UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JILL SIKKELEE, individually and as Personal representative of the estate of DAVID SIKKELEE, deceased; Plaintiff, v. PRECISION AIRMOTIVE CORPORATION, et al. Defendants.	Case No. 4:07-cv-00886-JEJ (The Honorable John E. Jones, III) Complaint Filed: May 16, 2007

PLAINTIFF'S BRIEF IN OPPOSITION TO AVCO CORPORATION, ON BEHALF OF ITS LYCOMING ENGINES DIVISION'S RENEWED MOTION FOR RECONSIDERATION

COMES NOW Plaintiff, Jill Sikkelee, by and through her undersigned counsel, for Plaintiff's Brief in Opposition to Avco Corporation, on behalf of its Lycoming Engines Division's Renewed Motion for Reconsideration, states as follows:

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COUNTER-ISSUES

I. Whether there is "clear error" presented by Lycoming to warrant reconsideration of this Court's July 3, 2012, Order, when:

(a) Lycoming reargues its original motion except for one new argument, which it could have raised earlier;

(b) Lycoming's new and untimely argument based upon a federal regulation pertaining to maintenance (1) is illogical; (2) expressly contradicts its attempt in its underlying motion to ignore its prior admissions as to federal standards of care it owes as Type Certificate holder/manufacturer, and ignores federal regulations related to Lycoming's engine fuel system design, reporting of defects, continued airworthiness duties, investigating failures, etc.; (3) ignores the federal aviation definition of "manufacturer" (one who "causes a product or a part thereof" to be produced as opposed to just one who produces a product), of "aircraft engine" (which includes accessories like a carburetor or fuel injector), and of "product" (which includes an "aircraft engine"); and (4) ignores a case adverse to Lycoming where the trial court found a question of fact existed as to whether replacement parts in an overhauled MA series carburetor were manufactured or caused to be manufactured by Lycoming and Precision;

(c) The Restatement (Third) does not change that Lycoming is a manufacturer and/or *de facto* manufacturer of a product, this Court has already found various questions of fact existed as to negligence independent of strict liability, Plaintiff produced various proofs in support of her claims, and Pennsylvania law clearly allows for recovery for the alleged breaches of federal standards of care;

(d) Lycoming manufactured/sold the subject O-320 engine, and caused to be produced the subject MA-4SPA carburetor having the same throttle body to bowl screw/lock washer design mandated by Lycoming in 1965 (from safety wire, a feasible alternative); Lycoming manufactured, sold and distributed its defective continued airworthiness instructions applicable to this engine and its replacement MA-4SPA carburetor, *and* Lycoming caused the subject engine overhaul and its MA-4SPA carburetor to be produced and installed on its engine in 2004;

(e) Under the Restatement (Third), Lycoming also has non-delegable post-sale duties to warn, post-sale duties to investigate failures, post-sale duties to report, and a post-sale duty to recall;

(f) Pennsylvania public policy supports liability under the Restatement (Third); and

(g) Newly discovered evidence (just produced by Lycoming following a recent Court Order) shows knowledge and attempts by Lycoming to "resurrect" a solution to the ongoing problem of loosening of throttle body to bowl screws on Lycoming engines **as far back as June 12, 2003—2 years before this accident**; and a post-accident Lycoming email contains an admission that the loose throttle body to bowl screw "problem" was a **design issue** unique to MA series carburetors installed on the Lycoming engines?

Suggested answer: No.

II. Whether this Court misconstrued summary judgment standards and inferences in denying Lycoming's Motion, and/or did not know the meaning of the terms "shall" or "fact"?

Suggested answer: No.

SUMMARY

Lycoming's motion essentially amounts to a re-argument and should be rejected; mere disagreement is not enough to meet the burden for reconsideration.[1]

[1] The Middle District "cautions that any litigant considering bringing a motion to reconsider based upon that ground should evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant." *Dodge v. Susquehanna,* 796 F. Supp. 829, 830 (M.D. Pa. 1992). "[R]econsideration is not permitted simply to allow a 'second bite at the apple.'" *Chambers v. School Dist. of Philadelphia Bd. of Educ.,* 2012 WL

There is no intervening or significant change in the law or facts. The Restatement (Third) merely incorporates some negligence principles into design defect and defective warning analysis. This Court has already found various questions of fact exist as to negligence independent of strict product liability. Plaintiff produced various proofs in support of her claims and Pennsylvania law allows for recovery for strict liability and for negligence for breaches of federal standards of care. The Restatement (Third) does not change this. Moreover, there are post-sale federally mandated standards of care owed by Lycoming as to its O-320 engine independent of original design, which have been allegedly breached and are a causal factor in this accident.

