EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HERMAN TAYLOR, Individually and as Personal Representative of the Estate of Marc E. Taylor, Deceased, and ANNE MAUVAIS, Individually and as Personal Representative of the Estate of Robert G. Dodson, Deceased, Plaintiffs, v. TELEDYNE TECHNOLOGIES, INC., et al., Defendants.	CIVIL ACTION NO. 1:00-CV-1741-JEC

O R D E R

The above represent thirteen pending motions, contained in nine pleadings, and involve disputes over the production of documents and the admissibility of certain expert testimony at trial. Discovery disputes have plagued this case.[1] Indeed, even though the case was filed over two years ago, discovery disputes

[1] Although there are two decedents in this case--Marc Taylor and Robert Dodson--and therefore two plaintiffs, only plaintiff Taylor and his counsel have been embroiled in the discovery disputes. According to counsel, counsel for plaintiff Mauvais has largely deferred to counsel for plaintiff Taylor in these discovery matters. Nonetheless, as both plaintiffs are sharing expert witnesses, rulings on experts proffered by defendant Taylor will also affect plaintiff Mauvais.

still exist. As evidence of the above is the fact that the file contains 132 separately tabbed pleadings, and summary judgment motions have not yet even been filed.

I. Background[2]

This diversity action arose out of an airplane crash in Fulton County on June 29, 1999, that killed the only two persons on board. Plaintiff Herman Taylor is the father of Marc Taylor, the twenty-nine year old "pilot" and plaintiff Anne Mauvais is the widow of Robert Dodson, the twenty-nine year old "co-pilot."[3] The plaintiffs allege that the cause of the crash that killed Taylor and Dodson was a malfunction in the airplane's right engine, and they have filed this wrongful death action against the manufacturer of the airplane engine, Teledyne Technologies, and its affiliated corporations.

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[2] The facts recounted are taken from the numerous pleadings filed in this case, which, as noted, is still in the discovery phase, due to the continuing discovery disputes between the parties. Given the substantial drain on this Court's time that resolution of these disputes has already taken, the Court has not taken the additional time to cite to a particular pleading for each assertion made in this Order, which endeavor would have been quite tedious.

[3] Although Taylor was purportedly the pilot and Dodson was purportedly the co-pilot, there appears to be some dispute as to whether those labels are accurate. That is, it appears that defendant may be contending that Dodson was actually piloting the plane, although he was not licensed to do so.

Taylor, the pilot, worked for Paragon Air Express, which was an "air taxi" or "air courier" service. Dodson, the co-pilot, was not actually a paid employee of Paragon, but instead paid Paragon $4,000 for the privilege of gaining flying time on its planes in order to gain enough flying experience to eventually become a commercial pilot for an airline. Dodson had recently quit his $40,000 a year computer job at Federal Express to pursue flying full-time, thereby foregoing not only his salary, but apparently also his life insurance.[4] Dodson was a licensed pilot, but was only qualified to fly smaller planes and would apparently need many more hours of flying experience before he could ever be considered for a pilot's position at a commercial airline. Neither Taylor nor Dodson lived in Georgia; Taylor lived in Tennessee and Dodson lived in Florida.[5] They both died in Fulton County, Georgia, however, which was where this case was filed.

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[4] According to defendants, Dodson also worked at a Ruby Tuesday's restaurant at the time of his death, but the Court has not seen evidence of this allegation. (Defs. Reply Br. [114] at 14.) Defendants also claim that Taylor was employed by Outback Restaurants at the time of his death, but it is not clear how many hours he "worked" at Paragon and how many hours at Outback, or in what capacity.

[5] It is not clear to the Court where Taylor was actually domiciled, because he was apparently in the process of moving, but questions of domicile are not relevant to any of the issues in the pending motions.

The plane, a twin-engine Beech Baron, took off from Fulton County Charlie Brown Airport at 6:30 a.m. on June 29, 1999, and was headed to Mobile, Alabama on Paragon business to deliver payroll checks for ADC. Immediately after takeoff, the plane experienced a loss of power in the right engine, and one of the crew members radioed the airport tower that they had engine trouble and needed clearance to land. The man on duty in the tower told them they were cleared to land on any runway, and the plane attempted to circle back to the airport to land. Unfortunately, the plane was never able to gain sufficient altitude and, within just one or two minutes after takeoff, it crashed into a heavily wooded area about 60 feet away from I-20, near Six Flags, only 3/4 mile from the airport. Although the man in the airport tower did not see the plane go down, because the plane was so low behind the trees, he instantly saw the smoke rising from the trees not far from the end of the runway and realized that the plane had crashed.

Several people driving in their cars along I-20 witnessed the crash, and immediately pulling over to the emergency lane, they rushed to the plane. At least one eyewitness heard someone in the cockpit yelling, "Get me out of here," but before the witnesses could get to the plane, it burst into flames. Although one of the witnesses had a fire extinguisher, the fire so engulfed the plane

that the witnesses were unable to do anything except wait for emergency personnel to arrive. When the two bodies were eventually recovered from the plane, they were burned beyond recognition, in addition to having multiple fractures and other injuries from the crash.

Based on the medical examiner's report, it is arguable that Dodson, the co-pilot, survived the actual crash--and thus might have been the individual who yelled to passersby--as he had significant soot in his lungs, indicating smoke inhalation. This matter appears to be disputed, however, and could well become an issue with respect to damages. The ultimate cause of death for both men, however, according to the medical examiner's final report, was multiple trauma injuries from the crash, with secondary smoke inhalation.

At this stage of the case, the parties are still arguing over discovery issues, so there is limited evidence in the record regarding what the parties might actually contend in summary judgment motions or at trial. Nevertheless, the Court assumes that there is no dispute that the right engine of the plane experienced at least a partial loss in power, which created the emergency situation. The plaintiffs contend that the engine failed because of a faulty intake valve on the #5 cylinder, which they claim was a recurring problem with this particular model of

engine that should have alerted Teledyne of a need to correct the problem. The plaintiffs have produced reports from several experts who have opined that a faulty intake valve caused the engine to fail.

The defendants' theory is not entirely clear from the pleadings before the Court, but it appears that their defense will most likely be (1) the intake valve was not faulty and did not cause the crash, but that instead the valve was damaged in the fire, which explains why it appeared to be faulty afterwards; (2) even if the valve caused the engine to fail, it was the result of poor maintenance by Paragon,[6] and not a result of a defect in the design or manufacture of the engine; and (3) regardless of the cause, even if the right engine failed, a competent pilot using standard emergency procedures would nevertheless have been able to land the plane safely under the power of the left engine. Defendants have produced at least one expert who will testify that standard operating procedure, upon the loss of power in one engine, is to switch the propeller of that inoperable engine to the "feather" position, which will enable the plane to operate solely under the power of the other working engine. As it appears that the right propeller was <u>not</u> in the "feather" position, as it

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[6] Paragon was initially named as a defendant in the complaint, but it has since been dismissed from the case.

needed to be to avoid a crash, the defendants presumably will argue that pilot error constituted a significant cause of the crash, even if it was not the initial cause.

Furthermore, there appears to be some evidence that Dodson was sitting in the left (pilot) seat, while Taylor was in the right (co-pilot) seat, although Dodson was only cleared by Paragon to be second-in-command ("SIC") on that plane and thus should have been in the right seat. Further, Dodson had failed a test on emergency procedures only one month prior to the accident, although he later passed the test. Although Taylor was qualified to fly this plane, he was not a certified flight instructor. Further, it is against FAA regulations to perform flight instruction on a revenue flight. Thus, it appears that Dodson should not have been flying the plane and, if he were doing so, this conduct could aid the defendants' arguments regarding contributory negligence.

The Court has not located the final NTSB investigatory report in the record, but based upon the deposition excerpts and other reports in the record, it appears that the final NTSB report concluded that the failure of the right engine was the primary cause of the crash, with pilot error a secondary contributing factor. It is not clear whether the NTSB blamed a faulty intake valve for the failure of the right engine.

Pending Motions

There are multiple pending motions, all related to discovery issues. This case has had a tortured procedural history, all emanating out of the parties' failure to handle, without constant Court intervention, their discovery obligations in the case. The case was filed in July, 2000, and over two years later, the case has not reached the summary judgment stage because of these tedious and time-consuming discovery issues. Plaintiffs Mauvais and Taylor originally filed separate wrongful death actions in Fulton County Superior Court, and Teledyne removed both actions to this Court. The initial discovery period in both actions lapsed in December, 2000, without the parties having done much discovery at all. Indeed, plaintiff Mauvais did virtually nothing to prosecute her case whatsoever and let the discovery period lapse without having conducted any discovery at all.

Nevertheless, because of some confusion resulting from the consolidation of the cases in February, 2001, and because it appeared that all the parties had contributed to the delays, almost one year after the initial discovery period expired, in November, 2001, the Court re-opened and extended discovery until February 8, 2002, and ordered that all expert reports were due on December 7, 2001. (Order [69].) Subsequently, the Court again extended the deadline for expert reports, with plaintiffs to

provide their expert reports by January 11, 2002, and with defendants' deadline extended to January 25, 2002.[7]

In January, 2002, during the last few weeks of the discovery period, the parties argued about the order in which the many expert witnesses would be deposed. Again, defendants wished to stagger the depositions of experts, with plaintiffs' experts testifying first, followed by defendants' expert. For the same reason that a staggering of expert reports made sense, this sequence of depositions was also logical. Accordingly, on February 1, 2002, the Court held a telephone conference, at which time it granted the defendants' request to allow depositions of the plaintiffs' experts before requiring defendants to produce their own experts for the plaintiffs' counsel to depose. The Court also extended the discovery period one final time until March 15, 2002. Although the discovery period expired on March 15th, meaning that summary judgment motions were due in early April, no motions have been filed because the parties continue to dispute discovery matters, having filed several motions between

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[7] In setting a December 7th deadline for both sides' expert reports, the Court had not stopped to consider that a simultaneous deadline made no sense. That is, defendants' experts could not offer an opinion until they learned, through plaintiffs' experts, exactly what theory of defect the plaintiffs were pursuing. Accordingly, when the defendants requested a staggering of the disclosure of expert reports, the Court agreed that such a procedure was appropriate.

