STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

A INVESTMENT, LLC, et al.,

Plaintiffs,

V

Case No: 19-175865-CB
Honorable Michael Warren

CONTACT AVIATION, LLC, et al.,

Defendants.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

At a session of said Court, held in the
County of Oakland, State of Michigan
July 28, 2021

PRESENT: HON. MICHAEL WARREN

_____/

INTRODUCTION

A soul in tension that's learning to fly
Condition grounded but determined to try
Can't keep my eyes from the circling skies
Tongue-tied and twisted, just an earth-bound misfit, I

Pink Floyd, Learning to Fly

In the end, this case is about a grounded plane and grounded ambitions. Despite the Plaintiffs' grand plans to fly across much of the world making millions of dollars in chartered flights in their newly acquired Falcon 50 jet, these dreams were as solid as a vapor trail. Meanwhile, the Defendants' repeated, flagrant violations of the discovery

process warrant the dismissal of their Counter Complaint.[1] This case is truly an "earth-bound misfit."

This case circumnavigates about a Falcon 50 aircraft that a combination of the Plaintiffs own. The Falcon 50 was purchased by some of the Plaintiffs with the assistance of Defendant Raptor Aviation, Inc., a Florida limited liability company (owned and operated by Defendant John Rockford Shirk), which earned a commission on the sale. Shortly after its acquisition, the Falcon 50 was piloted by Plaintiff Avraham Rod Salinger to Oakland International Airport. After it arrived, Salinger asked that certain services be performed on the Falcon 50 by Defendant Contact Aviation, LLC, a Michigan limited liability company. Tepid, then hotly contested disputes soon were launched between Salinger and Contact Aviation. Likewise, a dispute about the payment of the sales commission to Raptor began to climb. This lawsuit was soon chartered.

The Plaintiffs, A Investment, LLC, a Wyoming limited liability company, Aero Attack Systems, Inc., a British Columbia corporation, Aero Attack Systems, Inc., a Wisconsin corporation, and Salinger, initiated this case with the filing of a Complaint on August 14, 2019 against Contact Aviation, John Rockford Shirk (hereafter "Shirk"), Felicia N. Shirk, Raptor, and Unique One Aircraft Interiors, Inc., a Michigan corporation. Unique One was voluntarily dismissed on August 26, 2019. The remaining Defendants filed their

[1] Although the Michigan Rules of Court use "counterclaim," MCR 2.10(A)(3), since the Defendants misnamed their pleading "Counter Complaint," the Court will follow that convention when addressing the Defendants' pleading.

Counter Complaint on June 17, 2020.[2] An Amended Complaint omitting Defendants Felicia N. Shirk and Unique One was filed on July 1, 2020. The Amended Complaint alleges claims for Common Law Conversion (against all Defendants), Statutory Conversion (against all Defendants), Claim and Delivery,[3] Equitable Relief - Injunction as to Sale,[4] Piercing the Corporate Veil as to the "Shirks,"[5] Negligence (against Contact Aviation), Breach of Fiduciary (against Raptor), and Quiet Title (against Raptor).

The Counter Complaint alleges claims for Breach of Contract (Count I on behalf of Contact Aviation and Count IV on behalf of Raptor), Account Stated (on behalf of Contact Aviation), and Claim and Delivery and for Enforcement of Lien Rights including Possession and Sale of the Falcon 50 (on behalf of Contact Aviation).[6]

A few weeks before trial, the Court issued an Order dated May 10, 2021 granting Plaintiffs' Motion to Compel Discovery and Discovery Sanctions (the "May 10 Order").

---

[2] Although both the title and several sentences within the Counter Complaint use the singular "Defendant," both Defendants assert claims in the Counter Complaint and it is signed by their single lawyer as "Attorney for defendants and counter plaintiffs."

[3] The Amended Complaint does not identify the party against which it is directed.

[4] The Amended Complaint does not identify the party against which it is directed.

