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QUEZADA ELIZARDI and AIDA MAGDALENA RIOS DE
ELIZARDI, *Appellents*

V.

TWIN COMMANDER AIRCRAFT, L.L.C., formerly known and doing
business as TWIN COMMANDER AIRCRAFT CORPORATION,
Appellee

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I. INTRODUCTION

On May 2, 2004, a Twin Commander Model 690C (a/k/a 840) twin engine turbo prop aircraft owned and operated by the Procuraduria General de la Republica ("PGR") of the government of Mexico suffered a rudder assembly related in-flight break-up and crashed near the city of Aguascalientes, Mexico killing all seven PGR agents on board. Families of the deceaseds filed separate actions in King County Superior Court, the county of Twin Commander's corporate headquarters, with identical liability allegations against Twin Commander alleging, *inter alia*, that Twin Commander knew of and was charged with knowledge from previous events and accidents there were structural safety problems with its aircraft rudder systems; it sought *via* FAA form 8110-3, affirming compliance with FAA rules, and received authority from the FAA to issue Alert Service Bulletin 235 (SB 235) to fix these problems; the PGR complied with SB 235 for the accident aircraft; the aircraft's rudder problems were not resolved because SB 235 insufficiently addressed the inspection and maintenance of the structural integrity issues based on known but concealed or withheld previous rudder flutter related events and in-flight break-ups; and SB 235, as an amendment to the aircraft's maintenance manual, was the defective product that caused the crash. The seven wrongful death and survival actions were consolidated by the Trial Court.

Twin Commander originally filed its Motion to Dismiss under the General Aviation Revitalization Act (GARA). The crash victims' families filed a consolidated response. Twin Commander then withdrew from consideration its Motion to Dismiss. Later, on March 30, 2007, Twin Commander filed its Motion for Summary Judgment under GARA. The families responded in opposition on April 16, 2007. On April 24, 2007, Twin Commander filed its Reply and on May 10, 2007, the families filed their Sur-Reply. On May 22, 2007, the Trial Court granted Twin Commander's Motion for Summary Judgment without articulating a specific reason for so holding other than "there are no material issues of fact in dispute as to the applicability of the GARA Statute of Repose and as to whether the Plaintiffs' claims fall under one of the statutory exceptions to the GARA Statute of Repose". No formal orders of dismissal were entered by the trial court, but the ruling of Judge Hilyer finding the GARA statute of repose applicable to the victims' families' claims is dispositive of the victims' families' claims, and qualifies as a final dispositive order and reviewable as a matter of right under RAP 2.2.

The families bring this appeal seeking reversal of the summary judgment and remand for trial.

II. ASSIGNMENTS OF ERROR

Assignment of Error

The Trial Court erred in granting Twin Commander's Motion for Summary Judgment applying the eighteen-year statute of repose in the

General Aviation Revitalization Act (GARA) to the seven wrongful death and survival claims brought by the crash victims' families.

Issues Pertaining to Assignment of Error:

- A. Whether the amendment to the accident aircraft's maintenance manual *via* Twin Commander's Alert Service Bulletin 235, alleged to be the defective product that caused the crash and published within 13 months of the crash, triggered the "rolling" provision of GARA's 18 year statute of repose? 49 U.S.C. § 40101(2)(a)(2).
- B. Whether, under established summary judgment review standards, movant Twin Commander established its status as a "manufacturer", entitling it to GARA's immunity? 49 U.S.C. § 40101(2)(b)(1).
- C. Whether, under established summary judgment review standards, movant Twin Commander established it did not knowingly misrepresent, conceal or withhold required information to the FAA that is causally related to the harm, entitling it to GARA's immunity? 49 U.S.C. § 40101(2)(b)(1).
- D. Whether, under established summary judgment review standards, the non-movant victims' families raised a fact issue that Twin Commander knowingly misrepresented, concealed or withheld required information to the FAA that is causally related to the harm, implicating an exception to GARA's immunity? 49 U.S.C. § 40101(2)(b)(1).

III. STATEMENT OF THE CASE

The accident aircraft was a Twin Commander Model 690C, tail number XC-JEH, originally manufactured by Gulfstream American Corporation under an FAA approved type certificate, issued an export airworthiness certificate and sold to a Venezuelan purchaser in 1981. (CP 4402-4405 - FAA Export Certificate of Airworthiness). In 1989, Twin

Commander purchased the type certificate to Model 690C along with type certificates for other models. (CP 4408-4419).

A “type certificate” is issued by the FAA and certifies that the type design for a particular aircraft model with specified operating limitations and conditions (per Civil Aviation Regulations (CAR) before 1965 and Federal Aviation Regulations (FAR) after 1965) meets the airworthiness requirements of those regulations. The type certificate authorizes its holder to manufacture and sell the model as specified and the FAA to issue airworthiness certificates. Butler v. Bell Helicopter, Textron, (2003) 109 Cal. App. 4th 1073. Pursuant to the FARs, the aircraft type certificate holder is responsible for continued airworthiness support.

On November 1, 2002 and March 27, 2003, two Twin Commander Models 690A and 690B aircraft (predecessors to the accident Model 690C) experienced in-flight break-ups due to rudder assembly separation. In the March 27, 2003 accident occurring in Georgia, the aircraft crashed nose down killing all onboard. The pilot in the November 1, 2002 accident occurring in Texas was able to land the aircraft with great difficulty. (CP 3961-3962 - NTSB-Factual Report Aviation) In response to these incidents, Twin Commander authored and submitted FAA form 8110-3 to the FAA, a Statement of Compliance with the FARs, requesting approval of SB 235 allegedly to correct its aircrafts’ airworthiness issues endemic to much of its fleet - deterioration and cracking in the rudder tip, top rudder rib and forward rudder spar. (CP 3806 - Submitted FAA Form

8110-3). Twin Commander, however, reported to the FAA only these two recent incidents as necessitating SB 235. Based on Twin Commander's representation of FAR compliance, the FAA approved SB 235 on April 18, 2003 applicable to Twin Commander fleet models 685, 690, 690A, 690B, 690C, 690D, 695, 695A and 695B. (CP 3802 - FAA Approval of SB 235).

SB 235 requires a one-time close visual inspection of only the rudder tip, top rudder rib, and forward rudder spar with particular attention to the area between the top hinge and top rudder rib. If no damage is found, the rudder is to be reinstalled, and the aircraft allegedly may be safely returned to service. (CP 3807-3814 - SB 235). The accident aircraft was one of a number of its fleet covered by SB 235. The PGR maintenance personnel performed the one time close visual SB 235 required inspection on October 27, 2003. Finding no damage, the aircraft was returned to service. (CP 1438-1440, 1850-1807 - Excerpts, PGR Report of Crash (Spanish and English). Six months later, on May 2, 2004, the in-flight break-up of the rudder assembly and fatal crash occurred. The Mexican governmental investigation of the crash determined that the cause of the crash was the inadequacies of the inspection and maintenance procedures of SB 235. (*Id.*).

Despite the families allegations (consistent with the investigative report) that SB 235 was the defective product, because the aircraft was more than 18 years old at the time of the crash, Twin Commander raised

the 18-year Statute of Repose contained in the General Aviation Revitalization Act of 1994 (“GARA”), 49 U.S.C. § 40101 (1994). The decedents’ families contested GARA’s applicability alleging that the law and facts demand application of GARA’s misrepresentation/concealment/withholding exception and new/replacement component, system or part “rolling” provision. The families have alleged and proven that the 13 month old SB 235, amending the aircraft maintenance manual, was itself the defective product that caused the crash per GARA’s 18 year “rolling” provision and that there were other undisclosed rudder related events and in-flight break-ups “similar” to “identical” to the rudder failure in this case in addition to the undisclosed 1979 CAR misrepresentations concerning the rudder assembly flutter type-certification tests for the 690C, all knowingly misrepresented, concealed or withheld from the FAA that were causally related to the crash. Though this proof was unnecessary because of Twin Commander’s failure to carry its summary judgment burden in the first place, the victims’ families, with so much at stake, provided it nonetheless.

