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2
3 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

4 SHIRLEY CAROLINE McINTOSH,
5 Individually and as Guardian and
6 Representative of M.M., D.M.,
7 T.M., and J.M., minors,

8 Plaintiffs,

9 v.

10 CUB CRAFTERS, Inc.,

11 Defendant.

No. CV-13-3004-EFS

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO DISMISS DEFENDANT'S
FOURTH AFFIRMATIVE DEFENSE**

12 **I. INTRODUCTION**

13 This matter comes before the Court on Plaintiff Shirley
14 McIntosh's Motion to Dismiss Defendant's Fourth Affirmative Defense,
15 ECF No. 15, filed in her individual and representative capacity.
16 Having reviewed the pleadings, the record in this matter, and
17 applicable authority, the Court is fully informed. For the reasons
18 set forth below, Plaintiffs' motion is granted in part and denied in
19 part.

20 **II. BACKGROUND**

21 **A. Factual History¹**

22 On April 23, 2011, Plaintiff Shirley McIntosh's husband, David
23 McIntosh, was killed in the crash of a Cub Crafters Model CC11-160

24 ¹ The factual history recited herein is based on the factual
25 allegations in the Complaint, ECF No. 1. See *Ashcroft v. Iqbal*,
26 556 U.S. 662, 678 (2009). The Court assumes to be true those
portions of the Complaint that "contain sufficient allegations of
underlying facts to give fair notice and to enable the opposing
party to defend itself effectively," but the Court does not afford
the presumption of truth to allegations that "simply recite the
elements of a cause of action." *Starr v. Baca*, 652 F.3d 1202,
1216 (9th Cir. 2011).

1 Carbon Cub (registered as N143FJ), a Light Sport Aircraft (LSA). The
2 crash occurred at Everitt Airport in Parker, Colorado, during a sales
3 demonstration flight, destroying the aircraft and killing Peter Vinton
4 and David McIntosh. Peter Vinton, the pilot of the aircraft, was
5 demonstrating the flight maneuvers and climb performance of the
6 aircraft to Mr. McIntosh, a passenger in the aircraft.

7 **B. Procedural History**

8 On January, 24, 2013, Plaintiff, on behalf of herself and four
9 minor children, filed a Complaint alleging negligence and wrongful
10 death against Cub Crafters, Inc. ECF No. 1. On February 20, 2013,
11 Defendant filed their Answer, alleging multiple affirmative defenses
12 including:

13 **Fourth Affirmative Defense.** The product referred to in the
14 Complaint, was designed, tested, assembled, manufactured,
15 certified, approved, and sold in full compliance with the
16 Federal Aviation Regulations (14 C.F.R. § § 1 et seq.), and
17 in full compliance of American Society for Testing and
Materials (ASTM) standards under the supervision of the
Federal Aviation Administration, an agency of the United
States Government, and, as such, the claims set forth in
the Complaint are preempted by federal law.

18 ECF No. 5 at 2. On June 4, 2013, the Court held a Scheduling
19 Conference, and directed the parties to file any dispositive motions
20 related to the preemption defense by August 5, 2013. ECF No. 10. On
21 August 5, 2013, Defendant filed a memorandum further clarifying the
22 Fourth Affirmative Defense but sought no specified relief. ECF No.
23 14. On August 15, 2013, Plaintiffs filed a Response and Motion to
24 Dismiss arguing that preemption does not apply and concluding that the

1 Fourth Affirmative Defense should be dismissed.² ECF No. 15. On
2 September 5, 2013, Defendant filed a response to the motion to
3 dismiss, ECF No. 16, and subsequently, the Court permitted Plaintiffs
4 to file a reply, ECF No. 20, which was filed on September 24, 2013,
5 ECF No. 21.

