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In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division

In the matter of: )  
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TPI INTERNATIONAL ) Adversary Proceeding  
AIRWAYS, INC. ) Number 91-2030  
(Chapter 11 Case 91-20162) )  
)  
*Debtor* )  
)  
)  
)  
)  
TPI INTERNATIONAL )  
AIRWAYS, INC. )  
)  
*Plaintiff* )  
)  
)  
)  
v. )  
)  
)  
FEDERAL AVIATION )  
ADMINISTRATION, an agency of )  
the United States; )  
DEPARTMENT OF )  
TRANSPORTATION, a department )  
of the United States Government )  
)  
*Defendant* )

**ORDER ON MOTION TO SUPPLEMENT RECORD**

The above-captioned Motion was held on August 12, 1992, at which time the Plaintiff requested that this Court supplement the record on the appeal of this Court's decision by including the complete transcript of five depositions taken during the discovery phase of this case notwithstanding the fact that only selected excerpts of those depositions were included in the record on which my ruling was based and when none of the additional testimony proposed to be added to the record was otherwise considered by me in making that

ruling. Plaintiff relies on Rule 10(e) of the Federal Rules of Appellate Procedure which provides in relevant part:

**(e) Correction or Modification of the Record.** If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified, and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

The Defendants objected to inclusion of these additional materials and while the question of whether Rule 10(e) is applicable to Bankruptcy Courts when its language refers only to District Courts was not conceded by the Government, the thrust of the Government's argument is that the authority granted under Rule 10(e) is only the authority to include matters in the record which were actually considered by the court but which may not have formally been introduced. The Plaintiffs rely on In re Candor Diamond Corp., 26 B.R. 844 (Bankr. S.D.N.Y. 1983), and an additional bankruptcy decision cited therein, In re Food Fair, Inc., 15 B.R. 56 (Bankr. S.D.N.Y. 1981), which stand generally for the proposition that the Bankruptcy Court has the authority to include items in the record on appeal that were not actually part of the record if the inclusion is necessary to afford the reviewing court a full understanding of the case, with the notation that the item was not part of the record below. In reviewing the facts of those cases, however, they appear to be limited to fact situations in which a bankruptcy judge who has presided over numerous hearings in a case has relied on documents introduced at earlier hearings or trials or

information testified to at previous hearings in reaching his decision even though there was no formal tender of proof of those facts at the subsequent hearing. As such it is analogous to the concept of judicial notice. That is, if in previous proceedings in the same court certain evidence was introduced on which the court relied in making a decision in a separate proceeding, the Court could formally have taken judicial notice of the previous testimony or document. The fact that the court did not do so, but, in fact, relied on that testimony suggests that the appellate court may need the additional designation of that testimony or document in order to review the decision.

The case before me is distinguishable. In this case, I did not rely on any of the testimony now proffered for inclusion in the record on appeal in reaching the decision and entering the ruling which is now under appeal. It is also undisputed that that testimony was not made a part of the record. Under those circumstances I conclude that it would be inappropriate to grant the motion. *See Hoover v. Blue Cross and Blue Shield of Alabama*, 855 F.2d 1538, 1543, footnote 5 (11th Cir. 1988) (Affidavit not filed with district court due to inadvertence and not considered by the court could not be filed as part of the record on appeal); *Ross v. Kemp*, 785 F.2d 1467 (11th Cir. 1986) (In *habeas corpus* proceedings, deposition reasonably believed to have been filed as part of the record and relied upon by the parties in their pleadings could be made part of the record on appeal). *See also Wright, Miller, Cooper, and Grossman, Federal Practice and Procedure: Jurisdiction* §3956. Plaintiff's Motion should be denied.

#### ORDER

IT IS THEREFORE THE ORDER OF THIS COURT that Plaintiff's Motion

to Supplement the Record is denied.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of August, 1992.