IV. ARGUMENT

THE TRIAL COURT ERRED IN GRANTING TWIN COMMANDER’S MOTION FOR SUMMARY JUDGMENT APPLYING THE EIGHTEEN-YEAR STATUTE OF REPOSE IN THE GENERAL AVIATION REVITALIZATION ACT (GARA) TO THE SEVEN WRONGFUL DEATH AND SURVIVAL CLAIMS BROUGHT BY THE CRASH VICTIMS’ FAMILIES.

A. THE GENERAL AVIATION REVITALIZATION ACT

1. Relevant Portions

The General Aviation Revitalization Act of 1994 (“GARA”) is a statute of repose that places an 18-year time limitation on filing products liability actions against manufacturers of allegedly defective aircraft and/or component parts that have caused an accident.

GARA provides in part that:

[N]o civil action for damages for death or injury to person or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as manufacturer if the accident occurred-

(1) after the applicable limitation period beginning on-

(A) the date of the delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of the first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

(2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition. GARA § 2(a).

[GARA’s “rolling” provision]

Importantly, Congress included several exceptions to GARA’s restriction on civil actions. Relevant here is the exception for knowing misrepresentation, concealment or withholding of required information to the FAA.

[GARA does not apply] if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered. GARA § 2(b)(1).

2. Legislative History

GARA was passed in response to a barrage of pressure and aggressive lobbying from the U.S. general aviation industry. *House Committee on Public Works & Transportation*, HR Rep. No. 103-525, 103rd Congress, 2nd Session, Part 1 at 1 (1994); McNatt & England, *The Push for Statutes of Repose in General Aviation*, 23 *Transp. L.J.* 323, 326-7 (1995). Its chief opponents included consumer groups such as Citizen Action and Public Citizen. *Id.*

Congress explained that GARA was “designed to limit excessive product liability costs, while at the same time affording fair treatment to persons injured in general aviation aircraft accidents.” *House Committee on Public Works & Transportation*, HR Rep. No. 103-525, 103rd Congress, 2nd Session, Part 1 at 1 (1994); Steggerda, *The Problematic Application of the Knowing Misrepresentation Exception*, 24 *Transp. L.J.* 191, 230 The manufacturers claimed and Congress accepted that, for those general aviation aircraft and component parts in service beyond the

statute of repose, “any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself.” *Id.* (citing GARA, HR. No. 103-525(11) at 1648). Congress accepted the claim, stating, “[I]t is extremely unlikely that there will be a valid basis for a suit against the manufacturer of an aircraft that is more than 18 years old. Nearly all defects are discovered during the early years of an aircraft’s life.” *House Committee on Public Works and Transportation*, H.R. Rep. No. 103-525, 103d Congress, 2d Sess., Part 1 at 3 (1994).

3. Fairness - GARA’s “Rolling” Provision and 4 Exceptions

Congress acknowledged that because of FAA and manufacturer requirements, aircraft, over their lifespan, will be inspected, maintained and rebuilt or replaced, (*House Committee on Public Works and Transportation*, H.R. Rep. No. 103-525, *supra*, Part 2 at 6.) an “element of fairness” required the statute to be a “rolling” one, meaning that when “any new component, system, subassembly or other part” is added to or replaces an original to the aircraft, the 18-year statute begins to run again for that component, system, subassembly or other part. GARA § 2(a) (2).

The misrepresentation exception is designed to ensure that during the repose period, GARA does not incentivize manufacturers to hide known defects or other information required to be submitted to the FAA. Senator Pressler explained, “[U]nder this piece of [modified] legislation the little guy can still sue when it is appropriate. We must always protect

the right of people to receive justice under our legal system.” Steggerda, *supra*, 24 Transp. L.J. 191 at 227.. He believed that with the exceptions, “the overall goal of this liability reform initiative is reached,” which is “to give those negligently injured by an airplane manufacturer legal recourse commensurate with a level more appropriate to the industry.” Senator Metzenbaum reasoned that without the knowing misrepresentation exception “there would be complete immunity from private suits after the statutory period, if a manufacturer learned of a defect or other problem, it could simply sit on the information and hope that an accident does not occur within the time frame.” *Id.*

B. SUMMARY JUDGMENT STANDARDS

1. Twin Commander - Movant

Twin Commander chose a CR 56 Motion for Summary Judgment as the procedural vehicle to determine its claim for and the victims' families' opposition against GARA's death-knell dismissal. Twin Commander is so entitled when its summary judgment proof establishes, as a matter of law, that there is no genuine issue of fact as to one or more of the essential elements of the victims' families' claims. Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 177, 125 P.3d 119, 124 (Wash. 2005) (en banc). Thus, Twin Commander must conclusively negate any genuine issue of fact on any one or more of the families' claims. Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605, 607 (1960). If the families fail to respond to the motion, Twin Commander is still not

entitled to summary judgment unless it has conclusively established its right to judgment. A non-movant's failure to respond cannot supply by default the summary judgment proof necessary. *Id.*

Twin Commander did not meet this burden. Its dismissive Reply to the families' Response (CP 1366 – Reply at p. 3) citing GARA's § (2)(b)(1) fatally ignores established summary judgment law that squarely places on them, as the moving party, these legal and evidentiary burdens. This was not a trial on the merits. In its original Summary Judgment Motion, Twin Commander again fatally and without authority asserted that once it successfully invoked GARA, "the burden shifts to the plaintiff to proffer evidence sufficient to prove each of the elements of the exception". (CP 897 – Motion at p. 16). No authority is cited for this allegation because none exists. Neither GARA nor any case law allows a defendant that asserts a GARA defense to circumvent long standing established summary judgment law squarely placing the burden on the moving defendant. On the contrary, the Burroughs v. Precision Airmotive Corp. case, (2000) 78 Cal. App. 4th 681, extensively relied upon by Twin Commander, involved GARA issues and was properly analyzed under traditional summary judgment standards. Similarly, Robinson v. Hartzell Propeller, Inc., 326 F.Supp.2d 631 (D. Pa. 2004) and Butler v. Bell Helicopter, Textron, (2003) 109 Cal. App. 4th 1073 involved GARA legal and factual issues in which defendants, moving for summary judgment, filed supporting declarations analyzed under traditional summary

judgment standards .

2. Deceaseds' Families – Non-Movants

Only if the Court finds that Twin Commander produced conclusive summary judgment proof to support its claim as a matter of law does the families' responsive evidence need be considered. Then, the evidence favorable to the families will be taken as true with every reasonable inference indulged and all doubts resolved in their favor. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030, 1031 (1982).

3. Standard of Review on Appeal

Review of orders granting summary judgment are de novo. The Court of Appeals considers the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21,896 P.2d 665 (1995). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

C. ISSUE A PERTAINING TO ASSIGNMENT OF ERROR

- A. **The amendment to the accident aircraft's maintenance manual via SB 235, alleged to be the defective product that caused the crash and published within 13 months of the crash, triggered the "rolling" provision of GARA's 18 year statute of repose. GARA § (2)(a)(2).**

GARA's "rolling" provision causes the 18 year repose period to begin anew "with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage" GARA § 2(a)

(2) In this connection, the undisputed summary judgment evidence establishes that Twin Commander obtained FAA approval, issuing SB 235 on April 18, 2003, within 13 months of the date of the crash (CP 3802 – FAA Approval of SB 235; 3807-3814 – SB 235); it defines certain limited requirements for inspection and maintenance of the rudder tip and upper structure (CP 3807-3814 – SB 235); the accident aircraft's maintenance manual requires checking "the applicability of all. . . Service Publications issued by Twin Commander. . . Check the applicability of publications. . . and ensure all relevant instructions are noted for compliance." (CP 680 – Sommer Dec. at p. 6); SB 235 amended this maintenance manual (*Id.*); and the "SB is a required component of the aircraft". (*Id.*)