[5] The title of this claim refers to "the Shirks." However, the title page does not identify Felicia Shirk as a defendant. To add to the advection fog, allegation 101 refers to Felicia Shirk as the owner of Contact Aviation, but then the relief sought only seeks against a singular "Shirk individually . . . " Whether she properly remained a Defendant is moot in light of the Court granting a directed verdict on her behalf during the trial. All references to "Shirk" in this Findings of Fact & Conclusions of Law refer to John Shirk. Moreover, piercing the corporate veil is not a separate cause of action but a remedy. *Gallagher v Persha*, 315 Mich App 647, 653 (2016) (citation omitted) ("piercing the veil of a corporate entity is an equitable remedy sparingly invoked to cure certain injustices and not a separate cause of action"). Like the claims against Felicia Shirt, because this claim was disposed of entirely during trial, this in-artful presentation of the issue in the Amended Complaint is rendered moot.

[6] Although the Counter Complaint only asserts a lien on behalf of Contact Aviation, much of the testimony flew around a lien asserted by Raptor. However, Raptor's lien was not even briefed.

The May 10 Order provided that the "Defendants will have until May 19, 2021 to serve full and complete answers to the Interrogatories and Requests for Production (validly signed) and amended Answers to Admission." Discerning that the Defendants had not complied with the May 10 Order, on the eve of trial, the Plaintiff filed a Motion to Strike Defendants' Answer and Affirmative Defenses and Counter-Complaint, Enter a Default Against Defendants on Plaintiffs' Complaint and Deem All Requests for Admissions Admitted as a Discovery Sanction (the "Motion to Strike"). Reflecting that the truth of the Motion to Strike would likely best be revealed during the final approach of trial, the Court took the Motion to Strike under advisement.

The Court presided over an *exhaustive* bench trial. The original course was plotted to take at most three trial days. However, the zealous advocacy of the lawyers produced vicious cross winds encompassing six full days of trial - spread over nine days. Accordingly, the Court issues this Findings of Fact, Conclusions of Law, and Judgment.

At stake is whether the Plaintiffs have proper claims for Conversion, Statutory Conversion, and Claim and Delivery relating to avionics equipment of the Falcon 50 when the Court finds by clear and convincing evidence that none of the avionics equipment was ever improperly possessed by the Defendants? Because the answer is "no," the Plaintiffs' claims for Conversion, Statutory Conversion, and Claim and Delivery are dismissed.

Further at stake is whether the Plaintiffs are entitled to any damages involving (1) interior damage to the headliner and sidewall of the Falcon 50, (2) injury to the avionics of the Falcon 50, and (3) lost revenue from charter flights for the Falcon 50, when the Court finds by clear and convincing evidence that the Plaintiffs' testimony regarding such damages is rank speculation and incredible? Because the answer is "no," all the Plaintiffs' claims for damages are dismissed.

Additionally, at stake is whether the Plaintiffs' claim for Quiet Title should be dismissed when the Plaintiffs utterly failed to brief it or argue it cogently (if at all) at trial? Because the Plaintiffs have abandoned the issue, the answer is "yes," and the Plaintiffs' claim for Quiet Title is dismissed.

Also, at stake is whether the Defendants' Counter Complaint should be dismissed when the Court finds by clear and convincing evidence that the Defendants engaged in flagrant, repeated violations of discovery and the May 10 Order that prejudiced the Plaintiff's defense of the Counter Complaint? Because the answer is "yes," the Defendants' Counter Complaint is dismissed as a discovery sanction.

Further at stake is whether the Plaintiffs are entitled to a default against the Defendants because of their flagrant, related violations of discovery when those violations were not materially prejudicial to the Plaintiffs' case in chief? Because this dramatic sanction is unwarranted in these circumstances, the answer is "no."

In addition to the dismissal for discovery sanctions, also at stake is whether Contact Aviation's claims relating to nonpayment for services rendered should be dismissed when the Court finds by clear and convincing evidence that the amount for authorized services rendered did not exceed the amount for services paid? The answer is "yes," and Contact Aviation's Counter Complaint is dismissed for this independent reason.

Also, in addition to the dismissal for discovery sanctions, at stake is whether Raptor's Counter Complaint for commissions should be dismissed because the counterclaim unequivocally pleads for $22,500 in damages when there is absolutely no question that at the time the Counter Complaint was filed, the claim was at most for $15,000? Because the Counter Complaint was false when it was filed and never rectified, it is independently dismissed under MCR 2.504(B).

