5. Plaintiffs Presented Evidence that HBC's Misrepresentatic are Causally Related to the Subject Accident

Daniel Hart was an experienced and proficient pilot, with approximately 1,158 flight hours, 500 in multi-engine aircraft, approximately 390.5 in the Duke, and advanced training in the Duke and two other Beech models.(A154-A161). As an experienced pilot, Dan followed the Duke AFM in performing his pre-flight and pre-takeoff inspections.(A825-A827; A941-A962; A938-A959; A874; A438-A439). Because of the lack of guidance in the AFM/POH and lack of a reliable flap position indicator, Dan Hart had no way to recognize and diagnose split flaps.(A938-A959).

The accident occurred because of an inadvertent asymmetric deployment of the flaps when excessive loads were placed on the flap system over time, causing the system to essentially pull itself apart, and ultimately led to the fracturing of the key of the 90 degree drive assembly.(A484).

The post-accident evaluation shows the FAA relied upon HBC's representations of safety and remains unaware the Duke cannot be safely flown in a right side split flap configuration under takeoff and climb conditions. After this accident, HBC submitted an analysis of the amount of aileron deflection necessary to counter the effect of a right split flap.(A1138-A1150). However, this analysis was not based on flight tests,

but was done with a calculation using the Baron wing, modified to account for the Duke's wingspan, without taking into account P-factor or torque, and assumed a 70 knot airspeed.(A1138-A1150). However, the memo's author later testified 70 knots is not only below takeoff power, but is too slow for the Duke to maintain flight.(A1051 at 53).

6. Plaintiffs Presented Evidence that the Flap System was Replaced within 18 Years of the Accident

According to Bob Pinto, the mechanic who maintained the accident aircraft from approximately 2001 until 2007, in the 1990's, every item of the flap system was replaced in accordance with the manufacturers' recommendations.(A969 at 63-A970 at 66). Pinto testified he personally checked all of the records to verify all the service letters were done, and the overall flap system had been overhauled or replaced within in the recommended 2000 hours.(A969 at 63-A970 at 66). He specifically recalls when he started to maintain the aircraft for Hayward Daisey, the DRBA "almost everything done to it."(A969 at 63-A970 at 66).

The flap system replacement is not recorded in the available logbooks, which end in February 1995.(A154). It follows then at sometime between 1995 and 2001, the flap system was replaced within the 2000 hour replacement period. When deposed about the availability of replacement parts, HBC' representative testified, "[i]t's my understanding the flap actuator, the flexible drive shaft assemblies, the motors are

manufactured by contractors for the company….We specify how the parts to be made and we specify the recognized manufacturers for those parts."(A962 at 28-A963 at 30; A974 at 25). HBC has control over licensing its proprietary material to vendors who physically construct the products. (A962 at 28-A963 at 30).

7. Plaintiffs Presented Evidence of a Written Warranty

The same HBC DOA who certified the Duke also attested to the Airworthiness Certificate which accompanied the subject aircraft at its first sale, which provides:

> This airworthiness certificate is issued pursuant to the Federal Aviation Act of 1958 and certifies that, as of the date of issuance, the aircraft to which issued has been inspected and found to conform to the type certificate therefore, to be in condition for safe operation, and has been shown to meet the requirements of the applicable comprehensive and detailed airworthiness code as provided by Annex 8 to the Convention on International Civil Aviation, except as noted herein.

(A978-A979).

B. Explanation of the Judgment and Order under Review

The trial court's opinion reduced Plaintiffs' arguments to three claims of misrepresentation intended to implicate GARA's Misrepresentation Exception. First, the court addressed Plaintiffs' argument that HBC certified the Duke through its DOA and falsified the certification reports, by claiming the flap system was "interconnected" and the Duke complied with all applicable Federal Aviation Regulations.

