IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JILL SIKKELEE, Individually and as Personal Representative of the ESTATE OF DAVID SIKKELEE, Deceased,	:	Case No. 4:07-cv-00886-MWB
	:	(Judge Brann)
Plaintiff	:	
v.	:	
PRECISION AIRMOTIVE CORPORATION, et al.,	:	
Defendants	:	

REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE GROUND OF CONFLICT PREEMPTION

I. INTRODUCTION

Plaintiff's claims are based on the allegedly defective design of the aftermarket replacement carburetor that she claims caused the accident. And, the key question presented by Lycoming's Conflict Preemption Motion is whether the design of *that aftermarket carburetor* could be changed absent express FAA approval. Instead of addressing that issue, plaintiff digresses into an irrelevant (and incorrect) argument that Lycoming could have changed its design requirements for new carburetors manufactured by other companies that Lycoming procures for use on its new engines. In doing so, plaintiff fails to inform this Court

that, even if Lycoming had made such a change (which would also require FAA approval), it would have had no effect on the aftermarket carburetor at issue. The reason for plaintiff's tactic is clear. She has to concede the defense as it relates to the carburetor that actually is involved in this case, and so wants to avoid talking about it.

To defeat Lycoming's motion, plaintiff ultimately must show that the carburetor design could be changed *without* FAA approval. She cannot do that because she concedes that a design change to the replacement carburetor would require FAA approval. Plaintiff's focus on a change to the new carburetors is meaningless for the same reason—because that change also would require FAA approval.

Finally, even assuming, *arguendo*, that Lycoming somehow could change the design of the new carburetors without FAA approval, that fact still would not help plaintiff because that change would not automatically result in a similar change to the replacement carburetor. Plaintiff demonstrates this by her intentional failure to argue the conclusion that she would like—that a change in the new carburetors automatically and necessarily would result in a similar change to the aftermarket replacement carburetor, or that aftermarket carburetors could not continue to be sold absent a similar design change. Plaintiff does not make this argument because no basis exists for it and because it is contradictory to the

regulatory scheme imposed by the federal government. If Lycoming started using a different new carburetor on its new engines, that fact would not change the ability of other parties to manufacture and sell replacement PMA carburetors and carburetor parts. The two simply are not related. Recognizing this, plaintiff merely argues that if the design of the new carburetors had changed, Kelly "almost certainly" would have made a similar design change under its PMA. This assumption is sheer speculation. It also has nothing to do with the law of conflict preemption.

II. ARGUMENT IN REPLY

A. Plaintiff's Claims Based Upon The Aftermarket Replacement Carburetor Are Conflict Preempted

Plaintiff concedes that the FAA approved Kelly's PMA parts, and that Kelly required FAA approval to alter the design of those parts. (Doc. 546 ¶¶ 11-23). Accordingly, plaintiff's design defect claims based on those parts, which formed the attachment mechanism at issue in this case, are conflict preempted.

1. The FAA Expressly Approved The Design Of The Attachment Mechanism In The Replacement Carburetor

One of the few accurate statements in plaintiff's brief is that conflict preemption requires a showing that the FAA expressly approved the design feature at issue. Plaintiff concedes that the FAA expressly approved Kelly's replacement parts when it issued the PMA to Kelly. (Doc. 546 ¶¶ 11-23).

Plaintiff's argument that the issuance of Kelly's PMA for the replacement gasket, screw, and lock washer did not involve the FAA's approval of the design of the attachment mechanism itself is without merit. These parts have no function apart from acting collectively to attach the throttle body to the bowl in the MA-4SPA carburetor. In fact, plaintiff's expert witness described at length for this Court how crucial it is that they work as a unit so that the carburetor halves do not separate and cause the engine to lose power. (N.T. Nov. 13, 2013 at 23-35) (Doc. 458, 459).

Plaintiff's attempt to divorce the FAA's approval of each Kelly replacement part from its approval of the attachment mechanism itself is all the more difficult to understand in light of her description of the process by which Kelly obtained its PMA:

> [T]o obtain approval for its replacement articles, Kelly tested an OEM carburetor for a period of time (*e.g.*, 150 hours), and then tested a carburetor that contained [the] Kelly [replacement] parts [the gasket, screws and lock tab washers] for the same period of time. It then prepared a report documenting that its parts *performed* just as well or better than the OEM parts.

(Opp. Br. at 6) (emphasis added). (See also Doc. 546 ¶¶ 35-37). The only function *performed* by the gasket, screws, and lock washers is to work together as the design feature that secures the carburetor throttle body to the bowl. It is nonsensical to assert that Kelly and the FAA analyzed 300 hours of carburetor

operation simply to confirm that the gasket performed as a gasket, the screw as a screw, and the lock washer as a lock washer—while ignoring whether the attachment mechanism they formed operated properly to hold the carburetor together.

