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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KENNETH C. BURTON, as Personal Representative of the ESTATE OF ULISES DESPOSORIOS SANTIAGO, and on behalf of ERIKA BARAJASA VASQUEZ, VIRGINIA DESPOSORIO BARAJAS, ULISES DESPOSORIOS BARAJAS, TEOFILO UVALDO DESPOSORIOS CABRERA, and IRENE SANTIAGO NAVA,

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KENNETH C. BURTON, as Personal Representative of the ESTATE OF JUAN GALINDO HERRERA, and on behalf of REBECA ESCAMILLA MAGALLANES, ERICK GALINDO ESCAMILLA and LILLIAN ITZE GALINDO ESCAMILLA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF PABLO LOZADA LEGORRETA, and on behalf of MARIA DE LOURDES ESQUIVEL AVALOS, GERSON FABRICIO LOZADA ESQUIVEL, DIANA PAOLA LOZADA ESQUIVEL and PRISCILLA LOZADA ESQUIVEL,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF CESAR GABRIEL MAYA, and on behalf of STEPHANIE GUADALUPE MAYA TRIUJEQUE and DIEGO HANNIEL MAYA TRIUJEQUE,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF JESUS ARCINIEGA NIETO, and on behalf of ANGELICA MARGARITA ARIZMENDI GUADARRAMA, ESTEFANIA ARCINIEGA ARIZMENDI, JOSE FRANCISCO ARCINIEGA PEREZ and CONSUELO NIETO TAPIA, and

Reply Brief

KENNETH C. BURTON, as Personal Representative of the ESTATE OF MARIANELA ELIZARDI RIOS, and on behalf of MARIANELA AIDA QUEZADA ELIZARDI and AIDA MAGDALENA RIOS DE ELIZARDI, *Appellants*,

v.

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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. TWIN COMMANDER’S SUMMARY JUDGMENT BURDEN OF PROOF	1
III. ARGUMENT AND AUTHORITY	4
A. TWIN COMMANDER HAS FAILED TO ESTABLISH AS A MATTER OF LAW THAT IT IS A GARA “MANUFACTURER” AND THE FAMILIES’ EVIDENCE RAISED AT LEAST A FACT ISSUE	4
B. TWIN COMMANDER HAS FAILED TO ESTABLISH AS A MATTER OF LAW THAT SB 235 WAS NOT A REVISION OR NEW COMPONENT, SYSTEM OR PART OF THE AIRCRAFT/MAINTENANCE MANUAL AND THE FAMILIES’ EVIDENCE RAISED AT LEAST A FACT ISSUE	6
C. TWIN COMMANDER MISREPRESENTED, CONCEALED OR WITHHELD REQUIRED INFORMATION FROM THE FAA THAT IS MATERIAL AND RELEVANT TO THE OPERATION OF THE AIRCRAFT AND CAUSALLY RELATED TO THE ACCIDENT AND THE FAMILIES’ EVIDENCE RAISED AT LEAST A FACT ISSUE	17
IV. CONCLUSION	27

TABLE OF AUTHORITIES

CASES

Alexander v. Beech Aircraft Corp., 952 F.2d 1215
(10th Cir. 1991) 10

Alter v. Bell Helicopter Textron, Inc., 944 F.Supp.
531 (S.D. Tex. 1996) 10

Baldwin v. Sisters of Providence, Inc., 112 Wn.2d 127
(1989) 3

Burroughs v. Precision Airmotive Corp., (2000)
78 Cal. App. 4th 681 5

Butler v. Bell Helicopter, Textron, 109 Cal. App. 4th
1073 (2003) 26

Caldwell v. Enstrom Helicopter Corp., 230 F.3d
1155 (9th Cir. 2000) 9, 10, 11,
12, 13, 14

Carolina Industry Prods. v. Learjet, Inc., 189 F.Supp.2d
1147 (D. Kansas 2001) 10

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) 2, 3

Colgan Air, Inc. v. Raytheon Aircraft Co., 507 F.3d 270
(4th Cir. 2007) 13, 14, 15, 16

Driver v. Burlington Aviation, Inc., 110 NC App. 519,
430 S.E.2d 476 (N.C. Ct. App. 1993) 10

Hash v. Children’s Orthopedic Hospital, 110 Wn.2d 912
(1988) 2

Hasler Aviation, LLC v. Aircenter, Inc., 2007 WL
2263171 (E.D. Tenn. Aug. 3, 2007) 5

Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168,
125 P.3d 119 (Wash. 2005) (en banc) 2

<u>Mason v. Schweizer Aircraft Corp.</u> , 653 NW2d 543 (Iowa 2002)	5
<u>Michaud v. Fairchild</u> , 2001 Del. Supr. LEXIS 482 (2001)	5
<u>Preston v. Duncan</u> , 55 Wn.2d 678 (1960)	2
<u>Robinson v. Hartzell Propeller, Inc.</u> , 326 F. Supp. 2d 631 (D. Pa. 2004)	10, 23, 24, 25
<u>Sheesley v. Cessna Aircraft Co.</u> , 2006 WL 1084103 (S.D.S. 2006)	5, 6, 19
<u>United States v. Varig Airlines</u> , 467 U.S. 797 (1984)	26, 27
<u>White v. Kent Medical Center, Inc.</u> , 61 Wn.App. 163 (1991)	3, 18
<u>White v. State</u> , 131 Wn.2d 1, 9, 929 P.2d 396 (1997)	2
<u>Young v. Key Pharmaceuticals, Inc.</u> , 112 Wn.2d 216 (1989)	2

STATUTES

CAR § 3.159	22
CAR § 3.311	22
14 CFR § 21.3	20
14 CFR § 43.13	9
14 CFR § 91.403	7, 8
14 CFR § 91.417	8
14 CFR § 91.7	8
14 CFR § 91.419	8