Further at stake, in addition to the dismissal for discovery sanctions, is whether Contact Aviation's asserted lien and its attempted foreclosure should be vacated when the Court has found by clear and convincing evidence the underlying debt warranting the assertion of the lien has been dismissed and the attempted foreclosure sale violated the applicable processes and procedures? Because the answer is "yes," the lien is hereby vacated, and the Plaintiff's request for equitable relief regarding the same is rendered moot.

FINDINGS OF FACT

General Findings of Fact regarding Credibility

The Court makes the following General Findings of Fact regarding the credibility, demeanor, veracity, vocal tone and expression, tonality, and honesty of the witnesses and the exhibits before it:

- ***John Shirk - Managing Director of Contact Aviation.*** His testimony vacillated between credible and incredible depending on the question posed. At times his testimony is afforded great weight (especially when he testified about failing to provide discovery in a timely fashion) and others no weight whatsoever (for example, when he testified that Salinger agreed to $5500 in monthly hanger fees). The Court's Specific Findings of Fact incorporate the Court's determination of allocating weight and credibility appropriately.

- ***Albert Hiedinger - Owner of Raptor.*** Much like Shirk, his testimony vacillated between credible and incredible depending on the question posed. At times his testimony is afforded great weight (especially when he testified that he actually received a $10,001 payment toward the commission he earned) and others he simply lied or was completely wrong in his recollections (for example, when he testified that he read the Counter Complaint and believed that it somehow mysteriously acknowledged the $10,001 payment toward the commission, and that he did not receive certain insurance proceeds from Challenger Carry Over

Commission[7]). The Court's Specific Findings of Fact incorporate the Court's determination of allocating weight and credibility appropriately.

- ***Avraham Rod Salinger - Owner & Manager of the company Plaintiffs.*** Salinger's ego, bursts of indignation, and flights of fancy were hardly persuasive. His testimony with regard to physical damage to the Falcon 50 (involving avionics, headliner, and other assorted assertions) was ungrounded, and his testimony regarding lost income of over $1.44 million from a nonexistent charter service was nothing more than speculative, wishful thinking. With few exceptions, his testimony was incredible and given no weight.

Specific Findings of Fact

The Court makes the following Specific Findings of Fact by a clear and convincing evidence:[8]

The Acquisition

- Together, the corporate Plaintiffs directly or indirectly acquired ownership of a Falcon 50. Salinger is at least a partial owner and primary manager of the corporate Plaintiffs. At the direction of Salinger, the plane was purchased through a broker,

[7] Defined below.

[8] The clear and convincing standard was not applied as the threshold of proof for the Plaintiffs' or the Defendants' burden of proof to prove their respective affirmative claims (the Court is quite aware that only a preponderance standard applied), but specific findings of fact are made in accord with the clear and convincing evidence standard.

Raptor, which is wholly owned and managed by Hiedinger. Raptor was owed $22,500 in sales commission for this transaction.

- The Plaintiffs were short on cash to fully fund the Falcon 50's acquisition, so Hiedinger agreed to hold back his commission payment which enabled the transaction to close.
- In addition to the $22,500 Falcon 50 commission, Hiedinger testified that he believed he was actually owed another $2,500 in sales commission from a prior transaction involving a Challenger plane (the "Challenger Carry Over Commission") and that it would be added to the outstanding $22,500 for the Falcon-50 commission. Hiedinger's testimony in this regard was not credible. His fanciful accounting did not support this claim and he failed to reduce the amount he was owed from the Challenger Carry Over Commission when he did not account for insurance premium refunds he received which offset the amount he believed was due and owing under the Challenger Carry Over Commission.
- Eventually, the Plaintiffs paid Hiedinger $10,001 in connection with the Falcon 50 commission. Salinger began to dispute the remainder of the charge because (1) the Challenger Carry Over Commission was unsubstantiated (i.e., he challenged the fanciful accounting), and (2) Salinger professed a somewhat concocted concern about the propriety of the overall transaction and whether Raptor had actually engaged in an illegal money laundering scheme.
- To assert a lien on the Falcon 50, Hiedinger filed a document with governmental authorities with false information claiming that Hiedinger performed "labor" on

the Falcon 50. In the middle of his testimony, Hiedinger creatively invented a defense to this misrepresentation claiming that his brokering services for the sale of the Falcon 50 constituted "labor." However, when he filed the document, he did not actually believe this, he did not care about the veracity of the government document, and this explanation was clearly invented on the stand.