Hence, the FAA expressly approved the attachment mechanism design feature that was in use on the replacement carburetor involved in the accident.

2. It Was Not Possible For Kelly To Change The Design Of Its PMA Parts Without FAA Approval

Conflict preemption occurs when it is impossible for a product manufacturer, on its own, to comply with both federal and state law. The Third Circuit set this law out clearly when it remanded the issue to this Court. However, plaintiff has elected to ignore this legal principle and, instead of addressing impossibility, she argues only that Kelly probably would have tried to change its design if the new carburetor design had been changed.

The question for "impossibility" under conflict preemption is not whether the manufacturer would have tried to change its design, or whether the federal agency involved would allow the change. Rather, it "is whether the [manufacturer] could *independently* do under federal law what state law requires of it." PLIVA, Inc. v. Mensing, 564 U.S. 604, 620 (2011) (emphasis added). "For, even if an alternative design aspect would improve safety, the mere 'possibility' that the FAA would approve a hypothetical application for an alteration does not make it

possible to comply with both federal and state requirements. As the Supreme Court observed in PLIVA, if that were enough, conflict preemption would be 'all but meaningless.'" Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 704 (3d Cir.), cert. denied, 196 L. Ed. 2d 433 (2016).

Plaintiff's speculation that Kelly "almost certainly" would have changed the design of its parts is meaningless. The only relevant question for conflict preemption is whether Kelly independently could change the design of its parts without FAA approval. Sikkelee, 822 F.3d at 703-04. The clear answer to that question is no. Plaintiff concedes, as she must, that the design of any product manufactured pursuant to a PMA must be approved by the FAA. (Opp. Br. at 5-6). (See also Doc. 546 ¶¶ 11-23). FAA approval likewise is required for any change to that design. (Doc 533-6; Doc. 546-6; Doc. 546-7).

Because the FAA approved Kelly's PMA parts and the design of the attachment mechanism which they collectively formed, and because Kelly was unable to make any changes to its parts absent FAA approval, all of plaintiff's design defect claims based on those parts are conflict preempted—including her design defect claims against Lycoming.

B. Plaintiff's Arguments Related to Lycoming's Alleged Ability to Change The New Carburetor Design Do Not Help Her Position

Plaintiff asks this Court to assume, without support, that a change in the Lycoming design requirements for new MA-4SPA model carburetors procured for

use on new engines necessarily would lead to a similar change in the design of the aftermarket replacement carburetor. However, that assumption still does not help plaintiff because the new carburetor design could not be changed without FAA approval—and the conflict preemption doctrine still would operate to bar plaintiff's design defect claims.[1]

1. The FAA Specifically Approved the Lock Washer Attachment Mechanism Design in the MA-4SPA Model Carburetor

Plaintiff concedes that the FAA approved the design of the subject lock washer attachment mechanism on the MA-4SPA model carburetor. (Doc. 456-1). In 1965, Marvel-Schebler, the manufacturer of the new carburetors used by Lycoming on its new engines at the time, proposed to change the design of the attachment mechanism by substituting lock washers for lock wire. (Doc. 456 ¶¶ 27, 28; Doc. 456-1). This proposed design change was approved by the FAA, as evidenced by the Form FAA-1600 "Statement of Compliance of Aircraft or Aircraft Components with Civil Air Regulations," dated February 26, 1965, and signed by an FAA Designated Engineering Representative (then known as a "DEER" and now known as a "DER"). (Doc. 456-1).

[1] Plaintiff's argument that federal law does not conflict with Lycoming's alleged "duty to warn" or "FAA reporting obligations" is irrelevant to this motion. The Conflict Preemption Motion is directed to plaintiff's design defect claims, not these other claims—which lack merit in any event.

The DER's approval of the design constituted FAA approval of that design:

> [D]esignated engineering representatives [are appointed by the FAA] to assist the FAA certification process. These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development. The representatives act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification. In determining whether an aircraft complies with FAA regulations, they are guided by the same requirements, instructions, and procedures as FAA employees.

United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 805 (1984) (citations omitted). "[W]hen performing a delegated function, [DERs] are legally distinct from and act independent of the organizations that employ them." Swanstrom v. Teledyne Continental Motors, Inc., 531 F. Supp. 2d 1325, 1333 (S.D. Ala. 2008) (quotation and citation omitted).

