

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

[REDACTED TO REMOVE PLAINTIFF NAMES]

[PG], individually as surviving spouse and as personal representative of the Estate of [FG], deceased, and as mother and natural Guardian of [VG] and [MG], surviving minor children of [FG], deceased;

[AS], individually as surviving spouse and as personal representative of the Estate of [RT], deceased;

[EF], individually as surviving parent and as personal representative of the Estate of [AP], deceased, [MP], surviving father of [AP], deceased, [RP], surviving sibling of [AP], deceased, [MF], surviving sibling of [AP], deceased;

[DL], individually as surviving spouse and as personal representative of the Estate of [JL], deceased, and as mother and natural Guardian of [DL], surviving minor child of [JL], deceased, [DL], surviving adult child of [JL], deceased;

[JB], and [AB], individually as surviving adult children and as co-personal representatives of the Estate of [JR], deceased;

[ST], individually as surviving sibling and as personal representative of the Estate of [AD];

[KC], individually as surviving spouse and as personal representative of the Estate of [CC], deceased, and as mother and natural Guardian of [CF], surviving minor child of [CC], deceased, [MC], surviving parent of [CC], deceased, [CC], surviving parent of [CC], deceased;

[JR], individually as surviving sister and as personal representative of the Estate of [LS], deceased, [SG], surviving parent of [LS], deceased;

[ES], individually as surviving spouse and as

Case No. CV-06-5964 (BMC) (JO)

FIRST AMENDED COMPLAINT

PLAINTIFFS DEMAND
TRIAL BY JURY

personal representative of the Estate of [LS], deceased;

[JC], individually as surviving spouse and as personal representative of the Estate of [ML], deceased, and as mother and natural Guardian of [AL], surviving minor child of [ML], deceased, [EL], surviving parent of [ML], deceased, [ML], surviving parent of [ML], deceased;

[DF], individually as surviving spouse and as personal representative of the Estate of [OM], deceased, [DO], surviving adult child of [OM], deceased, [TO], surviving adult child of [OM], deceased;

[RL], individually as surviving spouse and as personal representative of the Estate of [LL], deceased, and as mother and natural Guardian of [AL], surviving minor child of [LL], deceased;

[EB], individually as surviving spouse and as personal representative of the Estate of [HB], deceased, and as mother and natural Guardian of [DB], surviving minor child of [HB], deceased, [SB], surviving adult child of [HB], deceased;

[ED], individually as surviving parent and as personal representative of the Estate of [ED], deceased, and individually as surviving grandparent and as personal representative of the Estate of [RC], deceased;

[RG], individually as surviving adult child and as personal representative of the Estate of [RG], deceased;

[OS], [TM], [DM], [EM], [EM], [AN], individually as surviving adult children and as co-personal representatives of the Estate of [OM], deceased;

[EA], individually as surviving spouse and as personal representative of the Estate of [LA], deceased;

[MA], individually as surviving spouse and as personal representative of the Estate of [EO], and as mother and natural Guardian of [RA] and [GA], surviving minor children of [EO], deceased;

[NP], individually as surviving spouse and as personal representative of the Estate of [EP], deceased, [RP], surviving adult child of [EP], deceased, [TP] surviving adult child of [EP], deceased;

[MD], individually as surviving spouse and as personal representative of the Estate of [IB], and as father and natural Guardian of [MM] and [MM], surviving minor children of [IB], deceased;

Plaintiffs,

v.

EXCELAIRE SERVICE, INC., a New York corporation, and HONEYWELL INTERNATIONAL INC., a Delaware corporation;

Defendants.

Plaintiffs, by and through undersigned counsel, for their amended complaint for damages, state and allege as follows:

INTRODUCTION

1. This is a wrongful death action arising from a mid-air collision between an U.S.-registered aircraft and a Brazilian-registered aircraft in Brazilian airspace on September 29, 2006. An executive jet owned and operated by defendant ExcelAire Service, Inc. (hereinafter “ExcelAire”), en route to ExcelAire headquarters in New York and flown by two American pilots employed by ExcelAire, collided with a commercial airliner carrying plaintiffs’ decedents, causing the latter aircraft to plunge into the Amazon rainforest, killing all 154 persons on board. The pilots of the ExcelAire jet were flying at an incorrect altitude at the time of the collision, and

the ExcelAire jet's transponder (the component part that transmits a plane's altitude and identification information, and operates its automatic anti-collision system), designed and manufactured by defendant Honeywell International Inc. (hereinafter "Honeywell"), was not functioning at the time of the collision.