Application of the Restatement (Third) reinforces the Court's findings, and certainly does not change the public policy of Pennsylvania, which holds manufacturers accountable. Lycoming is a manufacturer and a *de facto* manufacturer of its O-320 engine overhauled in 2004, of its approved MA-4SPA replacement carburetor (containing Lycoming's throttle body to bowl screw design and Lycoming part number) installed in 2004, and a manufacturer of Lycoming's defective continued airworthiness instructions. The Restatement (Third) supports liability for design defect, for failure to warn, and also for failure to recall.

3279243, *3 (E.D. Pa. August 13, 2012) (quoting *Bhatnagar v. Surrendra Overseas Ltd.,* 52 F.3d 1220, 1231 (3d Cir. 1995)). *See also Pellicano v. Office of Personnel Management,* 2012 WL 4103891, *3 (M.D. Pa. September 18, 2012)

The Court also properly interpreted factual inferences in favor of the non-movant. Lycoming does not demonstrate "clear error" or that the Court misapplied the legal standard for summary judgment.

COUNTER-FACTS AND ARGUMENT

Lycoming ignores its previous admissions that if Plaintiff proves a violation of a federal standard of care, she has a damage remedy under state law.[2] Various proofs submitted by Plaintiff support allegations that federal standards applicable to this engine and its fuel system were breached by Lycoming at the time of original manufacture and thereafter.

Various proofs establish that Lycoming designed and manufactured its O-320 engine (a product), and created and published its O-320 engine's continued airworthiness instructions (also a product), and caused this MA-4SPA replacement carburetor (a product) to be installed on its O-320 engine during the 2004 overhaul. Proofs show that *Lycoming* chose a MA-4SPA carbureted fuel system for its

[2] (Doc.#108, p.16) ("the FAA continues to regulate aircraft engines by imposing reporting obligations on aircraft engine manufacturers and by imposing ongoing maintenance requirements. For example, specific reporting requirements apply to type-certificate holders and aviation parts manufacturers when 'any failure, malfunction, or defect in any product' results in any of thirteen enumerated occurrences. 14 CFR § 21.3."); (Doc.#111, p.9) ("If a violation of a federal standard of care is established, a plaintiff may seek whatever **damages** are permitted by the applicable states' laws. *Abdullah,* 181 F.3d at 368."). Lycoming argued that no other standard could apply to the duties and obligations of an aircraft component manufacturer other than federal regulations. (Doc.#111, p.13)

engine when feasible alternatives existed at the time of manufacture (i.e., safety wire for the screws, fuel injection as opposed to carburetion, etc.).[3] Proofs show, in part, the subject O-320 engine was in a defective condition at the time of manufacture, and had the same defect in design (throttle body to bowl screw/lock washer attachment system) when overhauled in 2004. (Id.)

Lycoming entered a license agreement with Marvel Schebler/Precision to produce the MA-4SPA pursuant to Lycoming's design requirements.[4] *Lycoming* mandated that the design of the MA-4SPA fuel system could not be changed without Lycoming's approval, and Lycoming approved the very design change in 1965 to the throttle body to bowl screw system.[5] Proofs show that *Lycoming* caused the replacement MA-4SPA and its attachment system to be produced and installed on the accident engine.[6] In 2004, Lycoming's Type Certificate required

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[3] (Doc.#268, ¶¶15-17); (Doc.#234-6); (Doc.#238-4, pgs. 94, 201, 212); (Doc.#234-4, pgs. 14-17, 26); (Doc.#234-12 (under seal)) "Plaintiff has further demonstrated that alternative designs were feasible and contemplated but, ultimately, rejected by Lycoming in favor of the defective throttle body to bowl assembly herein at issue." (Doc.#299, p.27)

[4] "Lycoming conceded that '[f]or maintaining the flow limits on a particular carburetor as it is installed in the engine, that is our responsibility.'" *Hetzer-Young v. Precision Airmotive Corp.,* 921 N.E.2d 683, 688 (Ohio App. 2009).