The FARs (14 C.F.R. et seq.) constitute the regulatory framework under which the relationships and obligations of persons and companies with respect to aircraft are defined. 14 C.F.R. § 21.24(a)(2)(iii) requires "Instructions for Continued Airworthiness" (maintenance manuals) in accordance with 14 C.F.R. § 21.50(b). 14 C.F.R. § 21.50(b) also requires Instructions for Continued Airworthiness (maintenance manuals) be

delivered “to the owner of each type of aircraft, aircraft engine or propeller upon its delivery or upon issuance of the first standard Airworthiness Certificate for the affected aircraft. . . .” all in accordance with 14 C.F.R. § 23.1529. 14 C.F.R. § 23.1529 sets out detailed requirements of Instructions for Continued Airworthiness (maintenance). Without proper maintenance manuals, an aircraft may not be Type-Certificated by the FAA and cannot fly. 14 C.F.R. §§ 21.1, 21.11, 21.17(b), 21.24(a)(2)(iii), 21.50(b), 23.1(a) and 23.1529. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854 (1973) and In re: Paris Air Crash, 399 F.Supp. 732 (C.D. Cal. 1975). Further, C.F.R. § 23.3 identifies maintenance information required for each aircraft including trouble-shooting information, describing probable malfunctions, how to recognize those malfunctions and the remedial actions for same. Service bulletins are an integral part of the informational system used to ensure continued airworthiness of type certificated aircraft. 14 C.F.R. §§ 21.24(a)(2)(iii), 23.1529. In fact, FAR §§ 43.13 and 145.109 require maintenance personnel to maintain aircraft using the "current" manufacturer maintenance manual and "service bulletins".

In Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1158 (9th Cir. 2000), the Ninth Circuit, the highest court in the United States to decide this issue, held that a revised aircraft manual is considered a “new part” or a “new informational system” for the “rolling” provision of

GARA because it contains instructions necessary to operate the aircraft. In Caldwell the defective manual failed to include a warning that the last two gallons of fuel could not be used; as a result, the helicopter ran out of fuel and crashed. The Plaintiffs successfully argued that the defective product on which their claim was based was not the underlying design flaw, but rather the defective aircraft manual:

In the present case, however, plaintiffs do not assert that the manufacturer had a continuing duty to warn. Instead, plaintiffs contend, under theories of strict liability and negligence, that the revised manual itself is the defective product that caused the accident. See Driver v. Burlington Aviation, Inc., 110 NC App. 519, 430 S.E.2d 476, 483 (N.C. Ct. App. 1993) (holding that, because the plaintiffs premised liability on a defective aircraft manual, a North Carolina statute of repose would not bar the action if the manual caused the injury and was sold to plaintiffs within the applicable period.)

...The only question for us is to decide is whether a revised aircraft manual can fall within GARA's rolling provision. We hold that it can. Caldwell, 230 F.3d at 1157.

The Court went on to discuss how the manual was an integral part of the general aviation aircraft product:

In other words, a flight manual is an integral part of the general aviation aircraft product that a manufacturer sells. It is not a separate, general instruction guide (like a book on how to ski), but instead is detailed and particular to the aircraft to which it pertains. The manual is the "part" of the aircraft that contains the instructions that are necessary to operate the aircraft and is not separate from it. It fits comfortably within the terminology and scope of GARA's rolling provision. *Id.* at 1157-58.

See also Carolina Industry Products v. Learjet, Inc., 189 F.Supp.2d 1147 (D. Kansas 2001) where the clear distinction is drawn about what a complaint must allege: “The Ninth Circuit [in Caldwell] was careful to point out that the plaintiff did not allege negligence based on failure to warn but “under theories of strict liability and negligence, that the revised manual itself is the defective product that caused the accident.” *Id.* Further, in Holliday v. EXTEX, 457 F.Supp.2d 1112 (D. Hawaii 2006), the district court held under the facts of the case that Caldwell’s holding regarding manuals can be interpreted to mean that, unlike a “hard” part, a manual cannot be changed without issuing a new writing, whether it be a new page or a new book.

As in Caldwell, the crash victims’ families herein have not alleged that the aircraft was defective or a manufacturer’s failure to warn; rather that the cause of this accident was the defective SB 235 (except as to pleading alternative causes of action per the knowing misrepresentation exception to GARA. The Robinson plaintiffs properly did the same.) Whether the Court decides that SB 235, as a revision to the maintenance manual, is a new “part”, a new “informational system” or a new “component”, the decision to issue SB 235 and its very existence did not occur until April 18, 2003. The families have alleged that SB 235 was defective on that date. By effectively revising the maintenance instructions for the rudder in the maintenance manual, SB 235 serves as

new part for purposes of GARA. Twin Commander had a duty to get it right on that date but did not.

The Caldwell revised "aircraft" manual at issue was a "flight" manual; here it is a "maintenance" manual. Both are indisputably "manuals" that are part of the aircraft and not "separate" products. Further, in Caldwell as here, the families presented the Court with indisputable evidence of how the respective revisions "within the last 18 years" are "alleged to have caused [the] death, injury or damage" - there, "a warning about the fuel system" unusable fuel supply and here, a faulty service bulletin that did not adequately apprise owners of the true problem or fix. Plaintiffs alleged in Caldwell and the instant action, the revisions were the defective products that cause the accidents. *Id.* A bulletin (SB 235) that revises a maintenance manual is directly comparable to a bulletin that revises a flight manual such that, as a matter of "logic", there are only two possibilities - either an aircraft's maintenance manual revised by SB 235 is "a part of the aircraft, or it is a separate product". Because it is not a separate product ("like a book on how to ski"), it is either a "part" of the aircraft that contains the instructions that are necessary to maintain the aircraft and is not separate from it or it could be viewed as an informational "system" or a "component" containing the necessary maintenance instructions. Either way, it fits "comfortably" within the terminology and scope of GARA's rolling provision. *Id.*

Pursuant to its duty to provide instructions for continued airworthiness of the airplane, Twin Commander sought and obtained FAA approval and then issued SB 235 which revised the original maintenance manual to include additional inspection instructions for the rudder tip, rudder rib and rudder spar. As required under 14 C.F.R. § 23.1529, SB 235 provides information on how to recognize probable malfunctions with the rudder tips - specifically to *look* for damage - and provides remedial action based on the damage found--either to replace the tip or “request advice from Twin Commander Aircraft Corporation.”

Just like a flight manual, a maintenance manual is part of an aircraft. In fact, each maintenance manual has a part number just as every other part of an aircraft. Maintenance manuals include subsequent service publications (bulletins), which revise or amend the maintenance manual. (CP 676-680 – Sommer Dec.) Just as an aircraft must be flown consistent with the flight manual, to remain airworthy it must be maintained in compliance with the applicable maintenance manuals prepared by the manufacturer and/or type certificate holder. In order to maintain its airworthiness under the FARs, the aircraft must be maintained in compliance with the applicable service manuals. (*Id.*)

The Caldwell decision further explained that the flight manual could be viewed as an informational “system” or a “component” containing the necessary operational instructions. *Id.*, at 1157, fn. 3. A “system” is “a regularly interacting or interdependent group of items

forming a unified whole.” Hiser v. Bell Helicopter Textron Inc., 111 Cal. App. 4th 640, 649 (Cal. Ct. App. 2003) (quoting Merriam-Webster’s Collegiate Dict. (10th ed. 2001)). An aircraft is an integral whole and includes the aircraft, flight manual, and applicable maintenance manuals and revisions. As a regularly interacting part of the aircraft necessary for safe operation, SB 235 makes up the informational system which runs the aircraft. Service bulletins such as SB 235 are mechanisms by which manufacturers inform the owners of aircraft of the need for particular service work to be done. As such, service bulletins are part of the informational system which insures the flight safety of the aircraft. Service bulletins are usually issued by the manufacturer when they become aware of problems or difficulties the owner or operators are experiencing with the aircraft in the field. (CP 691-699 – Twa Dec.). From the manufacturer’s point of view, service bulletins are mandatory in order to ensure the operational safety of the aircraft. (*Id.*). Furthermore, the General Instruction section of the 690C Maintenance Manual specifically prescribes, “Check the applicability of all . . . Service Publications issued by Twin Commander Aircraft Corporation Check the applicability of publications for all installed equipment and ensure all relevant instructions are noted for compliance.” (CP 676-680 – Sommer Dec.). And, not only does the manufacturer consider a service bulletin to be part of the informational system necessary for safe operation of the aircraft, FAR § 145.109 describes the data requirements of a

certified repair station, ordering that the following documents and data are required for maintenance and preventive maintenance:

- (1) airworthiness directives
- (2) instructions for continued airworthiness
- (3) maintenance manuals
- (4) overhaul manuals
- (5) standard practice manuals
- (6) **service bulletins**
- (7) other applicable data acceptable to or approved by the FAA
(emphasis added)

Because GARA's "rolling provision" applies, the Trial Court erred in granting Twin Commander's Motion for Summary Judgment.