49 CFR § 835.2	19
FAR § 43.13	9
FAR § 145.109	9
49 U.S.C. § 1154	19

OTHER AUTHORITIES

Aviation Accident Law	19
FAA Order 8100.9(A), 1-10(m)	26
NTSB Order EA-5221, <i>Blakey v. Law</i> (2006)	7

I. INTRODUCTION

Before the Court is a *de novo* review of a summary judgment wherein, under applicable and accepted standards, this Court must determine if Twin Commander's evidence, if any, and the law entitled it to summary judgment on the following three GARA issues:

1. Has Twin Commander established as a matter of law on undisputed material facts that it is a GARA "manufacturer" or do the law and the families' evidence raise at least a fact issue;
2. Has Twin Commander established as a matter of law on undisputed material facts that the alleged defective product, SB 235, was neither a revision nor a new component, system or part of the aircraft/maintenance manual or do the law and the families' evidence raise at least a fact issue; and
3. Has Twin Commander established as a matter of law on undisputed material facts that there was no knowing misrepresentation, concealment or withholding of required information from the FAA that is material and relevant to SB 235 causally related to the accident (i.e., the "required information" to issue SB 235 was provided to the FAA) or do the law and the families' evidence raise at least a fact issue.

II. TWIN COMMANDER'S SUMMARY JUDGMENT BURDEN OF PROOF

It is necessary to carefully distinguish between Twin Commander's initial responsive obfuscation to citations of *trial* rather than *summary judgment* burden of proof cases. While the families do not contest, but accept, their trial burden of proof for the alleged GARA exceptions, it is the mixmaster arguments of Twin Commander, attempting to change or confuse their true summary judgment burden, of which the families object. Twin Commander refers to their established summary judgment burden as

“non sensical” and the families’ confirmation of their burden as “without citation” as if references to the Washington cases of Korslund, Preston, White, and Young do not exist. (Appellants’ Br., pp. 10-11; Appellee’s Br., pp. 9-10) The most egregious half-truth is Twin Commander’s citation to Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225 (1989) and Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) for the proposition that:

if the non-movant “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial, then the court should grant the motion”. (Appellee’s Br., p. 9).

The truth is that neither Young nor Celotex abrogate the moving party’s burden, inexplicably omitted by Twin Commander but quoted in Young immediately before Twin Commander’s above proposition. The omitted important first half of the burden of proof equation is:

In a summary judgment motion, the moving party bears the **initial** burden of showing the absence of issue of material fact. [Washington citation omitted] If the moving party is a defendant and **meets this initial showing, then** the inquiry shifts to the party with the burden of proof at trial, the plaintiff. **If, at this point,** the plaintiff ‘fails’ . . . [Twin Commander’s proposition] (Young, p. 225 (citing Celotex, p. 322) (emphasis added).

That Twin Commander chose to test GARA’s applicability with a motion for summary judgment, then failed in its burden does not translate to a justifiable excuse for misstating the applicable law.¹ Per Young, the

¹ Consistent (and still viable) is Hash v. Children’s Orthopedic Hospital, 110 Wn.2d 912 (1988) holding that the burden of establishing that the case presents no genuine issues of fact (leaving the trier of fact nothing to decide) and the moving party is entitled to judgment as a matter of law is on the moving party, *even though the overall burden of proof at trial may be on the other party.*

burden of “showing” – pointing out to the court – there is an absence of evidence to support the non-movant’s case still requires the moving party to identify “those portions of the ‘pleadings, depositions, answers to interrogatories , and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact”. Celotex at 323; Baldwin v. Sisters of Providence, Inc., 112 Wn.2d 127, 132 (1989). It is emphasized that “only rarely” will a moving party comply with the strict requirements of Celotex and Young without having made specific citations to the record in its *opening materials*. White v. Kent Medical Center, Inc., 61 Wn.App. 163 (1991).

In its opening materials, Twin Commander cites the families’ experts’ declarations as its own summary judgment evidence and then contends the declarations are incorrect to establish its right to judgment. In its “EVIDENCE RELIED UPON” section, Twin Commander “in support of its motion, . . . relies upon . . .” Plaintiffs’ Original and Amended Complaints, Twin Commander’s Amended Answers, the Declarations of Plaintiffs’ experts Sommer, Donham, Hood and Twa, Plaintiffs’ Response to Twin Commander’s [withdrawn] Motion to Dismiss and Twin Commander’s Type-Certificate Data Sheet for the 690C aircraft at issue (CP 881-902, *et. seq.*). Thus, excluding the obvious incompetent summary judgment evidence (complaints, answers and lawyer argument), Twin Commander proved under applicable summary judgment standards its Type-Certificate holder status and, *via* the families’ experts’ declarations, SB 235 was the defective product that caused the

fatal crash, it was responsible for the misrepresentations, concealment and withholding of required information from the FAA material and relevant to the issuance of SB 235 that was a cause of the fatal crash, and SB 235 was a component, system or part of the aircraft that was alleged to have caused the fatal crash occurring within approximately 13 months of the crash. With this proof, Twin Commander proclaims there is “no dispute as to the facts.” (Appellee’s Br., p. 8) While there are disputes of fact and law, this is sufficient, in and of itself, to end the inquiry adverse to Twin Commander. However, because of the serious nature of the liability and damage issues involved, the families will continue to respond on the merits to each of the three issues.

III. ARGUMENT AND AUTHORITY

A. TWIN COMMANDER HAS FAILED TO ESTABLISH AS A MATTER OF LAW THAT IT IS A GARA “MANUFACTURER” AND THE FAMILIES’ EVIDENCE RAISED AT LEAST A FACT ISSUE

Acknowledging that Twin Commander’s Type-Certificate data sheet establishing it is the Type-Certificate holder of the aircraft (CP 906-939) is some evidence under some case law of GARA “manufacturer” status, this does not support such status as a matter of law. Continuing its obfuscation, using terms such as “uniformly”, “not surprisingly”, “unremarkable proposition”, “unanimous case law”, Twin Commander represents that “all courts faced with this or similar issues have reached the same conclusion.” (Appellee’s Br., pp. 12-16). The necessity for it to elevate disputed case law to undisputed case law is obvious – its summary

judgment burden to establish its GARA “manufacturer” status as a matter of law. In this, however, Twin Commander fails.