6 **III. MOTION TO DISMISS DEFENDANT'S FOURTH AFFIRMATIVE DEFENSE**

7 Plaintiffs moves to dismiss Defendant's Fourth Affirmative
8 Defense which asserts that the claims in the Complaint are preempted
9 by federal law. However, the parties' briefing is completely devoid
10 of citation to the standard for the relief sought. While Plaintiffs'
11 motion is captioned as a "Motion to Dismiss" and concludes that
12 "Defendant's Affirmative Defense No. 4 should be dismissed," the brief
13 also argues that "federal preemption does not apply to this
14 litigation, and Defendant's Affirmative Defense No. 4 (federal
15 preemption) must be stricken" and that "[u]nder Ninth Circuit
16 precedent, Defendant's defense would be stricken." ECF No. 15.
17 Accordingly, the briefing is unclear if Plaintiffs seek relief
18 pursuant to Federal Rules of Civil Procedure 12(b)(6) or 12(f).
19 However, having reviewed Plaintiffs' motion and the applicable
20 authority, the Court finds the motion should be treated as a motion to
21 strike. Compare *Rutman Wine Co. v. E.&J. Gallo Winery*, 829 F.2d 729,
22 738 (9th Cir. 1987) ("The purpose of [Rule] 12(b)(6) is to enable
23 defendants to challenge the legal sufficiency of complaints")
24 with *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*,

25 _____
26 ² Plaintiffs' motion was not filed as a motion nor noted for a hearing. See
Local Rule 7.1. Accordingly, the filing was not docketed as a pending motion
until September 6, 2013.

1 677 F.2d 1045, 1057 (5th Cir. 1982) ("Rule 12(f) motion to dismiss a
2 defense is proper when the defense is insufficient as a matter of
3 law.") and *Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Local*
4 *Union No. 584*, 281 F. Supp. 971, 976 (E.D.N.Y. 1968) ("[A]t one time
5 the proper procedure for raising objection to the sufficiency of a
6 defense troubled some courts, it seems that the 1946 amendment to Rule
7 12(f) was designed to provide a specific method of raising such a
8 challenge.")

9 **A. Legal Standards**

10 1. Motion to Strike

11 Rule 12(f) of the Federal Rules of Civil Procedure allows the
12 court to strike from "any pleading any insufficient defense or any
13 redundant, immaterial, impertinent, or scandalous matter." The
14 purpose of a Rule 12(f) motion is to avoid the costs that arise from
15 litigating spurious issues by dispensing with those issues prior to
16 trial. *Sidney-VinSTEIN v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th
17 Cir. 1983). Rule 8(c) of the Federal Rules of Civil Procedure
18 determines whether the pleading of an affirmative defense is
19 "sufficient." See *Wyshak v. City National Bank*, 607 F.2d 824, 827
20 (9th Cir. 1979). A defense may be found "insufficient" as a matter of
21 pleading or as a matter of substance. With respect to substantive
22 insufficiency, a motion to strike an affirmative defense is proper
23 "when the defense is insufficient as a matter of law." See *Kaiser*
24 *Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d
25 1045, 1057 (5th Cir. 1982).

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1 2. Federal Preemption

2 Federal law may preempt state law in three ways. First,
3 "Congress may withdraw specified powers from the States by enacting a
4 statute containing an express preemption provision." *Arizona v.*
5 *United States*, 132 S.Ct. 2492, 2500-01 (2012). Second, "States are
6 precluded from regulating conduct in a field that Congress, acting
7 within its proper authority, has determined must be regulated by its
8 exclusive governance." *Id.* at 2501. Finally, "state laws are
9 preempted when they conflict with federal law." *Id.* Regardless of
10 the type of preemption involved – express, field, or conflict – "[t]he
11 purpose of Congress is the ultimate touchstone of pre-emption
12 analysis." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)
13 (internal quotation marks omitted).

14 Recently, in *Gilstrap*, the Ninth Circuit reviewed the issues of
15 field preemption under the Federal Aviation Act (Act). *Gilstrap v.*
16 *United Air Lines, Inc.*, 709 F.3d 995, 1004 (9th Cir. 2013). In
17 *Gilstrap*, the Ninth Circuit recognized that "federal law generally
18 establishes the applicable standards of care in the field of aviation
19 safety." *Id.* at 1005 (citations omitted) (emphasis in original). The
20 court then adopted the Third Circuit's division of the Act's field
21 preemptive effect into two components, the "state standards of care,
22 which may be field-preempted by pervasive regulations, and state
23 remedies, which may survive even if the standard of care is so
24 preempted." *Id.* at 1006. Accordingly, the Ninth Circuit has
25 established a two-part framework for evaluating field preemption.
26 First, the Court must "ask whether the particular area of aviation

1 commerce and safety implicated by the lawsuit is governed by pervasive
2 federal regulations." *Id.* Then, if pervasive federal regulations
3 exist, "any applicable state standards of care are preempted . . .
4 however, the scope of field preemption extends only to the standard of
5 care." *Id.* "Local law still govern[s] the other negligence elements
6 (breach, causation, and damages), as well as the choice and
7 availability of remedies." *Id.* (citations omitted).