D. **ISSUE B PERTAINING TO ASSIGNMENT OF ERROR**

B. Under established summary judgment review standards, movant Twin Commander has not established its status as a "manufacturer" entitling it to GARA's immunity. GARA § (2)(b)(1).

GARA's § (2)(a)(1), by its very terms, protects only a manufacturer "in its capacity as a manufacturer". Twin Commander states and the families of the deceaseds do not contest that Twin Commander was, at the time of this occurrence, the type certificate holder for the Model 690C aircraft in question. Having the status of a type-certificate holder, however, does not *ipso facto* establish "manufacturer" status. The two cases primarily relied upon by Twin Commander establish the two prong analysis necessary to determine "manufacturer" status: Mason v. Schweizer Aircraft Corp., 653 NW2d 543 (Iowa 2002) and Burroughs v. Precision Airmotive Corp., (2000) 78 Cal. App. 4th 681. To qualify for

GARA protection, the California and Iowa courts require defendants to first prove they were “aviation manufacturers” and secondly to establish they had taken on the liabilities and responsibilities of the original manufacturer. The Mason court, finding that Schweizer was a manufacturer, held:

GARA does not define the term “manufacturer”. Black's Law Dictionary defines the word as an “entity engaged in producing or assembling new products”. Black's L. D. 977 (7th Ed. 1999). In this case, it is undisputed that Schweizer did not make or produce the helicopter or the air filter housing at issue. Nonetheless, it is part of the general aviation industry, and more importantly, is engaged in producing current models of the aircraft at issue here. (emphasis added). *Id.* at 548.

In Burroughs, Precision acquired the type certificate and right to produce the Marvel-Schebler line of carburetors. While Precision did not manufacture the carburetor at issue, it did continue to manufacture carburetors for use in the aviation industry. The court found that Precision was a successor manufacturer of general aviation aircraft parts, including the carburetors of the type in issue in the case

In addition, however, in accord is Michaud v. Fairchild, 2001 Del. Supr. LEXIS 482 (2001), where the successor corporation had simply acquired the assets and type certificates to a particular line of aircraft, but not the tail of liability specifically associated with the model aircraft in question. Under these circumstances, the court found that the successor type certificate holder could not avail itself of GARA protection because it

had not acquired the liabilities of the original manufacturer. The court also cited, with approval, § 13 RESTATEMENT 3rd OF TORTS: PRODUCT LIABILITY, which provides that a successor corporation or other business entity that acquired assets of a predecessor corporation or other business entity, whether or not they had acquired any liabilities in regard to said product line, has an on-going duty to warn regarding the product line they had acquired. *See, e.g., Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 692 P.2d 787 (1984) setting forth the Supreme Court rules regarding successor corporate liability. “A successor manufacturer who has taken over the duties and obligations of the original manufacturer as to that product is also protected from liability for such claims.” *Id.*

Not only has Twin Commander indisputably proven that it does not and has not ever manufactured an aircraft (CP 1168-1170 – Geoffrey Pence Dec.), it has otherwise offered no proof of either of the 2 necessary prongs, to-wit: (1) it was a “manufacturer” within the meaning of that term as used in GARA, and (2) it specifically intended to acquire the liabilities and obligations of the original manufacturer of the models in question when it purchased the Type Certificates to these models from Gulfstream. Twin Commander has not provided sufficient summary judgment proof of its manufacturer status and the undisputed evidence proves it has not met the required two-prong test to establish such status, failing its summary judgment burden.

E. **ISSUES C AND D PERTAINING TO ASSIGNMENT OF ERROR**

- C. Under established summary judgment review standards, movant Twin Commander has failed to establish it did not knowingly misrepresent, conceal or withhold required information to the FAA that is causally related to the harm entitling it to GARA's immunity. GARA § (2)(b)(1); and
- D. Under established summary judgment review standards, the non-movant Deceaseds' families have raised a fact issue that Twin Commander knowingly misrepresented, concealed or withheld required information to the FAA that is causally related to the harm, implicating an exception to GARA's immunity. GARA § (2)(b)(1).

Twin Commander has offered no competent summary judgment evidence establishing, as a matter of law, it did not knowingly misrepresent, withhold or conceal required information from the FAA that is causally related to the harm suffered and has thereby failed to meet its burden of proof. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 757 P.2d 507 (1998). Failing same, reversal and remand is in order. Nevertheless, because this case involves the deaths of seven innocent victims as a result of Twin Commander's misrepresentation and concealment of critical information affecting flight safety, the families have provided the Court evidence creating fact issues. Holmes v. Wallace, 84 Wn. App. 156, 926 P2d 339 (1996) (non-movant's evidence, together with all reasonable inferences, must be accepted as true).

1. GARA's § 2(b)(1) Exception

The “required information” that must not be knowingly misrepresented, concealed or withheld from the FAA per GARA’s § 2(b)(1) exception has been sufficiently defined over the years to include information under a statute, regulation, case, in response to a direct inquiry from the FAA, or to correct information previously supplied directly by the manufacturer to the FAA. Butler v. Bell Helicopter Textron, *supra* at 1083, n17. The Robinson court confirmed an “affirmative duty [of the manufacturer] to report a defect or a design problem . . .”. A manufacturer is “not supposed to wait for the FAA to identify a problem. To the contrary, [manufacturer] had a responsibility to identify any problems, investigate the problems, and report a solution to the problems to the FAA.” Robinson at p. 658. The Civil Aviation Regulations (predecessor to the FARs and the authority under which Twin Commander Model 690C was manufactured and type-certificated, “CAR”) §§ 3.159 and 3.311 require type certification demonstration by manufacturers that aircraft are free from flutter and excessive vibration on tail and control surfaces verified by testing to critical flight characteristics (CP 1034 – Donham Dec. at p. 25; CP 1126-1144 – Donham Supp. Dec.). The type certificate holder and/or manufacturer is responsible to “fully advise the FAA of a [safety of flight] problem and to conduct all inspections and tests necessary to determine that the aircraft complies with its FAA approved type design and airworthiness requirements (14 C.F.R. § 21.3, 21.31 and

21.33).” (CP 1121-1122 – Twa Supp. Dec. at pp. 2-3). If any of this information previously provided to the FAA proves incorrect, per Butler the information must be corrected. The overriding consideration in these FAA reporting requirements is to “promote safe flight of civil aircraft” and when issuing certificates, an air carrier's duty to provide service “with the highest possible degree of safety in the public interest.” “[S]afety permeates the whole [FAA].” Butler at p. 1084.

Per Butler, the “knowing” element of this GARA exception only applies to misrepresentation, and not to concealment or withholding. *Id.* at 1083, n. 25. However, it has also been held that “knowing” applies equally to concealment and withholding. Sheesley v. Cessna Aircraft Co., 2006 WL 1084103, at *8 (D.S.D. April 20, 2006) Regardless, the issue of intent is one to be determined by the jury. In Robinson v. Hartzell Propeller, Inc., 326 F. Supp. 2d 631, 652-653 (D. Pa. 2004), the Court held that “the issue of intent is particularly inappropriate for resolution by summary judgment because evaluating state of mind often requires the drawing of inferences from the conduct of parties about which reasonable persons might differ.” Requiring proof of intent conflicts with U.S. Supreme Court precedent. *Id.* Therefore, direct evidence of intentional concealment, such as an affidavit asserting intentional concealment, is not necessary to survive summary judgment. *Id.* at 659.