[5] (Lycoming ECN, Doc.#234-12 (under seal))

[6] (FAA Order 8130.2F, Definitions, 8(u), attached hereto as Exhibit 1; Doc.#235-2, p.5) Of note, in a July 6, 2012, case filed by Lycoming in this Court against Precision, Lycoming admits that its engine fuel system is part of the engine type design, that many of its engines are fuel injected (as opposed to carbureted), that fuel injection servos are part of Lycoming's design, each has a corresponding

an MA-4SPA carburetor with this type of attachment system be installed on its O-320 engine, which it knew to be defective.[7]

The MA-4SPA replacement carburetor had a Lycoming part number (indicating it was part of Lycoming's engine type design);[8] was approved and a foreseeable replacement carburetor fuel system for Lycoming's O-320 engine containing the same mandated throttle body to bowl screw/lock washer design; and was overhauled in 2004 and installed on the overhauled engine pursuant to Lycoming's continued airworthiness instructions.[9]

Lycoming recently admitted in a complaint it filed in this Court (in an unrelated trademark infringement lawsuit involving Marvel Schebler carburetors, which include the MA-4SPA model) that, "Lycoming's supplier [of carburetors], under its PMA, manufactures float carburetors **in compliance with Lycoming's certified type-certificated engine specifications**." (Doc.#256, p.2) Lycoming also admitted it was "not possible" for a PMA holder "**to prove that its product is**

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part number "which were created as part of the engine design," and Lycoming can "delegate the manufacturing to suppliers of its choosing." (July 6, 2012, Lycoming Complaint, attached hereto as Exhibit 2, pgs.3-4)

[7] "At the time of this subject accident, the accident aircraft had a Precision Airmotive Corp. Marvel Schebler MA-4SPA carburetor installed on the Lycoming O-320-D2C engine in accordance with FAA Type Certificate Data Sheet E-274 [issued to Lycoming]." (Doc.#234-5, p.11). The engine was preserved for long-term storage and was installed "new" in 1998 (as admitted by Lycoming in its aircraft accident report). (Doc.# 234-12 (under seal))

[8] (Exhibit 2, p.4, ¶18)

[9] (Doc.#299, pgs. 9-10, 14-15); (Doc.#234-6, p.4); (Doc.#234-5, p.7)

identical to the Lycoming-owned type design without relying upon the Lycoming-owned type design itself." (emphasis added)(Id., p.4)[10]

Lycoming knows it's responsible for component parts for its O-320 engine fuel system even if it does not actually manufacture them. Federal regulations (that Lycoming argued control standard of care) placed responsibility for the O-320 engine's carburetion system and, in particular, throttle body to bowl screw attachment system defects, *on Lycoming*. "Marvel Schebler carburetors are a **part of the engine type design** and are not approved separately. **The type certificate holder [Lycoming] is responsible for the type design and also the correction of service problems. Marvel Schebler manufactures carburetors under PMA procedures, but this is based on a licensing agreement with the engine manufacturers**…" (Doc.#234-13; Doc.#299, p.15, n.3) (emphasis added)

Long ago the FAA went *to Lycoming* to address a concern about throttle body to bowl screws loosening on its O-320 engines. Approximately 10 months before this accident, co-defendant Precision also went to *Lycoming* seeking its help in addressing the ongoing loose bowl screw problem. Lycoming knew of the loose

[10] In conjunction with its duties as Type Certificate Holder, Lycoming as Production Approval Holder is responsible under the federal regulations for any non-conformity in parts manufactured by suppliers for its O-320 engine. (Doc.#234-5, p.8) Lycoming was "responsible for ensuring that each product, or part thereof, conforms to the FAA approved design data and is in a condition for safe operation." (Id.) Precision could not redesign the MA-4SPA carburetor system approved for the O-320 engine without Lycoming's approval.