January and April regarding various discovery disputes. It is these motions that the Court addresses in this Order.

The pending motions are as follows:

1. Defendants' Motion to Strike Plaintiffs' Expert Reports and to Preclude Certain Expert Testimony [93]

2. Plaintiffs' Motion for Cessation of Discovery Abuses [94-1] and to Compel [94-1] and for Sanctions [94-3]

3. Plaintiffs' Motion to Extend Page Limit [95]

4. Plaintiffs' Motion to Compel [96]

5. Defendants' Motion to Preclude Testimony [99-2]

6. Defendants' Motion to file excess pages [99-1].

7. Defendants' Motion to Compel Plaintiffs to Complete Forms and Authorizations [108]

8. Defendants' Motion to Strike [117-1] and to Preclude Testimony by Plaintiffs' Expert Elizabeth Laposata [117-2]

9. Plaintiffs' Motion to Compel [120]

10. Defendants' Motion to Preclude Testimony Based upon Additional Testing [121]

To summarize the main areas of dispute, defendant Teledyne argues that plaintiffs have not complied with the spirit of this Court's Order that all of plaintiffs' expert reports were due by January 11, 2002. Defendants have filed multiple motions to preclude the plaintiffs from being able to present testimony from certain experts who did not provide full reports of their opinions by that date. Plaintiffs, on the other hand, have filed multiple

motions to compel the defendants to produce a huge number of documents that defendants have objected to producing. As noted, defendants have objected to the document requests on the ground that the requests were filed too late in the discovery period and that the requests are overbroad because they seek discovery of documents not related to plaintiffs' theory of liability, which again is the alleged failure of the intake valve on the #5 cylinder in the right engine.

I. Defendants' Pending Motions

Defendants have filed multiple motions to preclude the plaintiffs from presenting testimony from experts who did not file complete reports of their opinion by the deadline established for the filing of plaintiff's expert reports: January 11, 2002. Defendants have asked that the Court strike certain reports from the record because the reports that have been provided do not comply with the requirements of Rule 26. Although defendants seek to have the reports struck from the record, plaintiffs presumably do not intend to admit the reports, themselves at trial; indeed, the reports are so abbreviated that admission of them would not advance plaintiff's case very far. Thus, striking the reports, by itself, accomplishes little. Thus, defendants' ultimate goal is to bar the testimony of an expert for whom no

report was provided or, at the very least, to limit the scope of the testimony from these experts.

A. Defendants' Motion to Strike Plaintiffs' Expert Reports and to Preclude Certain Expert Testimony [93]

Defendants' first motion contests the sufficiency and/or timeliness of expert reports from two of plaintiffs' experts: F.A. Raffa, an economist, and Artemas Keitt Darby, a United Airlines pilot and co-owner of AIR, Inc., which offers career counseling and outplacement services for airline pilots. Both of these experts submitted reports related to the valuation of plaintiffs' damages. Darby's opinion reflects his estimate of the decedents' projected lifetime earnings as airline pilots; Raffa's opinion purports to evaluate the present value of those lifetime earnings as projected by Darby's report, combined with the present value of the loss of the decedent's "services." Defendants object to both reports on the grounds that the reports fail to comply with the requirements of Rule 26 or were untimely, or both.

1. Artemas "Kit" Darby

Plaintiffs' expert Artemas "Kit" Darby is a United Airlines Captain with over 25 years of experience as a pilot and flight instructor, including several years spent in the U.S. Army and Georgia National Guard. (Defs. Mot. to Strike [93], Ex. D.) In addition to his experience as a pilot with a major airline, Darby

is also a "professional aviation employment and career consultant," and is the owner and founder of AIR, Inc., which he describes as a "nationwide aviation career counseling organization that has successfully provided aviation career information and assistance to over 100,000 aspiring airline pilots, flight attendants, and aviation mechanics." (Darby Decl., Pls. Ex. 3 [109], which is not signed by Darby.) Darby speaks frequently at various conferences and seminars on subjects related to employment of airline pilots and other subjects related to the airline industry. He offers himself as a witness who has a great deal of knowledge about the salaries and benefits offered by the major airlines, as well as their general hiring practices. His expert report for each decedent is titled a "Career Earnings and Benefits Model" and reflects that it is Darby's construction of "an employability study and career earnings model." (Defs.' Mot. to Strike [93], Ex. D.)

In rendering this model, Darby has assumed that both Taylor and Dodson would eventually achieve their purported goals of becoming airline pilots for major commercial airlines. Armed with this rather large assumption, Darby has predicted what the value of their earnings and benefits would be after a projected 30-year career as airline pilots. For Taylor, Darby has assumed that the latter would have spent one more year working at Paragon, would

have then applied for and received a job at a regional airline, for whom he would have worked for three more years as a pilot, and finally would have applied for and received a job as a pilot with a major airline for the next twenty-six years, followed by eleven years of retirement before his death at age 70. Calculating the average income stream for a pilot with such a projected career track, Darby predicted that Taylor would have earned $5,567,773 over his lifetime, which figure includes his projected salary, fringe benefits, and retirement income, but does not include any income from outside employment or personal investments.

For Dodson, Darby assumed he would spend "two additional years" working as a pilot with Paragon before applying for and receiving a job with a regional airlines, for whom he would work for three more years, after which he too would apply for and receive a pilot's position with a major commercial airline, in whose employ he would spend the next twenty-five years working, followed by nineteen years of retirement before his death at age 78.[8] Darby analyzed the average income stream for a pilot with this projected career track, and thereby calculated Dodson's probable income stream as being $5,801,669 over his lifetime,

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[8] Darby predicted a longer life expectancy for Dodson because he was white and Taylor was black, and actuarial tables reflect a longer life expectancy for a white male, than for a black male.

which includes his salary, fringe benefits, and retirement income, but also does not include any income from outside employment or personal investments.

Without even focusing on the validity of Darby's assumption that Dodson would achieve such a career path, it is obvious that one of his predicate assumptions is false. Specifically, Dodson was not actually employed by Paragon at the time of his death, as Darby assumed,[9] but instead Dodson paid Paragon a fee to allow Dodson to gain flying time on Paragon flights. According to defendants, at the time of his death, Dodson was actually employed by Ruby Tuesday's restaurant and Taylor was employed, at least part time, by Outback Restaurants, as well as by Paragon. (Defs. Reply Br. [114] at 14.)

Defendants object to Darby's report because he is not an economist and is not qualified to make a prediction of the projected lifetime earnings of the decedents. Defendants also argue that Darby has not subjected his "career earnings model" to any peer review, and, thus, there is no objective analysis of the scientific validity of his methods. Accordingly, defendants contend that Darby's report is not sufficiently reliable under the

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[9] Darby states in his report that "At the time of his accident, Mr. Dodson was actively employed as a First Officer by Paragon Air Express." (Defs. Motion to Strike [93], Ex. E, at 3.)

standards established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under *Daubert*, when faced with a proffer of expert scientific or technical testimony, the trial judge must act as a "gatekeeper" and must determine at the outset whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, at 592-593.

The factors to be considered in determining whether the an expert's reasoning is valid include: (1) whether the theory or technique is capable of being tested, and whether it has been tested; (2) whether the theory or technique has been subjected to publication and peer review; (3) the known or potential rate of error of the theory or methodology; and 4) the degree to which the theory or technique has "widespread acceptance" in the field generally. *Id.* at 593-594. The court's approach in analyzing these factors must be flexible, with the focus solely on the principles and methodology, and not the outcome or conclusions generated from that methodology. *Id.* at 594-595.

Defendants argue that, in determining the projected income streams of the decedents, Darby's "economic model" fails to meet the *Daubert* test for scientific validity because it has never been tested, it has never been subjected to peer review, and there is no evidence that it has been "generally accepted" by economists as a reliable method for predicting the earning potential of a commercial pilot for either a regional or a major airline carrier. Indeed, defendants have produced reports from their own experts challenging Darby's methods and the assumptions underlying much of his projections. (*See* Defs. Ex. G, H.) Defendants have produced a report from an economist named Scarborough, who explains many perceived flaws in Darby's analysis, including his erroneous additions of vacation pay, sick leave, and certain other benefits to the projected income stream, and his failure to address and acknowledge the economic realities affecting the income stream of commercial pilots, including the fact that most pilots do not enjoy full-time uninterrupted employment throughout their careers. (Defs. Ex. G.) In sum, Scarborough's report indicates that Darby's report is based on several faulty assumptions about the typical career and lifetime earnings of a commercial airline pilot, and also ignores basic economic principles in calculating the value of a person's lifetime earning capacity.

Furthermore, defendants argue that Darby's report is riddled with errors and is based upon factual assumptions that have no basis in the record and, indeed, in some instances are contradicted by evidence in the record. For example, as noted, Darby states in his report that Dodson was employed by Paragon at the time of his death as a "First Officer," when actually Dodson was not employed by Paragon, but was instead paying them to "rent" flying time in their airplanes. Darby assumes that both Taylor and Dodson would be successful in achieving their alleged goals of being commercial pilots for major airlines, but his report contains no discussion of any probability analysis or statistical data that supports a conclusion that the decedents would actually ever achieve that goal.

Plaintiffs do not dispute that Darby is not an economist, but they argue that Darby is an expert in the field of aviation employment and career consultation and that he is qualified to provide testimony about the hiring prospects of both Taylor and Dodson. They contend that defendants are rigidly applying the *Daubert* factors to Darby's report when the application of those factors is not necessarily appropriate because Darby is "not an academic or scientific professional whose work is published or presented at symposiums or conferences for peer review." (Pls. Resp. Br. [109] at 16.) They argue that his testimony is based

upon his years of personal observation and experience in the aviation industry and, under the Supreme Court's decision in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), such testimony is admissible.