The original manufacturer and type certificate holder or subsequent type certificate holder if the type certificate and production rights have

been transferred have duties regarding the on-going airworthiness of an aircraft. The duties require reporting certain types of information to the FAA. FAR § 21.3 requires the type certificate holder to notify the FAA if it becomes aware of any failure, malfunction or defect in any product, part, process or article that results in subsection (c) failures (including vibration). In relevant part, FAR 21.3 provides as follows:

21.3 Reporting of failures, malfunctions, and defects

(a) Except as provided in paragraph (d) of this section, the holder of a Type Certificate (including a Supplemental Type Certificate), a Parts Manufacturer Approval (PMA), or a TSO authorization, or the licensee of a Type Certificate shall report any failure, malfunction, or defect in any product, part, process, or article manufactured by it that it determines has resulted in any of the occurrences listed in paragraph (c) of this section...

(c) The following occurrences must be reported as provided in paragraphs (a) and (b) of this section:

(8) A **significant aircraft primary structural defect or failure** caused by any autogenous condition (fatigue, understrength, corrosion, etc.).

(9) Any **abnormal vibration or buffeting** caused by a structural or system malfunction, defect, or failure.

(11) Any **structural or flight control system malfunction, defect, or failure which causes an interference with normal control** of the aircraft for which derogates the flying qualities. (Emphasis added.)

Further, if a type certificate holder becomes aware of a significant flight safety problem, it has an obligation to fully advise the FAA of the problem and to conduct all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements. It must “identify” and “investigate” any problems and “report a solution . . . to the FAA”. Robinson v. Hartzell Propeller, Inc., *supra* at 658. 14 C.F.R. §§ 21.3, 21.31, 21.33. The required representation of full compliance is in a “Statement of Compliance with the Federal Aviation Regulations”, FAA form 8110-3 with such substantiating data as is necessary that certifies, by signature of the type certificate holder, such compliance. (CP 691-699 – Twa Dec.; CP 1120-1125 – Twa Supp. Dec.). The FAA then receives the 8110-3 form with any attachments and either approves or not the requested action. (CP 691-699 – Twa Dec.).

2. Twin Commander withheld, concealed and misrepresented to the FAA serious rudder flutter flight safety issues in previous aircraft incidents and crashes, failing to fully disclose and investigate the problems and report a solution.

“Flutter” is one of the most serious conditions that can plague an aircraft. Flight flutter is, in basic terms, an excessive vibration in the airframe of an aircraft, usually control surfaces, that can lead to catastrophic failures and in-flight break-ups of the aircraft. Because flight flutter is a significant flight safety problem, any such potential must be fully investigated and disclosed to the FAA per FAR 21.3. (CP 1009-1038 – Donham Dec.; CP 1126-1144 – Donham Supp. Dec.)

In order to understand the extent of Twin Commander's charged awareness of the flutter problem in their aircrafts' rudder assemblies, we begin in 1970 during Gulfstream's type certificate developmental testing phase of the predecessor to the 690C, Model 690. (CP 1126-1144 – Donham Supp. Dec.). On June 26, 1970, a prototype 690 suffered an in-flight break-up of its rudder and crashed during a test flight. Investigation revealed that the crash was caused by a flutter problem of the dynamic coupling between the rudder tab and the rudder and fin modes within the rudder assembly. Engineering analysis concluded that to obtain adequate flutter margins, an increase of the rudder horn balance weight from 8 to 12 pounds was necessary. (CP 1126-1144 – Donham Supp. Dec.; CP 2544-2683 – Report No. S122-049 – Vertical Tail Flutter). Twin Commander, as the current Type Certificate holder and charged with this knowledge from its own archived documents, never reported this to the FAA. (CP 1126-1144 – Donham Supp. Dec.)

In 1979, for Model 690C (accident aircraft) type certification purposes, in order to substantiate to the FAA that the 690C's redesigned rudder assembly was free from flutter and vibration, complete flutter and vibration analyses were required. These flutter test reports reveal misrepresentations to the FAA by Gulfstream and now charged to Twin Commander (as the current type-certificate holder) who withheld these misrepresentations from the FAA. The required flutter and vibration testing per CAR §§ 3.159 and 3.311 had, in fact, not been properly

performed and Twin Commander never corrected this misrepresentation. Incredibly, (1) the rudder tab system found to be the problem in certifying the 690 was excluded from the required 690C flutter analysis, (2) the 690C test aircraft was not flown to its required full flight envelope including the most critical configuration, (3) a 4.12 pound rudder balance weight in the mathematical flutter analysis was used instead of a 12 pound weight as previously recommended to correct flutter problems, and (4) the 690C test aircraft was not configured as required to type certification configuration. (CP 1126-1144 – Donham Supp. Dec.; CP 2207-2413 – Report No. S12-092, “Flutter and Vibration Analysis & Test Substantiating Model 690C”; CP 2417-2542 – Report No. S12-102, “Flutter Parameters Required for Basic Flutter Substantiation of 690C/D, 695A”). The 690C was certified by the FAA anyway under the then existing Delegation Option Authority (DOA, *infra*) process after the original manufacturer, Gulfstream, advised the FAA that all necessary tests under the FARs had been performed, when they had not. That they had not is readily determined by a review of Twin Commander’s archived type-certification documents for the 690C, a task performed by the families’ expert but not Twin Commander.

On March 28, **1982**, a type certified Model 690C suffered an in-flight break-up and crashed in Arkansas. While the main focus of the investigation centered on the left wing, it is important that the rudder horn assembly was never found, a fact suspiciously similar to the 2003 SB 235

reported Texas and Georgia in-flight break-ups, determined to be flutter related (CP 1009-10378 – Donham Dec.), where neither rudder cap was found. This event and similarity were never reported to the FAA by Twin Commander at any time. (CP 2969-3296 – Report No. S16-062, Accident Investigation re: 1983 Arkansas Crash).

In **1992**, another Twin Commander 690C rudder failed in flight causing in-flight break-up and a catastrophic crash near Denver. (CP 2698-2965 – Accident Investigation re: 1992 Colorado Crash). The rudder cap was recovered and Twin Commander's (by now, it was the type-certificate holder) testing determined that the vertical rudder spar failed in a twisting force below the rudder cap and above the design load while the aircraft was being operated within its operational flight envelope. (CP 1009-1038 – Donham Dec.; CP 2698-2965 - Accident Investigation re: 1992 Colorado Crash) This rudder failure was described in an internal memo by Jeff Cousins, Twin Commander's V.P., as "identical" and the "same" as the SB 235 reported Texas and Georgia in-flight rudder break-ups. (CP 4356-4357 – 4/4/03 e-mail from Jeff Cousins re: rudder inspections). The families' flight flutter expert, Robert Donham, concluded that, based on the damage pattern to the rudder and that it failed above the design load, this rudder also failed as a result of rudder flutter. (CP 1135 – Donham Supp. Dec. at p. 10) Regardless, Twin Commander concealed and withheld from the FAA the "identical"/"same" nature of this rudder failure in relation to the SB 235

FAA 8110-3 filing. (CP 1126-1144 – Donham Supp. Dec.; CP 691-699 – Twa Dec.; CP 2207-2413 - Report No. S12-092, “Flutter and Vibration Analysis & Test Substantiating Model 690C”; CP 2417-2542 – Report No. S12-102 – “Flutter Parameters Required for Basic Flutter Substantiation of 690C/D, 695A; CP 2698-2965 – Accident Investigation re: 1992 Colorado Crash). Additionally, Twin Commander’s investigation into this crash confirms that it also knew at that time of another “four known cases (and possibly more) of the [rudder] horn [cap] departing the rudder.” (CP 1336-1338 – 4/26/93 Trip Report; CP 4858-5233 – NTSB Report re: Dec. 1992 Casper Air Crash, Denver, Co.). Once again, this critical information was not revealed but was withheld and concealed from the FAA.