- Prior to the filing of the Counter Complaint, Raptor knew that $10,001 had been paid toward the Falcon 50 commission. At best, even including the Carry-Over Commission of $2,500, Raptor was owed $14,999. Nevertheless, the Counter Complaint unequivocally lists $22,500 as due and owing and demands payment for $22,500 in damages in its prayer for relief (interestingly omitting the $2,500 for the Challenger Carry-Over Commission). A review of the Counter Complaint nowhere revealed or acknowledged the $10,001 payment. In discovery, Raptor stuck to its position and in fact demanded the full $25,000 and did the same during trial. Raptor's cryptic answers to interrogatories never acknowledged the $10,001 payment. In fact, even after the Defendants were ordered to amend their discovery answers by the May 10 Order, nothing about the $10,001 payment was conceded. It was not until trial that Hiedinger admitted on the stand that the $10,001 had been paid. Hiedinger's attempt to twist into the Counter Complaint and the interrogatory responses that the $10,001 had been disclosed is false flak of the highest order. Raptor repeatedly and flagrantly violated the discovery process and made an unequivocal misrepresentation in the Counter Complaint about the outstanding amount of the commission. It also failed to provide the

documentation that supported the Challenger Carry-Over Commission until mid-way through the trial.

Grounded

- After the Falcon 50 was acquired, Salinger, who had piloted the Falcon 50 to Oakland County International Airport, requested some minor services be performed. He left but the Falcon 50 remains there to this day, albeit not in the hands of Contact Aviation.
- After paying for some original service work not the subject of this litigation, the Plaintiffs and Contact Aviation disputed the scope of the services subsequently ordered by Salinger. The Plaintiffs and Contact Aviation agreed that the Falcon 50 would be left with Contact Aviation and be charged a hanger fee. Despite Shirk's incredible testimony to the contrary, there was an agreement that rent would be $100 a day when work was not being performed on the plane. Likewise, contrary to Shirk's unbelievable testimony, there was no agreement that interest could be charged. Salinger and Contact Aviation went back and forth about possible service work, but most of the potential work was nothing more than bleed air. Contact Aviation kept requesting deposits for services that Salinger had not agreed to.
- The Plaintiffs eventually paid Contact Aviation $20,000 for services rendered.
- Contrary to Salinger's incredible testimony, the interior of the plane was not harmed by Contact Aviation while in its care. There was no damage to the jet's headliner, its side walls, carpet, or avionics. Salinger's testimony about the

avionics being swapped out is completely divorced from reality as the pertinent sections of the logbooks which would be necessary to prove such a claim was never used to substantiate this claim and were not introduced into evidence, and his testimony about viewing removed avionics (through the WhatsApp application) was a fanciful figment of his imagination.

- A CAMP report supporting material portions of the Defendants' arguments and testimony involving needed maintenance on the Falcon 50 and related matters was not provided by the Defendants during discovery. It was provided to defense counsel well after the dates ordered by this Court, and defense counsel failed to provide it to the Plaintiffs prior to trial.
- The Defendants admitted that they failed to timely provide their lawyer with supplemental discovery as ordered by the Court. Although it was due to be produced to the Plaintiffs no later than May 19, 2021, it was not even tendered by the Defendants to their lawyer until May 26, 2021 at 5:49 p.m. However, this information was only produced to the Plaintiffs when the Court again ordered it be produced in the middle of the trial. Even if the Court accepts that these documents were "lost in cyberspace" due to technical glitches between the Defendants and their lawyer, their lawyer had the responsibility to ensure he actually received the same and forwarded it appropriately to the Plaintiffs' counsel - which he utterly failed to do. This untimely disclosed discovery was material to the viability of the Defendants' Counter Complaint but had little to do with the Plaintiffs' Amended Complaint.