throttle body to bowl screw problem on its O-320 engines and failed to report it to the FAA, as required.[11] "Lycoming has not properly addressed the fastener torque issue in its continued airworthiness documents, nor has it resolved the continuing body to bowl loosening problem."[12] Lycoming also knows its responsible for instructions for continued airworthiness as to the O-320 engine and its fuel system under the federal regulations.[13]

Lycoming continues to mischaracterize and omit portions of the record, and understands an A&P mechanic is required under federal regulations to follow the Type Certificate holder's manuals. (14 CFR §§ 43.13; 43.2) Lycoming fails to cite the complete Kelly records (which show that Kelly did not change Lycoming's throttle body to bowl screw attachment system design, Kelly installed PMA approved parts, and complied with Lycoming's SB 366). Proofs show that Lycoming's continued airworthiness instructions were followed by Triad and Kelly during the overhaul.[14] Lycoming omits that its accident investigation report

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[11] Lycoming also recently admitted in answer to discovery that it is aware of no reports it sent to the FAA pursuant to 14 CFR § 21.3 and 14 CFR § 145.221 to apprise the FAA or public of this problem, malfunction and defect of loosening of throttle body to bowl screws. (Lycoming Amended Answer to Request Nos. 4 and 5, attached hereto as Exhibit 3)

[12] (Doc.#234-5, p.22)

[13] Note, Lycoming does not contend that its SB 366 (discussing loose throttle body to bowl screws) was inapplicable to the accident O-320 engine with the approved MA-4SPA replacement carburetor.

[14] Lycoming's portion of the brief suggesting no evidence of compliance

attached the aircraft engine logbooks shows that the engine was overhauled to manufacturer (i.e., Lycoming) "overhaul manual new limits."[15]

Lycoming's document production (received by Plaintiff on **September 17, 2012**—in response to this Court Order dated June 20, 2012, granting Plaintiff's motion to compel) further supports denial of Lycoming's motion. Some documents produced include:

(1) a letter from the FAA to Lycoming showing that *Lycoming* was responsible for promulgation of Marvel Schebler continued airworthiness instructions for its engines (Doc.#320-3 (under seal)).[16]

(2) an internal Lycoming memo showing Lycoming itself began to work on a "resurrected" revision to its defective SB 366 **as far back as June 12,**

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with Lycoming's manuals is a misrepresentation. "Triad Aviation, Inc. disassembled, inspected and overhauled the subject engine to the manufacturers overhaul manual new limits." (Doc.#234-6, p.8) "Kelly Aerospace…is an FAA certified repair station…and overhaul facility for Lycoming/Marvel Schebler/Precision Airmotive carburetors. As such, Kelly is required to follow the service manual and instructions set forth by Precision…**Kelly overhauled the subject carburetor in accordance with the requirements of Lycoming and the Precision Airmotive Service Manual. Lycoming SB 366 was also complied with**." (Id.) "The engine overhaul manual is a document that is required to be put forth by the engine Type Certificate Holder or manufacturer." (Id., p. 9 of 44) "Kelly Aerospace…was required to overhaul the carburetor in accordance with the Lycoming and Precision maintenance publications." (Id.) (Doc.#234-5, p.8) The overhaul records show compliance with SB 366.

[15] (Doc.#80, p.22)

[16] Plaintiff filed a Rule 56(d) Affidavit (in the alternative) in opposition to Lycoming's original motion. (*See* Doc.#296, p.48; Doc.#296-4)

2003—more than two (2) years before this accident.[17]

(3) a post-accident internal Lycoming email shows that Lycoming believed that a **"problem"** existed with MA series carburetors and bowl screws loosening on Lycoming engines due to a **design issue** (as opposed to service issues).[18]

(4) Service Information Records show that Lycoming knew before the crash of a continuing problem with loose throttle body to bowl screws on O-320 engines.[19]

A recently discovered affidavit of Lycoming's in-house counsel, Tim Harrington, in a case filed in Washington State by Lycoming against co-defendant Precision indicates that Lycoming offered (after this aircraft accident) to indemnify Precision for MA series carburetor "design defects."[20]

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[17] (*See* Doc.#320-4 (under seal)) Lycoming's SB 366 (also a defective product) was created and distributed by Lycoming. Lycoming's post-accident amendments to SB 366 (SB 366A and 366B) admit that complying with SB 366 by using a screwdriver could compromise the integrity of the lock washer system (i.e., make the problem even worse).