8 In *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir.
9 2007), the Ninth Circuit held that any state-imposed duty to warn
10 airline passengers about risks of deep vein thrombosis was preempted
11 by the FAA and its corresponding regulations. *Id.* at 471 ("[T]he
12 regulations enacted by the Federal Aviation Administration, read in
13 conjunction with the [Act] itself, sufficiently demonstrate an intent
14 to occupy exclusively the entire field of aviation safety and carry
15 out Congress' intent to preempt all state law in this field."). The
16 Ninth Circuit in *Montalvo* pointed to specific and comprehensive
17 regulations governing the warnings and instructions given to airline
18 passengers. *See id.* at 472-73; *see also Gilstrap v. United Air Lines,*
19 *Inc.*, 709 F.3d 995, 1007 (9th Cir. 2013) (finding pervasive
20 regulations as to when and where air carriers must provide assistance
21 in moving through an airport, but not finding pervasive federal
22 regulations about how airline agents should interact with passengers).
23 By contrast, in *Martin*, the Ninth Circuit held that the Act did not
24 preempt a state tort lawsuit involving aircraft stairs because, in
25 contrast to the lengthy list of federal regulations on passenger
26 warnings, "the only [federal] regulation on airstairs is that they

1 can't be designed in a way that might block the emergency exists."
2 *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d
3 806, 808, 812 (9th Cir. 2009).

4 **B. Discussion**

5 Here, neither party has presented any claim of express or
6 conflict preemption, accordingly, as to Defendant's Fourth Affirmative
7 Defense, the Court looks to the Act's field preemptive effect
8 utilizing *Gilstrap's* two-part framework.

9 Defendant's Fourth Affirmative Defense asserts preemption as to
10 "the claims set forth in the Complaint." ECF No. 22. However,
11 Plaintiffs correctly argue that there must be pervasive regulation as
12 to each theory of liability asserted. ECF No. 15 at 4. In response,
13 Defendant clarified that the Fourth Affirmative Defense "is directed
14 only to this specific claim, paragraph 4.5a of the Complaint." ECF
15 No. 16 at 6. Plaintiffs' Complaint at paragraph 4.5a asserts that
16 Defendant was negligent in "failing to properly design, test, and
17 approve the stall/spin characteristics of the accident aircraft." ECF
18 No. 1 at 5-6. Accordingly, to the extent Plaintiffs seek to strike
19 the Fourth Affirmative Defense as applied to all claims except 4.5a,
20 the motion is granted. However, as to the claim of negligence
21 asserted in 4.5a, the Court must determine whether, and in what
22 respect, pervasive regulations exist as to the design, test, and
23 approval of stall/spin characteristics of the accident aircraft.

24 The aircraft at issue was a Cub Crafters Model CC11-160 Carbon
25 Cub (registered as N143FJ), a Light Sport Aircraft (LSA). The
26 Administrator of the Federal Aviation Administration has broad

1 authority to publish regulations to provide for aviation safety. 49
2 U.S.C. § 106. Under this authority, the FAA in 2004 published a Final
3 Rule in the Federal Registrar with the purpose to "[i]ncrease safety
4 in the light-sport aircraft community by closing the gaps in existing
5 regulations" and to "[p]rovide for the manufacture of light-sport
6 aircraft that are safe for their intended operations." See
7 Certification of Aircraft and Airmen for the Operation of Light-Sport
8 Aircraft, 69 FR 44772-01. This rule added Federal Aviation Regulation
9 (FAR) 21.190. See 14 CFR § 21.190. FAR 21.190(c) provides:

10 (c) Manufacturer's statement of compliance for light-sport
11 category aircraft. The manufacturer's statement of
12 compliance required in paragraph (b)(1)(iii) of this
13 section must--

