does not involve any claim related to a Lycoming service bulletin. *See* Pl. Br. 3-5; Oral Arg. 1:07-1:50. Plaintiff mentions a Lycoming service bulletin only in passing in her brief. *See* Pl. Br. 25, 26 n.23 (referring to "SB 366"). When Lycoming issued that service bulletin in 1973, recommending tightening of the screws attaching the throttle body to the bowl, the FAA (through its designated representative) specifically approved "[e]ngineering [a]spects" of the bulletin. D. Ct. Dkt. No. 234-10.

[2] As Lycoming has explained, the district court's order should be reversed to the extent it denied Lycoming's motion for summary judgment because all of plaintiff's claims, including the remaining claim based on 14 C.F.R. § 21.3, fail under Pennsylvania law. *See* Lycoming Br. 54-60.