Finally, plaintiffs argue that they will lay the appropriate factual foundation for all of the factual assumptions underlying Darby's report and that defendants' challenge to the factual assumptions goes to the weight of the expert testimony, not its admissibility. According to plaintiffs, vigorous cross-examination would allow defendants to challenge the factual assumptions underlying Darby's conclusions.

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court held that the basic gatekeeping obligation imposed by *Daubert* applies to any testimony from a proffered "expert," including scientific and technical testimony, but also applies to any testimony that is based on an expert's skills, observations, and specialized experience in a particular field. *Kumho*, 526 U.S. at 149. When applying the *Daubert* factors, however, a court is not to consider those factors a "definitive checklist," because those factors may not always be pertinent to the testimony of a particular expert. *Id.* at 150. Thus, the court must apply a flexible test that applies pertinent *Daubert* factors, but that also takes into consideration other factors as

well. For example, the court may instead focus on the extent of the expert's personal knowledge or experience in the area. *Id.* at 151. The objective of the court in undertaking this inquiry is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

The Court concurs with plaintiffs that a strict *Daubert* analysis of this kind of expert, with its expectations of peer review and the testability of a hypothesis, is not an apt approach. Yet, while the guidelines applicable to one espousing a scientific expert may not fit an expert who testifies as to mathematical or statistical matters, *Kumbo* makes clear that the Court cannot absolve itself of its gatekeeper functions, merely because a different kind of expert is involved. Indeed, as noted, *Kumbo* requires the gatekeeper to ensure that the proffered expert, no matter his field, employs the same level of intellectual rigor that would be required for a more traditional scientific expert.

Evaluated even in this more flexible manner, the Court concurs with defendants that Darby's status as an "expert" in the area on which he offers testimony, as well as the reliability of Darby's report, are both highly questionable. The Court acknowledges that, as a pilot and an individual who counsels

aspiring aviators, Darby knows a lot about the airline industry and employment opportunities for pilots. Were Darby testifying as a personnel specialist about the type of job openings available in the airline industry or the qualifications for such, his expertise would appear sound. Nevertheless, Darby has no credentials as an actuary, statistician, or accountant to suggest that he would know better than anyone else how to calculate the lifetime earning stream of a person in any industry. His only formal degree is a B.S. degree in aeronautical studies from Embry-Riddle University in Florida. (Defs. Mot. to Strike [93], Ex. D.) Yet, notwithstanding his absence of training in any area that would appear to render him an expert in offering supportable calculations of the likely lifetime career earnings of a commercial pilot, Darby's expert report for each decedent is titled a "Career Earnings and Benefits Model" and reflects that it is Darby's construction of "an employability study and career earnings model." (Defs.' Mot. to Strike [93], Ex. D.)

Thus, at the outset, it appears that Darby lacks training or experience in the area about which he seeks to offer testimony. This is more than just a technical objection, as defendants argue that Darby has made several computational errors in calculating the projected lifetime earnings of the decedents, which errors result from a mathematical methodology that purportedly does not

comport with generally accepted economic principles. The Court observes that, although Darby is knowledgeable about the aviation industry in general, and may be familiar with the raw data surrounding the salaries and benefits paid to airline pilots, an economist or accountant would seem to be more equipped to make the actual calculations of projected income streams over a person's lifetime, based on raw data concerning the current salaries and benefits payable to airline pilots.

Were Darby acting merely as a summary witness who had added up agreed upon numbers and come up with a bottom line figure, the Court would accept the value of his testimony. Yet, to the extent that Darby's computations are more than just an arithmetic toting up of numbers, and instead suggest that he has attempted to follow an accounting model, he should have some expertise in accounting principles. Moreover, as experts who can perform such accounting exercises are rather plentiful, plaintiffs' retention of Darby causes the Court some concern that plaintiffs were unable to locate a less impeachable witness who would be willing to testify to the large dollar figures that Darby has calculated.

Nevertheless, were this the only basis of defendants' objection, the Court would not sustain it without first having a hearing. Defendants, however, mount a more fundamental objection that causes the Court greater concern. Specifically, Darby's

calculations of the decedents' lifetime income stream are based on assumptions for which there is no evidentiary support and which, on their face, are wildly speculative, if not outright suspect. As noted, Dodson had most recently worked in the computer industry and was working at Ruby Tuesday's while taking flying lessons with the hope of ultimately qualifying as a commercial pilot. From these facts, Darby projects that Dodson would have worked for two years at Paragon as a pilot,[10] that he would then get a job with a regional airline for three more years, and then that he ultimately would land a job as a pilot with a major airline, for whom he would work for twenty-five more years. Yet, Darby offers no basis for his conclusion that Dodson would enjoy such success and, even without any expertise in the field, the Court is aware that the competition for pilot positions for major airlines has always been quite intense and that, with the downsizing that airlines are now undergoing, the quest is even more daunting. By way of analogy, the fact that a person may take piano lessons does not mean that he will ever make it to Carnegie Hall as a concert pianist.

As to decedent Taylor, he was already a commercial pilot for an air courier company, but there is no evidence to suggest any

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[10] As noted *supra*, Darby begins with the false assumption that Dodson was currently working as a pilot for Paragon.

likelihood that he would ever gain a position with a large, commercial airline, or even a regional airline. A solid expert report in this area would have offered statistics about the likelihood that either of these men, with their particular training and background, would ultimately become an airline pilot for a regional or large airline, in Taylor's case, or for any airline, in Dodson's case.[11] A solid report would provide information about the availability of pilot openings in the industry. Instead, Darby completely ignores the economic difficulties faced by all the major airlines in the wake of September 11, 2001, which have only increased since his report, and predicts, without any data or evidence to support this prediction, that the airlines will be back to their normal hiring practices within "one or two years." The Court hopes that Darby is right, but his speculation seems to be contradicted by the current realities of the airline industry.

A reliable report would also offer some information about the likelihood of lay-offs or reductions in force by the airlines. As noted, Darby assumes that, once they obtained jobs as airline

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[11] A comparison of Darby's numbers for each decedent readily reveals that he has not factored in the likelihood of successfully obtaining a pilot position, as he imputes a greater income to Dodson, who was still taking lessons, than to Taylor, who was actually a working pilot with a courier service.

pilots for major airlines, both decedents would have been employed continuously for the next thirty or so years, when the evidence in the record suggests that such an uninterrupted career path is highly atypical for commercial airline pilots, many of whom experience frequent "furloughs" during which time they are not flying at all and are not earning any income from flying. Because Darby's predicate assumption lack any factual support, his bottom line figures are rather useless.

Plaintiffs counter that defendants can point out the fallacies in Darby's opinion, through cross-examination. Yet, the Supreme Court in *Daubert* rejected the notion that an expert opinion that lacks expertise or an arguably reasonable methodology can be offered, merely on the theory that an experienced attorney can readily shoot holes through it or that a sensible jury will quickly spot the weaknesses of the opinion. This Court is supposed to be the gatekeeper and, on the evidence before it, Darby's expert testimony would not appear to be admissible.

Although the Court assumes that Darby's testimony will, and should,[12] follow the outline set out in his report, any ruling on the admissibility of his testimony seems premature at this point. Motions for summary judgment are not yet due and plaintiffs will

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[12] See discussion *infra* concerning the adequacy of plaintiff's expert reports, in general.

have to survive such motions before Darby's testimony concerning damages will become relevant. Accordingly, the Court makes no final ruling at this point on the admissibility of Darby's testimony. Nevertheless, the Court's strong inclination, as reflected in this Order, would be to exclude Mr. Darby's expert testimony from trial, if that testimony follows the path outlined above. Therefore, the Court **DENIES without prejudice** defendants' Motion to strike Darby's report, as being premature.[13]

2. F.A. Raffa

Plaintiffs' expert F.A. Raffa has a Ph.D. in Economics and has submitted an expert report dated January 11, 2002. The report consists of a short letter to plaintiffs' attorney stating that he is "in the process of evaluating the full value of the life lost as a result of the death of Mr. Marc Taylor." (Defs.' Mot. to Strike [93], Ex. A.) He has also submitted a virtually identical letter reflecting he will be doing the same for Robert Dodson. (Defs.' Mot. to Strike [93], Ex. B.) Raffa further states:

> In this regard, I am in receipt of the January 2002 report of Mr. Kit Darby. Mr. Darby has undertaken an analysis of the remaining lifetime earning ability of Mr. Taylor, based on a model in which Mr. Taylor is assumed to have spent two more years at Paragon Air

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[13] The Court assumes that unlike defendants' objections regarding other plaintiff experts, who provided virtually no report, in contravention of the Court's directives, defendant here does not object to the adequacy of Darby's report.

> Express, followed by three years with a regional airline, and twenty-five years at a major airline, until retirement at age 60.
>
> As concerns the loss of the lifetime earning ability of the decedent, I will be reducing Mr. Darby's lifetime earnings projection to a present value equivalent.
>
> In addition, I anticipate undertaking a present value analysis of the loss of services sustained as a result of the death of Mr. Taylor. This analysis will rely upon the testimony of surviving family members and/or national statistical averages, as appropriate, to evaluate this claim.

(Defs.' Mot. to Strike [93], Ex. A.) Essentially, that is the entire report from Dr. Raffa, along with his attached curriculum vitae, which reflects that he has a B.S. in Business Administration, an M.B.A. in Finance, and a Ph.D. in Economics, and also provides a long list of other cases in which he has provided expert testimony.

Defendants have objected to the report from Dr. Raffa on the ground that it does not comply with the requirements of Fed. R. Civ. P. 26. Rule 26 requires that an expert report "contain a complete statement of all opinions to be expressed and the basis and reasons therefore," but defendants argue that this "opinion" from Dr. Raffa contains nothing of substance at all, and instead merely states that he has been retained by plaintiffs to provide an undescribed opinion at some indefinite date in the future.