JURISDICTION AND VENUE

2. Subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1332(a) and 1369. Plaintiffs, and each of them, allege an amount in controversy in excess of \$75,000, exclusive of interest and costs. There is complete diversity of citizenship between plaintiffs and their decedents, domiciled in Brazil, and defendants ExcelAire, a corporation organized under the laws of and headquartered in the State of New York, and Honeywell, a corporation organized under the laws of the State of Delaware with its headquarters located in New Jersey. This action arises from a single accident in which more than 75 persons died, and the accident occurred in a location other than the states where the defendants reside.

3. Venue is proper in this district and division pursuant to 28 U.S.C. § 1391(a) and (c), in that each of the defendants is subject to personal jurisdiction in this District. Defendant ExcelAire has its headquarters in this District. Defendant Honeywell designs, manufactures, markets and sells aircraft components which it knows are used on aircraft flying to and from airports located in this District, including component parts for the Embraer Legacy 600 owned and operated by ExcelAire which was en route to ExcelAire's headquarters in this District at the time of the accident. These component parts manufactured by Honeywell for the Legacy 600 include the transponder, which, as described below, substantially contributed to the mid-air collision that resulted in the death of all those on board on the commercial airliner, including plaintiffs' decedents.

PARTIES

4. Plaintiff [PG], a citizen and resident of Brazil, is the surviving spouse of decedent [FG], the personal representative of his estate, and the mother and guardian of their surviving minor children plaintiffs [VG] and [MG]. Plaintiffs [VG], a minor, and [MG], a minor, are citizens and residents of Brazil and the surviving children of [FG]. Decedent [FG] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

5. Plaintiff [AS], a citizen and resident of Brazil, is the surviving spouse of decedent [RT] and the personal representative of his estate. Decedent [RT] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

6. Plaintiff [EF], a citizen and resident of Brazil, is the surviving mother of decedent [AP] and the personal representative of his estate. Plaintiff [MP], a citizen and resident of Brazil, is the surviving father of decedent [AP]. Plaintiff [RP], a citizen and resident of Brazil, is the surviving brother of decedent [AP]. Plaintiff [MF], a citizen and resident of Brazil, is the surviving sister of decedent [AP]. Decedent [AP] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

7. Plaintiff [DL], a citizen and resident of Brazil, is the surviving spouse of decedent [JL], the personal representative of his estate, and the mother and guardian of their surviving minor child plaintiff [DL]. Plaintiff [DL], a minor, is a citizen and resident of Brazil and the surviving child of decedent [JL]. Plaintiff [DL], a citizen and resident of Brazil, is the surviving adult child of decedent [JL]. Decedent [JL] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

8. Plaintiffs [JB], [MB], and [AB], citizens and residents of Brazil, are the surviving adult children and co-personal representatives of the estate of decedent [JR]. Decedent

[JR] was a citizen and resident of Brazil at the time of her wrongful death on September 29, 2006.

9. Plaintiff [ST], a citizen and resident of Brazil, is the surviving sibling and personal representative of the estate of [AB]. Decedent [AB] was a citizen and resident of Brazil at the time of her wrongful death on September 29, 2006.

10. Plaintiff [KC], a citizen and resident of Brazil, is the surviving spouse of decedent [CC], the personal representative of his estate, and the mother and guardian of their surviving minor child plaintiff [CF]. Plaintiff [CF], a minor, is a citizen and resident of Brazil and the surviving child of decedent [CC]. Plaintiff [MC], a citizen and resident of Brazil, is the surviving mother of decedent [CC]. Plaintiff [CC], a citizen and resident of Brazil, is the surviving father of decedent [CC]. Decedent [CC] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

11. Plaintiff [JR], a citizen and resident of Brazil, is the surviving sister of decedent [LS] and the personal representative of his estate. Plaintiff [SG], a citizen and resident of Brazil, is the surviving mother of decedent [LS]. Decedent [LS] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

12. Plaintiff [ES], a citizen and resident of Brazil, is the surviving spouse of decedent [LS], and the personal representative of his estate. Decedent [LS] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

13. Plaintiff [JC], a citizen and resident of Brazil, is the surviving spouse of decedent [ML], the personal representative of his estate, and the mother and guardian of their surviving minor child plaintiff [AL]. Plaintiff [AL], a minor, is a citizen and resident of Brazil and the surviving child of decedent [ML]. Plaintiff [EL], a citizen and resident of Brazil, is the

surviving father of decedent [ML]. Plaintiff [ML], a citizen and resident of Brazil, is the surviving mother of decedent [ML]. Decedent [ML] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