While standing on their previous argument and authorities, the families recognize Twin Commander’s newly cited case, Hasler Aviation, LLC v. Aircenter, Inc., 2007 WL 2263171 (E.D. Tenn. Aug. 3, 2007). It is unclear how Twin Commander, in good faith, could make such bold above quoted characterizations while citing Hasler as authority unless it omits, as it did, any reference to the Hasler court’s acknowledgement that:

1. This question [“whether/when a type-certificate holder and a manufacturer are synonymous”] has not been answered in this formulation, and
2. In 2006, a federal district court “held that a type-certificate holder is not always considered a manufacturer under GARA”. Sheesley v. Cessna Aircraft Co., 2006 WL 1084103 (S.D.S. 2006).²

While Hasler suggested this question was “extensively researched”, it did not cite or discuss, as the families have, the Michaud v. Fairchild decision, 2001 Del. Supr. LEXIS 482 (2001). (Appellants’ Br., pp. 21) Neither did it recognize the Mason and Burroughs courts, finding Schweizer and Precision were GARA manufacturers, considered important to that conclusion these companies were still actually producing aircraft and carburetors, unlike Twin Commander which has never manufactured a single airplane. (G. Pence Dec., CP 1185 and Appellee’s Motion, CP 882) Further, the Sheesley court, after concluding that a Type-Certificate holder is not automatically entitled to GARA’s “manufacturer” status, said:

² Interestingly, Twin Commander cites the Sheesley decision, as authority, elsewhere in its Appellee’s Brief (at p. 32).

The Court finds that Congress meant what it said – the [rolling] provision rolls the repose period for a claim against the manufacturer of a defective part. If Congress intended to roll the provision for the holder of the Type-Certificate covering the part, it could have said so because Congress understood the Type-Certification application process when it adopted GARA. Sheesley at pp.[*20-*23].

Thus, with no consensus in the law concerning the quantity or quality of evidence necessary to support a Type-Certificate holder *ipso facto* attaining GARA “manufacturer” status, there can be no establishment as a matter of law. With a fact issue left, Twin Commander has not established its entitlement to GARA summary judgment.

B. TWIN COMMANDER HAS FAILED TO ESTABLISH AS A MATTER OF LAW THAT SB 235 WAS NOT A REVISION OR NEW COMPONENT, SYSTEM OR PART OF THE AIRCRAFT/ MAINTENANCE MANUAL AND THE FAMILIES’ EVIDENCE RAISED AT LEAST A FACT ISSUE

Twin Commander presented not a scintilla of evidence in support of its Motion for Summary Judgment to prove that when it authored SB 235, it did not intend SB 235 to be nor was it a new component, informational system or part added to the aircraft that revised the aircraft’s maintenance manual. On the contrary, Twin Commander’s summary judgment evidence affirmatively established the opposite. Because it authored that portion of the maintenance manual in question (*below*) and the entirety of SB 235 after its alleged thorough investigation, it would not have been difficult or awkward for Twin Commander to provide that evidence if the facts so warranted. But it proved no such thing. With no controverting evidence, the summary judgment standards are clear – the

evidence must be accepted as true along with all reasonable inferences while any doubts being resolved against Twin Commander. This alone is sufficient for the Court to find that summary judgment should be reversed.

Although indisputably it has not manufactured any aircraft and was not even in business until 1989, Twin Commander must have sometime after 1989 written at least the general instructions section of Model 690C's maintenance manual that required:

. . . check[ing] the applicability of all Airworthiness Directives, **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. (Donald Sommer Dec., CP 968) (emphasis added).

Thus, while this confirms the accident aircraft's maintenance manual incorporates Service Bulletins from Twin Commander itself, case law also declares that a manufacturer may legitimately incorporate by reference Service Bulletins into its manuals. The NTSB so held in an appeal by a mechanic who had his certificate suspended for not following a service publication incorporated into Lycoming's manual.

Respondent replies solely on the argument that manufacturer's service instructions do not apply to mechanics performing maintenance work on Part 91 aircrafts [sic]. . . . We do not find this argument persuasive. . . . **a manufacturer may legitimately incorporate such service publications into a manual by reference.** NTSB Order EA-5221, *Blakey v. Law*, at 6-7 (2006). (emphasis added)

Once service publications are so incorporated into a maintenance manual, compliance becomes an airworthiness limitation; failure to comply means that no person may operate [the] aircraft. 14 CFR § 91.403.

Further, SB 235 was a new component, system or part added to the aircraft because one of the compulsory steps to comply with SB 235 was to make an entry into the aircraft's maintenance log books, a permanent part of the aircraft's records required by law for the aircraft to remain airworthy. (SB 235 at p. 5, CP 4367). 14 CFR § 91.417 requires such logs to record maintenance, preventative maintenance, alterations, required or approved inspections for each aircraft with a description and date of the work performed and signature and certificate number of the person approving the aircraft for return to service. These logs must be maintained such that the owner/operator and pilot can determine the aircraft's airworthiness status before flight. 14 CFR §§ 91.7, 91.403. Thus, the log books are a legally required part of any trip's flight planning and their contents affect the pilot's "go / no-go" decision. Simply, if the log books indicate unairworthiness, the pilot cannot legally fly. They are also part of the flight planning process because they indicate necessary inspection intervals affecting trip legs or destinations, are permanent records that must be transferred with the aircraft when sold and, if lost, must be reproduced to a level adequate to indicate current airworthiness. *Id.*; 14 CFR § 91.419. Thus, the maintenance logs are tied to a unique aircraft by law, are necessary for the safe operation of the aircraft, allow the owner/operator and pilot to plan, manage and conduct a given flight safely by allowing the responsible parties to determine the current and future airworthiness of the aircraft as required by law. Most importantly, the accident aircraft's logs, unique and distinct to this aircraft, contained

numerous references to SB 235's compliance, confirming the applicability of this discussion to this specific aircraft. (PGR Investigative Report, Exh. 31 to Plaintiffs' Response to the Motion for Summary Judgment, CP 1543-44, 1548, 1555, 1561, 1582, 1586 and 1601; Plaintiffs' Exh. 33 (English translation), CP 1909-10, 1914, 1921, 1927, 1948, 1952 and 1967).