- The Defendants undertook a foreclosure sale, the consummation of which was enjoined by this Court's predecessor. The Defendants failed to comply with the requirements necessary to foreclose the plane, including posting notice at all airports within 25 nautical miles of Pontiac. MCL 259.205b. As such, even if there was a proper lien (and there is not) any the attempted foreclosure sale was defective. The existence of a lien on the Falcon 50 was solely predicated on the debts allegedly incurred and due and owning in this case. As those claims have been dismissed, there is no debt to which a lien can now be validly asserted.
- In the end, the Plaintiffs paid Contact Aviation $20,000 and Contact Aviation has failed to show (by a preponderance of evidence) that it is owed more. Contact Aviation was a sloppy bookkeeper, unilaterally made-up charges, and otherwise fell short of proving that it was entitled to more than it was paid. The testimony that Contact Aviation was owed more than $20,000 was unconvincingly built upon invoices not timely sent, storage rates never accepted, unilaterally imposed interest charges, and services that were unauthorized.

CONCLUSIONS OF LAW

I
All But One of the Plaintiffs' Claims Experienced Loss of Control

A
Because the avionics were not removed, the claims for Conversion and Claim or Delivery are dismissed

The Plaintiffs claim that the Defendants improperly seized and swapped out avionics equipment from the Falcon 50, forming the basis of the Common Law Conversion, Statutory Conversion, and Claim and Delivery claims.[9] Because the avionics were never removed, the Plaintiffs' claims for Conversion or Claim and Delivery have no factual basis and are dismissed. MCL 600.2919a (statutory conversion); *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc,* 497 Mich 337, 351-352 (2015) (common law conversion); MCR 3.105(A)(1) (claim and delivery). These claims never made it past the threshold.

B
Because the Plaintiffs Failed to Prove Any Damages, Any Claims Asserting the Same are Dismissed

As noted in the General Findings of Fact, Salinger's ego, bursts of indignation, and flights of fancy were hardly persuasive. His testimony with regard to physical damage to the Falcon 50 (involving avionics, headliner, walls, etc.) was ungrounded, and his

[9] In closing argument, the Plaintiffs specifically eschewed any claim that the Falcon 50 itself was specifically improperly seized.

testimony regarding lost income of over $1.44 million from a nonexistent charter service was nothing more than speculative, wishful thinking. As such, the Plaintiffs' claims for Negligence and any damages claims (from whatever source) are hereby dismissed.[10] The hypoxiatic nature of Salinger's testimony doomed these claims.

C
The Quiet Title Claim is Abandoned

The Quiet Title claim was not briefed by the Plaintiffs. Nor was it directly addressed in the Plaintiffs' opening statement or closing argument. "Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). Because the Plaintiffs have failed to cite any authority or engage in any meaningful analysis to support their argument, the argument is deemed abandoned. See, e.g., *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959); *Houghton v Keller*, 256 Mich App 336, 339-340 (2003); *People v Odom*, 327 Mich App 297, 311 (2019) ("As a preliminary matter, defendant has failed to identify any authority that requires a trial court to consider a motion for substitute counsel before it may consider any subsequently filed motion by the attorney who was the subject of the motion for substitution. Accordingly, defendant has abandoned this issue. See *People v Martin*, 271 Mich App 280, 315 (2006)"); MCR 2.119(A)(2) ("A motion or response to a motion that presents an issue of law must be

[10] Exactly under what theory of liability the $1.44 million of lost charter services was pursued is a bit of mystery. A review of the trial brief is of no assistance. The lost rent is asserted on the last page of the brief, but totally unlinked to any of the Plaintiffs' theories. This attempt to assert $1.44 million was hidden in the clouds. But it is a moot point.

accompanied by a brief citing the authority on which it is based"). This claim never left the tarmac.

D
Because the Counter Complaint is Dismissed and the Attempted Foreclosure Sale was Defective, the Lien is Vacated and the Foreclosure Sale Permanently Enjoined

As addressed below, the Counter Complaint is dismissed. Because there is no debt for which a lien can be asserted, there can be no foreclosure sale, and the lien is vacated and the foreclosure sale permanently enjoined. This is the sole claim which takes flight.