14. Plaintiff [DF], a citizen and resident of Brazil, is the surviving spouse of decedent [OM], and the personal representative of his estate. Plaintiffs [DO] and [TO] are citizens and residents of Brazil and the surviving adult children of decedent [OM]. Decedent [OM] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

15. Plaintiff [RL] is a citizen and resident of Brazil and the surviving spouse of decedent [LL], the personal representative of his estate, and the mother and natural Guardian of their surviving minor child plaintiff [AL]. Plaintiff [AL], a minor, is a citizen and resident of Brazil and the surviving child of decedent [LL]. Decedent [LL] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

16. Plaintiff [EB] is a citizen and resident of Brazil and the surviving spouse of decedent [HB], the personal representative of his estate, and the mother and natural Guardian of their surviving minor child plaintiff [DB]. Plaintiff [DB], a minor, is a citizen and resident of Brazil and the surviving child of decedent [HB]. Plaintiff [SB] is a citizen and resident of Brazil and the surviving adult child of decedent [HB]. Decedent [HB] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

17. Plaintiff [ED] is a citizen and resident of Brazil and the surviving parent of decedent [ED] and the personal representative of her estate. Plaintiff [ED] is also the surviving grandparent of decedent [RC] and the personal representative of her estate. Decedent [RC] was

the minor child of decedent [ED]. Decedents [ED] and [RC] were citizens and residents of Brazil at the time of their wrongful deaths on September 29, 2006.

18. Plaintiff [RG] is a citizen and resident of Brazil and the surviving adult child of decedent [RG], and the personal representative of her estate. Decedent [RG] was a citizen and resident of Brazil at the time of her wrongful death on September 29, 2006.

19. Plaintiffs [OS], [TM], Nancy [DM], [EM], [EM], and Maria [AN] are citizens and residents of Brazil and the surviving adult children of decedent [OM], and the co-personal representatives of her estate. Decedent [OM] was a citizen and resident of Brazil at the time of her wrongful death on September 29, 2006.

20. Plaintiff [EA] is a citizen and resident of Brazil and the surviving spouse of decedent [LA], and the personal representative of his estate. Decedent [LA] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

21. Plaintiff [MA] is a citizen and resident of Brazil and the surviving spouse of decedent [EO], the personal representative of his estate, and the mother and natural Guardian of their surviving minor children plaintiffs [RA] and [GA]. Plaintiffs [RA] and [GA], minors, are citizens and residents of Brazil and the surviving children of decedent [EO]. Decedent [EO] was a citizen and resident of Brazil at the time of his wrongful death on September 29, 2006.

22. Plaintiff [NP] is a citizen and resident of Brazil and the surviving spouse of decedent [EP], and the personal representative of her estate. Plaintiffs [RP] and [TP] are citizens and residents of Brazil and the surviving adult children of decedent [EP]. Decedent [EP] was a citizen and resident of Brazil at the time of her wrongful death on September 29, 2006.

23. Plaintiff [MD] is a citizen and resident of Brazil and the surviving spouse of decedent [IB], the personal representative of her estate, and the father and natural Guardian of

their surviving minor children plaintiffs [MM] and [MM]. Plaintiffs [MM] and [MM], minors, are citizens and residents of Brazil and the surviving children of decedent [IB]. Decedent [IB] was a citizen and resident of Brazil at the time of her wrongful death on September 29, 2006.

24. Defendant ExcelAire is and was at all material times a New York corporation having its principal place of business in New York and within this District. At all material times, ExcelAire owned and operated the Embraer Legacy 600 business jet, United States F.A.A. Registration No “N600XL,” that was involved in the accident that gave rise to this action (the “ExcelAire Aircraft”).

25. Defendant Honeywell is and was at all material times a Delaware corporation, having its principal place of business in New Jersey. Honeywell was and is authorized to do, and continues to do, systematic business in New York sufficient to satisfy the Due Process Clause and to subject it to this Court’s jurisdiction. Prior to September 29, 2006, Honeywell designed, manufactured, assembled, inspected, tested, distributed, marketed and introduced into the stream of commerce the transponder installed on the ExcelAire Aircraft.

GENERAL ALLEGATIONS

26. On September 29, 2006, plaintiffs’ decedents were each passengers traveling aboard a Boeing 737-800, registration “PR-GTD” (the “Gol Aircraft”), operated by Gol Linhas Inteligentes S.A. (hereinafter “Gol”), a Brazilian commercial carrier, as Gol Flight 1907. The flight departed at approximately 3:35 pm from Manaus, Brazil, and was scheduled to stop in Brasilia, Brazil before continuing on to Rio de Janeiro, Brazil. It was expected to arrive in Brasilia at approximately 6:10 pm.