The court stated the record showed HBC represented to the FAA the Duke flap system was interconnected through a central flap motor and therefore, HBC was exonerated of demonstrating that the aircraft had "safe flight characteristics."(Op. at 12-13). When examining Plaintiffs' evidence, the court held "Plaintiffs are unable to identify any information that was misrepresented to the FAA."(Op. at 13). The court cited excerpted deposition testimony from Plaintiffs' expert who was asked to identify "piece(s) of information that [HBC] had that it was required to give the FAA that it did not" for purposes of showing compliance with certification regulations.(Op. at 13). Naturally, since Plaintiffs' claim was that HBC concealed information, the witness stated "[a] specific document? I don't have one."(Op. at 13). Based upon that testimony alone, the trial court found "no evidence of misrepresentation to the FAA at the initial certification of the Beech Duke."(Op. at 13).

Next, the trial court addressed Plaintiffs' claim of misrepresentation with respect to the flight test HBC performed in response to the FAA demand. The court assumed that even if there was a misrepresentation during initial certification, the subsequent flight tests severed any causal connection to the accident.(Op. at 14). The trial court described the series of communications between the FAA and HBC, wherein the FAA ultimately stated it had been misled by HBC because it believed that

flight tests had been done (A234-A243.), as "extensive."(Op. at 15). Then, the court discounted Plaintiffs' argument that HBC manipulated the tests and falsely reported the results by abandoning the test plan it could not pass in favor of a new lenient protocol by determining "[n]either the FAA nor the regulations specified the precise manner in which the flight testing was to be conducted."(Op. at 16). The court reasoned Plaintiffs' criticisms of HBC's manipulation of the tests to achieve favorable results amounted to nothing more than "[d]isagreements over what tests should have been performed…".(Op. at 18). The court characterized the dialogue between the FAA and HBC about the flight test as "ongoing and open."(Op. at 18). Also, and without citing to the record, the trial court stated "HBC provided the FAA with a detailed plan outlining how the flight test would be conducted."(Op at 18). Ultimately, the court held the FAA's acceptance of HBC's test results, "the FAA implicitly acknowledged that it found the testing procedures employed appropriate."(Op. at 19).

The court summarily dismissed the Plaintiffs' continuing airworthiness argument that HBC failed to disclose defects to the FAA, to correct the defects, or to inform pilots of the defect.(Op. at 19). The trial court focused, instead, on a series of Service Difficulty Reports ("SDRs") lodged in an FAA database.(Op. at 20-21). The court found HBC did not have to report any defect in the flap system to the FAA because the SDR

database already identified system failures.(Op. at 20-21). The FAA's access to the SDRs coupled with the "extensive communications regarding the occurrence of an asymmetric flap condition in the Beech Duke", exonerated HBC according to the trial court.(Op. at 20-21).

With respect to GARA's Rolling Provision, the court held there was no evidence the replaced components were actually "new" as opposed to "overhauled," and that the record did not establish HBC manufactured or sold the replacement part at issue.(Op. at 23-24). Lastly, the trial court held that HBC's representation of airworthiness did not amount to an express warranty for purposes of GARA's Warranty Exception.(Op. at 26).

The court granted summary judgment and denied as moot Plaintiffs' Motion for Judgment on the Pleadings based on HBC's failure to plead GARA as an affirmative defense.(Op. at 27).

ARGUMENT

I. PLAINTIFFS HAVE PRESENTED A COMPELLING JURY QUESTION CONCERNING GARA'S MISREPRESENTATION EXCEPTION

(1) Question Presented

Did the trial court improperly grant summary judgment by resolving factual disputes raised by the Plaintiffs' evidence in support of GARA's Misrepresentation Exception?(A333-A1154; A1203-A1242).

(2) Scope of Review

A grant of summary judgment is reviewed *de novo.* Simpson v. Colonial Parking, Inc., 26 A.3d 333 (Del. 2012). The Court must examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues." Merrill v. Crothall-American, Inc., 606 A.3d 96, 99-100 (Del. 1992). All facts are viewed in a light most favorable to the non-moving party. Del. Super. Ct. R. 56(c). Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances. Hammond v. Colt Intus. Operating Corp., 565 A.2d 558, 560 (Del. Super. 1989).

