

CAUSE NO. 2009-24865

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SANCZ
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STEXX

J.C. PENNEY COMPANY, INC. §
and ILLINOIS NATIONAL INSURANCE §
COMPANY, as subrogee of §
J.C. PENNEY COMPANY, INC. §
§
§
Plaintiffs §
§
V. §
§
FALCON CREST AVIATION SUPPLY, INC.. §
AND FALCON CREST ACCESSORIES, INC. §
§
§
Defendants §

IN THE DISTRICT COURT OF
FILED
Loren Jackson
District Clerk
DEC 14 2009
Time: _____
By: _____
Harris County, Texas
HARRIS COUNTY, TEXAS
Deputy

234th JUDICIAL DISTRICT

ORDER

On this the _____ day of _____, 2009, came on to be heard Defendant Falcon Crest Accessories, Inc.'s ("Defendant" or "Falcon Crest") Motion for Sanctions for the Intentional Destruction of Key Material Evidence and Spoliation of Evidence. After providing notice to the Plaintiffs J. C. Penney Company, Inc., and Illinois National Insurance Company, as subrogee of J. C. Penney Company, Inc. ("Plaintiffs"), and an opportunity to be heard, and after considering the Motion, any response, the evidence, and the pleadings, the Court is of the opinion that the Defendant's Motion is in all respects good and should be granted. It is therefore,

ORDERED, ADJUDGED and DECREED, as follows:

The Court finds the following facts ~~have been proven by the Defendants by at least clear and convincing evidence:~~

- 1) The alleged condition of the Wheel was first observed by Plaintiffs on or about July 23, 2007;
- 2) At some time after the condition of the Wheel was observed, the Wheel was returned for an examination to Meggitt Aircraft Braking Systems Corporation d/b/a Dunlop Aerospace Braking Systems d/b/a Dunlop Aerospace North America;

- 3) The Wheel was examined, disassembled, and tested by Dunlop's Chief Airworthiness Engineer Gery Percival ("Percival"), and Dunlop Senior Technical Support Engineer Rick page, both of whom generated a report dated November 13, 2007. The Testing included the disassembly, examination, and testing of the Wheel and its various components;
- 4) At no time did Plaintiffs advise Falcon Crest Aviation Supply, Inc., or Falcon Crest Accessories, Inc. that the Wheel was going to be returned to Dunlop for examination, testing, and reporting;
- 5) In his report, Percival notes: "The lack of witness marks caused by the missing drive bar attachment nut/bolt washer to the interfacing paint indicated that the torque applied to the nut/bolt combination was not consistent with the torque applied to the remaining drive bar attachment nut/bolt combination for this wheel";
- 6) Plaintiffs disclosed for the first time on November 17, 2009, that the Wheel had been overhauled during 2007. Plaintiffs confirmed on November 18, 2009 that the Wheel had been overhauled and returned to service during 2007, and that as part of that overhaul the Wheel was completely refinished, such that the missing hardware was replaced and all marks and paint reworked by an overhaul facility;
- 7) The Wheel is no longer in the condition it was in at the time of the alleged incident, nor at the time of the Testing by Dunlop;
- 8) At no time did Plaintiffs advise Falcon Crest Aviation Supply, Inc., or Falcon Crest Accessories, Inc. that the Wheel was going to be overhauled and returned to service, or that the marks and paint were to be reworked by an overhaul facility;
- 9) Plaintiffs had an absolute obligation to preserve the subject wheel in the condition it was in at the time of the testing by the manufacturer, as Plaintiffs knew or should have known that the wheel and the evidence alleged to exist in the paint thereon would be a significant and hotly contested issue at trial;
- 10) Defendant has no ability whatsoever to examine the Wheel in the condition it was in at the time of the alleged incident, the Testing, and has no reasonable mechanism available to either contest or verify the results of the Testing, which is directly responsible for the prejudice experience by Defendant in defending this case.

By reason of the foregoing facts, the Court finds that Defendant has been compromised and prejudiced in at least the following respects:

- 1) The opportunity to attend the Testing;

- 2) The opportunity to have any of its expert witnesses attend the testing by the wheel's manufacturer;
- 3) The opportunity to have any of its expert witnesses examine the Wheel in its complained-of condition;
- 4) The opportunity to have any of its expert witnesses examine the alleged "witness marks" made the basis of Plaintiffs' expert report;
- 5) The opportunity to have any of its expert witnesses assess and determine the attributes associated with the Wheel, including the quality and nature of the paint, the quality and nature of the alleged "witness marks", a determination as to whether the surface underlying the drive bar had been tampered with, and a forensic examination of the areas surrounding the subject drive bar along with the associated hardware;
- 6) An opportunity to assess the quality and nature of the Testing, including the observations regarding break-away values, such as, but not limited to, the serial number and calibration status of the torque wrench utilized to assess the break away values, and technique associated therewith;
- 7) Any opportunity to examine and assess the quality and nature of the balance of the hardware associated with the Wheel, such as the remaining drive bars, nuts, bolts, and washers, at the time of the Testing.

