[* 1 ]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Koraeich Justice PART 54

Stojano J.C.V. et al

- v -

United Technologies Corp NY et al

INDEX NO. 3052-80

MOTION DATE 5/6/02

MOTION SEQ. NO. 038

MOTION CAL. NO. ____

The following papers, numbered 1 to 5 were read on this motion tolfor Compel

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

SCANNED OCT 23 2002

**Cross-Motion:** ☑ Yes ☐ No

**Upon the foregoing papers, it is ordered that this motion** and cross-motion are denied as moot, in accordance with the annexed Decision, Order and Judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 10/8/02

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 2 ]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich PART 54
Justice

Stajano, Julio

- v -

United Technologies

INDEX NO. 00 3052/80

MOTION DATE 3/18/02

MOTION SEQ. NO. 037

MOTION CAL. NO. 103

The following papers, numbered 1 to 2 were read on this motion to/for discovery

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits | 3 |

SCANNED
OCT 23 2002

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied as moot, in accordance with the annexed Decision, Order and Judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 10/8/02

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 3 ]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich Justice PART 54

Stephen J White

- v -

United Technologies Corp City

INDEX NO. 3052-80

MOTION DATE 8/29/01

MOTION SEQ. NO. 035

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for Summary judgment

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-3 |
| Answering Affidavits — Exhibits | 4-7 |
| Replying Affidavits | |

SCANNED OCT 25 2002

**Cross-Motion:** [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the annexed Decision, Order and Judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 10/8/02

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 28

..... x

JULIO CESAR WILSON STAJANO and ANA MARIA DELGATTE de STAJANO, as parents and natural Guardians of infant Plaintiff CHANTAL DELGATTE STAJANO, and JULIO CESAR WILSON STAJANO and ANA MARIA DELGATTE de STAJANO, individually,

Plaintiffs,

Index No. 003052/1980

-against-

**DECISION, ORDER and JUDGMENT**

UNITED TECHNOLOGY CORPORATION OF NEW YORK CITY and UNITED TECHNOLOGIES CORPORATION and SIKORSKY AIRCRAFT, INC.,

Defendants.

----------x

**KORNREICH, J**:

Motion sequence numbers 35, 37 and 38 are herewith consolidated for disposition.'

## I. BACKGROUND:

In five consolidated actions, plaintiffs Alberto Lopez, Miguel Lopez, Julio Stajano, Robert Tochodjukhan, and Teresa Aparicio[2] alleged that on November 14, 1971, they were injured when a helicopter – which had been manufactured by the Sikorsky Aircraft division of defendants United Technologies Corporation of New York City and United Technologies Corporation -- crashed at a waterside air show in Pocitos, Montevideo, Uruguay. The Lopez plaintiffs originally

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'Motion sequence numbers 28, 29, 30, 32 and 33 are not addressed herein. Those motions are still pending before Justice Martin Schoenfeld, the Judge previously assigned to these cases.

[2]By order dated August 20, 1997, the following actions were consolidated: 7469/78 (Alberto Lopez); 7473/78 (Miguel Lopez); 3052/80 (Stajano); 3051/80 (Tochodjuklian); and 3595/80 (Aparicio).

commenced their actions for strict products liability (e.g., defective design, negligent manufacture, and failure to warn) in 1978, and the others in 1980. After many years of pretrial procedural wrangling, the cases were transferred to another jurisdiction. However, Justice Edward Greenfield of the Supreme Court, New York County reinstated them in this Court on February 13, 1990.[3] Throughout their long history, the actions have been plagued by protracted delays followed by periods of frenetic motion practice – e.g., applications to strike or amend pleadings, quarrels over discovery, and motions to dismiss or for summary judgment. By November of 1997, all of the cases save the instant Stajano action were resolved. Currently before the Court are: (a) a motion by defendants seeking leave to serve and file a Second Amended Answer (#35); (b) defendants' motion for summary judgment (#35); and (c) a number of discovery-related requests made by plaintiffs (#37 and #38).