(3) Merits of Argument

1. The trial court erred in finding no misrepresentation at initial certification concerning the interconnectedness of the flap system and that HBC satisfied all requirements under the Federal Aviation Regulations

The trial court erred in finding GARA's Misrepresentation Exception does not apply. This Exception prohibits summary judgment when the factual record supports a finding that the manufacturer (1) knowingly misrepresented, concealed, or withheld, (2) required information from the Federal Aviation Administration, that is (3) causally related to the accident. GARA § 2(b)(1); Rickert v. Mitsubishi Heavy Indus., Ltd., 923 F. Supp. 1453, 1456 (D. Wyo. 1996); Robinson v. Hartzell Propeller, Inc., 326 F. Supp. 2d 631, 647 (E.D. Pa. 2004). The Misrepresentation Exception works in conjunction with the general rules governing summary judgment. Rickert, 923 F.Supp. at 1456-57. "If … the plaintiff presents material facts in support of her claim, the defendant can do little more than proffer contrary facts. Faced with two sets of conflicting and material facts, the Court cannot grant summary judgment. Id.

"Required information" means the manufacturer had an affirmative duty to report the information at issue under a statute, regulation, case law, in response to a direct inquiry from the FAA, or to correct information previously supplied by the manufacturer to the FAA. Cartman v. Textron Lycoming Reciprocating Engine Div., 1996 WL 316575, *3 (E.D. Mich. Feb. 27, 1996); Butler v. Bell Helicopter Textron, Inc., 109 Cal. App. 4th 1073, 1084, 135 Cal. Rptr. 2d 762 (2003).

Aviation manufacturers have to the duty to represent the airworthiness of their products and to report any design defects to the FAA. In United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 815 (1984), the Supreme Court explained the certification of aviation products: "the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer". Id. at 467 U.S. at 816-17. If the FAA is deprived of this important safety information, it cannot ensure the safety of our nation's airspace. Butler, 135 Cal.Rptr.2d at 772-773.

Truthful characterization of safety findings is of the utmost importance when the manufacturer acts under DOA authority. In general, aircraft manufacturers operating under DOA status may issue aircraft type certificates and police compliance with minimum standards. O'Brien v. Cessna Aircraft Co., 2010 WL 4721189, *6 (D. Neb. 2010). A DOA holder has the duty not only to report defects, but to correct them. Id. at 657. A defendant's status as a DOA is relevant to GARA's Misrepresentation Exception. Robinson, 326 F.Supp.2d at 652.

The trial court erroneously found there was no evidence of misrepresentation at the initial certification of the Duke, even though HBC represented the flap system was interconnected and it complied with Federal Aviation Regulations when it did not.(Op. at 12-13). The trial

court discounted the fact that after certification the FAA specifically stated the flap system was not interconnected and the Duke and other similar models were experiencing flap system malfunctions in the field.(A221-A222; A234). The trial court reconciled HBC's misrepresentation by stating HBC told the FAA the flap system was "interconnected through a centralized drive motor" when this language appears nowhere in the certification submission.(Op. at 12)(A234).

The trial court relied upon HBC's characterization of Plaintiffs' expert testimony from Aaron Olmstead, who tragically died the day after his deposition without an opportunity to explain his testimony, alleging he could not point to a "specific document" that was withheld from the FAA. It is not, however, Plaintiffs' contention that a document was withheld at certification. Rather, information was misrepresented. Moreover, Mr. Olmstead was not Plaintiffs' only expert. Plaintiffs' experts all concluded HBC concealed a defect in the Duke flap system, which allowed a single point failure to cause split flaps.(A444 at 172). Plaintiffs' expert, Donald Sommer, testified HBC knew and failed to report to the FAA the defective flap system: "It's not the failure of the key that I'm talking about; it's the failure of a flap system."(A466 at 258-259).