14 (1) Identify the aircraft by make and model, serial number,
15 class, date of manufacture, and consensus standard used;

16 (2) State that the aircraft meets the provisions of the
17 identified consensus standard;

18 (3) State that the aircraft conforms to the manufacturer's
19 design data, using the manufacturer's quality assurance
20 system that meets the identified consensus standard;

21 (4) State that the manufacturer will make available to any
22 interested person the following documents that meet the
23 identified consensus standard:

- 24 (i) The aircraft's operating instructions.
- 25 (ii) The aircraft's maintenance and inspection
26 procedures.
- (iii) The aircraft's flight training supplement.

(5) State that the manufacturer will monitor and correct
safety-of-flight issues through the issuance of safety
directives and a continued airworthiness system that meets
the identified consensus standard;

(6) State that at the request of the FAA, the manufacturer
will provide unrestricted access to its facilities; and

1 (7) State that the manufacturer, in accordance with a
2 production acceptance test procedure that meets an
applicable consensus standard has--

- 3 (i) Ground and flight tested the aircraft;
4 (ii) Found the aircraft performance acceptable;
and
5 (iii) Determined that the aircraft is in a
condition for safe operation.

6 14 CFR § 21.190(c).

7 Plaintiffs contend that because FAR 21.190 refers to "consensus
8 standards" that no federal standard is mandated for the purposes of
9 preemption. ECF No. 21 at 2. However, this reliance upon the term
10 "consensus" is misplaced. On November 5, 2004, the FAA issued Order
11 8130.2F to "explain the new regulations . . . regarding addition of
12 the light-sport aircraft category and light-sport experimental
13 aircraft." Foreword, FAA Order 8130.2F, Airworthiness Certification
14 of Aircraft and Related Products, Issued November 5, 2004 (Cancelled
15 April 16, 2011 by Order 8130.2G). Section 6 of FAA Order 8130.2F
16 describes the certification requirements and procedures applicable to
17 Light Sport Aircraft, specifically:

18 d. Light-Sport Aircraft Construction. The manufacturer of
19 an aircraft for airworthiness certification in the light-
20 sport category **must manufacture the aircraft to the design
21 requirements and quality system of the applicable consensus
standard that has been accepted by the FAA and published
through a notice of availability in the Federal Register .**
. . A list of accepted consensus standards can be found on
the FAA Web site.

22 Section 6, 121(d), Order 8130.2F CH5 (revised 1/15/2010) (emphasis
23 added). Pursuant to this Order, on October 15, 2009, the FAA
24 published a Notice of Availability which revised the consensus
25 standard acceptable for certification to "ASTM Designation F 2245-09,
26 titled; Standard Specification for Design and Performance of a Light

1 Sport Airplane." 74 FR 52997. Relevant portions of ASTM F 2245-09
2 include "4.5.9 Spinning," "4.5.7 Wing Level Stall," and "4.5.8 Turning
3 Flight and Accelerated Turning Stalls." ASTM Standard F 2245-09.
4 These standards set forth requirements for the stall and spin
5 performance of LSA aircraft, and as adopted by the FAA, must be met to
6 receive airworthiness certification.

7 Here, the Court finds that these ASTM Standards, as adopted by
8 the FAA and required for airworthiness certification, pervasively
9 regulate the stall/spin characteristics of light sport aircraft.
10 Accordingly, based upon field preemption, federal law exclusively
11 establishes the standard of care as to the design, test, and approval
12 of the stall/spin characteristics, preempting any state standards.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court finds that Defendant's
15 Fourth Affirmative Defense regarding preemption, as applied to only
16 the claim of negligence at paragraph 4.5a of the Complaint, is
17 sufficient as a matter of law.

18 Accordingly, **IT IS HEREBY ORDERED:**

19 **1.** Plaintiffs' construed Motion to Strike, **ECF No. 15**, is
20 **DENIED IN PART** (as to Complaint ¶ 4.5a) and **GRANTED IN PART**
21 (as to remaining claims).

22 **2.** The Court finds that as to the design, test, and approval
23 of the stall/spin characteristics of the accident aircraft,
24 federal law exclusively establishes the standard of care
25 preempting any state standards.

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