Furthermore, defendants also object to Dr. Raffa's report because it explicitly relies on the information contained in Darby's report, discussed above. Dr. Raffa's report reflects that he intends to use the projected income streams of both decedents from Darby's report, and intends to conduct a present value analysis of those income streams, and also to conduct a present value analysis of the plaintiffs' "loss of services" from each decedent. Because Darby's report relies on flawed assumptions, defendants argue that Raffa's opinion, whatever it might be, will be infected with the same unreliability.

Plaintiffs respond that Dr. Raffa's initial report was timely submitted to defendants on January 11 and, if defendants did not think that his report contained sufficient information under Rule 26, they should have filed a motion to compel the plaintiffs to provide a more detailed report, which they failed to do. Despite defendants' failure to ask for a more detailed report, plaintiffs state that they did provide a supplemental report of Dr. Raffa's testimony to defendants before defendants filed their motion to exclude his testimony, but that defendants failed to reveal that fact in their motion filed with the Court. According to plaintiffs, Dr. Raffa's deposition was scheduled to take place two days after defendants filed this motion. Thus, plaintiffs argue that because they provided the supplemental reports to defendants

five days before Dr. Raffa's deposition, defendants were provided with a sufficient opportunity to prepare for his deposition.

Plaintiffs have submitted the supplemental reports of Dr. Raffa, dated February 21, 2002 (one month and ten days after the deadline for submission of expert reports). (Pls. Ex. 5, 6 [109].) The supplemental reports provide Dr. Raffa's complete analysis of the present value of both decedents' projected lifetime earnings, as well as the present value of the loss of their "household services." Dr. Raffa used the "career earnings model" from Darby's report, and then conducted a present value analysis to conclude that the present value of the total economic loss from Taylor's death was $1,924,016 if he obtained employment with a national airline carrier, and $3,523,371 if he obtained employment with a major airline carrier.[14] Dr. Raffa performed a similar present value analysis for Dodson and concluded that the present value of the total economic loss from Dodson's death was $2,130,497 if he obtained employment with a national airline carrier, and $3,806,825 if he obtained employment with a major airline carrier.

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[14] In his "career earnings model," Darby differentiated between a "national airline" and a "major airline," defining a "major airline" as an airline whose annual revenues are $1 billion or more. (Darby Report, Defs. Ex. D at 20.) It is not clear if this revenue cut-off is a minimum or average.

In their reply brief, defendants do not dispute that plaintiffs eventually provided a supplemental report containing Dr. Raffa's conclusions about the present value of the economic loss sustained by the plaintiffs. Nevertheless, defendants argue that the Court ordered the parties to provide all expert reports by January 11, 2002, and that this is yet another example of plaintiffs' repeated failure to comply with the Court's rulings and deadlines. According to defendants, plaintiffs did nothing more than identify Dr. Raffa as their proposed expert by January 11th, but didn't actually provide a report containing his expert opinion until February 21st, just days before his deposition.

The Court agrees with defendants that the "report" provided on January 11 contained no real opinion at all, but merely stated that Dr. Raffa was in the process of conducting an analysis from Darby's report and would be submitting a report of his opinion at some time in the future. Plaintiffs waited until the deadline of January 11th to produce Darby's report, and if they knew that Dr. Raffa was going to need Darby's report in order to conduct his own analysis, then the plaintiffs necessarily knew that Dr. Raffa's report would not be provided to defendants by January 11th. Accordingly, despite plaintiffs' arguments that they complied with the requirements of Rule 26 by providing a "supplemental" report on February 21st, in reality, there was nothing supplemental about

the report provided on February 21st, which was, in fact, the real expert report that should have provided on January 11th. Instead, the report submitted to the defendants on January 11th did nothing more than identify Dr. Raffa as their proposed expert, and notify defendants that his opinion would be forthcoming at some unspecified date in the future.

As to plaintiffs' response that defendants were not prejudiced by the untimeliness of Dr. Raffa's "supplemental" report, they do not provide an adequate explanation for their delay in providing this report. Further, given the rushed and compressed discovery schedule of the last few weeks of discovery, defendants presumably had little leisure time to stop their other preparation and deal with plaintiffs' tardy report. The plaintiffs also argue that an expert may testify on any matter that is within the scope of the subject matter of the opinion provided in his expert report, and since the subject matter of Dr. Raffa's opinion is the valuation of the plaintiffs' economic losses, then Dr. Raffa may testify on any matter related to that subject at trial. In essence, plaintiffs argue that it is enough under Rule 26 to provide a one-paragraph expert report that says nothing more than "I'm Dr. Raffa and I plan to testify about the plaintiffs' economic damages." Clearly, this is a specious argument that deserves little response. Rule 26 does not call

merely for a witness list. Instead, it requires a far more detailed statement of the expert's opinion than merely identifying him and his general area of expertise. Indeed, plaintiffs do not even address defendants' argument that the alleged report of Dr. Raffa fails to comply with the requirements of Rule 26. Were this plaintiffs' only failure to comply with their obligations under Rule 26, the Court would treat this lapse leniently. As discussed *infra,* however, this appears to be just one more example of the conscious decision of plaintiffs' counsel to ignore the deadlines set out by the Federal Rules, the Local Rules of this Court, and this Court's Orders.

Nevertheless, the Court does not have to grapple with the timeliness issues, because, as noted *supra,* Dr. Raffa's report may be inadmissible on the merits, given that it is based on Darby's projections, which the Court will likely decline to admit at trial. Moreover, this issue of damages is premature until motions for summary judgment are decided. Accordingly, the Court **DENIES WITHOUT PREJUDICE** defendants' motion to strike Dr. Raffa's report, and will reach the ramifications of its untimeliness only if it appears likely that Dr. Raffa will indeed be offering testimony. In the event that the Court does decide to allow Dr. Raffa to testify, however, it will require plaintiff to compensate

defendants for the additional inconvenience and time necessitated by plaintiffs' untimely disclosure.

B. Defendants' Motion to file excess pages [99-1]

In connection with the above motion seeking to preclude the admission of the testimony from Darby and Raffa, defendants have requested permission to file a brief in excess of the page limitations of the local rules. The docket sheet also reflects that this motion is "Defendants' Motion to Preclude Testimony [99-2]" but that appears to be an error, because the motion seeks only to exceed the page limits for the brief filed in support of a motion to preclude testimony [93].

This motion to exceed the page limit is unopposed. Thus, defendants' Motion to file excess pages [99-1] is **GRANTED**. The Clerk should remove the reference to Motion for Miscellaneous Relief [99-2] from the docket.

C. Defendants' Motion to Compel Plaintiffs to Complete Forms and Authorizations [108]

As part of their document requests, defendants have sought that plaintiffs produce Taylor's military records. Taylor received flight training while in the Navy, but had been discharged from the service, apparently at his own request, before he completed the normal course of training. Defendants argue that Taylor's performance during his training in the military is

directly relevant to the defense that pilot error caused the crash. Furthermore, defendants argue that the military records would also be relevant on the question of damages, to show that Taylor did not have the necessary skill to become a commercial airline pilot and therefore would have never been hired as such.

Defendants requested that plaintiff Taylor complete the necessary authorization forms that would allow the Navy to provide Taylor's military records to defendants, but plaintiff refused to do so. Defendants then filed a motion to compel plaintiff to complete the necessary forms and authorization that would enable defendants to obtain Taylor's military records.

Plaintiffs argue that, even though defendants never actually specifically requested copies of Taylor's military records, plaintiffs nevertheless produced all such records to defendants. Plaintiffs have attached copies of the military records that they allegedly produced to defendants as Exhibit 3 to their response brief [119]. Furthermore, according to plaintiffs, defendants never requested in any Request to Produce that plaintiffs produce an executed form authorizing the Navy to release Taylor's military records to defendants. Accordingly, plaintiffs argue that defendants are not entitled to bring a motion to compel plaintiffs to produce this authorization form.

In defendants' reply brief [124], they argue that plaintiffs have not provided all of Taylor's military records, but instead, have indicated to defendants that they have provided all of those documents in their possession or "control." Defendants contend that plaintiffs have not provided all the documents related to Taylor's progress in Navy flight school and argue, for the reasons set out above, that the documents are obviously relevant to the issues in this action. Furthermore, defendants argue that, although plaintiffs may not be in actual possession of all Taylor's Navy records, Herman Taylor, as Marc Taylor's father and next of kin, is nevertheless in "control" of his son's Navy records, as Herman Taylor has the authority to obtain the records from the Navy and to authorize the Navy to release the records to defendants. Thus, defendants argue that plaintiffs should be required to complete the authorization form to allow defendants to obtain Taylor's Navy records, or the Court should order plaintiffs to produce all of Taylor's Navy records, not just those currently in possession of the plaintiffs.

The Court agrees with defendants that Taylor's Navy records could be highly relevant to the issues in this action. Indeed, plaintiffs have not challenged defendants' argument that Taylor's Navy records are relevant or discoverable. Instead, plaintiffs argue that they are not required to sign an authorization form

releasing all of Taylor's Navy records to defendants, as such records are not in the "control" of plaintiffs and nothing in the Federal Rules requires the plaintiffs to obtain documents in the custody of a third party in order to produce those documents to defendants. Also, plaintiffs question whether the Navy would even honor Herman Taylor's request.