Next, the trial court determined the subsequent flight testing severed the chain of causation from any misrepresentation at

certification to the subject accident.(Op. at 14). This rationale assumes HBC truthfully performed and reported the results of the flight test, a matter which is in dispute. The TIR falsely stated HBC had complied with all applicable Federal Airworthiness Regulations which also included the preparation of the AFM.(A995-A1002). The trial court ignored how HBC's failure to perform split flap flight tests at certification allowed the AFM to be approved without reference to a split flap failure, and HBC never addressed it after the subsequent flight testing additional pilot skills were needed under the best of circumstances.(A941-A962; A248-A259).

Lastly, the court never acknowledged the Plaintiffs' argument that HBC never incorporated an emergency asymmetric flap shut down switch because it misrepresented to the FAA it would be redundant.(A230-231). However, the limit switch only limits the left wing flap movement

2. The trial court erred in finding no misrepresentation in subsequent flight testing

The undisputed facts of record establish HBC admits testing the Duke with a right sided split flap failure yields a more dangerous failure mode (A190, A613; A673-A667; A1056; A1111-A1113), testing the aircraft with less weight makes it less controllable (A249, A252, A1057), and testing the Duke with a left sided split flap still yielded a result requiring "additional pilot technique."(A252). The disputed facts show a pilot's ability to control a right sided split flap failure was beyond the

bounds of acceptable aircraft performance, and caused this accident.(A756, A812, A849). Upon this record, the trial court credited, to the exclusion of all contrary evidence, HBC's statement made to the FAA "there was no significant difference in the results that would require performing the test with one flap retracted as opposed to testing with the other flap retracted."(Op. at 16).

The trial court held Plaintiffs' evidence amounted to a disagreement over what tests should have been performed and did not rise to the level of misrepresentation.(Op. at 18). However, Plaintiffs' claim is not a mere "criticism of the testing procedures employed by HBC during its flight testing", but rather a criticism that HBC knew the aircraft was not safe with split flaps, and tested it in a manner to manipulate the results.(A483, A248-A259, A613 at 189-90, A673-A675)(See generally Section A(3) above). This case falls in line with the GARA Misrepresentation Exception opinions which address affirmative misrepresentation by the manufacturer to the FAA about the results of a test which are not supported by the testing and then covers up the reasons why its product fails in the field.

In Robinson, the plaintiffs' aircraft crashed when a large portion of a propeller blade broke away from the aircraft in mid-flight. Robinson, 326 F. Supp.2d at 635. The defendant's propeller vibration certification

report represented that the vibratory stress levels were "were approximately the allowable value"; however, the graphs showing the stress levels objectively showed they exceeded a line marked "allowable." Id. at 638. The defendant made this certification as a DOA. Id. at 639. Thereafter, the propeller model began experiencing a number of failures in the field which the DOA manufacturer blamed on poor maintenance and pilot abuse. Id. at 640-41. At summary judgment, defendant argued the Misrepresentation Exception did not apply because the graph showing the excessive stresses was included in the certification submission "so the FAA would have been able to make this determination itself." Id. at 649. The court rejected this argument concluding that the existence of the graphs supported whether the defendant made the misrepresentation knowingly, and did "not correct the misstatement as a matter of law." Id. at 650. Therefore, because the facts established the concealment of high stresses at the certification stage "a jury could infer that [the defendant] was aware of the high vibratory stress that resulted from the propeller/engine combination but blamed propeller failures on other factors to conceal this problem." Id. at 654.

In Hinkle v. Cessna Aircraft Co., the plaintiff argued GARA's Misrepresentation Exception applied because Cessna's certification report for the 421B aircraft used engines powered above 400 hp when Cessna

told the FAA that the engines tested were only 375 hp. No. 247099, 2004 WL 2413768 (Mich. App. Oct. 28, 2004) at *11. The trial court granted summary judgment holding "even if there were a mathematical error, it was in fact disclosed that it was not a withholding, or at least the data upon which the mathematical error was premised was provided [the FAA] and disclosed." Id. at *10. The appellate court reversed because a jury could infer Cessna misrepresented the horsepower capabilities to meet the single engine climb requirements. Id. at *11-12.