27. On September 29, 2006, the ExcelAire Aircraft departed from Sao Jose dos Campos, Brazil at approximately 2:51 pm and was scheduled to stop in Manaus, Brazil, before continuing to New York for use by ExcelAire.

28. The Gol Aircraft was carrying 148 passengers and six crew members. Most passengers were Brazilians, but there were several Europeans and one American on board. The Gol Aircraft had been delivered new to Gol on September 12, 2006 and had logged only approximately 230 flying hours.

29. The ExcelAire Aircraft was on its maiden voyage. ExcelAire authorized its employees, Joseph Lepore and Jan Paladino, to operate the aircraft. Lepore and Paladino are American citizens and residents of this District. In addition to the two pilots, there were five other passengers on board the ExcelAire Aircraft: two American ExcelAire executives, one American New York Times reporter, and two Brazilian Embraer executives.

30. The flight plan for the ExcelAire Aircraft, delivered to the pilots and filed with air traffic control prior to the flight, dictated that it fly at an altitude of 37,000 feet until passing over Brasilia, at which point it was to turn northwest towards Manaus and descend to 36,000 feet, prior to ascending to 38,000 feet at an aerospace point called "Teres" 500 kilometers later and maintaining that altitude until its descent to Manaus. The flight plan of the Gol Aircraft dictated that it would fly at an altitude of 37,000 feet until reaching Brasilia. These flight plans were in keeping with applicable rules dictating that planes flying west be at even-numbered altitudes, while planes flying east be at odd-numbered altitudes, providing for at least 1,000 feet of separation.

31. The ExcelAire Aircraft's transponder, designed and manufactured by Honeywell, ceased functioning shortly after the aircraft passed over Brasilia. The transponder is an electronics component installed in the cockpit which transmits the aircraft's identification information, altitude, speed, and coordinates to air traffic control. The transponder also operates the aircraft's Traffic Collision Avoidance System (TCAS). The TCAS is a computerized

avionics device that communicates the aircraft's altitude to other planes in the vicinity, receives equivalent information from the TCAS of those planes, and issues voice warnings or "resolution advisories" to "climb" or "descend" if two aircraft come too close to one another. When the transponder is not functioning or is in "standby" mode, the TCAS cannot function either.

32. Thus, when the ExcelAire Aircraft's transponder ceased functioning, air traffic controllers could no longer determine its altitude, its TCAS could no longer perceive nearby planes, and the TCAS of nearby planes could no longer perceive the ExcelAire Aircraft. After losing the ExcelAire Aircraft's transponder signal, air traffic controllers sought repeatedly to contact the aircraft via radio, but received no answer. On information and belief, the ExcelAire Aircraft's pilots did not attempt to contact air traffic control via radio for at least 45 minutes after their transponder ceased functioning, and did not at any time advise air traffic control of problems with the aircraft's transponder.

33. The ExcelAire Aircraft collided in mid-air with the Gol Aircraft at approximately 4:57 pm, about 300 kilometers after point Teres and 200 kilometers from the town of Peixoto de Azevedo, at an altitude of 37,000 feet. This was the correct altitude for the Gol Aircraft according to its flight plan. According to its flight plan, however, the ExcelAire Aircraft should have been at 38,000 feet at the time of the collision.

34. The damage caused to the Gol Aircraft by the collision caused it to plunge nose-first into the Amazon rainforest. All 154 persons on board were killed in the crash.

35. The ExcelAire Aircraft's transponder began functioning again approximately ten seconds after the collision, at which point the pilots entered the emergency transponder code of 7700. The pilots of the ExcelAire Aircraft also regained radio communications after the accident, as they sent a mayday signal on the emergency radio

frequency, which was picked up by a cargo plane in the area. The pilot of the cargo plane directed them to a nearby military air strip at Cachimbo Air Base, where the ExcelAire Aircraft landed safely, without injury to any of those on board.

36. Subsequent to the mid-air collision, the remains of plaintiffs' decedents were found at the site where the Gol Aircraft crash-landed, amid its wreckage.

37. Brazil is a signatory to the Convention on International Civil Aviation, Rules of the Air, and a member of the International Civil Aviation Organization ("ICAO"). Pursuant to ICAO rules applicable in Brazil and/or standards of due care, when given a new radio frequency by air traffic control, an aircraft should ensure that it is copied by air traffic control upon switching to the new frequency. If the aircraft is not copied on the new frequency or otherwise experiences a communication failure, it must first attempt to reestablish communication with air traffic control by returning to its prior radio frequency. The aircraft should also consult the radio frequency maps carried on board the aircraft to determine the correct radio frequencies for its location.