Twin Commander, however, contends that the families "egregiously" relied upon 14 CFR § 43.13 for the suggestion that maintenance personnel are required to maintain aircraft using the current manufacturer maintenance manual and service bulletins pursuant to FAR §§ 43.13 and 145.109, suggesting that because § 43.13(a) allows there *may* be other means acceptable to the [FAA], use of the manufacturer's maintenance manual and service bulletins are not required. While § 43.13(a) leaves room for other possibilities, Twin Commander provided no proof that there existed any such other possibilities, leaving, as mandatory - "shall" use the methods, techniques and practices prescribed in the current maintenance manual. Failing any such other evidence, the summary judgment evidence confirms mandatory compliance with Twin Commander's maintenance manual as a legal prerequisite to the aircraft's continued airworthiness.

Regardless of how many times or ways Twin Commander continues to obfuscate the families' Caldwell approved cause of action as "artful pleading", "recasting", "disguise", "parse allegations", the families pled exactly what the facts of the case allowed them to plead, just as the plaintiffs in Caldwell were allowed to do. The Caldwell plaintiffs did not

allege the design defect in the helicopter for its inability to use the last two gallons of fuel, choosing instead to allege that the aircraft manual, another part of the aircraft, was defective. The Ninth Circuit did not penalize plaintiffs when two components are designed defectively and the plaintiffs, as master of their pleadings, choose the viable claim. The families have done nothing more or less herein by choosing the viable claim. No party may dictate to the other to pursue a non-viable claim or defense in lieu of a viable one; otherwise, the logical next strategic move would be self-evident.

In support of its “recasting” argument, Twin Commander cites Robinson v. Hartzell Propeller, Inc., 326 F.Supp.2d 631 (E.D. Pa. 2004), Alter v. Bell Helicopter Textron, Inc., 944 F.Supp. 531 (S.D. Tex. 1996) and Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991) (applying Indiana’s non-GARA Statute of Repose). These authorities are distinguishable. In the instant case, as in Driver and Caldwell, the families did not contend that the aircraft was defective. In each of Twin Commander’s cases, the plaintiffs alleged that the aircraft was defective. Alter v. Bell Helicopter, relied upon by Twin Commander, recognizes this distinction. Further, Twin Commander’s criticism of and suggestion that three district court Fed.Supp. decisions, Alter v. Bell Helicopter Textron, Inc., 944 F.Supp. 531 (S.D. Tex. 1996); Robinson v. Hartzell Propeller, Inc., 326 F.Supp.2d 631 (E.D. Pa. 2004), and Carolina Industry Products v. Learjet, Inc., 189 F.Supp.2d 1147 (Kan. 2001) would trump a Ninth Circuit U.S. Court of Appeals opinion should be rejected. The Ninth

Circuit in Caldwell, again the highest court in the land to decide this GARA issue, knew exactly what it was deciding and why – a decision that to this day is good law based on rock solid analysis. Likewise, Twin Commander’s assertion that to implicate the rolling provision, (1) the allegation must center on a “part” of the aircraft and (2) the new part must have replaced an existing part should be rejected. (Appellee’s Br., pp. 21-22). That GARA’s exception is implicated if (1) a new “component, system, subassembly or other part” is (2) “added to” the aircraft appears to have escaped its analysis. Also, contrary to Twin Commander’s assertion, there was no allegation in Caldwell that a newly revised manual “replaced” an older version. Rather, plaintiff argued and the Ninth Circuit accepted that a revised aircraft manual is a part of the aircraft and is sufficient to implicate GARA’s rolling provision if the existing manual was substantively altered, revised or some portion deleted concerning the defect in issue within 18 years. Caldwell at 1158. Further, contrary to Twin Commander’s allegation, the Ninth Circuit did not “carefully limit[ed]” the scope of its holding. (Appellee’s Br., p. 28). It “comfortably” made the decision using irrefutable “logic” that this aircraft manual is a “component”, “informational system” or “part” of the aircraft legitimately implicating GARA’s rolling provision. Caldwell at 1157. It should again be clear why Twin Commander discusses the Caldwell decision with purposeful ambiguity – “for a variety of reasons inapplicable here, the *Caldwell* court accepted the argument that an aircraft manual is

an integral part of a general aviation aircraft product that a manufacturer sells.” (Appellee’s Br., p. 28).

Essentially, every one of these cases cited by Twin Commander regarding a publication’s capacity to activate GARA’s rolling provision looks to Caldwell for guidance. The Caldwell court determined that the publication at issue was a “component”, “informational system” or “part” of the aircraft for GARA purposes based on the following factors:

1. It contained information necessary for the safe operation of the aircraft because of design, operating, or handling characteristics;
2. It was not a general instructional guide;
3. It was detailed and particular to the model aircraft to which it pertains;
4. It was required by regulations to be operationally considered when using the aircraft;
5. It contained information substantively altered, revised or with some portion deleted concerning the defect in issue within 18 years; and
6. It was the cause of the accident in question.