II
The Defendants' Counter Complaint Experienced Improper Inflight Decisions and Planning

A
Defendants Engaged in Repeated, Flagrant Violation of Discovery and Discovery Orders Warranting Dismissal of the Counter Complaint

As our Supreme Court has recognized "Where the Michigan Constitution authorizes us to make rules to govern court proceedings, the authority to enforce those rules inescapably follows. At the heart of preserving an organized polity, we must attend to relevant issues, including concerns over belligerent, antagonistic, or incompetent lawyering." *Maldonado v Ford Motor Co,* 476 Mich 372, 375 (2006). As such, "trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action." *Id.* at 376, citing *Banta v Serban,* 370 Mich 367, 368 (1963); *Persichini v Beaumont Hosp*, 238 Mich App 626, 639-640 (1999); *Prince v MacDonald*, 237 Mich App

186, 189 (1999). "This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* citing *Chambers v NASCO, Inc,* 501 US 32, 43; 111 S Ct 2123; 115 L Ed 2d 27 (1991).

In addition to this inherent authority, the Michigan Rules of Court provide that in the event a party violates an order of this Court to provide or permit discovery, this Court "may order such sanctions as are just . . . ." MCR 2.313(B)(2). Such sanctions may include, inter alia, one or more orders (1) establishing facts or other matters in connection with the action, if they were the subject of the violated discovery order, MCR 2.313(B)(2)(a), (2) prohibiting the disobedient party from supporting or opposing designated claims or defenses, MCR 2.313(B)(2)(b), (3) prohibiting the disobedient party from introducing designated matters into evidence, *Id.*, (4) "striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment of default against the disobedient party," MCR 2.313(B)(2)(c), (5) treating the disobedience as contempt of court, MCR 2.313(B)(2)(d), (5) requiring the disobedient party to produce another for examination, MCR 2.313(B)(2)(e), and (6) sanctioning the disobedient party for reasonable expenses, including attorney fees. MCR 2.313(B)(2)(f). The sanctions of the trial court are within its sound discretion. *Dean v Tucker,* 182 Mich App 27, 32 (1990). See also F*rankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396-397 (1992); *Kalamazoo Oil v Boerman,* 242 Mich App 75, 86 (2000).

Although an order dismissing a proceeding or entering a default judgment is a proper sanction for the violation of a discovery order, see, e.g., *Thorne v Bell*, 206 Mich App 625, 632 (1994), this Court "should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate." *Bass v Combs*, 238 Mich App 16, 26 (1999). See also *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451 (1995). In exercising its discretion, a trial court must create a record that it gave "careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Dean*, 182 Mich App at 32. See also *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 629-630 (1987); *Kalamazoo Oil*, 242 Mich at 86. In fact, because an entry of default or dismissal of an action is a dramatic remedy, it must be used with caution. *Mink v Masters,* 204 Mich App 242, 244 (1994); *Traxler v Ford Motor Co*, 227 Mich App 276, 286 (1998).

Accordingly, when evaluating the appropriate sanction to levy for a violation of a discovery order, this Court should consider a number of factors, including, but not limited to, "whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to [the party requesting default], and whether willfulness has been shown." *Traxler*, 227 Mich App at 286 (citations omitted), quoting *Thorne*, 206 Mich App at 632-633. See also *Frankenmuth Mutual Ins Co*, 193 Mich App at 396-397; *Mink,* 204 Mich App at 244. Attempts to cure and actual notice of the information at issue are also factors to be

considered. See, e.g., *Dean*, 182 Mich App at 33. In undertaking this analysis, this Court should also evaluate "whether a lesser sanction would better serve the interests of justice." *Id.* at 33. In any event, "[t]he sanction of a default judgment should be used only when there has been a flagrant and wanton refusal to facilitate discovery." *Mink*, 204 Mich App at 244. See also *Traxler*, 227 Mich App at 633; *Kalamazoo Oil,* 242 Mich App at 86. Thus, an accidental or involuntary violation of a discovery order generally should not result in a default judgment. *Mink,* 204 Mich App at 244; *Traxler,* 227 Mich App at 286; *Kalamazoo Oil,* 242 Mich App at 86. This is so because although "the rules of practice give direction to the process of administering justice and must be followed, their application should be a fetish to the extent that justice in a particular case is not done." *Dean,* 182 Mich App at 32. See also *Higgins v Henry Ford Hosp,* 384 Mich 633, 637 (1971).