Under Robinson and Hinkle, a trial court cannot enter summary judgment by siding with one party's view of the evidence over the other. However, the trial court ruled "the record establishes that HBC engaged in ongoing and open dialogue with the FAA prior to commencing flight testing."(Op. at 18). However, during this dialogue HBC tried to avoid flight testing and the FAA insisted it be done.(A230-A234). There was nothing "ongoing and open" about how the flight test would be performed, nor is there record evidence that HBC submitted the original test plan to the FAA. However, the Court says that "[t]he record establishes that once testing commenced, HBC provided the FAA with a detailed plan outlining how the flight test would be conducted."(Op at 18). The only evidence HBC presented was an affidavit stating that the plan was located in the same file as the test in HBC's office.(A137-A164).

Even if the FAA knew the aircraft would be tested in a left sided split flap configuration, there is no evidence showing the significance of that change was provided to the FAA.(A1052 at 60-A1053 at 61 showing HBC knowledge of significance of the change). The trial court ascribed to the fiction that FAA approval of a manufacturer's conduct eliminates any possibility of misrepresentation. In Robinson, the FAA approved the vibration test, but the results were falsified. In Hinkle, the FAA approved the single engine climb rate flight tests, but the results were falsified. Thus, the trial court invaded the province of the jury by finding the FAA "implicitly acknowledged that it found the testing procedures employed appropriate" when it accepted the Test Report.(Op. at 19).

The trial court's finding that "neither the FAA nor the regulations specified the precise manner in which the flight testing was to be conducted" is not accurate.(Op. at 13). The Federal Aviation Regulations required the Duke to be safely controllable and maneuverable during all normal phase of flight under all probable operating conditions (including engine failure and split flaps) without "exceptional piloting skill, alertness, or strength". 14 C.F.R. § 23.143(a), (b); 14 C.F.R. § 21.701(a). HBC, however, performed this flight test, by testing the aircraft in the most controllable condition and manipulated the tests by abandoning the original protocol testing the right flap extended, at takeoff conditions,

and not at gross weight. (See record cites at Section A(3) above). From this deceptive test, HBC represented to the FAA that the Duke was safe in a split flap configuration, and that it would make no difference if tested with the right flap down.(A252, A1029).

The trial court's opinion also shows a misunderstanding of the significance of the SDR system, as it identified over one hundred instances of reported flap system failures as evidence that the FAA was aware of a problem.(Op. at 19-21). This position was rejected in the Robinson case which held that the number of failures identified in the SDR database is sufficient to place a manufacturer on notice of a design defect and "is appropriate for resolution by the jury" under GARA's Misrepresentation Exception. Robinson, 326 F.Supp. 2d at 654-55. The Robinson court also held that under 14 C.F.R. § 21.3 and the applicable DOA regulations, "[a] manufacturer's failure to produce evidence of its investigation into reported component failures is sufficient to raise an inference of concealment or withholding. Direct evidence of intentional concealment… is not necessary to survive summary judgment." Id.

II. The Trial Court Erred in Rejecting the Rolling Provision Despite Evidence the Flap System was Replaced Within the 18 Years.

(1) Question Presented

Did the trial court err in granting summary under GARA's Rolling Provision when the flap system was replaced within 18 years of the subject accident?(A333-A1154; A1203-A1242).

(2) Scope of Review

A grant of summary judgment is reviewed *de novo.* Simpson, 26 A.3d 333 (Del. 2012).

(3) Merits of Argument

GARA's Rolling Provision sets the starting point for the 18 year limitations period, "with respect to any new component, system, subassembly, or other part" alleged to have caused the accident "after the applicable limitation period beginning on the date of completion of the replacement or addition." GARA § 2(a)(2).