While the Caldwell court would likely have identified unique factors tailored to SBs if their task was to determine whether SB 235 was a “component,” “system,” or “part” of an aircraft, SB 235 nonetheless still satisfies all of the factors the Caldwell court identified:

1. The admitted purpose of SB 235 was to promote safe operation of the aircraft because of design, operating or handling characteristics;
2. SB 235 was not a general instructional guide;

3. SB 235 was detailed and pertained to Model 690C, both by SB 235's own terms and by its required entry into this aircraft's permanent record;
4. The pilot was required by law to inspect the aircraft's permanent record to confirm the successful completion of SB 235 as a prerequisite to flight planning and to operate the aircraft;
5. SB 235 was required by regulations to be accomplished on the aircraft per the maintenance manual and was uniquely incorporated into that particular aircraft by the required entry of compliance into the aircraft's permanent record; and finally
6. SB 235 was the cause of the fatal crash;

It must also be recognized that some "additions" to an aircraft can require no tangible "parts" yet still affect aircraft flight planning, operation and cause accidents. There are products on the market, for instance, that allow operators to increase an aircraft's payload yet no metal changes to the aircraft are made, just paperwork - log entries that tie these products to a particular aircraft.³ If a manufacturer offers such a defective part for sale that increases an aircraft's payload beyond safe limits and this causes the aircraft to crash, GARA's rolling provision would be implicated because this would be tied to the aircraft and an entry in its permanent aircraft record - even if no tangible "widget" was bolted to the aircraft.

Thus, failing any defensible substantive criticism of Caldwell's applicability, Twin Commander rests its hope for affirmance on the recent decision, Colgan Air, Inc. v. Raytheon Aircraft Co., 507 F.3d 270 (4th Cir.

³ See e.g., STC SA02450CH which is advertised to: "Increase the allowable gross weight of Univair (ERCO) 415-C and -CD Aircraft from their present 12,060 lb. to a 13,020 lb. maximum weight". No metal parts are required for most aircraft. www.alpha-aviation.com.

2007),⁴ asserting that Caldwell is now trumped because the Colgan court “addressed the exact issue presented here”. (Appellee’s Br., p. 24). We know this to be but another disingenuous misstatement because (1) the court itself, after reviewing the *applicable* GARA statute of repose cases⁵, confirmed “the controlling issues in [those] cases concerned a duty to warn and the statute of repose – two issues **not** before us in this matter” and (2) the court stipulated that their ruling was only applicable to the narrow factual situation presented - the rationale used was “for purposes of analysis under these facts. . . .” *Id.* at 276. (emphasis added) This renders Colgan inapposite. The Colgan court was faced with competing arguments concerning the construction of a disclaimer clause in a Used Airliner Airplane Warranty that turned on whether, under the contract, a maintenance manual was “part of the Aircraft”. Note, neither the law of GARA nor its “component” or “system” or “part” options were before the court.

The court suggested that because a maintenance manual may be kept at a maintenance facility for use on multiple aircraft, it seemed not to be a part of the aircraft. (*Id.*) This argument fails. First, the required entry of compliance with SB 235 in the accident aircraft’s log made SB 235 a component of the aircraft. The inspection and recording event specified

⁴ Twin Commander impliedly asserts that the families are due criticism for their “fail[ure] to mention” this case, published some approximate six weeks before the families’ appellate brief was filed. (Appellee’s Br., p. 24).

⁵ Apparently, however, the Fourth Circuit spent precious little time reviewing the Caldwell decision, incorrectly reciting the holding that the aircraft manual was a “part” of the helicopter that “does **not** restart the applicable statute of repose within the meaning of [GARA]” when, in fact, the holding was the aircraft manual was a “part”, “component”, or “informational system” that **did** restart GARA’s statute of repose. *Id.* at p. .

by SB 235 was unique for each aircraft and had distinctive implications for each particular aircraft upon which it was performed. By Twin Commander's reasoning, the more aircraft that are exposed to a dangerous publication, the less GARA liability the Type-Certificate holder would be exposed. From the perspective of the accident aircraft, SB 235 became a part tied uniquely to it when the defective procedure was performed on the aircraft and entered in its logs, just as a defective part becomes tied to a particular aircraft when it is installed and then recorded in the aircraft's permanent record. (*supra*, pp. 7-8) Second, the issue here surrounds a defective Service Bulletin specifying a particular procedure to be carried out on specific models of aircraft, including the accident aircraft [SB 235, CP 4363]. Third, the maintenance manual in Colgan was not the sole method of ensuring airworthiness like it is for the accident aircraft. SB 235 and its compliance are incorporated into the maintenance manual by its very terms. Finally, the pilot in Colgan was not required to verify that the procedures specified in that maintenance manual were logged into that aircraft's log books before flight like the pilot of the accident aircraft was required to do per SB 235.

Further, in granting summary judgment, the Colgan trial court determined that movant met its summary judgment burden, as a matter of law, the maintenance manual was a part of the aircraft. The appellate court reversed finding there was conflicting evidence and authority from non-movant that raised "an issue of fact as to whether Raytheon considered the maintenance manual to be part of the aircraft . . ." defeating

summary judgment. *Id.* at 278. The attempt by Twin Commander to find solace in the Colgan case, a case that declares there is a fact issue, is again based on faulty obfuscation. The families take the court's position – the conflicting evidence and authority is sufficient to at least raise a fact issue requiring reversal of the summary judgment just as it required reversal of Raytheon's summary judgment in Colgan.

Finally, Twin Commander's position on GARA's rolling provision causation requirements is fatally flawed. It contends:

. . . Plaintiffs cannot reasonably contend – *let alone prove, as GARA requires* – that the issuance of the Service Bulletin caused the accident because the accident would have occurred regardless (Appellee's Br., p. 28; emphasis added).