By reason of all of the foregoing, the Court finds good cause that the Plaintiffs be sanctioned.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Plaintiffs' expert witnesses, retained and non-retained, *be and hereby are stricken in their entirety, including the report by the wheel's manufacturer.* Plaintiffs shall not put on any expert witness opinion testimony during the trial of this cause in any form, nor shall Plaintiffs or counsel for the Plaintiffs argue or suggest to the jury in any respect that any examination, testing, or reporting regarding the subject wheel was done, nor shall Plaintiffs or their counsel argue or suggest the existence of any report by the wheel's manufacturer, of any alleged "witness marks" or equivalent terms during the trial of this cause, including any alleged determination of causation related to any alleged "witness marks" or "torque values" related to examination or testing. Defendant is permitted to put on evidence, and state and

argue to the jury that: i) the subject wheel was in Plaintiffs' possession in its complained of condition; ii) Plaintiffs sent the subject wheel to Defendant for a warranty claim, Defendant performed a visual examination of the subject wheel and could not identify any defects; iii) Plaintiffs sent the subject wheel in for overhaul before suing Defendant; iv) the subject wheel is no longer in the condition it was in when Plaintiffs alleged that it was defective. Defendant is

~~specifically permitted to put on evidence and argue to the jury that Plaintiffs destroyed evidence of the condition of the subject wheel during the wheel's overhaul in 2007. Plaintiffs are specifically barred as well from putting on any rebuttal evidence to expert testimony put on by Defendant. The Court further instructs Plaintiffs that they shall engage in no conduct that could reasonably be interpreted as frustrating or circumventing, or attempting to frustrate or circumvent, this Court's orders.~~

Plaintiffs be and hereby are **ORDERED** to pay to Defendant the following: i) all of Defendant's reasonable and necessary attorneys' fees incurred in defending this matter through the date of this Order; Defendant shall prepare and submit to the Court an attorneys' fee bill depicting all such reasonable and necessary attorneys' fees no later than the _____ day of _____, 20____, upon which Plaintiffs shall pay all such fees and expenses to Defendant through its counsel no later than thirty (30) days following receipt thereof; ii) Plaintiffs shall pay to Defendant all of Defendant's costs incurred in retaining its expert witnesses through the date of this order. Defendant shall prepare and submit to the Court a bill depicting all such expert witness fees no later than the _____ day of _____, 20____, upon which Plaintiffs shall pay all such fees and expenses to Defendant through its counsel no later than thirty (30) days following receipt thereof; iii) Plaintiffs shall pay post-judgment interest on all of the foregoing amounts at the highest rate allowed by law

The Court specifically finds that the facts and circumstances of this case giving rise to the sanction set forth herein to be in full compliance with the guidelines set forth in *TransAmerican Nat. Gas Corp., v. Powell*, 811 S.W. 2d 913, 917 (Tex. 1991). The Court further finds that no lesser sanction will be effective in fulfilling the purpose of sanctions as set forth in *Cire v. Cummings*, 134 S.W. 3d 835, 842 (Tex. 2004), by reason of the fact that Plaintiffs' intentional destruction of the key material evidence cannot reasonably be remedied by the use of any lesser sanction, such as an instruction to the jury regarding the missing evidence, as all of Plaintiffs' expert witnesses would reasonably rely upon the report by the wheel's manufacturer in opining in connection with this case. The Court further finds that no lesser sanction is appropriate by reason of the intentional destruction of key material evidence because Defendant has no reasonable opportunity or mechanism to verify, challenge, or otherwise contest the report by the wheel's manufacturer. Plaintiffs' conduct gives rise to a presumption that the condition of the wheel at the time it was examined by the wheel's manufacturer, had it been preserved, would have proven harmful to Plaintiffs' case. *

All relief not specifically granted herein is hereby denied.

January 5, 2010



HONORABLE JUDGE PRESIDING

* Furthermore, the Court grants Δ 's supplemental motion in part - no evidence of damage regarding the brake ~~part~~ assembly (which is no longer available for inspection) will be allowed. No relief is granted at this time re: the maintenance records

**ORDER APPROVED AND ENTRY
REQUESTED:**

COATS & EVANS, P.C.

/s/ **Gary L. Evans**

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**ATTORNEYS FOR DEFENDANTS
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AND FALCON CREST ACCESSORIES, INC.**

Unofficial Copy Office of Loren Jackson District Clerk