[18] (Doc.#320-5 (under seal), discussing design reasons behind the "problem")

[19] (Doc.#320-6 (under seal)) A motion for discovery sanctions is currently pending before Judge Blewitt as to redacted Lycoming emails, which will likely further support knowledge of a defect. (Doc.#310) Lycoming is conducting a further search of its email server and searching for other documents. (Doc.#334)

[20] (T. Harrington Affidavit, attached as Exhibit 4)

I. LYCOMING IGNORES PLAINTIFF'S NEGLIGENCE CLAIMS

There is no showing of "clear error" as to Plaintiff's negligence claims. Lycoming erroneously attempts to meld Plaintiff's negligence claims into strict product liability.[21] In addition to its obligations for the engine fuel system design, Lycoming has concurrent federal obligations to monitor its engines, to investigate and report failures/defects, and to publish continued airworthiness instructions. Pennsylvania recognizes both causes of action, i.e., negligence and strict product liability, and this has not been changed by the Third Circuit's prediction as to design defect and failure to warn.[22] Also, this Court incorporated negligence principles (which include foreseeability and feasible alternatives discussed in the Restatement (Third)) into its July 2012 Order. (Doc.#299, pgs. 27-31)

Lycoming's argument—that it should not be held liable, even if it breached a federal standard of care, because it did not actually "sell," "manufacture" or "distribute" the specific Lycoming approved replacement carburetor for its O-320 engine (an engine that Lycoming admits it designed, manufactured, and sold)—

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[21] (*See* Doc.#301, pgs.15-16, wherein Lycoming cited no authority and spent only three sentences on its argument as to the Court's denial of summary judgment as to Plaintiff's negligence claims).

[22] *Sikkelee v. Precision Airmotive Corp.,* 2012 WL 5077571, *1 (3d Cir. October 17, 2012) (emphasis added) ("The Pennsylvania Supreme Court has not issued a definitive opinion on whether the Restatement (Third) of Torts or the Restatements (Second) of Torts and applies to **strict liability and product defect** cases. Accordingly, we will follow the precedent set out in *Covell* and *Berrier."*)

should again be rejected.[23] Lycoming ignores the federal standards of care that it argued apply and control herein.

The FAA defines a "manufacturer" as an entity that "**causes a product or part thereof to be produced**." (*See* FAA Order 8130.2F, Definitions, u., Ex. 1) Title 14 CFR § 21.1(b)(5), defines **"product"** as "an aircraft, **aircraft engine,** or propeller," and 14 CFR § 1.1, defines **"aircraft engine"** as "an engine that is used or intended to be used for propelling aircraft. It **includes** turbo-superchargers, appurtenances, and **accessories necessary for its functioning...**." Lycoming admits that its engine is not an engine without its carburetor.[24]

Lycoming ignores, *AVCO Corp. v. Neff,* 30 So.3d 597, 601 (Fla. App. 1 Dist. 2010), a case **involving an MA series carburetor and Lycoming,** where the Florida court denied an interlocutory appeal where: "the trial court denied Petitioners' motions for summary judgment, finding that genuine issues of material fact existed. The court found that a genuine dispute existed **as to whether the replacement parts in the overhauled carburetor were manufactured or caused to be manufactured by Petitioners.**"

Lycoming also ignores *Pridgen v. Parker Hannifin, Corp*., 916 A.2d 619,

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[23] As to negligence, this Court found, in part, that material questions of fact existed for the jury as to the claimed federal standard of care violations, and whether Lycoming was aware of the defect and failed to remedy it or notify the FAA as mandated by federal standards. (Doc.#299, pgs.29-33)

[24] (Doc.#234-2, pgs.48-49**)**

623 (Pa. 2007)—**another MA series engine fuel system case against Lycoming**, wherein the Pennsylvania Supreme Court agreed with the plaintiff that Lycoming sits "'at the top of the aviation food chain with respect to all components comprising the type certificated engine.'" *See also Pridgen v. Parker Hannifin Corp. (Pridgen II),* 974 A.2d 1166, 1172 (Pa. Super. Ct. 2009) ("in the absence of GARA repose, [Lycoming] might indeed be liable for **design defects** in a replacement [carburetor] and/or the aircraft systems within which such components function.") These cases support this Court's finding of *de facto* manufacturer.