***A. The Accident:***

According to a contemporaneous account of the event published by the local Uruguayan newspaper El Dia, on which plaintiffs rely, the accident came about as follows: Some 5,000-10,000 spectators had assembled on a bluff and beach in Pocitos, Montevideo, Uruguay on the afternoon of Sunday, November 14, 1971, to witness an *air* show being put on by the Uruguayan military. At approximately 5:25 p.m., Uruguayan Navy Captain Waldemar Ferdomo as Pilot, assisted by Amilcar Gonzalez as Co-Pilot, got into a helicopter ("Helicopter A"), which was parked on the bluff some seven meters above the beach and waters of the Mar del Plata. Beside

[3]The early procedural history of these cases can be gleaned from Cappellini v. United Technology of New York, 79 A.D.2d 593 (1st Dept. 1980) (conditionally dismissing actions and allowing them to be instituted in Uruguay or Connecticut) and Cesar v. United Technology of New York, 148 Misc.2d **918** (Sup. Ct., N.Y. County 1990), aff'd 173 A.D.2d **394** (1st Dept. 1991) (reinstating the actions in New York).

Helicopter "A" was parked a second helicopter of the same basic design ("Helicopter B"). Both aircraft had been purchased by Uruguay from the U.S. government in 1971.[4]

Ferdomo and Gonzalez undertook to demonstrate that Helicopter A could transport a jeep across the water. "For this," the translated El Dia article explains, the pilots' "land helpers placed strong belts to the vehicles [sic] forming a mooring. This was hung at one of the aircraft's flanks by means of a small crane." For reasons that are not explained, the operation did not run smoothly, and "the pilot had to make several attempts to haul the vehicle up." At length, the "land helpers" managed to secure the "belts" around the jeep in such a way that the helicopter could lift into the air with the jeep "hanging beneath it".[5]

The helicopter with its dangling jeep flew out over the ocean. However, suddenly one of the "belts" hooked to the front of the jeep came "unfastened," and the released corner of the vehicle sagged sharply downward. When the jeep became unbalanced, the helicopter's center of gravity shifted and the aircraft began to lose altitude. The pilot headed back to shore, intending,

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[4]The two helicopters have numerous model and serial numbers, based on who is doing the designating. Both are considered Model S-58 by civilian authorities; H-34A by the United States Army; H-34 by the U.S. Air Force; HSS-1 by the U.S. Navy; and HUS-1 by the U.S. Marines. One has, at a minimum, serial numbers 143934 and 58698, while the other has, at a minimum, serial numbers 143941 and 58722. The Uruguayan Navy apparently designated the two craft as A-061 and A-062, respectively. The evolution of the helicopter design at issue here will be discussed in greater detail later in this Decision.

[5]Plaintiffs' counsel volunteers in an Affirmation dated May 11, 1999 that these "belts" created a species of conventional harness for transporting jeeps over water, which counsel calls a "four-legged type of sling" or a "four-legged bridle." According to counsel, one belt would have been secured to each of the jeep's four quarters, and all four belts would have met for fastening at the "external cargo hook" protruding from the belly of the aircraft. However, aside from plaintiffs' counsel's say-so, and in light of the crew's difficulties in fastening the jeep to the helicopter, there is nothing in the record to support Mr. Heller's conclusion that the operation was a routine securing of a "four-legged bridle" to an "external cargo hook."

apparently, to land the helicopter near where the flight had originated. However, as Helicopter **A,** progressively losing altitude, approached the bluff where Helicopter B was still idling, the jeep slammed into the side of the cliff. The impact yanked the helicopter forward and down, causing it to crash onto the top of the still-parked Helicopter B -- with great force and with its propeller still rotating. The fuel tanks of both aircraft exploded. In the ensuing conflagration, metal projectiles -- e.g., shards of rotor blades, and bullets from the machine guns that had been inside the two cockpits -- erupted in all directions, dismembering and killing eight people instantly, and injuring 40-100 others. Miraculously, the crew of both aircraft, including Pilot Waldemar Ferdomo and Co-Pilot Amilcar Gonzalez, managed to escape with their lives.