Here, GARA's Rolling Provision applies because the entire flap system was replaced within the 18 year period. (A972-A973). GARA sets forth two separate and distinct 18 year limitations periods, only one of which can apply to a plaintiff's claims based on the "failure" of a single aircraft part. GARA §§ 2(a), 2(a)(2); Avco Corp. v. Cherry, 2008 WL 5234691, *5-6 (E.D. Va. Dec. 15, 2008). Defendants have the burden to prove the Rolling Provision does or does not apply. Glover v. American

Resource Corp., 1996 WL 33484136, *3 (Cal. App. Sept. 13, 1996). In Glover, the California Court of Appeals recognized Defendant "needed to show that the defective replacement provision did not apply in order to meet its burden of showing the action is barred by the Act." Id. at *3.

Other courts have incorrectly labeled the Rolling Provision as an "exception" or "tolling" provision, and held plaintiff bears the burden of proof.[1] However, imposing the burden on Plaintiffs is incorrect because the Rolling Provision neither excepts nor tolls, but rather is the period that applies to replacement parts. Because the 90 degree drive and entire flap system were replaced, it was HBC's burden to establish the part was not new when installed.(A972-A973).

In addition, the trial court held Plaintiffs failed to establish that the replacement of the 90 degree drive was manufactured or sold by HBC.(Op. at 25-26). The factual record shows HBC manufactured these components through contracted vendors who manufacture the parts pursuant to HBC's proprietary drawings.(A965 at 28-A966 at 30). HBC also testified that it is "the only company that can make the components for the flap actuating system" and that it licenses that right to its vendors who physically construct the product.(A977, A965 at 28-A966 at 30.).

[1] Willett v. Cessna Aircraft Co., 851 N.E.2d 626, 636 (Ill. App. 2006); Agape Flights, Inc. v. Covington Aircraft Engines, Inc., 2011 WL 2560281 *5 (E.D. Ok. June 28, 2011); Southside Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Indus., Ltd. , 927 N.E.2d 179,195 (Ill. App. Ct.).

III. GARA'S WARRANTY EXCEPTION APPLIES

(1) Question Presented

Did the trial court err in granting summary judgment when Plaintiffs presented evidence of a written warranty, therefore invoking GARA's Warranty Exception?(A333-A1154; A1203-A1242).

(2) Scope of Review

GARA's Warranty Exception provides: "Subsection (a) does not apply … to an action brought under a written warranty enforceable under law but for the operation of this Act."GARA § 2(b)(4).

(3) Merits of Argument

An express warranty is created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." 6 Del. C. § 2-313(1)(a). Such a warranty may also be created by, "[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description." 2-313(1)(b).

The delivery of an airworthiness certificate to an aircraft purchaser constitutes an express warranty made in addition to or in connection with the terms of a purchase agreement. Limited Flying Club Inc. v. Wood, 632 F.2d 51 (8th Cir. 1980). In Wood, the transaction involved the sale of a used

aircraft and a purchase agreement which did not provide a warranty that the aircraft was airworthy. Id. at 56. However, prior to the sale, the seller presented the purchaser with the aircraft's log book and airworthiness certificate. Id. The Eighth Circuit reversed the district court's finding that the presentation of the airworthiness certificate did not constitute an express warranty of airworthiness. Id. The Court ruled, "[u]nder these circumstances [the seller] expressly warranted the accuracy of that description – the airworthiness of the airplane – and is liable for damages arising from the breach of that warranty."Id.

The express warranty of airworthiness in this case is memorialized in the airworthiness certificate HBC **signed and delivered** it with the aircraft to its first purchaser. This warranty provides, "the aircraft to which issued has been inspected and found to conform to the type certificate therefore, to be in condition for safe operation…".(A981-A982).

However, the trial court erred in relying upon an Arizona decision which held recognition of an airworthiness certificate as a written warranty under GARA would eviscerate the statute.(Op. at 26)(citing Bianco v Cessna Aircraft Co., 2004 WL 3185847, *8 (Ariz. Ct. App. 2004)). However, by GARA's clear terms, when a warranty exists under state law and not a non-existent federal policy to champion the rights of manufacturers over victims. The Statute is clear and the Warranty Exception applies.