In *Walton v. Avco Corp.,* 610 A.2d 454 (Pa. 1992), the Pennsylvania Supreme Court held that a helicopter manufacturer was not only liable for incorporating a defective Lycoming engine into its helicopter, but also had an **independent duty to warn,** derived from its knowledge of a defect in the engine which was communicated to it by the engine manufacturer. This is in accord with the federal regulations cited by Plaintiff. Here, Lycoming clearly had an independent duty to warn, derived from its knowledge of a defect in the O-320 engine's fuel metering design, which was communicated to it by Precision many months before this accident and known internally long ago.

Lycoming ignores Pennsylvania cases holding that federal regulations may

create a duty under the law of Pennsylvania.[25] In fact, breaches of federal aviation regulations may give rise to negligence per se under Pennsylvania law.[26]

II. LYCOMING'S RESTATEMENT (THIRD) INTERPRETATION IS MISTAKEN

There is no "clear error" here. Liability attaches to a commercial seller, including, without limitation, a manufacturer or other distributor, of a product that inflicts harm on a person because of a design defect or defect in instructions/warnings. (Restatement (Third) of Torts §§ 1; 20) The Restatement (Third) provides, in part, that a product is defective in design or because of inadequate instructions "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." (Restatement (Third) of Torts, § 2(a)-(b)) Warnings are not a substitute for the provision of a reasonably safe design. (Restatement (Third) of

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[25] (Doc.#269, pgs.31-35); *Stewart v. Precision Airmotive, LLC,* 7 A.3d 266, 277 (Pa. Super. 2010) (in a case *involving Lycoming,* the Court found that "the existence and scope of Precision's duty to report information to the FAA is defined by federal safety regulations….")

[26] *Berkebile v. Brantly Helicopter Corp.,* 281 A.2d 707 (1971), *aff'd* 337 A.2d 893 (Pa. 1975). *See also Gatenby v. Altoona Aviation Corporation,* 407 F.2d 443 (3d Cir. 1969) (negligence per se as to violation of federal aviation regulations); *Stanton by Brooks v. Astra Pharmaceutical Products, Inc.,* 718 F.2d 553, 564 (3d Cir. 1983).

Torts § 2, cmt.)

The foreseeable risks of harm posed by the O-320 engine and its defective fuel system and defective continued airworthiness instructions could have been reduced or avoided had Lycoming adopted an alternative design and/or the provision of reasonable instructions or warnings.

Lycoming continues to ignores the FAA definition of "manufacturer," which is consistent with § 20(a) of the Restatement (Third). Under § 20(a), **sellers "include**, **but are not limited to, manufacturers**, wholesalers and retailers," and § 20(b) even discusses the liability of **non-sale distributors.** (Restatement (Third) of Torts, § 20(a)-(b)) (emphasis added). **The FAA defines a** "**manufacturer" as an entity which causes a product or part thereof to be produced** (FAA Order 8130.2F, Definitions, u. Manufacturer, Ex. 1)—not one who just produces a product. See also *Neff* and *Pridgen*, *supra.* This supports the Court's finding of Lycoming as a *de facto* manufacturer.

Lycoming ignores that § 4 of the Restatement (Third) provides that Plaintiff can prove a design defect by showing a violation of a federal regulation. This is in accord with Lycoming's prior contentions and this Court's prior preemption ruling. Plaintiff has established violations by Lycoming of multiple federal regulations by Lycoming at the time of manufacture and thereafter.

As explained in the "Reporters' Note" (a) to § 20 (the section relied upon by Lycoming), "This Restatement, acknowledging that strict products liability applies to these **nonsale methods** of distribution, designates them with the phrase **'otherwise distributes.' In these areas into which strict products liability is expanding**, **courts frequently consider public policy in making their decisions**." Public policy supports a finding that Lycoming is a manufacturer of its MA-4SPA replacement carburetor. The carburetor has a Lycoming part number and in 2004, the engine was overhauled to manufacturer (Lycoming) new limits.