Specifically, (1) while Twin Commander may continue to inaccurately presume that somehow, without proof, its summary judgment burden shifts to the families, summary judgment standards are clear that Twin Commander retains the burden to establish, as a matter of law, its entitlement to summary judgment; (2) GARA's rolling provision causation requirement is not answered by asking Twin Commander's question – would this accident have occurred had Twin Commander never issued SB 235? The correct question is whether the fatal crash would have been avoided had Twin Commander issued a non-defective Service Bulletin. Recalling that Twin Commander, as the Type-Certificate holder, had the duty to support its fleet by, *inter alia*, issuing accurate Service Bulletins, it is improper to pose a causation question based on the assumption that Twin Commander shirks another duty; and (3) GARA's rolling provision

has no requirement for the families to “prove” anything in order to survive summary judgment. The only burden to successfully invoke GARA’s rolling provision is to “allege” that within 18 years the new component, system, subassembly or other part which replaced or was added to the aircraft caused the death, injury or damage. The families have done so, pleading 13 months. The “prove” language is found in GARA’s fraud exception of which the families’ evidence there establishes causation anyway.

Twin Commander is a company responsible for supporting its fleet, including Model 690C. It is to do so by issuing accurate Service Bulletins that require, compliance with Service Bulletins that are incorporated by reference into its maintenance manual to then be recorded in the aircraft’s permanent logs to keep the aircraft airworthy. Thirteen months before the fatal crash, Twin Commander wrote SB 235 designed to prevent the exact accident events upon which this lawsuit is based. This case then presents a complaint about specific affirmative yet incompetent and inadequate acts by an aircraft Type-Certificate holder designed to prevent the exact accident events upon which the lawsuit is based, accruing within GARA’s 18 years. Incredibly, Twin Commander thinks it is “perverse “ to hold them accountable for *their* defective Service Bulletin that was incorporated by reference into *their* maintenance manual pursuant to *their* written instructions when it was *their* duty to provide such support to *their* fleet as the fleet’s Type-Certificate holder. (Appellee’s Br., p. 30).

C. TWIN COMMANDER MISREPRESENTED, CONCEALED OR WITHHELD REQUIRED INFORMATION FROM THE FAA THAT IS MATERIAL AND RELEVANT TO THE OPERATION OF THE AIRCRAFT AND CAUSALLY RELATED TO THE ACCIDENT AND THE FAMILIES' EVIDENCE RAISED AT LEAST A FACT ISSUE

Twin Commander continues to incorrectly contend the families bear the summary judgment burden of proof in this GARA exception. (Appellee's Br., p. 31). Again, the "opening materials" in its original Motion are wholly devoid of any evidence to support its burden of proof that it provided the FAA all "required information" in support of its Form 8110-3 Certification for issuance of SB 235. And because Twin Commander again performed all the alleged "intensive review", including "all the break-ups we have records of", to write SB 235, it would not have been difficult or awkward for Twin Commander to provide sworn testimony to support their attorneys' argument. Yet, they proved no such thing. Only later did "rebuttal documents", as part of their summary judgment reply in violation of White v. Kent Medical Center, *supra*, provide some such evidence, albeit insufficient and incompetent to satisfy its summary judgment burden (CP 1363-1393, *et seq*).⁶ Specifically: (1) Pierre DeBruge's Declaration (CP 1177-1180) does more to support the families' position than Twin Commander's. As the individual responsible for working with the FAA to identify any potential problem with the rudder, the steps necessary to address the problem and the issuance of SB

⁶ Geoffrey Pence's Declaration (CP 1183-1186) is irrelevant to this issue; Exhibit C (CP 1189-1327), Rockwell's investigation into the 1970 flutter related crash of prototype Model 690 was thoroughly discussed by the families in their original Response to the Motion for Summary Judgment and Appellants' Brief; Exhibit E (CP 1336-1338) is discussed *infra*, pp. 25-26.

235, Twin Commander provided no information concerning his qualifications to do so (other than he was an “engineering manager” – whatever that may mean) and confirmed, through the absence of discussion, not one reference to the FAA of the “required information” from the 1970, 1979, 1982, 1992 events or their SB 235 relevance. The conclusory nature of Mr. DeBruge’s comments that he did not withhold, conceal or misrepresent to the FAA renders them incompetent summary judgment evidence; and (2) Exhibits B (CP 1187-1188), D (CP 1328-1335), F (CP 1339-1346) and G (CP 1347-1361) all contain inadmissible and therefore incompetent probable cause reports (Aviation Accident Law, CP 5314-5323). *See also*, Sheesley, *supra* at pp. [*111-*116] (recognizing the distinction between NTSB Accident Report Probable Cause Determinations and NTSB Factual Reports), holding that:

Congress has explicitly limited the admissibility of NTSB reports in civil litigation: ‘no part of a report of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter contained in the report’. [Per 49 U.S.C. § 1154(b) and 49 CFR § 835.2 this includes] the report containing the [NTSB’s] determinations, including the *probable cause* of an accident, issued either as a narrative report or in a computer format . . . *Id.* **Thus, Section 1154(b) and the corresponding federal regulations prohibit the admissibility of NTSB’s probable cause determination. *Id.*** (emphasis added)

Through Twin Commander’s 20 pages of briefing on this issue, it never contests the quality or quantity of the “required information” that is to be presented to the FAA per GARA’s exception – any information required under a statute, regulation, case, in response to a direct inquiry

from the FAA or to correct information previously supplied. As this is an affirmative duty to report a defect or design problem, a Type-Certificate holder or manufacturer may not wait for the FAA to identify a problem.⁷ It has an affirmative responsibility to identify any problems, including prior similar failures, investigate these problems/failures and report a solution, to fully advise, connect the dots, the FAA of these safety of flight problems and conduct all inspections and tests necessary to determine that the affected aircraft comply with FAA approved type design and air worthiness requirements. (Appellants' Br., pp. 24-25, 35-36)⁸.