38. On information and belief, the ExcelAire Aircraft's pilots failed to promptly take the steps required pursuant to ICAO rules and/or standards of due care to maintain communication with air traffic control and/or resolve a loss of communication with air traffic control. The pilots should have quickly recognized that they had lost radio communication shortly before passing over Brasilia because they were not copied by air traffic control on their new frequency, and/or because they were in busy airspace where frequent radio "noise" would be expected. Nonetheless, on information and belief, the pilots did not return to their prior radio frequency, nor did they not consult their frequency maps to determine whether they were using a correct frequency for the area.

39. ICAO rules mandate that if changing radio frequencies does not succeed in reestablishing communication, an aircraft flying in visual meteorological conditions in airspace where radar is used by air traffic control—as the ExcelAire Aircraft was at the time—must either 1) land at the nearest suitable airport, reporting its arrival to the appropriate air traffic control; or 2) if considered inadvisable to land, maintain the last altitude authorized by air traffic control for seven minutes after setting the transponder to Code 7600 (for loss of communication) or failing to report at a compulsory reporting point, whichever is later, and thereafter adjust its altitude in accordance with the flight plan. ICAO Annex 2: 3.6.5.2.

40. On information and belief, the ExcelAire Aircraft pilots did not follow the ICAO rules above. They did not land at the nearest suitable aerodrome of Manaus, nor did they set the transponder to Code 7600. More than 45 minutes transpired after they lost communications just before Brasilia, but the pilots did not adjust their altitude in accordance with the flight plan by descending to 36,000 feet after Brasilia, and then climbing to 38,000 feet after Teres. Instead, they remained at 37,000 feet, despite their flight plan and despite the fact that odd-numbered altitudes are reserved only for planes heading in the opposite direction.

41. ExcelAire did not exercise adequate care in the hiring and selection of, and/or did not provide adequate training and supervision to, the pilots operating the ExcelAire Aircraft. On information and belief, first officer Lepore had only five hours of flying time on an Embraer Legacy 600 aircraft, and was piloting a Legacy 600 for the first time on the flight that gave rise to this action. On information and belief, both Lepore and Paladino had never flown in Brazil prior to said flight, except for brief test flights at the Embraer facility.

42. On information and belief, the ExcelAire Aircraft pilots improperly operated the transponder, placing it in “standby” mode or otherwise deactivating it. On

information and belief, the ExcelAire Aircraft pilots failed to take note of warning lights indicating that the transponder was in standby and that the TCAS was off, and failed to take steps to reactivate the transponder and TCAS. The pilots' lack of sufficient training on the ExcelAire Aircraft and its avionics likely contributed to these failures.

43. The negligent acts and omissions of ExcelAire and its pilots described above were a substantial contributing factor to the mid-air collision that proximately caused the wrongful deaths of plaintiffs' decedents. Had the pilots followed applicable ICAO rules and standards of due care, or had they properly operated the transponder and/or noticed and acted upon the transponder and TCAS warning lights, the collision would most likely have been averted.

44. While the acts and omissions of ExcelAire and its pilots described above constitute negligence, Honeywell shares responsibility for the collision and the wrongful deaths of plaintiffs' decedents because it defectively designed the transponder on the ExcelAire aircraft, and failed to warn of dangers resulting from foreseeable uses of the transponder.

45. The Honeywell transponder on the ExcelAire Aircraft contains several design flaws that were recognized long before the occurrence of the subject accident and which create a high risk that common and foreseeable pilot errors will render the transponder—and with it the lifesaving TCAS equipment—inoperative. On information and belief, the line key that puts the transponder into “standby” mode is located in close proximity to line keys that are commonly used by pilots in flight for other purposes. If the pilot's finger slips slightly, the standby line key will be depressed also or instead, deactivating the transponder and the TCAS.

46. On information and belief, the Honeywell transponder on the ExcelAire Aircraft may also revert to “standby” mode if the pilot does not complete entry of a new four-

digit transponder code quickly enough, generally within a few seconds. Delays of a few seconds are not uncommon, as a pilot can be distracted by radio communications or other events, often must ask air traffic control to repeat the new code if it is not heard or understood adequately the first time, or must consult the book containing the proper code for the region while entering it to ensure all four digits are remembered correctly.

47. Failures of Honeywell transponders (and in turn TCAS) due to such inadvertent switches into “standby” mode have been reported frequently in the United States and Europe, and at least one narrowly-averted mid-air collision in Europe is attributed to the problem. These failures prompted aviation authorities on both continents to issue airworthiness directives requiring the installation of new software to remove the delay on certain Honeywell transponders. The effective date for the Federal Aviation Administration’s airworthiness directive on the matter was October 17, 2006, and it provides 18 months thereafter for installation of the updated software.