Lycoming misconstrues this Court's citation of *Polius v. Clark Equipment Co.,* 802 F.2d 75, 77-78 (3d Cir. 1986).[27] Public policy continues under the Restatement (Third) to support a finding that Lycoming impliedly warrants the continued airworthiness of its engine, and is in the best position to absorb the loss.

Lycoming ignores that §10 of the Restatement (Third) imposes a post-sale duty to warn, which is again consistent with Lycoming's prior admissions as to federal standards of care and this Court's preemption ruling. This is in accord with *Walton v. Avco Corp., supra.*, which discusses a post-sale duty to warn under

[27] Lycoming has not presented evidence to rebut that it "designed the MA–4SPA carburetor, that its design must be complied with by the manufacturer to which it granted the design license, that the overhauling mechanic must comply with its design, or that the 2004 overhaul of its engine, including manufacture and installation of an MA–4SPA carburetor allegedly known to have been defective, was in fact accomplished pursuant to its binding designs and mandatory directives." (Doc.#299, pgs.18-19)

Pennsylvania law. Comment (a) to § 10 of the Restatement (Third) (emphasis added) even states that **"[c]ourts recognize that warnings about risks discovered after sale are sometimes necessary to prevent significant harm to persons and property."** The question is whether a reasonable person in Lycoming's position would provide a warning. (Restatement (Third), § 10, Comment (b)). The answer is "yes." [28]

Lycoming ignores § 11 of the Restatement (Third), which imposes a post-sale duty to recall consistent with 14 CFR § 39.5. Pursuant to 14 CFR § 39.5(a)-(b), the FAA will issue an Airworthiness Directive (AD) addressing a product when it finds that: "(a) An unsafe condition exists in the product; and (b) The condition is likely to exist or develop in other products of the same type design." Had Lycoming truthfully reported a **design defect** in its O-320 engine fuel system to the FAA (for instance, through its mandatory obligation to investigate failures and report malfunctions and defects to the FAA pursuant to 14 CFR § 21.3), an AD would have issued, which is tantamount to a recall. Defendant admits it did not

[28] As held by the Court: "Plaintiff cites to Lycoming's continuing airworthiness instructions and manual, void of any warning with respect to the defective carburetor design, as proof that Lycoming has failed to warn of a dangerous defect. Further, Plaintiff notes a complete lack of reports to the FAA regarding the various defects and malfunctions regarding the throttle body to bowl assembly. Without any argument or contradictory evidence presented by the Defendant to prove otherwise, ample evidence exists to put this issue to the jury." (Doc.#299, p.28)

send any such reports to the FAA.

In *Lou v. Otis Elevator Co.,* 933 N.E.2d 140, 149 (Mass.App.Ct. 2010), the court applied § 14, Comment (d), of the Restatement (Third), and found that a trademark licensor could be held liable by virtue of its substantial participation in design, manufacture, or distribution of a product. The licensor had a role in placing a dangerous product into the stream of commerce. This supports liability here, as Lycoming had a role in injecting a dangerous product into the stream of commerce. *See also Brandimarti v. Caterpillar Tractor Co.,* 527 A.2d 134, 139-140 (Pa. Super. 1987) (the court applied § 400 of the Restatement (Second) to Caterpillar "although Caterpillar did not manufacture the product at issue and was not a supplier of the product participating in the chain of distribution")[29]

Also, Pennsylvania law provides that "**only unexpected substantial changes"** will absolve the seller of an engine (a product) from liability for injuries caused by that product.[30] Where a product has reached the user or consumer even with a substantial change, the question becomes whether the manufacturer could

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[29] The Restatement (Third) of Agency, § 7.06 also recognizes the principle of non-delegable duty, and notes that it is a "basic tort-law principle." This basic tort law principle "is often termed one of 'non-delegable' duty because a principal is not relieved of liability on the basis that the principal has delegated performance of the duty to another person, whether or not that person is an agent of the principal." Restatement (Third) of Agency, § 7.06, Comment *a*. Lycoming was the principal as to the MA-4SPA carburetor for its O-320 engine.