In 2002 and 2003, the two most recent incidents of rudder failure occurred, all with identical rudder appearances as the 1992 Denver rudder failure. (CP 4356-4357 - 4/4/03 e-mail from Jeff Cousins re: rudder inspections). On November 1, **2002**, a 690A sustained substantial damage after the top portion of its rudder separated during flight across Texas. Fortunately, the aircraft landed successfully and was analyzed by Twin Commander. (*Id.*). On March 27, **2003**, a 690B rudder also broke up in-flight while descending into Georgia. (CP 3929-3959 – 2003 Georgia crash; CP 4356-4357 - 4/4/03 e-mail from Jeff Cousins re: rudder inspections). The aircraft crashed killing all on board. *Id.* As in the prior Denver incident, it was determined that the rudder failures were below the

rudder cap. (CP 4356-4357 - 4/4/03 e-mail from Jeff Cousins re: rudder inspections). Per Twin Commander, the significance is that all three rudder failures appeared the “same”, “identical”. (*Id.*).

On April 17, 2003, *via* its SB 235 form 8110-3 FAA submission, after receiving “reports from the field” (four of its service centers) that some rudder caps were showing signs of cracking and other alarming deterioration, Twin Commander reported only the Texas and Georgia incidents to the FAA and none of the other above referenced incidents. (CP 4363-4371 – SB 235). Further, although Twin Commander’s internal memo confirmed it had no evidence that the caps were the primary cause and that the service center reports also included numerous cracks in the lower horizontal ribs (an area not required to be inspected per SB 235), this information was never disclosed. (CP 2199 – April, 2003 e-mails to/from Jeff Cousins; 4356-4357 - 4/4/03 e-mail from Jeff Cousins re: rudder inspections). Twin Commander thereby minimized these serious problems by referring to only the two recent Georgia and Texas incidents, withholding from the FAA the fact that the rudder damage in the 1992 Denver incident was the “same”/“identical”, the failure was well above the design load during normal operation (indicative of rudder flutter), it had known since 1970 that Model 690 had a problem with rudder assembly flutter that was carried over to the 690C by virtue of improper flutter testing procedures for type certification in 1979, the rudder horn assembly was not found in the 1982 Arkansas in-flight break-up, and it knew as far

back as 1993 there were “four known cases (and possibly more)” similar failures in addition to the 1992 Denver incident that was “identical”/“same” as the Georgia and Texas rudder failures. (CP 4858-5233 – NTSB Report re: Dec. 1992 Casper Air crash, Denver, Co.). The clear evidence is that Twin Commander was aware of this pattern of similar rudder failures over a number of years and incidents, failures that are covered by FAR 21.3 and 21.33 and are flutter related but withheld and concealed this critical flight safety information from the FAA, contrary to the FAR 21.3 and 21.33 regulations. Under similar circumstances, in Butler v. Bell Helicopter Textron, *supra*, the Court held that the manufacturer’s knowledge of five prior undisclosed military aircraft accidents caused by the failure of identical tail rotor yokes installed in the aircraft satisfied the knowing misrepresentation exception to GARA.

At the time Twin Commander submitted Service Bulletin 235 to the FAA, it had in its possession knowledge of at least seven prior instances of similar rudder damage, at least two of which clearly resulted in catastrophic in-flight break-ups. Type certificate holders and component manufacturers are required to investigate component failures and accurately report the results of such investigation to the FAA. Robinson v. Hartzell Propeller Inc., *supra*. They must “identify” the problem, “investigate” and “report a solution” to the FAA. *Id.* It cannot wait for the FAA to identify the problem. *Id.* Failure to produce evidence

of its investigation into reported component failures is sufficient to support an inference of concealment or withholding. *Id.* In other words, Twin Commander had in its files and, as the Type Certificate holder, is charged with the knowledge that revealed an incipient flutter problem with the rudder assembly on its Model 690 series, including the 690C, and not only withheld or concealed that information from the FAA and failed to identify, investigate and report a solution for these failures but also failed to correct misinformation previously supplied to the FAA concerning inadequate rudder flutter type certification testing of 690C. Butler, *supra.* (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.; CP 1120-1125 – Twa Supp. Dec.). No flight flutter testing or engineering analysis was conducted by Twin Commander to determine why rudder flutter problems on their aircraft continue to exist or to determine the solution. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.).

In SB 235, Twin Commander misrepresented to the FAA that it had done an adequate engineering investigation, analysis, and testing, and determined that the recommended inspection procedure and fix would solve the problem and render the aircraft airworthy. However, there is no evidence that Twin Commander did any engineering, investigation, analysis or testing as required. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.). For example, in order to rule out a flight flutter problem, Twin Commander would have had to perform in-flight

flutter testing, which was not done. (*Id.*). Despite the serious and dangerous nature of flight flutter, Twin Commander actually misrepresented to the FAA that a one-time visual inspection of the rudder cap area was adequate, when, in fact, it was not. Because the cracking was noted to be in-service progressive fatigue cracking, it most certainly required not just a one-time visual inspection as recommended by Twin Commander, but, at an absolute minimum, recurring inspections of the rudder using much more extensive procedures such as dye penetrant testing, eddy current testing, ultrasonic testing, microscope testing and the removal of paint. (CP 711-715 – Hood Dec.; CP 1145-1146 – Hood Supp. Dec.; 675-681 – Sommer Dec.).

Prior similar failures constitute “required information” to be provided to the FAA in connection with a full engineering analysis of the failure in issue, per Butler (5 identical yoke failures on military helicopters) and Robinson (2 reports of same mid-blade propeller model failures along with disputed others). The victims’ families have identified at least 7 incidents and in-flight break-ups that they have proven implicate rudder flutter, events that were “required information” material and relevant to the performance of this aircraft in connection with the flight safety issue in question. The full engineering analysis the families’ experts did that Twin Commander did not revealed not only these similar instances but also the root cause, at type certification, of the rudder flutter problem for Model 690C. These involve in-flight break-ups of the type

Twin Commander represented its customer service manager researched, yet none were reported to the FAA as required information incident to this investigation. It is no answer to this GARA misrepresentation, concealment or withholding claim for Twin Commander to allege that the FAA, at some time in the past, knew, if it did, of these isolated events; Twin Commander is “not supposed to wait for the FAA to identify a problem”. To the contrary, Twin Commander had an affirmative responsibility to fully advise (“connect the dots”) the FAA of a safety of flight problem and to conduct all necessary inspections and tests, and correct any previously provided incorrect information.

From Jeff Cousins, Twin Commander’s then President, we know exactly what Twin Commander did and reported and did not do or report when submitting, requesting and obtaining FAA approval of SB 235. (CP 4356-4357 – 4/4/03 e-mail from Jeff Cousins re: rudder inspections; CP 4374-4376 – Story Behind the Story). After being informed of the 2002 and 2003 Texas and Georgia in-flight break-ups involving tearing of the rudders, Geoffrey Pence, Twin Commander’s “customer service manager” with no proven engineering expertise had the responsibility to “investigat[e] all the breakups we have records of” including the 1992 Casper Air 690C (840) with tearing of the rudder “identical to” and the “same” appearance as the Texas and Georgia incidents. Twin Commander’s self-described “intensive review” involved asking “four TACA Service Centers to inspect the rudder caps . . .”. Only “7” aircraft

(of a fleet of several thousand) were inspected, resulting in reports of cracking and deterioration of the rudder tips, upper rudder assembly and numerous “cracked lower horizontal stabilator [sic] ribs”. (CP 2199 – April, 2003 e-mails to/from Jeff Cousins). Its investigation did not determine a cause but ruled out the cap – “we have no evidence to point to the cap as [the] primary cause of the problem”. This is the extent of Twin Commander’s “full” engineering analysis and conclusions, although admitting it had “a responsibility to all owners, passengers, and the FAA to see that these critical components were inspected . . .”. Armed only with this, Twin Commander submitted Form 8110-3 signed by its Engineering Manager certifying “compliance with applicable [FAR and CAR] sections” in connection with its request for FAA approval of SB 235. Based only on these conclusory representations, without any FAA required showing of any “full” engineering analysis (inspections, testing, documents and accident report reviews, etc.) the FAA, the next day, approved SB 235. (CP 3802).