Although there appears to be no Eleventh Circuit case on this issue, most of the courts that have addressed this issue have held that Rule 34 does require a party to sign authorizations to obtain discoverable records that are within the party's control; *i.e.*, if a party's military records are relevant and discoverable, a court can compel the party to execute an authorization for the military to release the records to the opposing party. *See e.g., United States ex. rel Woodard v. Tynan*, 776 F.2d 250, 252 (10th Cir. 1985); *McKnight v. Blanchard*, 667 F.2d 477, 481-82 (5th Cir. 1982); *Phillips v. Ins. Co. of N. Am.*, 633 F.2d 1165, 1167-68 (5th Cir. 1981). Plaintiffs routinely submit medical records to defendants, without the need for court intervention to require this disclosure, and plaintiffs there do not argue that such records are not in their "control," simply because their doctors have them. If plaintiffs can be required to sign authorizations releasing their medical records, then it would stand to reason that they can also be required to sign authorizations releasing

their military records also. If the Navy balks, the Court can issue an Order, but first plaintiff should cooperate. Thus, plaintiffs' argument that Rule 34 does not require them to produce the authorization form is without merit.

Accordingly, defendants' Motion to Compel should be granted, and plaintiffs should be ordered to execute **IMMEDIATELY** the requested authorization form releasing Taylor's military records to defendants. Furthermore, the Court will awards defendants attorney's fees and costs incurred in bringing this unnecessary motion to compel.

D. Defendants' Motion to Strike [117-1] and to Preclude Testimony by Plaintiffs' Expert Elizabeth Laposata [117-2]

1. Background

This motion deals with some of the same issues and arguments raised in connection with Dr. Raffa's report: namely, how complete and detailed an expert report must be to comply with the requirements of Rule 26(a)(2). With regard to this witness, however, plaintiffs never supplemented their woefully inadequate expert "report," but instead effectively ambushed defendants at the deposition with a witness who testified, not only in much greater detail than the truncated report indicated, but who also offered a totally different opinion than the "report" had suggested was her conclusion. The Court concludes that, with this

witness, plaintiffs' counsel, Mr. Wolk, has engaged in a purposeful and premeditated violation of federal rules and of this Court's order.

To understand why the Court feels so strongly about the conduct of plaintiff Taylor's counsel, a more detailed recitation of one of the discovery disputes in this case is called for. As noted, although plaintiff Mauvais did nothing during the discovery period and plaintiff Taylor did little, this Court acceded to their request that discovery be reopened and the Court reopened discovery in November, 2001 for a three month period, with discovery to close on February 8, 2002. (Order, [69] at 31). As the parties had noted that no expert discovery had occurred, the Court also included a deadline for the disclosure of expert reports: December 7, 2001. *Id.* Later, at the request of the parties, the parties extended the latter date until January 22, 2002. In setting this simultaneous deadline, the Court was not focused on the fact that typically a plaintiff's expert and expert report need to be disclosed first, so that a defendant will know what theory it is rebutting. Indeed, Local Rule 26.2 calls for plaintiff to announce his expert and disclose that report early in the discovery process, to allow the defendant time to retain his own expert to respond to the defendant. In its efforts to deal with plaintiffs' motion to reopen discovery and other motions, the

Court simply was not thinking of the problems that simultaneous disclosure could pose.

Thereafter, the defendants requested this Court to stagger the disclosure of expert reports, so that defendants could become aware of the particular defect in the airplane being alleged by plaintiff and could retain an expert who could respond to that assertion. Accordingly, the defendants requested a modest two week period after the disclosure of plaintiff's reports on January 11,2002, or, in other words, a deadline of January 25, 2002 for disclosure of the defendants' expert reports.

As this appeared to be a sensible request, the Court was surprised when plaintiff's counsel opposed this request. Not only did counsel lack a substantial reason for opposing the request, but his reaction seemed quite ungracious, given the fact that plaintiffs were already in violation of Rule 26's requirement that they disclose their experts early in the process, as the case was already in its 17th month with no disclosure by plaintiffs, and as plaintiffs had found it necessary to seek a reopening of discovery because they had pursued almost no discovery during the regular process. Moreover, the merits of defendants' request were strong. As defendants pointed out in their reply, they were unable to defend themselves against a theory of liability that plaintiffs had not yet deigned to disclose. As defendants noted, since

plaintiffs' expert could opine to any number of causes of the crash,[15] it would be unreasonable to require defendants to retain dozens of experts in the off-chance that one of them might hit on just the defect that the plaintiffs had in mind.

Shortly thereafter, the Court issued an Order allowing the staggered disclosure of expert reports and expressing its surprise that, given plaintiffs' history of dilatory conduct, plaintiffs would oppose what seemed to be a sensible request. Further, acknowledging plaintiffs' concern that it might not be able to disclose an expert on the issue of plaintiffs' contributory negligence until after it heard from defendants' expert on that matter,[16] the Court stated:

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[15] Defendants noted that the theories could range from: engine design defect; engine manufacture defect; right engine failure, left engine failure, or both; in-flight fire; fuel leakage; complete loss of engine power; partial lost of engine power; defective: engine nozzles, fuel pump, cylinders, manifold valve, fuel metering valve, intake valves, exhaust valves, aneroid valve, aneroid valve, by-pass valve, pistons, push rods, rocker arms, injection nozzles, spark plugs, engine case, crank shaft, any of various pumps and filters, any of dozens of nuts, bolts, screws, clamps or seals, any of dozens of connecting hoses or wires. (Teledyne Defs.' Reply in Supp. of Mot. to Order Expert Testing and Stagger the Time for the Parties to File Expert Rpt. [79].)

[16] Defendants were unable to provide an expert opinion on plaintiffs' contributory negligence until they first learned what theory of defect plaintiffs were pursuing, so that defendants could articulate what a reasonable response by a pilot to the particular defect would be.

> In any event, if further expert disclosures need to be made as a result of any opinion set out in defendant's staggered report, the parties should **promptly** alert the Court to that need. The Court wishes the record to be complete before the filing of motions summary judgment.

(Order of January 8, 2002 [80] at 5 n.3) (emphasis in original).

On January 25, 2002, defendants filed an emergency motion indicating that, contrary to the earlier agreement between counsel that expert depositions would be staggered, plaintiffs had unilaterally noticed the deposition of all ten of defendants' expert witnesses for the next week, although plaintiffs had refused to make seven of their ten expert witnesses first available for deposition. As a result of plaintiffs' conduct, not only would the depositions not be staggered, but the parties would have to conduct the depositions of almost twenty expert witnesses in a two week period of time. The defendants proposed a short extension of expert discovery, but plaintiffs, who again had been the recipients of the Court's largess in reopening discovery, had refused. Defendants further noted that the full text of Local Rule 26.2(C) reads, as follows:

> Any party who desires to use the testimony of an expert witness **shall designate the expert sufficiently early** in the discovery period **to permit the opposing party the opportunity to depose the expert and,** if desired, **to name its own expert witness** sufficiently in advance of the close of discovery **so that a similar discovery**

deposition of the second expert might also be conducted prior to the close of discovery.

F.R.Civ.P.26.2(C) (emphasis added). Accordingly, defendants argue, Rule 26, Local Rule 26.2(C), and the spirit of this Court's Order requiring staggered disclosure of expert reports meant that plaintiffs' depositions should occur first, after which defendants' experts would offer their opinions to rebut the testimony of plaintiffs' experts. Defendants requested an emergency hearing.

As defendants noted, while the Court had not mentioned the timing of the depositions, it was surprised at plaintiffs' conduct, as the rules and the spirit of the Court's Order supported defendants' request. Accordingly, the Court scheduled an emergency telephone conference.

At the very beginning of this conference, counsel for the defendants made clear that it was not his intention to dredge up the many discovery disputes between counsel, but to come up with a neutral solution that would avoid requiring the Court to listen to all counsel's recriminations. As defendants' counsel appeared to the Court to occupy a higher moral ground on most of these disputes than did plaintiffs; the Court was pleased at counsel's demeanor. Moreover, the Court indicated that, as both parties had complained about the logistical nightmare that was entailed in

deposing almost twenty experts in different states in a two week period of time, the Court was willing to grant the parties an even longer period of time than defendants had requested. The Court indicated that it would extend discovery until March 15th, which represented a five week extension.

Inquiring of counsel for plaintiff whether that extension would work for him, the latter proceeded to launch into his litany of complaints about defense counsel and his complaint that the Court had earlier directed the staggered disclosure of expert reports. The Court responded:

> Mr. Wolk, I wish you had followed the lead of Mr. Green, because I don't want to get into who shot John. I want to solve this problem and I really don't want to get into that.

(Tr., Feb. 1, 2002 Hrg. at 10). Counsel continued with his complaints, to which the Court responded, "Mr. Wolk, you are not catching the drift here. The drift here is I want this to be amicable and I don't care about why or whatever....Now, let's move on to ...the staggering issue." *Id.* at 10-11. At that point, defense counsel articulated his objection to staggering the depositions: "There's absolutely no reason to stagger them." *Id.* Thereafter, the Court indicated that it wished to stagger the depositions and plaintiff's counsel finally indicated his agreement with that procedure. *Id.* at 13.

2. Dispute regarding Dr. Laposata

The Court has gone into some detail about the disputes concerning the staggering of reports and depositions because it believes that plaintiffs' counsel's recalcitrance concerning that matter illuminate the motivations behind his conduct with regard to the production of a report for Dr. Laposata.

Specifically, on January 11, 2002, the plaintiffs provided defendants with a letter from Elizabeth Laposata, M.D., the Chief Medical Examiner for the State of Rhode Island. Plaintiffs contend that this letter constituted the expert report required by Rule 26(a)(2). The relevant part of this "report" reads as follows:

> I have reviewed the Fulton County Medical Examiner's reports and related materials. It is my opinion, to a reasonable degree of medical certainty, that Mr. Taylor and Mr. Dodson died as the result of injuries suffered in the crash. It is my opinion that both Mr. Taylor and Mr. Dodson died of trauma. It is my opinion that both suffered smoke inhalation.
>
> My hourly rate is 350 per hour plus expenses.
> My experience and qualifications are set forth in the curriculum vitae provided with this report.
>
> I have authored numerous articles over the past ten years, which are set forth in my curriculum vitae.
>
> My previous deposition and trial testimony is set forth in the additional enclosure provided with this report. I may utilize at the time of trial certain exhibits; however, a final decision as to trial exhibits has not been made.