[30] *Merriweather v. E. W. Bliss Co.* 636 F.2d 42, 45 (3d Cir. 1980); *Davis v. Berwind Corp.,* 690 A.2d 186, 190 (Pa. 1997).

have reasonably expected or foreseen such an alteration of its product.[31] Lycoming cannot seriously argue that the overhaul or the approved replacement MA-4SPA carburetor (having a Lycoming part number and the same throttle body to bowl screw system design approved by Lycoming) was an unexpected or substantial change to its O-320 engine. The fuel metering system could not be changed without Lycoming's written approval. (Doc.##234-3; 234-4) *Even if* it was a *substantial* change, the question is for the jury whether it was *foreseeable*.

Lycoming's untimely argument concerning a maintenance regulation (i.e., 14 CFR § 43.2) should be rejected out-of-hand.[32] This argument comes long after Lycoming ignored various federal standards of care it owes in its underlying motion for summary judgment. Further, this untimely argument is expressly contrary to the FAA's definition of "manufacturer," and the other federal regulations pertaining to engine design, reporting of defects, continued airworthiness, etc.—which create direct, non-delegable duties upon Lycoming.

III. THIS COURT PROPERLY APPLIED SUMMARY JUDGMENT STANDARDS IN DENYING LYCOMING'S MOTION

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[31] *See Powermatic Houdaille,* 527 A.2d 1012 (Pa. Super. 1987); *Davis v. Berwind Corp.,* 690 A.2d 186, 190 (Pa. 1997); *Minick v. MTD Products Inc.,* 75 Pa. D. & C.4th 225, 233 (Pa.Com.Pl. 2005); *Thompson v. Motch&Merryweather Machinery, Co.,* 516 A.2d 1226 (Pa. Super. 1986).

[32] *See Dermo v. Isaacson,* 2012 WL 4207179, *2 (E.D. Pa. September 19, 2012) (a motion for reconsideration may not be used to revisit or raise new issues with the benefit of the hindsight provided by the court's analysis).

This Court understood the definition of the word "shall" and the meaning of a "fact" when considering Lycoming's motion, and properly applied reasonable inferences from the evidence in favor of the nonmoving party.

Respectfully submitted on this 28th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notification of such filing to the all CM/ECF participants.

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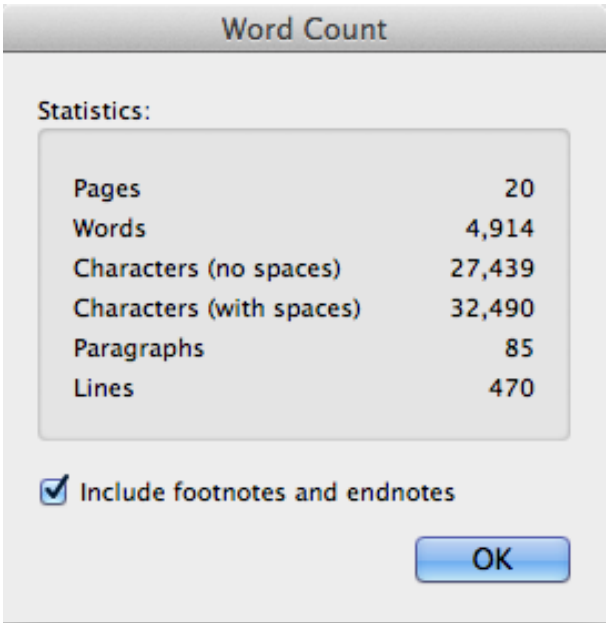
CERTIFICATE OF COMPLIANCE WITH LR 7.8(b)(2)

Pursuant to M.D. Pa. Local Rule 7.8(b), according to Microsoft Word for Mac 2011's word count tool, the total words in this brief (excluding the table of contents, table of authorities and index of exhibits) totals 4,914 words.



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INDEX OF EXHIBITS

EXHIBIT 1 – FAA Order, 8130.2F, Chg 3, April 18, 2007, Ch. 1, Sec. 8(u)

EXHIBIT 2 – July 6, 2012, Lycoming Complaint

EXHIBIT 3 – Lycoming Amended Answer to Requests for Production

EXHIBIT 4 – T. Harrington Affidavit