Reminiscent of a petulant infant who refuses to follow her parent's instructions, the Defendants refused to comply with the orders regarding discovery. The scope and depth of this petulance became Five by Five in the trial of the case. At trial, the Defendants unveiled over 200 previously undisclosed emails as well as a key affidavit that they were relying upon for part of their Counter Complaint (the latter was disclosed more than 2 weeks into the trial), failed to provide originals of photographs originally promised (which promise was reneged upon), failed to produce documents related to some charges (for example, documentation of detailing services, the underlying logs for tracking technicians' time performing services, the QuickBook Accounting Software Statements, invoices for other customers regarding charges for storage and parking), failed to

investigate whether better photographs could be provided, and actually created a new document (a photograph) on July 12th (more than two weeks into trial) which the Defendants tried to introduce at trial on July 13th. Also, after two weeks of trial and months of discovery order violations, Shirk fabricated the excuse that computer issues precluded the recovery of certain documents. The Defendants failed to respond accurately to Interrogatory Number 14 regarding how (i.e., to whom) the itemized statement of account was provided. As addressed by a separate Opinion and Order, the Defendants attempted to call at trial an expert witness whose testimony was never properly disclosed - even up to the minute he was going to be called.

Despite the Defendants' argument to the contrary, there was no reasonable excuse for failing to complete discovery prior to the original close of discovery, which was February 28, 2021,[11] much less the extended discovery period of April 30, 2021.[12] For example, Shirk admitted he had the emails, he just thought they were irrelevant under his theory of the case. The affidavit was obviously in the Defendants' possession years before the close of discovery. The new photograph could have been taken well before the beginning of trial. Shirk simply failed to investigate whether better quality photographs of the previously produced (in poor condition) photographs existed even when requested during trial. Shirk and Hiedinger inaccurately responded (via material omissions) to Interrogatory Number 10 involving the calculation of the amount of the lien at issue,

[11] Scheduling Order dated September 28, 2020.

[12] Amended Scheduling Order dated February 23, 2021.

which was consistent with the baseless demand for $25,000 of damages in the counterclaim. The invoices for other customers regarding storage and parking charges were not disclosed for no good reason. The Quickbook Accounting Statements were not produced because Shirk "didn't think I needed to do that." Shirk failed to provide any documentation regarding detailing services and failed to investigate whether there were time logs to track technicians' time. At trial Shirk testified that he just found out the night before that he had sent billings in March 2018 which he never disclosed in discovery. There was no excuse whatsoever for failing to disclose the expert's testimony.

Simply put, the Defendants engaged in a flagrant, serial pattern of violating discovery as evidenced not only by the trial by ambush tactics of late disclosure of discovery during trial, but the significant violation of the May 10 Order granting Plaintiffs' Motion to Compel Discovery and Discovery Sanctions, which ordered that the "Defendants will have until May 19, 2021 to serve full and complete answers to the Interrogatories and Requests for Production (validly signed) and amended Answers to Admission." Trial began on June 28, 2021, and still many of those documents were not produced.

There is no doubt that the Defendants have repeatedly failed to respond to discovery in a timely fashion, violated this Court's scheduling orders, and violated an order to compel the production of discovery by times certain. In considering the factors highlighted *supra* about the appropriate remedy, (1) the failure to respond to discovery requests extend over a substantial period of time, (2) the scheduling order and May 10

Order to compel were violated, (3) the time between the violation and the motion for dismissal has been short, (4) willfulness has been proven - or at very least deep neglect, (5) attempts to cure have finally been made in the middle or near the end of trial (with the exception of the photograph, which was simply sprung into the trial without any prior disclosure, and the expert, in which no attempt to cure was ever made), and (6) some of the information was known by the Plaintiffs, but of course they had no knowledge that it would be used at trial - the epitome of trial by ambush.

In light of the foregoing, no lesser sanction other than dismissing the Counter Complaint would serve the interests of justice. The Court took the Plaintiffs' Motion to Strike Defendants' Answer and Affirmative Defenses and Counter-Complaint, Enter a Default Against Defendants on Plaintiffs Complaint and Deem All Requests for Admissions Admitted as Discovery Sanctions under advisement to determine the extent of the alleged discovery violations and whether they were prejudicial. In light of the exhaustive trial, there is no question that discovery violations were many and prejudicial to the Plaintiffs' defense of the Defendants' Counter Complaint. Thus, dismissal of the Defendants' Counter Complaint is an appropriate sanction.[13] To hold otherwise would

[13]This sanction applies equally to all Defendants. The Defendants chose to unite behind one lawyer and trial strategy in this case. They chose to answer questions and discovery requests jointly. They filed a joint trial brief. They defended the motions to compel discovery in a uniform way. Both Defendants engaged in violations of discovery and the Court's May 10 Order.