> I reserve the right to supplement this report should additional relevant material be derived.

(Defs. Mot. to Exclude [117], Ex. A.) (emphasis added). Attached to the report was the doctor's curriculum vitae.

Defendants argue that this report falls woefully short of the requirements of Rule 26, and the Court agrees. Rule 26(a)(2) requires that an expert report contain "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions." Dr. Laposata's report barely contains her opinions, let alone the basis and reasons for those opinions or the data considered in forming the opinions. Furthermore, upon reviewing her deposition testimony, the glaring inadequacy of this "report" becomes apparent.

Defendants took the deposition of Dr. Laposata on February 21, 2002, at which time she brought with her a folder full of documents containing the various reports that she claimed to have relied upon in forming her opinions, including the report from the Fulton County Medical Examiner. During her deposition, Dr. Laposata stated that she relied heavily on the information provided to her about the crash by "Mr. Fiedler," who is another of the plaintiffs' experts. Although it is not clear what his

title is, Mr. Fielder provided Dr. Laposata with information related to the "dynamics" of the airplane crash. Dr. Laposata testified that, based on the information provided by Fiedler, as well as her review of the Fulton County Medical Examiner's report and other documents, it was her opinion that both Taylor and Dodson had survived the initial impact of the crash, but died from the subsequent fire as a result of the trauma from "thermal burns and inhaling the burning atmosphere." (*Id.* at 80.) Thus, despite the statement in her "report" that Taylor and Dodson died as the result of injuries suffered in the crash, Dr. Laposata testified exactly to the contrary in her deposition when she opined that the blunt-force injuries they sustained in the crash were not sufficient to cause their death, but that instead it was actually the "thermal" injuries (*i.e.*, burns and smoke inhalation) that caused their death.

Counsel for Teledyne questioned Dr. Laposata extensively during her deposition about her knowledge of Rule 26 and its requirements and wanted to know why her report did not mention any of the opinions she expressed during the deposition about the cause of death being attributable to the fire and/or smoke inhalation, but those questions did not elicit any helpful answers. In essence, Dr. Laposata stated that the report gave only her "general" opinions and that she had a lot of opinions

that were not expressed in the report, depending upon what she was asked. (See Defs.' Motion to Exclude [117], Ex. B, at 22.) A reading of most of the excerpts of the deposition provided by counsel renders understandable his frustration, because Dr. Laposata gave very vague responses about why her report failed to contain even a basic summary of her opinion as to the cause of death of the decedents and the reasons for that opinion; moreover, her doublespeak about the definition of "injuries" and "trauma" and "smoke inhalation" was hardly illuminating.

The responsibility for providing a detailed expert report that comports with the requirements of Rule 26 lies with the plaintiffs and their counsel, however, and it strains the Court's credibility to believe that Dr. Laposata did not receive guidance from the plaintiffs' counsel regarding the information that should be contained in the one-page letter sent to defense counsel that purported to be her expert report. Plaintiffs' counsel is obviously familiar with the requirements of Rule 26, or at least he should be, and his argument that the expert report need only disclose the "subject matter" of the expert's testimony is directly contrary to the clear language of the rule that the report should contain "a complete statement of all opinions to be expressed" by the expert. With respect to Dr. Laposata's report, not only did it not contain anything close to a "complete

statement" of her opinions, but it arguably is deliberately misleading as to her actual opinions, as she expressed them during her depositions. That is, as noted, in her report, the doctor indicated that the plaintiffs died as a result of injuries suffered in the crash and trauma. Yet, in her testimony, she suggested that plaintiffs suffered only minor fractures in the crash, and that those injuries could not possibly have been fatal, but that instead plaintiffs actually died from the fire that broke out after the crash, from both burns and smoke inhalation.

It is this Court's firm belief that plaintiffs' counsel deliberately ignored the requirements of Rule 26 and submitted a "report" from Dr. Laposata that he knew did not contain a complete summary of her opinions as to the cause of death of Taylor and Dodson, and perhaps even submitted a report that he intended to be deliberately misleading. The Court states this for several reasons. First, it is obvious that the letter was hardly a report, under Rule 26, and it is also obvious that the doctor's testimony contradicted this "report," as abbreviated as it was. Moreover, given the Court's Order requiring the staggering of the disclosure of expert reports, plaintiffs' counsel certainly understood the Court's concern that defendants be apprised of the basis for the expert's opinion. Finally, the continued contrariness and pique by counsel at the Court's requirement of a

staggering of expert disclosures and depositions convinces the Court that counsel was determined, no matter what this Court said, to have his own way, at least in part, on this matter. His reaction to defendants' complaint is little more than, "So what?" He appears to assume that this Court will simply allow his disobedience to pass.

Beyond the facts of this case, the Court also notes that this appears not to be the first time that plaintiffs' counsel has acted in this manner. That is, from its own research, the Court has discovered a decision from the Fifth Circuit, in which counsel, Mr. Wolk, did almost the same thing there as he did here. In *Michaels v. Avitech, Inc.*, 202 F.3d 746 (5th Cir. 2000), counsel had been directed, by a certain date, to "designate their expert with a report that implicates Avitech and any three witness they believe need to be deposed." *Id.* at 748. Counsel complied with a "brief" report that "at least implicate[d]" the defendant with some theory of the latter's negligence with regard to the failed equipment in the airplane crash. *Id.* Then, only two days before the defendant's deadline for filing a motion for summary judgment, counsel sent defendant a 21 page fax, that included radar plots, reports from previously undisclosed experts and a significantly revised and expanded report from the above describe expert. The

district court struck the new report as untimely and granted summary judgment for the defendant.

On appeal, the plaintiff objected to the striking of the report. Although the conference that led to the filing of the report had not been transcribed, defense counsel indicated that the Court's "extreme measures resulted from *the court's belief that the plaintiff tokenly complied with the literal wording of the initial order but purposefully ignored the common understanding between the parties and the court in order to gain a tactical advantage by the late designation of experts*." *Id.* at 750 (emphasis added). The Fifth Circuit concluded that the wording of the district court's order had been ambiguous and it did not presume bad faith on plaintiff's counsel's part. *Id.* It noted, however, that had counsel acted purposely to violate the court's order, a striking of the report would have been appropriate. This Court believes that the above quoted words from the Fifth Circuit opinion capture counsel's conduct, in this case as well. Moreover, this Court does conclude that counsel acted in bad faith.

To remedy plaintiffs' failure to comply with either the letter or the spirit of Rule 26, defendants seek an order from the court excluding Dr. Laposata from expressing any opinions during her testimony in this case, other than those expressed in the

January 11 "report," which in essence would preclude her from giving any of the opinions she expressed during her deposition. Defendants argue that such a remedy is required under Rule 37, which states, in relevant part:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

Fed. R. Civ. P. 37(c)(1) (emphasis added).

This Court agrees. Because plaintiffs failed to disclose information required under Rule 26(a) and have failed to show substantial justification for doing so, under Rule 37(c), exclusion of the doctor as a witness is an appropriate sanction. *See, e.g., Salgado v. Gen. Motors Corp.*, 150 F.3d 735 (7th Cir. 1998); *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995). As the Seventh Circuit stated in *Salgado*, exclusion of expert testimony is an appropriate sanction for a blatant failure to comply with Rule 26:

> The [expert] report must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush at trial; and moreover the report must be sufficiently complete so as to shorten or decrease the need for expert depositions and thus to conserve resources. Expert reports must not be sketchy, vague or preliminary in nature. Disclosures must not be used as a means to extend a discovery deadline. Expert reports must include "how" and "why" the expert reached a particular result, not merely the expert's conclusory opinions. Compliance with Rule 26, in particular with the requirement of total disclosure, is emphasized in the Advisory Committee comments. The "incentive for total disclosure" is the threat that expert testimony not disclosed in accordance with the rule can be excluded pursuant to Rule 37(c)(1). The availability of this sanction "put[s] teeth into the rule." The rule presents alternatives less severe than exclusion of the expert testimony, however. If the expert's report contains only incomplete opinions, the court may choose to restrict the expert's testimony to those opinions alone.

Salgado, 742 n.16 (citations omitted).

Here, the plaintiffs' failure to provide a complete statement of her opinions was hardly harmless, as defendants were clearly prejudiced by not being allowed to adequately prepare for her deposition. Furthermore, the plaintiffs' failure to provide all the supporting documents upon which Dr. Laposata based her opinions also deprived the defendants of an opportunity to review those documents before the deposition. Accordingly, the Court will exclude Dr. Laposata as a witness, or, alternatively, preclude any testimony by her that is inconsistent with her

report, if a means can be arrived at to accomplish such a result, given her now inconsistent testimony in her deposition.

E. Defendants' Motion to Preclude Testimony Based upon Additional Testing [121]

Defendants' final motion concerns still more plaintiffs' experts whom they are seeking to preclude from testifying at trial. Defendants contend that plaintiffs served them with expert reports from Larry Brown, Al Fiedler, and Dr. Richard McSwain on January 11, 2002, the deadline the Court had provided for plaintiffs to serve their expert reports to defendants. On January 25, 2002, defendants then served their own expert reports on plaintiffs in response to plaintiffs' experts. After these reports had been served and after the depositions of these experts had been taken, however, in the last days of discovery, on March 12 and 13, 2002, plaintiffs' experts conducted additional "testing sessions." Although defendants' counsel was notified of these tests, and attended the tests, they notified plaintiffs' counsel beforehand that they considered the additional tests to be untimely and would object to any attempt by plaintiffs to introduce any evidence from these tests at trial, or to submit new or revised expert opinions based on these tests. (*See* Defs.' Motion to Exclude [121], Ex. E.)