48. Alternative transponder designs were and are available to prevent an inadvertent switch to “standby” mode as a result of foreseeable pilot uses such as pressing an incorrect key right next to a correct one, or delaying more than a few seconds in entering a new transponder code. For instance, the standby line key and the line keys for other common functions could be placed farther apart, and/or the delay could be lengthened or removed, as is done by the available software update.

49. Honeywell did not provide adequate warnings regarding the danger posed by the foreseeable pilot uses above. On information and belief, the only notice regarding the loss of the TCAS provided by the Honeywell transponder on the ExcelAire Aircraft upon its transponder being switched to “standby” mode is a *white* light that reads “TCAS off.” There is

no voice warning, and no amber or red light of the type pilots are trained to look for as a sign of a safety problem. An amber “TCAS fail” light is only activated when there is a technical malfunction of the transponder, but the effect is no different when the transponder is in “standby” mode—in either circumstance, the TCAS is not performing its critical lifesaving function.

50. Alternative designs were and are available to provide a more adequate warning when a transponder enters “standby” mode and the TCAS is thus deactivated. A voice warning could be employed, and/or the same amber light that is activated when there is a technical malfunction.

51. The design flaws in the Honeywell transponder on the ExcelAire Aircraft were a substantial contributing factor to the mid-air collision that proximately caused the wrongful deaths of plaintiffs’ decedents. Had Honeywell implemented available alternative transponder designs such as those described above, the fatal collision most likely would have been averted by the operation of the TCAS, or more likely prior to the TCAS warnings through instructions from air traffic controllers to the ExcelAire Aircraft to adjust its altitude.

52. The aforementioned negligent acts and omissions by the ExcelAire Aircraft’s pilots, the defects in Honeywell’s transponder design, and Honeywell’s failure to provide adequate warnings regarding the risks posed by its transponder proximately caused the wrongful deaths of plaintiffs’ decedents and the consequent injuries to plaintiffs.

53. Prior to their deaths, plaintiffs’ decedents, and each of them, suffered property damage and multiple and diverse injuries of both a personal and pecuniary nature, including conscious pain and suffering, and severe fright and terror.

54. Plaintiffs are entitled to survival damages for these injuries pursuant to the New York survival statute, EPTL 11-3.3, and/or other applicable laws.

55. As a result of the deaths of plaintiffs' decedents, those decedents' next-of-kin, and each of them, have sustained substantial personal and pecuniary damages, including but not limited to mental anguish; loss of consortium, society, companionship, and guidance; loss of economic support; loss of services; and funeral expenses.

56. Plaintiffs are entitled to wrongful death damages for these injuries pursuant to the New York wrongful death statute, EPTL 5-4.1, et seq., and/or other applicable laws.

FIRST CAUSE OF ACTION

NEGLIGENCE AND VICARIOUS LIABILITY AGAINST EXCELAIRE

57. Plaintiffs restate the allegations of paragraphs 1 through 46 above.

58. At all material times, ExcelAire owned, operated, and/or controlled the ExcelAire Aircraft involved in the accident giving rise to this action.

59. At all material times, ExcelAire owed a duty to plaintiffs' decedents and all passengers aboard the Gol Aircraft on Gol Flight 1907, to operate and control the ExcelAire Aircraft with a reasonable standard of care.

60. As the owner, operator, and/or entity in control of the ExcelAire Aircraft, ExcelAire was responsible for ensuring that the ExcelAire Aircraft was operated only by properly-trained and competent pilots.

61. ExcelAire knew or should have known that if the ExcelAire Aircraft was not operated by properly-trained and competent pilots, there would be an unreasonable risk of harm to persons operating, flying, or being flown on board other aircraft in its vicinity.

62. As the owner, operator and/or entity in control of a dangerous instrumentality entrusted to its agents and/or employees, ExcelAire is legally, vicariously, and/or otherwise liable for the negligence acts of its employees, including but not limited to the pilots of the ExcelAire Aircraft.