There is a critical distinction that Twin Commander has either ignored or missed between the "required information" it asserts must be reported to the FAA and what the law demands must be so reported. Twin Commander believes it is sufficient if at any time in the past, anyone reported to any person working at any of the many FAA field offices an individual event in question even if the event was reported independent of any other individual events and regardless of the format, verbal or written. Witness Twin Commander's argument contending these relevant events were reported to the FAA: the 1970 Model 690 prototype flutter related

⁷ One need look no further than recent media reports of the FAA's "limited resources" to inspect airliners for support of the affirmative duty requirements.

⁸ Twin Commander inaccurately asserts that the families "critically and inexcusably" omitted paragraph (d) of 14 CFR § 21.3 while then contending that paragraph (d) relieves them of their GARA-related duty to report "required information" to the FAA. But, the families did reference paragraph (a) that excepts from application of this regulation the events identified in paragraph (d). More importantly, a regulation is but one source of reporting responsibility that qualifies as GARA "required information"; many other such sources rise to the level of GARA's "required information" status. (*See text above*). Lastly, whether the FAA was notified of the required information (paragraph (d)(ii)) per GARA's standard is a contested fact. (*see below*).

crash *via* a document from the NTSB (*Id.*, p. 42; *infra.* p. 25); the 1979 (inadequate) flutter and vibration testing to type certify Model 690C *via* some unknown manufacturer DOA/DER (CP 2209-2211); the 1982 Model 690C crash *via* J. Patras (CP 2976) whose name simply appears on Gulf Stream's internal accident report over the "Federal Aviation Administration" designation, does not appear on the NTSB report (CP 1339-1345), and there is no FAA report at all; and the 1992 Casper Air Model 690C rudder-related in-flight break-up and related trip report ("four known cases (and possibly more) of the horn departing the rudder") *via* Joe Williams and Roman Gabrys (CP 1333, 1337-38, 2760) whose names simply appear on an NTSB factual report over the "FAA" designation and Gabrys' trip report. (Appellees' Br., pp. 41-54) This position defies not only common sense and real world realities, but also the very reporting standards Twin Commander did not contest. As Twin Commander aptly points out, over 20,000 pages of documents were produced in this case alone (Appellee's Br., p. 38) out of many thousands more reviewed, taking many hours of attorney and staff time at extraordinary expense just on this one issue – all to properly affirmatively identify the problems, including prior similar failures, investigate and report a solution, all necessary to fully advise, connect the dots, of this one safety of flight issue. To expect the FAA to have the human, logistical and technical resources to expend the effort, time and money to do this is not a real world possibility. Especially so with all 50 states, numerous aircraft and part manufacturers, Type-Certificate holders, TSOs, etc. and innumerable aircraft and parts

over decades of time all under its jurisdiction. The duty of reporting “required information” does not end as Twin Commander contends; provisionally and logically does not and it cannot. The standard encompasses information on later occurring events that trigger further reporting of “required information”, i.e., to correct information previously supplied, in response to a direct inquiry, reporting a defect or design problem, prior similar failures, investigate, report solutions, connect the dots – *exactly what was required of Twin Commander incident to its Form 8110-3 submission*. Notably, Twin Commander does not factually address or contest the families’ evidence that it did not provide all the “required information” pursuant to its obligation when submitting Form 8110-3 requesting SB 235 approval because it cannot do so and prevail. It is now indisputable that Twin Commander and Pierre Debruge did not report the “required information” in its Form 8110-3 submission for FAA SB 235 approval by affirmatively fully reporting or advising, connect the dots, the FAA of these safety of flight problems, including prior similar failures, performing all inspections and tests and reporting a solution relating to:

- 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 (to correct information previously supplied);

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 existence and analysis of numerous reports of SB 235 related “cracked lower horizontal stabilator [sic] ribs”;

g. Twin Commander actually had “no evidence to point to the cap as the primary cause of the problem”; and

h. Twin Commander's Model 690 series aircraft have a recurring problem with flutter which affect flight safety.⁹

Twin Commander’s two arguments on this issue have both been soundly rejected in Robinson. First, Twin Commander contends that at some time in the past, the FAA knew some of the required information the crash victims’ families have proven were misrepresented, concealed or withheld from the FAA and could, therefore, itself identify the problem. In Robinson, Hartzell argued that certain graphs on vibratory stresses on the propeller exceeded the allowable limits while Hartzell stated that the stress

⁹ Note, the entirety of the FAA’s file incident to approval of SB 235 (Plaintiffs’ Exh. 24, CP 4783-4854) contains no research at all, whether FAA or Twin Commander, of the 1970, 1979, 1982 or 1992 incidents or any indication of the true findings made by Twin Commander in its limited SB 235-related investigation.

was “approximately” the allowable value. Hartzell concluded, therefore, that because the graphs were included with the report, “the FAA would have been able to make this determination itself”. Plaintiff responded by arguing that simply providing the graphs was inadequate and the FAA engineers were not familiar with propeller engineering. The court rejected Hartzell's argument concluding that while inclusion of the graphs and summary in the report may be relevant to the jury's determination of whether the statement was made knowingly, “it does not correct the misstatement as a matter of law.” *Id.* at 650. Here, the FAA is not required to find Twin Commander's aircraft's flight safety problems; Twin Commander cannot wait for the FAA to identify those problems. It is no answer, therefore, that “the FAA would have been able to make this determination itself”. *Id.* Secondly, Twin Commander tries to blame the in-flight break-ups on causes other than flutter, using inadmissible “probable cause” reports. (*see above*). On the same evidence, excluding these inadmissible “probable cause” reports, the families' experts conclude that the cause of the in-flight break-ups was flutter. This Court, as in Robinson, is therefore faced with conflicting conclusions from the same evidence. This issue was resolved in Robinson as the families request it be resolved here. Applying appropriate summary judgment review standards.