Discovery closed on March 15, 2002. Three days later, on March 18, plaintiffs served defendants with two videotapes labeled respectively "Larry Brown Engine Run" and "Al Fiedler Run," which were also accompanied by documents purporting to be data from these tests. The "Larry Brown Engine Run" reflects valve tests conducted on a Teledyne engine, and the "Al Fiedler Run" reflects tests conducted on the fuel selectors of a Beech Baron aircraft. On that same day, defendants also received a separate package purporting to be data from tests run by Dr. McSwain. The next day, March 19, defendants received "Plaintiff Taylor's Third Supplemental Answers to Teledyne Defendants' Second Continuing Interrogatories to Plaintiff." In response to Interrogatory 10, which asked plaintiff to identify all expert witnesses and the documents prepared by such experts that related to the lawsuit, plaintiffs stated that they "have supplied two (2) videotapes and laboratory data that provide supplemental and rebuttal support for the previously expressed opinions of plaintiffs' experts Dr. Richard McSwain and Messrs. Al Fiedler and Larry Brown."

Defendants contend that plaintiffs have failed to provide any supplemental expert reports pertaining to this additional testing data, and thus, defendants argue that plaintiffs should be prohibited from introducing any evidence related to the data from these tests into evidence. Furthermore, even if plaintiffs were

to provide supplemental expert reports, defendants contend that these tests were conducted far too late in the discovery process to be allowed into evidence, as defendants had no opportunity to depose plaintiffs' experts about their conclusions from this data. As an alternative to prohibiting this evidence altogether, should the Court choose to allow plaintiffs to present expert testimony on the results of these additional tests, defendants request an Order from the Court (1) requiring plaintiffs to file supplemental expert reports; (2) allowing defendants to re-depose the experts on the subject of these additional tests; and (3) allowing defendants to present supplemental reports from their own experts in response to the plaintiffs' experts.

It is not clear from the parties' briefs how significant these additional tests are to plaintiffs' case. Plaintiffs argue that the tests merely confirm the opinions of their experts and discredit the opinions of the defendants' experts. According to plaintiffs, the reports from defendants' experts, which were disclosed to plaintiffs on January 25, 2002 (the deadline for their disclosure), contained opinions not previously submitted or made known to plaintiffs; specifically, defendants' expert Dr. Claxton stated for the first time that he believed that the problem with the intake valve on the right engine was the result of exposure to the post-crash fire, and defendants' experts Eberly

and Smith stated that they believed that the cause of the right engine's failure was the improper positioning of the fuel selector valve.

Plaintiffs contend that they decided to perform additional measurements and analysis of the wreckage components in order to discredit these newly submitted opinions about the cause of the right engine failure. Several tests on the wreckage components were performed at McSwain Engineering in Pensacola on March 12 and 13, 2002, in the presence of Teledyne representatives. According to plaintiffs, the test results did not lead to the formation of any "new" opinions from their experts that would require supplemental reports; instead, the results of the McSwain tests merely confirmed the opinions previously submitted by the plaintiffs' experts that the "interference fit" problems with the intake valve occurred prior to the accident, not after, and that the fuel selector valve was not in the condition described by defendants' experts in their reports. In addition, the engine test run by Larry Brown that was submitted to defendants via videotape confirmed his opinion that the misaligned valve seat caused vibration in the engine, which led to the cylinders becoming loose. Finally, plaintiffs state that the test run by A.J. Fiedler, which was also videotaped and provided to defendants, was a test on the exemplar fuel selector, and

plaintiffs contend that the results of that test completely discredit the opinion of defendants' expert Smith that the change in position of the fuel selector caused the loss of power in the right engine.

Thus, plaintiffs contend that the tests were only conducted in response to the reports from defendants' experts that contained new theories about the cause of the right engine failure and, as the plaintiffs were not aware of these theories prior to the submission of the defendants' expert reports on January 25, the plaintiffs could not have conducted the test sooner. Moreover, the plaintiffs state that they promptly arranged the tests soon after receipt of the reports from defendants' experts and after conducting their depositions in early March. Finally, plaintiffs argue that defendants can not claim unfair delay, surprise, or prejudice, because they were present at the tests and participated in them and all the data and measurements from the tests were provided to defendants' counsel and experts. Furthermore, at the request of defendants' counsel, the component parts were immediately shipped to the defense expert for independent verification of the test results, and, despite requests from plaintiffs' counsel, defendants have refused to return the components or to provide any data from their own testing to the plaintiffs.

Plaintiffs also argue that defendants themselves submitted last-minute supplemental discovery responses on March 15, 2002, that identified for the first time new opinion witnesses that had not been previously disclosed to plaintiffs. In light of all these facts, plaintiffs argue that they complied with all orders from the court and all Federal Rules of Civil Procedure and they should be able to present evidence of these test results at trial.

Defendants have filed a reply in which they vigorously contend that plaintiffs' recent testing has violated the rules and this Court's Orders. Specifically, defendants note that the testing at issue was new testing conducted **after** the same witnesses' expert reports had already been served, conducted **after** these witnesses depositions had been taken, and disclosed **after** the close of discovery. Moreover, defendants note that, contrary to plaintiffs' argument that this testing only bolstered old opinions, and did not create new opinions by these witnesses, it is clear that this information constitutes new opinions. Further, defendants note that plaintiffs' claim that this new testing was necessitated by the need to respond to unexpected theories revealed by defendants in their expert report is contradicted by the fact that plaintiffs waited seven weeks after defendants disclosed their expert reports to make their disclosure. Of

course, by the time of plaintiffs' disclosure, discovery had expired.

This Court concludes that the conduct of plaintiffs' counsel, Mr. Wolk, is unprecedented for this Court. That he would embark on such a brazen course, notwithstanding all the discovery problems that he has created in this case, is nothing short of breathtaking. The Court certainly believes that the purpose of a trial is to establish the truth; for this Court, the determination of that truth is always more important than a fixation on whether an attorney has, as a procedural matter, crossed all his t's and dotted all his i's. This is so in every case, but it is doubly important in a case where two young men have died and where a defect in airplane equipment, if it exists, should certainly be uncovered, as such a defect could lead to other crashes and other deaths. Accordingly, if defendants' experts had revealed any fact or theory that would have legitimately called for additional or responsive testing, this Court would have considered a request for further reasonable discovery that would seem necessary and appropriate in a search for the truth. The Court had so indicated the possibility of such in a previous order. Yet, in that order, the Court had made clear that the plaintiffs should notify the Court promptly of that need in order to have such additional discovery ordered. Plaintiffs did neither. They never asked for

permission to conduct more expert discovery after the deadline and they did not pursue such in a prompt fashion, but, instead plaintiffs' counsel simple blustered forth in his usual unilateral style. Plaintiffs cannot expect the Court to countenance this conduct. Therefore, the Court **GRANTS** defendants' motion to preclude plaintiffs' experts from testifying at trial with regard to testing that was not disclosed in their expert reports.

If, in fact, this further testing would have aided in a search for the truth,[17] the Court, on behalf of the families of these young men, is greatly saddened by such a result. Plaintiffs' counsel has made clear his animosity toward the defendants and apparently toward a judicial system that seeks to require counsel to play by the rules. Nevertheless, the Court cannot understand why counsel, Mr. Wolk, would put his own personal agenda and his penchant for gamesmanship so far ahead of the interests of his clients. Because of the egregiousness of counsel's conduct, the Court regretfully concludes that it is left with little choice other than to impose this sanction.

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[17] The Court is doubtful that this is so, as otherwise plaintiffs' counsel would not have embarked on his own risky litigation version of the game "Chicken."

II. Plaintiffs' Pending Motions

Plaintiffs' motions are primarily motions to compel defendants to produce various documents related to their engines, including engineering drawings and specifications for the various components, etc. Defendants argue that the plaintiffs' requests are wildly overbroad, because, according to defendants, plaintiffs have essentially requested every document ever produced by the company going back 40 years or so, on every engine they have ever produced, which would require months to collect and produce and countless hours of work from multiple individuals and would result in the production of thousands and thousands of pages of documents. Defendants have objected to producing documents related to engines other than the model at issue, or related to engine components other than the intake valve. They also object to producing documents older than five years. Defendants have offered to produce documents related to the specific engine model and component at issue for the past five years, but plaintiffs have rejected this offer as far too limited. Plaintiffs argue that their requests are entirely reasonable, considering the retention requirements of the FAA which obligate defendants to retain these documents.

A. Plaintiffs' Motion for Cessation of Discovery Abuses [94-1] and to Compel [94-2] and for Sanctions [94-3]

Plaintiffs' first motion is an "Emergency Motion" seeking an Order from the Court telling defendants to stop their discovery abuses and to produce the documents requested by plaintiffs. Plaintiffs even go so far as to state that "Plaintiffs want only to get discovery over and get this double death case tried." Considering that it is largely the fault of the plaintiffs that this case is still in discovery after almost two years, their argument that they are in a hurry to get discovery completed so that they can try the case is absurd.

Plaintiffs' motion, which is only three pages long and has no brief in support, constitutes little more than a venting by plaintiffs' counsel, Mr. Wolk. The motion appears to be largely a restatement of the Motion to Compel [96], filed on the same day, February 25, 2002, as plaintiffs are objecting to the defendants' failure to produce various document and their failure to schedule certain depositions. They also seek sanctions against defendants for their willful failure to produce the documents in response to plaintiffs' document requests.

Through their motion for a "cessation of discovery abuses," the plaintiffs are essentially asking this Court to tell the defendants to behave. The appropriate remedy for a party's

failure to produce documents in response to a document request is for the requesting party to file a motion to compel, which plaintiffs also filed on the same day they filed this motion. Accordingly, this "Emergency Motion" is merely duplicative of plaintiffs' motion to compel [96], and the Court **DENIES** it.

B. Plaintiffs' Motion to Extend Page Limit [95]

This motion was filed the same day as [94] and [96], seeking an extension of the page limit on the brief in support of the motion to compel [96]. This Court **GRANTS** this motion.