This FAA approval was issued six months before the Lycoming ECO No. 13251, dated August 24, 1965 (Doc. 234-12), was issued,[2] and more than fourteen months before the FAA amended Type Certificate E-274 (Doc. 234-9) to certify

[2] Plaintiff's suggestion that Lycoming changed the design of the attachment mechanism through the issuance of its Engineering Change Order ("ECO") is incorrect. The ECO clearly identifies the reason for the change order as being "[t]o agree with Vendor [Drawing]." (Doc. 234-12). Plaintiff concedes that when the ECO was issued, Marvel-Schebler was the new carburetor supplier, that Marvel-Schebler proposed the attachment mechanism design change, and that Lycoming simply concurred in the proposed design change. (Doc. 456 ¶¶ 27, 28; Doc. 456-1). The ECO was issued only to change Lycoming's engineering data related to the carburetor. (Doc. 234-12).

the O-320-D2C model. As plaintiff has admitted, the type design of the O-320-D2C model engine includes both the MA-4SPA carburetor and the carburetor fasteners that the FAA approved in 1965. (Doc. 488 ¶¶ 1, 5, 10, 12, 13).

2. Any Change To The New Carburetor Design Required FAA Approval

Even if, as plaintiff alleges, Lycoming could work to bring about a change in the design of the carburetor attachment mechanism, it still could not effect that change on its own. Any such design change would require FAA approval.[3] Plaintiff concedes this point when she argues that the design change she advocates constitutes a "minor change" that can be made by a DER "without the FAA's prior approval." (Opp. Br. at 10). To the extent plaintiff is asserting that DER approval does not constitute FAA approval, she is wrong.[4] See Varig Airlines, 467 U.S. at

[3] Plaintiff's suggestion that Lycoming could have simply designated that a different model carburetor be used on the O-320-D2C model engine is without merit. Plaintiff admits that the *only* carburetor approved by the FAA for use on that engine is the MA-4SPA model carburetor. (Doc. 533 ¶¶ 1, 4; Doc. 546 ¶¶ 1, 4). In fact, Type Certificate Data Sheet No. E-274 establishes that the FAA specifically has authorized only one model carburetor for each model engine covered by Type Certificate No. E-274. (Doc. 234-9). Thus, no basis exists for plaintiff's suggestion that Lycoming, on its own, could simply "mix and match" different carburetors and engines.

[4] Plaintiff's assertion that a DER's power to effect a design change is a "very close analogue" to the ability of the prescription drug manufacturer in Wyeth v. Levine, 555 U.S. 555 (2009), to alter its drug label, is incorrect. The regulation involved in Wyeth permitted the drug manufacturer *itself* to change the label without the approval or involvement of the federal agency involved. Id. at 567-71. That is not at all analogous to an FAA DER approving a design change.

805. See also Letter Br. of Amicus Curiae Fed. Aviation Admin. at 5 (Doc. 534-1) ("Certain 'minor' changes, defined by regulation, may not require an amended or supplemental type certificate, but are still *subject to approval by the FAA*") (citing 14 C.F.R. § 21.95) (emphasis added).

So, even assuming that a change to the design of the new MA-4SPA model carburetors necessarily would cause a similar change to the design of aftermarket replacement carburetors, that "fact" still would be immaterial to this Conflict Preemption Motion because the design of the new carburetors could not be changed without the FAA's express approval.

C. Lycoming's Motion Falls Squarely Within the Remand Order

The Third Circuit stated that this Court should consider on remand the issues "whether the alleged design defect at issue in this case is a design aspect that was expressly incorporated into the type certificate for the Textron Lycoming O-320-D2C engine and what significance that might have for conflict preemption." Sikkelee, 822 F.3d at 703. The court noted that "because the type certification process results in the FAA's preapproval of particular specifications from which a manufacturer may not normally deviate without violating federal law, the type certificate bears on ordinary conflict preemption principles." Id. at 702.

Those are exactly the issues presented by Lycoming's motion. The design defect at issue in this litigation is the throttle body to bowl attachment mechanism

in the MA-4SPA model carburetor. Plaintiff alleges that the design of that attachment mechanism in the replacement carburetor involved in the accident was identical to the design in the new carburetors allegedly "controlled" by Lycoming, and therefore Lycoming is liable for the alleged design defect in that replacement carburetor.

As demonstrated above, the design of the attachment mechanism on the MA-4SPA model carburetor (both new and replacement carburetors) specifically was approved and authorized by the FAA, and that approval was incorporated into Lycoming's type certificate for the engine. In addition, the design of that attachment mechanism could not be changed absent the FAA's approval and authorization. Accordingly, Lycoming's conflict preemption motion falls squarely within the remand order.

III. CONCLUSION

The FAA expressly approved the design of the attachment mechanism at issue in this case, and the changes to that design that plaintiff alleges are required by Pennsylvania law could not be made independently by Kelly, or Lycoming, or anyone else. Those changes required the FAA's specific approval and authorization. As a result, because plaintiff's Pennsylvania state law design defect claims directly conflict with federal law, they are barred by the doctrine of conflict preemption and should be dismissed.

Respectfully submitted,

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Dated: March 24, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 24, 2017, a true and correct copy of the foregoing **Reply Brief in Support of Motion for Summary Judgment on Ground of Conflict Preemption** was served by electronic means, upon all counsel of record through the Court's ECF system.

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