The Court concludes that the evidence submitted by plaintiffs is sufficient to raise a genuine issue of material fact with respect to whether [manufacturer] misrepresented, concealed, or withheld the actual cause of propeller failures [in-flight break-ups]. According to [plaintiffs' experts], the true cause of the failures was . . . [rudder flutter]. . . plaintiffs' evidence raises a genuine issue of material fact as to whether [manufacturer] blamed the failures on other factors,

including pilot error . . . Based on this evidence, a jury could infer that [manufacturer] was aware of the [rudder flutter problems] but blamed [the failures] on other factors to conceal this problem. (Robinson at p. 655).

However and ironically, Twin Commander attempts to use the very source documents to support its attorneys' briefing contentions that the FAA was notified at some time in the past of the individual 1970 and 1979 events that it condemns the families using to prove Twin Commander did not fully advise the FAA. (Twin Commander's discussion of Rickert I and II in Appellee's Br., pp. 33-35). Twin Commander's contention "proof" will not withstand scrutiny.

1970 Model 690 Prototype accident (Appellee's Br., pp. 42-43).

Twin Commander represents that Exhibit B to its Reply Summary Judgment (CP 1188) proves that the incident was reported to the FAA. However, it is clear that Exhibit B was printed from the NTSB website. No evidence exists that it came from "the FAA's own accident and incident database" as its attorneys contend. The NTSB and FAA are separate and independent government agencies. Thus, Twin Commander's attorneys' contention that "In other words, the manufacturer disclosed to the FAA the accident and its likely cause while certifying the aircraft" without supporting reference is no evidence - incompetent attorney argument.

1979 Flutter and Vibration Testing (Appellee's Br., pp. 43-44).

Twin Commander contends that because the aircraft was tested for type certification purposes by the manufacturer pursuant to DOA authority, this "unequivocally establishes that the manufacturer accurately

informed the FAA” of the flutter and vibration non-compliance. (Appellee’s Br., pp. 43-44) In essence, Twin Commander takes the position that DOA authority equates with the FAA. This is an absurd argument nullified by the FAA’s DOA program under Order 8100.9(A) and United States v. Varig Airlines, 467 U.S. 797 (1984).¹⁰

The families have proven that misrepresentations were made by Rockwell, the original manufacturer that obtained the original type certificate on the Model 690C in 1979.¹¹ Separate and apart from the subsequent misrepresentations made to the FAA by Twin Commander, Twin Commander cannot avail itself of GARA protection due to Rockwell’s 1979 misrepresentations relied upon by the FAA under Rockwell’s then existing DOA status. Twin Commander argues that as the current holder of the 690C type certificate, they are its manufacturer entitled to the same protection under GARA as the original manufacturer.

¹⁰ DOA status confers nothing more than an authorization by the FAA to conduct certain functions. Order 8100.9(A), 1-10(m) defines Delegation Option Authority as:

A **manufacturer** holding a current type certificate and production certificate issued under standard procedures that is authorized by the FAA to conduct type, production, and airworthiness certification functions in accordance with 14 CFR part 21, subpart j. (emphasis added)

As it is indisputably true that the FAA is the sole administrative body that may issue type certificates for aircraft (DOA Br., CP 5271) one must ask, therefore, if Twin Commander is correct, why cannot the DOA manufacturer, if it is truly the FAA, issue its own type certifications? Why is a DOA manufacturer required to submit certification forms to the FAA if it is already the FAA? Isn’t that submitting certification forms to yourself? Why does the FAA have to review the forms submitted by a DOA manufacturer if it is already the FAA? Isn’t that you reviewing what you already did? Twin Commander’s full page footnote 10 encompassing its DOA briefing epitomizes the rule “statutory interpretations that ‘defy common sense, or lead to mischief or absurdity, are to be avoided.’” Butler v. Bell Helicopter, Textron, 109 Cal. App. 4th 1073, 1084 (2003).

¹¹ A detailed discussion of the inadequate flight flutter testing is set forth in the Appellants’ Brief and the declaration of the families’ flight flutter expert, Robert Donham.

Of course, if this is the case, which the families do not concede, the contrary proposition is also true - they are protected only to the extent Rockwell, the original manufacturer, is protected. Twin Commander is responsible for the 1979 misrepresentations made by Rockwell for the issuance of Model 690C's original type certificate and as such cannot avail itself of GARA protection.¹²

IV. CONCLUSION

Therefore, the families move the Court to reverse the summary judgment order of the trial court and remand the case for discovery, pretrial proceedings and trial.

RESPECTFULLY SUBMITTED this 21st day of April, 2008.

¹² In Varig Airlines, illustrative on this issue, Boeing had misrepresented under their DOA authority to the FAA that a 707 Boeing aircraft was designed in compliance with the CARs. However, flammable materials had been used in the design of a bathroom trash receptacle in violation of CARs. Subsequently, an in-flight fire broke out and asphyxiated over 100 passengers. The airline operating the aircraft sued the FAA for negligent issuance of the type certificate on the Boeing 707. **Boeing, as manufacturer, was held liable** but the FAA was granted immunity under the discretionary function exception to the FTCA because the defective design was not discovered during FAA "spot checks" of Boeing. Could it seriously be argued under the same facts as Varig that if the accident aircraft was a general aviation aircraft subject to GARA and manufactured more than 18 years before the accident, that Boeing, the manufacturer that improperly designed and constructed and misrepresented their compliance with the CARs to the FAA under their DOA authority, would be immune? It is just such an argument that Twin Commander makes in the instant action in attempting to argue for the application of GARA protection, despite the misrepresentations made by Rockwell, the original manufacturer, during the type certification of the 690C.

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The undersigned certifies that on this the 21ST day of April, 2008,
a true and correct copy of this document was served on each of the parties
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