As to its Alert Service Bulletin, Twin Commander confirmed:

The service bulletin represents the position of [TCAC] regarding this issue. It was written by extremely competent and experienced people . . . and issued only after careful review of the facts at hand. (CP 4374-4376 – Story Behind the Story). (emphasis added).

SB 235 thus speaks for itself as Twin Commander’s “position” on this flight safety issue. The entirety of the correspondence between Twin

Commander and the FAA regarding SB 235 confirms no other GARA (2)(b)(1) “required information” was provided to the FAA.

The undisputed evidence recited above from Twin Commander itself, however, establishes Twin Commander’s actual knowledge of its UNFULFILLED responsibilities - use “extremely competent and experienced people” to conduct an “intensive review” / “careful review of the facts at hand” - all inspections and tests necessary to determine that the aircraft complies with its FAA approved type design and airworthiness requirement, and report a solution to the FAA for this safety of flight problem.

Relative to the defective product at issue, SB 235, the FAA only knew about the 2002 and 2003 Texas and Georgia in-flight break-ups. It did not know, because Twin Commander misrepresented, concealed or withheld required information, that the problem was much more pervasive and systemic, relating back to the 1970 Model 690 prototype break-up that led to the 1979 Model 690C type certification violations. Per the DOA discussion below, the FAA did not know the specifics of the relationship between the inadequate CAR testing for type certification of Model 690C related to the rudder and trim tab. The redesigned rudder, among other design changes, required flutter and vibration analyses and tests to be conducted per CAR requirements, including flight testing to the full flight envelope at type certification configurations. This was not done. Neither did it know the relationship between the rudder cap missing in the 1982

Arkansas in-flight break-up to this safety of flight problem. While in 1982 a missing rudder cap may not have been significant, subsequent events raise the significance of this finding and its relationship to the safety of flight issue at hand to a much higher level, a level that a full engineering analysis should have revealed (and did reveal to the deceaseds' families' experts). The FAA did not know that the 1992 Casper Air in-flight break-up involved the "identical" or "same" appearing rudder tear, including the relationship between that finding and the 2002 and 2003 Texas and Georgia in-flight break-ups. It did not know the significance and relationship of the Trip Report's "four known cases (and possibly more) of the horn departing the rudder" or the recommended testing by the manufacturer was never performed. It did not know that Twin Commander's investigation into the very safety of flight issue in question also revealed numerous reports of "cracked lower horizontal stabilator [sic] ribs" severe enough to require "on-going maintenance", indicative of more pervasive problems with the tail of the aircraft than the limited recommended inspection areas per SB 235; or that contrary to SB 235's recommended fix to inspect and replace the rudder cap, Twin Commander had "no evidence to point to the cap as [the] primary cause of the problem". It did not know the dearth of analysis actually performed by Twin Commander from unqualified persons charged with the responsibility to fully determine the problem.

While recognizing that the issue of intent is “particularly inappropriate for resolution by summary judgment” because evaluating state of mind often requires the drawing of inferences from the conduct of parties about which reasonable persons might differ, the families have provided sufficient evidence from which legitimate inferences under appropriate summary judgment standards can be drawn that Twin Commander knowingly misrepresented, concealed or withheld information from the FAA. Robinson at p. 652-53. Twin Commander knew it was required to do an “intensive review” / “careful review of the facts at hand” and, integral to that, had the responsibility to “investigate all the break-ups we have records of”. These investigations were to be done by “extremely competent and experienced people” who would then write the service bulletin that represented Twin Commander's position regarding this issue. Twin Commander accepted its responsibilities to the “owners, passengers and the FAA to see that these critical components were inspected. . .”. (CP 4374-4376 – Story Behind the Story) It then submitted Form 8110-3 in connection with its request for FAA approval of SB 235, certifying “compliance with applicable requirements of the [FAR]” and certain CAR sections. (CP 3806 – Submitted FAA Form 8110-3) It is clear, therefore, that Twin Commander knew the full extent of its responsibilities and the crash victims’ families have presented sufficient proof that “required information” known to it was never submitted to the FAA in connection with the submission and request for

approval of SB 235. The *scienter* requirement has been met. Resolution of this issue should be left to the trier of fact.

Twin Commander's misrepresentation, concealment and withholding of this required information is causally related to the crash at issue. (CP 1009-1038 – Donham Dec.; CP 1126-1144 – Donham Supp. Dec.). After receipt of SB 235, the PGR performed the inspection as recommended. (CP 1438-1440 -Excerpts, PGR Report of Crash (in Spanish); CP 1850-1807 – Excerpts, PGR Report of Crash (English)). Finding no damage, the aircraft was returned to service. *Id.* Nevertheless, six months later, on May 2, 2004, the aircraft crashed killing all seven on board. *Id.* At the time, the aircraft was operating normally within the operational flight envelope, when the aircraft suffered incipient flight flutter of the rudder assembly which caused the in-flight break-up in question. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.; CP 691-699 – Twa Dec.; CP 1120-1125 – Twa Supp. Dec.). Had Twin Commander represented accurately the facts to the FAA and conducted the required investigation, tests and analysis, the rudder failure and crash would, in all likelihood, have been avoided. (*Id.*) Twin Commander should have issued a mandatory service bulletin grounding all affected aircraft until the flutter problem was resolved by appropriate engineering analysis and corrective measures – both to correctly identify the full extent of the problem, its engineering root or primary cause, and corrective action to be taken - and requested an emergency Airworthiness

Directive to the same effect be issued by the FAA. The only logical recourse by the FAA would be to ground the affected aircraft in the fleet until the corrective action is done and/or an AD can be issued. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.). Had these actions been taken, it is probable that owners such as the PGR would have complied with these requirements; the PGR did comply with the inadequate SB 235. (CP 1438-1440 -Excerpts, PGR Report of Crash (in Spanish); CP 1850-1807 – Excerpts, PGR Report of Crash (English)). In Butler, the Court reasoned that “causation issues . . . are matters for resolution by the trier of fact” because it could not conclude that there was no relationship between the information withheld from the FAA and the accident. Butler v. Bell Helicopter Textron, *supra* at 1087-1088.

Twin Commander’s pattern of providing misleading, partial information, inadequate engineering, and failure to perform necessary engineering testing for on-going airworthiness, are more fully articulated in the declarations of the crash victims’ families experts: Robert Donham, Donald Sommer, William R. Twa, Jr., and Mark Hood. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.; CP 675-681 – Sommer Dec.; CP 691-699 – Twa Dec.; CP 1120-1125 – Twa Supp. Dec.; CP 675-681 – Hood Dec.; 1145-1146 – Hood Supp. Dec.). In summary, however, the families’ summary judgment evidence that raise fact issues that Twin Commander knowingly misrepresented, concealed or withheld from the FAA are:

- that all rudder assembly flutter and vibration analyses and tests necessary for type certificate requirements had been conducted to demonstrate that Model 690C aircraft was free from flutter and excessive vibration under all speed and power conditions appropriate to the operation of the aircraft and that there was no buffeting condition in normal flight condition severe enough to interfere with satisfactory control of the aircraft in accordance with CAR §§ 3.159 and 3.311.
- that Model 690C aircraft had not been flight tested for flutter and vibration analyses and tests to the full flight envelope including type certification configuration and the most critical configuration in accordance with CAR §§ 3.159 and 3.311.
- that from type certification to the present including its submission and requested FAA approval of Alert SB 235:
 - a. the existence and analysis of the 1970 second prototype Model 690 in-flight break-up revealed it was due to violent rudder flutter with similar if not virtually same type circumstances as SB 235 reported Texas and Georgia in-flight break-ups;
 - b. the 1979 Model 690C type certification flutter tests were not in compliance with CAR §§ 3.159 and 3.311 because the analysis excluded the rudder trim tabs, the balance weight was reduced to 4.12 lbs. and the flight test was not conformed to type certificate flight configuration or at full flight envelope including the most critical configuration.
 - c. the existence and analysis of the 1982 Arkansas Model 690C in-flight break-up revealed “the rudder horn assembly was not found” at the wreckage site while the outboard (from the engine) section of the left wing was found 3 miles from the wreckage site, indicative of flutter related failures;
 - d. the existence and analysis of the 1992 Casper Air Model 690C in-flight break-up revealed “tearing of the rudder identical to” the rudder damage sustained by the aircraft in the reported Texas and Georgia break-ups due to violent rudder flutter well above the design load (the failure of the rudder well above design load can only be caused by flight flutter);

e. the existence and analysis of the other “four known cases (and possibly more) of the [rudder] horn departing the rudder” and that the recommended testing was never performed on these affected aircraft (per the Trip Report);

f. the above incidents unmistakably confirm that Twin Commander's Model 690 series aircraft have a recurring critical problem with flutter which affect flight safety and was thus required information to be revealed to the FAA in accordance with FAR § 21.3;

g. Twin Commander's investigation leading to the submission and requested FAA approval of SB 235 revealed there were also numerous reports of “cracked lower horizontal stabilator ribs” never reported to the FAA and not subject to SB 235 inspection;

h. Twin Commander actually had “no evidence to point to the cap as the primary cause of the problem” when submitting, requesting and receiving FAA approval of SB 235; and

i. Twin Commander had “compl[ied] with applicable requirements of the Federal Aviation Regulations” in connection with FAA Form 8110-3 submitting, requesting and receiving FAA approval of SB 235,