C. Plaintiffs' Motion to Compel [96]

On February 25, 2002, the same day that plaintiffs filed the above motions, they also filed a Motion to Compel [96] seeking an Order from the Court requiring defendants to produce the documents requested by plaintiffs in their First Request for Production of Documents. The basis for the parties' dispute is summarized above. Plaintiffs have requested a myriad of documents related to the engine model at issue in this action "and other similar engines" and they have not limited their requests to any particular time period. Defendants have offered to produce documents related to the specific model at issue and related to the specific intake valve component, but they object to producing "hundreds of thousands" of documents going back 40 years that relate to engine models other than the model at issue in this

action, or relate to components other than intake valves, which are completely irrelevant to the issues in this action.

The parties offer much contrasting explanations of the oppressiveness of this request, with defendants indicating that it could take months of work to compile the thousands of pages of documents, mostly irrelevant, that plaintiffs seek, and with plaintiffs disagreeing and offering an affidavit from a purportedly knowledgeable source indicating that defendants are being disingenuous about the difficulty entailed in producing the documents. Given the wide disagreement between the parties, combined with the Court's lack of expertise on the underlying aviation and engineering issues, the Court is at a loss as to who is right on this issue.

In attempting to sort this out, the Court notes that typically it would err on the side of giving a plaintiff wide ranging discovery on these matters, no matter that the discovery might be voluminous, as long as the Court felt that the plaintiff were honestly searching for pertinent evidence. Here, however, for reasons noted at length in this Order, plaintiff Taylor's counsel does not presently enjoy a lot of credibility with this Court.

Moreover, the timing of this request gives the Court some real pause. That is, given the time consuming nature of such a

document production request, the Court would have thought that, if this information were really important, plaintiff's counsel would have made the request early in the discovery process, not in the last month of discovery, as he did. As the timing of plaintiffs' request insured that these documents would be disclosed only during the last week of the regular discovery period, after all of the expert reports had already been exchanged and most depositions had been taken, the Court's scepticism at the sincerity of the requests is enhanced.[18] Indeed, plaintiffs have offered no explanation for why they waited until January, 2002, to serve these requests, when they filed the case in July, 2000.

Finally, plaintiff's counsel emphasizes that, as someone who has litigated against defendants for almost thirty years, he knows firsthand that they have turned over this information in other cases and are simply being recalcitrant here. Yet, if that is so, it would seem that plaintiff already has the information or, at

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[18] Consistent with the Court's observation, defendants argue that plaintiffs' request has occurred so late in the discovery process that much of the information will not be pertinent at trial, as plaintiffs have already fixed their theory of liability and as these new matters cannot alter that theory, at this time. Defendant has offered, by way of compromise, disclosure of documents that it feels are responsive to the theory of liability espoused by plaintiff. Not surprisingly, plaintiffs apparently believe that defendants' offer does not include all documents that might be responsive to plaintiffs' theory of liability, but plaintiffs have not explained in a way that this Court can understand why plaintiffs believe this to be so.

least, could identify a bit more precisely exactly what he wants the defendants to produce. Counsel's failure to do so gives some resonance to defendants' accusation that plaintiffs are embarking on nothing more than a rather large fishing expedition to try to harass defendants or to uncover potential problems with other Teledyne engines, for future use in other litigation.

On the other hand, the Court does not wish to allow its frustration with plaintiffs' counsel's antics to blind the Court to otherwise legitimate discovery needs by plaintiffs. Further, as noted, if there is a defect with this component of the Teledyne engine, or if defendants have been aware of such and have failed to take appropriate measures to correct the problem, this information needs to be revealed. The Court would not wish to unintentionally issue a discovery order that is so narrowly drafted that it would hamper a search for the truth that is reasonable in scope.

In deciding what discovery to order, the Court notes that, at this point, the plaintiffs have narrowed their theory of the case to focus on the intake valve of the #5 cylinder in the Teledyne IO 520 CB engine model. Accordingly, the Court agrees with defendants that it seems unreasonable for plaintiffs to request documents related to other engine models and other components going back approximately 40 years. Defendants contend that they

have already provided most of the documents related to the specific engine parts that are involved in this case. They also indicate that they have offered to produce all documents related to the intake valve seat of the IO 520 CB engine model from 1997 to the present, but that plaintiffs have refused this compromise.

Although defendants offer a five year period of time for disclosure, back to the year 1997, this Court believes that a ten year period of time, back to 1992 would be preferable. Accordingly, it seeks language for an order directing production of discovery materials relevant to the matters at interest for the intake valve of the #5 cylinder of the 520 CB engine, for the above period of time. Yet, the Court does not want its lack of knowledge about the subject matter to result in discovery that is worded too narrowly. In other words, if there were problems with the #4 cylinder that should have alerted the defendants to potential defects that ultimately arose with the #5 cylinder or if some defect with regard to the comparable components on the left engine, not the right engine, existed, the Court would wish for plaintiffs to know this.

Therefore, the Court has endeavored to set out the spirit of the document discovery that it believes to be appropriate. It would like counsel to confer to see if they arrive at more precise language to achieve this goal. Hope springs eternal, but in the

event that counsel cannot reach an agreement, plaintiffs shall refile a motion to compel setting out precisely, and without conclusory or accusatory language, what it is they want and why exactly these documents are necessary. Defendants may then respond.

Accordingly, the Court **GRANTS in part and DENIES in part** plaintiffs' motion to compel [96]. The parties shall confer and submit stipulated language, as well as a reasonable deadline for compliance, to the Court **by October 18, 2002.** In the event that counsel cannot agree on this matter, consistent with the spirit of the above directive, plaintiffs shall file a renewed motion to compel by **October 18, 2002,** after which the defendants shall respond. The Court will not deal with any issues concerning attorney's fees at this point, but will allow the parties to make those motions later when all these issues are resolved.

Finally, as discovery has now ended and the parties know the strengths and weaknesses of their respective cases, the Court urges them to discuss settlement with each other. If they believe that mediation would be helpful, the Court would consider allowing such.

D. Plaintiffs' Motion to Compel [120]

Plaintiffs' final motion is yet another Motion to Compel [120], seeking an Order compelling defendants to produce

documents. As the plaintiffs served their Request to Produce far too late in the discovery process to allow defendants ample time to respond, the Court **DENIES** this motion. Specifically, the plaintiffs submitted a supplemental request for production of documents on February 11, 2002. As noted, discovery had been set to expire previously on February 8th, but because the parties had scheduled so many expert depositions for the last couple of weeks of discovery during the telephone conference on February 1st, this Court extended the discovery period until March 15th to allow the parties to complete all the depositions.

Thus, it was only after that telephone conference that the plaintiffs served this supplemental request for documents on February 11. At no time in the conference did plaintiffs' counsel indicate that additional document requests would be forthcoming. Indeed, although the plaintiffs' counsel never stated that they would not be serving additional requests, the tenor of the entire conference was that the parties needed additional time only to work out the exchange of documents that had already been requested, and to schedule all the depositions that had already been noticed. Certainly, the Court, which was only trying to help the parties finish their depositions, would not have allowed a new round of document requests. Plaintiffs again try to cast blame on defendants for this problem, but that argument has run out of

steam. Accordingly, the Court concludes that plaintiffs' supplemental request was untimely and it **DENIES** this motion [120].

III. Conclusion

Accordingly, the Court rules, as follows, on the pending motions:

1. Defendants' Motion to Strike Plaintiffs' Expert Reports and to Preclude Certain Expert Testimony **[93]- DENIED WITHOUT PREJUDICE;**[19]

2. Plaintiffs' Motion for Cessation of Discovery Abuses **[94-1]** and to Compel **[94-2]** and for Sanctions **[94-3]- DENIED;**

3. Plaintiffs' Motion to Extend Page Limit **[95]- GRANTED;**

4. Plaintiffs' Motion to Compel **[96]- GRANTED IN PART AND DENIED IN PART, WITHOUT PREJUDICE;**[20]

5. Defendants' Motion to file excess pages **[99-1]- GRANTED;**[21]

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[19] As noted, if plaintiffs survive defendants' motions for summary judgment, defendants may refile this motion at that time.

[20] As noted, to reduce to writing the exact discovery required of defendant as to this document request, the parties shall confer and submit stipulated language, consistent with the spirit of the Court's Order, as well as a reasonable deadline for compliance, to the Court **by October 18, 2002.** In the event that counsel cannot agree on this matter, plaintiffs shall file a renewed motion to compel, consistent with the spirit of the above directive, by **October 18, 2002**, after which the defendants shall respond.

[21] The Clerk has also listed on the docket a separate sub-motion: Defendants' Motion to Preclude Testimony [99-2]. This latter notation is inaccurate, as defendants have not filed such a motion, as part of #99; instead, the motion to exceed pages related to a motion that, itself, sought to preclude testimony. Accordingly, the Clerk shall make this notation on the docket.

6. Defendants' Motion to Compel Plaintiffs to Complete Forms and Authorizations **[108]- GRANTED;**

7. Defendants' Motion to Strike **[117-1]** and to Preclude Testimony by Plaintiffs' Expert Elizabeth Laposata **[117-2]- GRANTED;**

8. Plaintiffs' Motion to Compel **[120]- DENIED;**

9. Defendants' Motion to Preclude Testimony Based upon Additional Testing **[121]- GRANTED.**

The Court will not deal with any issues concerning attorney's fees at this point, but will the parties to make those motions later when all these issues are resolved.

Finally, as discovery has now ended and the parties know the strengths and weaknesses of their respective cases, the Court urges them to discuss settlement with each other. If they believe that mediation would be helpful, the Court would consider allowing a limited stay of this case to allow such.

SO ORDERED this 30 day of September, 2002.

Julie Carnes

JULIE E. CARNES
UNITED STATES DISTRICT JUDGE