63. ExcelAire, by and through its agents and/or employees, breached its duty of care in various ways, including but not limited to:

- a. Failing to exercise due care in the hiring and selection of its employees and/or agents to ensure that all safety precautions were followed in the operation of the ExcelAire Aircraft;
- b. Failing to properly train and/or supervise its pilots in the operation of the ExcelAire Aircraft;
- c. Failing to ensure that the pilots of the ExcelAire Aircraft used standard, reasonably prudent piloting techniques and skills in the operation of the ExcelAire Aircraft, including following ICAO rules, state common law standards, and/or other applicable laws;
- d. Failing to properly navigate and/or operate the ExcelAire Aircraft in a reasonably safe and competent manner by failing to fly at the proper altitude in accordance with the flight plan and failing to comply with rules regarding proper altitudes for westbound aircraft;
- e. Failing to properly navigate and/or operate the ExcelAire Aircraft in a reasonably safe and competent manner by failing to take notice of a loss of communication with ground controllers, a loss of function of the transponder, and a loss of function of the TCAS;
- f. Failing to properly navigate and/or operate the ExcelAire Aircraft in a reasonably safe and competent manner by failing to take reasonable measures and/or follow ICAO rules to reestablish lost communication, transponder, and/or TCAS;
- g. Failing to properly navigate and/or operate the ExcelAire Aircraft in a reasonably safe and competent manner by failing to operate the transponder properly and/or deactivating it or switching it to “standby” mode; and

- h. Failing to warn passengers and crew on flights in the vicinity, and failing to warn air traffic control, of ExcelAire's failure to provide pilots trained and capable of properly and safely operating the ExcelAire Aircraft.

64. The negligent conduct of ExcelAire as described above was a direct and proximate cause of, and substantial factor in, the wrongful deaths of plaintiffs' decedents, and the damages and losses to plaintiffs and plaintiffs' decedents alleged herein.

65. WHEREFORE plaintiffs, and each of them, pray that judgment be entered in their favor and against ExcelAire in a sum in excess of seventy five thousand dollars (\$75,000.00) together with pre-judgment interest and the costs of this action.

SECOND CAUSE OF ACTION

STRICT PRODUCT LIABILITY AGAINST HONEYWELL

66. Plaintiffs restate the allegations of paragraphs 1 through 55 above.

67. At the time that the transponder on the ExcelAire Aircraft left the control of Honeywell it was defective, unreasonably dangerous and/or unfit for its intended use.

68. Honeywell designed the transponder with various design flaws, including but not limited to:

- a. Placement of line keys or other keys or buttons that deactivate the transponder or switch it to "standby" mode in close proximity to other line keys or other buttons serving common purposes, creating an unreasonable danger that foreseeable slips of a pilot's finger from the latter would depress the former, resulting in loss of transponder and TCAS functions;
- b. Reversion of the transponder to "standby" mode if a new four-digit transponder code is not completely entered within a few seconds, creating an unreasonable danger that foreseeable longer delays would result in loss of transponder and TCAS functions; and
- c. Insufficient warning when a transponder is switched to "standby" mode, creating an unreasonable and foreseeable danger that a pilot

will not notice the white “TCAS off” light and therefore not correct the problem.

69. Alternative transponder designs were and are available which would not create the unreasonable and foreseeable dangers described above.

70. The defective, unreasonably dangerous and/or unfit condition of the transponder was a direct and proximate cause of, and substantial factor in, the wrongful deaths of plaintiffs’ decedents, and the damages and losses to plaintiffs and plaintiffs’ decedents alleged herein.

WHEREFORE plaintiffs, and each of them, pray that judgment be entered in their favor and against defendant Honeywell in a sum in excess of seventy five thousand dollars (\$75,000.00) together with pre-judgment interest and the costs of this action.

THIRD CAUSE OF ACTION

NEGLIGENCE AGAINST HONEYWELL

71. Plaintiffs restate the allegations of paragraphs 1 through 60 above.

72. Honeywell owed a duty to plaintiffs’ decedents and all passengers aboard the Gol Aircraft on Gol Flight 1907, to design, manufacture, and market the transponder of the ExcelAire Aircraft with a reasonable standard of care.

73. Honeywell breached its duty of care in various ways, including but not limited to:

- a. Negligently designing the transponder such that line keys or other keys or buttons that deactivate the transponder or switch it to “standby” mode are in close proximity to other line keys or other buttons serving common purposes, creating an unreasonable danger that foreseeable slips of a pilot’s finger from the latter would depress the former, resulting in loss of transponder and TCAS functions;
- b. Negligently designing the transponder such that it reverts to “standby” mode if a new four-digit transponder code is not

completely entered within a few seconds, creating an unreasonable danger that foreseeable longer delays would result in loss of transponder and TCAS functions; and

- c. Negligently designing the transponder with insufficient warning when it is switched to “standby” mode, creating an unreasonable and foreseeable danger that a pilot will not notice the white “TCAS off” light and therefore not correct the problem.