- that:

j. a one time close visual inspection of the rudder tip, top rudder rib and forward rudder spar as set out in SB 235 would find the damage incident to the in-flight break-up problems of the rudder assembly, and

k. if no damage was found *via* the referenced inspection, the aircraft are safe to be returned to service with no recurrent inspections or repairs necessary. (Donham Supp. Dec., pp. 14-16).

In light of the above, the deceaseds' families have presented abundant evidence of material facts that Twin Commander “concealed, withheld,” or “knowingly misrepresented” required information to the

FAA. Thus, the families' cases fall within the GARA § 2(b)(1) exception and should be allowed to proceed to trial.

3. Twin Commander has never held the status of Delegation Option Authority (DOA) and no manufacturer with DOA status has ever been considered the FAA.

If a manufacturer proves to the FAA it is trustworthy, competent and has the resources to regulate itself, it can become a holder under the FAA's Delegation Option Authority (DOA) program. 14 C.F.R. §§ 21.39, 21.277 and FAA Order 8100.9A Par. 5-10 and Ch. 7. The manufacturer is then “authorized by the FAA to conduct type, production and airworthiness certification functions in accordance with 14 C.F.R. part 21, subpart J” (Order 8100.9A, par. 1-10m) and “to make findings of compliance and conformity for new certification projects, amendments to an existing type certificate, . . .”. (Order 8100.9A, par. 7-10(1)). It must appoint an “administrator” to administer the DOA program, adopt a DOA procedural manual and appoint authorized representatives responsible for, among others, finding conformity to the design and airworthiness of the aircraft and filing with the FAA Form 8130-9 Statement of Conformity per C.F.R. requirements. (Order 81 00.9A, ch. 7).

Specific to Type Certification of a new product, the manufacturer holding DOA authority must submit to the FAA, per 14 C.F.R. § 21.253 and Order 8100.9A, par. 7-10, the following:

1. Statement certifying that the design article satisfies the airworthiness standards.

2. Statement certifying that the data required by 14 C.F.R. § 21.293(a)(1)(i) has been placed in the data file.
3. A proposed type certificate data sheet.
4. The information necessary for safe operation of the product; flight manual, ICA, etc.

The FAA then reviews the submitted package, verifies the findings were complete, notifies the DOA holder, and approves and issues the airworthiness limitations, TC and data sheet. Thus, the DOA manufacturer need only certify to the FAA its "design article" passed and that the data is placed in the manufacturer's file. As confirmed in United States v. Varig Airlines, 467 U.S. 797 (1984), at best the manufacturer's certification is audited by the FAA by "spot-checking". The Supreme Court, in ruling that compliance with the FAA regulations under the DOA system was the responsibility of the manufacturer and that the FAA rarely audited or spot checked the manufacturer's compliance during the type certification process, it accepted the following:

The Government, on the other hand, urges that the basic responsibility for satisfying FAA safety standards rests with the manufacturer, not with the FAA. The role of the FAA, the government says, is merely to police the conduct of private individuals by monitoring their compliance with FAA regulations. According to the government, the FAA accomplishes its monitoring function by means of a "spot-check" program designed to encourage manufacturers and operators to comply fully with minimum safety requirements. Such regulatory activity, the Government argues, is the sort of governmental conduct protected by the discretionary function exception to the act. We agree that the discretionary function

exception precludes a tort action based on the conduct of the FAA in certificating these aircraft for use in commercial aviation. *Id.* at 815.

DOA authority granted by the FAA to an aviation manufacturer is thus tantamount to a teacher giving a student authority to grade his own tests and certify only that he passed (or failed). In this lawsuit, this student (Twin Commander) continues to give itself passing grades despite failing until it becomes necessary for someone adversely affected (crash victims' families) to find out why their product failed. Thereafter, the student's actual tests are reviewed revealing failing, not passing, grades not reported to the teacher (FAA) that caused the continued failures. The FAA does, as noted in Varig Airlines, audit the compliance by the DOA manufacturer through a "spot check" procedure. However, most of the underlying material is never provided to or reviewed by the FAA, but rather is kept by the manufacturer in its data files. It is this process that occurred in this case with regard to the type certificate flutter substantiations. Twin Commander's documents' distribution pages do not reveal distribution to the FAA nor do any records reveal any review by the FAA. However, most importantly, whether or not the flutter report was ever reviewed by the FAA, it was misrepresented to the FAA at the time of applying for type certification of the Model 690C Twin Commander that all necessary flight flutter testing had been performed on the tail of the 690C and Twin Commander never corrected this misinformation, all as asserted in the families' briefing and the declarations of their experts. With proof of this

procedure, under summary judgment review standards, Twin Commander's attorneys argued to the trial court that "by definition" and "the very fact of type certification proves the FAA knew" are incompetent to trump the families' evidence. The Varig Airlines case is also illustrative of how, respectfully, the Court should handle this case. In Varig Airlines, there was no question as to the manufacturer's liability for the defective aircraft that were in violation of the FAA airworthiness standards. The only question before the Court was whether the Government could also be liable under the Federal Tort Claims Act (FTCA) for negligent issuance of a type certificate pursuant to the DOA process, where the original manufacturer had not conducted the necessary tests and supervision to assure that the product was airworthy and the FAA did not find the defects through "spot checks." By analogy to the instant case, if a DOA manufacturer abused the DOA process and misrepresented to the FAA during the type certification process that all necessary tests had been conducted on its product to prove it was flutter airworthy, when in fact the aircraft was not, contrary to FAA airworthiness standards, the manufacturer would clearly still be liable and the FAA has no duty to find this misrepresentation.

4. NTSB "Probable Cause" Reports are Universally Inadmissible And the Trial Court Erred in Considering This Evidence

As Twin Commander knows, Section 701(e) of the Federal Aviation Act (§ 1441(e)) prohibits use of any part of NTSB reports, factual and “probable cause” reports alike, in any legal proceeding in all jurisdictions in the United States. The majority of courts have held this prohibition to apply only to probable cause findings, allowing the admission of the factual report absent another basis for objection. The minority view holds all NTSB reports and findings, including the factual report, to be inadmissible. But all courts hold inadmissible the “probable cause” portions. (CP 5292, 5315-5323 – SurReply and attachment, *NTSB - Investigation and Evidence* § 19.01 [2]). The families' experts have relied on the factual reports, not the probable cause reports and these experts have explained why, based on careful analysis of the factual reports, they do not believe any of the relevant accidents, despite inadmissible probable cause reports to the contrary, were due to flight into unexpected turbulence or overspeed, but were in fact due to an insipient flutter problem with the tail of the aircraft. Thus, any consideration of the “probable cause” reports by the Trial Court is error.

V. CONCLUSION

Therefore, the families move the Court to reverse the summary judgment order of the Trial Court and remand the case for disposition on the merits.

RESPECTFULLY SUBMITTED this 5th day of December,
2007.

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The undersigned certifies that on this the 10th day of December,
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