That they selected one lawyer to defend their disparate interests may not have been the wisest course of action as the pleadings and trial testimony revealed an independent basis for the claims asserted by each Defendant. In fact, had Raptor's commission claim been filed as a separate lawsuit, the false representation that $25,000 was due and owing - as opposed to $15,000 - could very well provide means for dismissing the case based on fraudulent representation in the Complaint (or at least cause to dismiss the claim in the

eviscerate the Michigan Rules of Court, all but erase the authority of the Court's orders, and denigrate the rule of law. This is a downward spiral the Court will not countenance.

On the other hand, the additional relief, i.e., that the Defendants' Answers and Affirmative Defenses be struck, that a default be entered, and that all Requests for Admissions be deemed admitted is too drastic. There was no material prejudice to the Plaintiffs' case based on the Defendants' discovery violations. The Plaintiffs' case has fallen apart due to the incredibility of Salinger on key issues, not because the Defendants violated discovery. This distress was self-inflicted, and the Plaintiffs should not receive a windfall based on discovery violations almost entirely unrelated to the Plaintiffs' claims.

B
Raptor's Counter Complaint is Independently Dismissed for Violating MCR 1.109(E)

In addition to the dismissal for discovery sanctions, Raptor's counterclaim for commissions should be dismissed because the Counter Complaint unequivocally pleads for $22,500 in damages when there was absolutely no question that at the time the Counter Complaint was filed, the claim was at most for $15,000. Because the Counter Complaint was false when it was filed, it is independently dismissed under MCR 2.504(B). See also *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006) ("trial courts possess the inherent authority to sanction litigants and their counsel, including the right

Circuit Court). *Guerrero v Smith*, 280 Mich App 647, 678 (2008) ("The filing of a signed document that is not well grounded in fact subjects the filer to sanctions.") This state of affairs raises potential concerns about internal conflicts of interest - which hopefully were raised by defense counsel and waived by his clients. The failure to do so could be cause for disciplinary action.

to dismiss an action"). There should be no go-around to escape the grave misrepresentation made in the Counter Complaint.

C
Because the Defendants Claims are Dismissed and the Attempted Foreclosure Sale was Defective, the Lien is Vacated and the Foreclosure Sale Permanently Enjoined

The underlying basis of any liens placed by Contact Aviation no longer has a factual predicate - i.e., there is no underlying debt. As such, any liens asserted against the Defendants are vacated. MCL 259.205b. Without a lien, there can be no foreclosure sale, rendering the Plaintiffs' last claim for relief moot.[14] Moreover, the attempt to foreclose on the plane was defective because the notice of such foreclosure was improper. As such, the Counter Complaint with regard to the lien and the foreclosure is dismissed on these independent grounds and the Foreclosure Sale permanently enjoined.[15] This adverse yaw ends the Defendants' attempt to obtain relief under the Counter Complaint.

[14] Although there was much testimony floating about Raptor's lien, it was not pled in the Counter Complaint and was unaddressed in the Defendants' trial brief. As such, any argument about Raptor's lien being valid has been deemed abandoned. See authorities above.

[15] Although there was much testimony floating about Raptor's lien, it was not pled in the Counter Complaint and was unaddressed in the Defendants' trial brief. As such, any argument about Raptor's lien being valid has been deemed abandoned. See authorities above.

JUDGMENT

In light of the foregoing Findings of Fact and Conclusions of Law, the Court hereby ORDERS that (1) the liens on the Falcon 50 are hereby VACATED and the Defendants be permanently enjoined from attempting to foreclose on the Falcon 50, and (2) all other claims of the Plaintiffs and the Defendants are DISMISSED.

/s/Michael Warren

_____/
HON. MICHAEL WARREN
CIRCUIT COURT JUDGE