74. The negligent conduct of Honeywell was a direct and proximate cause of, and substantial factor in, the wrongful deaths of plaintiffs’ decedents, and the damages and losses to plaintiffs and plaintiffs’ decedents alleged herein.

WHEREFORE plaintiffs, and each of them, pray that judgment be entered in their favor and against Honeywell in a sum in excess of seventy five thousand dollars (\$75,000.00) together with pre-judgment interest and the costs of this action.

FOURTH CAUSE OF ACTION

BREACH OF WARRANTY AGAINST HONEYWELL

75. Plaintiff restates the allegations of paragraphs 1 through 64 above.

76. Honeywell contractually warranted, expressly and/or impliedly, that the transponder of the ExcelAire Aircraft was safe and fit for its intended use, which is, among other things, to avert mid-air collisions and otherwise ensure the safety of passengers on the aircraft and on other aircrafts in the vicinity through transmission of identifying and altitude information to air traffic controllers and operation of the TCAS.

77. As passengers aboard the Gol Aircraft, an aircraft in the ExcelAire Aircraft’s vicinity, plaintiffs’ decedents were foreseeable beneficiaries of the warranties of Honeywell.

78. Honeywell breached its contractual warranties to plaintiffs' decedents, because the transponder of the ExcelAire Aircraft was not safe and fit for its intended use for various reasons, including but not limited to:

- a. The transponder was negligently designed in that line keys or other keys or buttons that deactivate the transponder or switch it to "standby" mode are in close proximity to other line keys or other buttons serving common purposes, creating an unreasonable danger that foreseeable slips of a pilot's finger from the latter would depress the former, resulting in loss of transponder and TCAS functions;
- b. The transponder was negligently designed in that it reverts to "standby" mode if a new four-digit transponder code is not completely entered within a few seconds, creating an unreasonable danger that foreseeable longer delays would result in loss of transponder and TCAS functions; and
- c. The transponder was negligently designed with an insufficient warning when it is switched to "standby" mode, creating an unreasonable and foreseeable danger that a pilot will not notice the white "TCAS off" light and therefore not correct the problem.

79. The breach of contractual warranty by Honeywell was a direct and proximate cause of, and substantial factor in, the wrongful deaths of plaintiffs' decedents, and the damages and losses to plaintiffs and plaintiffs' decedents alleged herein.

WHEREFORE plaintiffs, and each of them, pray that judgment be entered in their favor and against Honeywell in a sum in excess of seventy five thousand dollars (\$75,000.00) together with pre-judgment interest and the costs of this action.

FIFTH CAUSE OF ACTION

GROSS NEGLIGENCE – PUNITIVE DAMAGES-AGAINST EXCELAIRE AND HONEYWELL

80. Plaintiffs restate the allegations of paragraphs 1 through 69 above.

81. ExcelAire was grossly negligent, was willful and wanton in its conduct and/or exhibited an utter disregard for the safety of persons and property in its operation, by and through its agents and/or employees, of the ExcelAire Aircraft.

82. ExelAire and its officer(s) authorized employees to operate the ExcelAire Aircraft in Brazil despite knowing that those employees did not have sufficient training or competence to perform the task in a reasonably safe manner.

83. ExcelAire and its officer(s) authorized, participated in, and/or ratified the gross negligence of the ExcelAire Aircraft's pilots described herein, and/or deliberately retained the pilots in spite of said gross negligence.

84. Honeywell was grossly negligent, was willful and wanton in its conduct and/or exhibited an utter disregard for the safety of persons and property in its design, manufacture, assembly, sale and/or distribution, and post-sale instructions and warnings of the transponder for the ExcelAire Aircraft, as described in the Second, Third, and Fourth Causes of Action above.

85. The gross negligence, willful and wanton conduct and the utter disregard for the safety of persons and property exhibited by ExcelAire and Honeywell were direct and proximate causes, and substantial factors in, the wrongful deaths of plaintiffs' decedents, and the damages and losses to plaintiffs and plaintiffs' decedents alleged herein.

WHEREFORE plaintiffs, and each of them, pray that judgment be entered in their favor and against ExcelAire and Honeywell in a sum in excess of seventy five thousand dollars (\$75,000.00) together with pre-judgment interest and the costs of this action, and for punitive damages in a sum in excess of seventy five thousand dollars (\$75,000.00) and commensurate

with the proof in this case. Furthermore, plaintiffs demand a trial by jury of all issues triable as of right by a jury.

DEMAND FOR A JURY TRIAL

Plaintiffs demand a jury trial in this action for all claims so triable.

Dated: November 22, 2006

Respectfully submitted,

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