***B. s' heory o f Defendants' Liability:***

Plaintiffs, who were children at the time of this accident, were among the injured. To date, they have not been successfully deposed or medically examined by the defendants.[6] In addition, plaintiffs' counsel has apparently never interviewed Pilot Perdomo, Co-Pilot Gonzalez, other passengers on Helicopter **A** (if any), the "land helpers'' who fastened the jeep to the aircraft, personnel on Helicopter B, or any of the spectators – save one -- at the air show. The sole version of the foregoing events that has been supplied to the defendants and to this Court by

[6]The record reflects that in March-May 2001, several of the plaintiffs traveled to New York to be deposed and to undergo independent physical/psychiatric examinations. However, because of the disruptive behavior of plaintiffs' counsel, Mr. Heller, during these examinations, Justice Schoenfeld appointed Mr. Leslie Lowenstein as a Special Referee to supervise the proceedings. Mr. Lowenstein subsequently submitted a report in which he castigated Mr. Heller for the deliberate campaign of disruption that he had mounted during the examinations of his clients. Mr. Lowenstein related that Mr. Heller relentlessly caviled at questions, interrupted, objected, argued, and threw temper tantrums, thereby effectively destroying the examiners' ability to conduct their inquiries. In the end, Mr. Lowenstein recommended that Mr. Heller be held in contempt and be sanctioned for, inter alia, "shred[ding] the very fabric of the legal system in which he practices."

plaintiffs is contained in newspaper articles such as the El Dia item summarized above, and in an affidavit from one air show witness, Carlos Tochodjuklian, dated March 1999. Tochodjuklian's account contains no description of how the jeep was attached to the helicopter. His narrative regarding the how the collision came about tracks that of the El Dia journalist, except for the addition of the following sentence at the end of Tochodjuklian's affidavit: "The carrying hook connected to the bottom of the lifting helicopter never opened from the time the helicopter was over the water until the time the jeep struck the rocks."

Plaintiffs' original expert, Robert Nokes, is a retired pilot and vendor of Sikorsky helicopter parts. Nokes drafted several affidavits between December 1998 and May 2002, during the course of which plaintiffs' theory of the accident may be said to have evolved. Briefly, Nokes suggests that the electrical "cargo release" switch on the pilot's and co-pilot's cyclic control sticks "must have" malfunctioned ("manufacturing defect #1"); that the back-up mechanical cargo release pedal on the cockpit floor next to the pilot's right foot "must have" failed as well ("manufacturing defect #2"), and that the design of the aircraft was defective because there was no redundant "foot pedal'' close to the co-pilot by means of which the jeep could have been jettisoned ("design defect #1"). A comprehensive exposition of plaintiffs' basic theory of defendants' liability is supplied by Nokes on (unnumbered) pages 3-4 of his Affidavit dated March 29, 1999, as follows:

> Helicopter pilots receive a great deal of instruction in carrying external loads. Part of this instruction includes the drumming into them that if anything goes wrong while carrying an external load, the first thing they are to do is to release the load. This is called 'pickle the load.' Instructors emphasize the fact that no load is worth endangering the aircraft.
>
> If one of the straps holding the Jeep came loose, as it appears in the photographs, this instability would immediately be noticed by the pilot. He would

> feel a 'jerk' throughout the aircraft when the strap came loose. The photos I examined clearly show the load tilting downward. The pilot, by reflex, would immediately attempt to 'pickle' (release) the load by means of the electrical release button located on his control stick. Upon realization this action did not in fact release the load, he would have to have the co-pilot take control of the pedals, while he attempted to mechanically release the load utilizing the emergency load release pedal located on the floor to his right. In order to accomplish this maneuver, he must take his feet off the control pedals. The emergency release is a vertically operated, spring loaded device, located on the right side of the cockpit floor and must be activated by the pilot's right foot.
>
> It is logical to assume that the electrical and mechanical release mechanisms failed on this aircraft.
>
> Both pilot and co-pilot have electrical release capability so both would automatically use their reflex actions to attempt to release the load. However, in this model helicopter only one emergency mechanical release is available. This is located on the floor to the right of the pilot. The co-pilot cannot avail himself of this release mechanism. He is completely blocked from using it by the center console.
>
> One can conclude that this equipment failed to function by reason of a manufacturing defect, a design defect, or both. This model helicopter is designed without a dual [mechanical] emergency release system. There is no other emergency or fail-safe method of opening the cargo hook under the conditions described (emphases supplied).

***C. Discovery regarding, inter alia, the helicopter's design:***

After twice having had their Note of Issue stricken for failure to complete discovery, on February 16, 2000, plaintiffs filed a third Note of Issue, in accordance with an oral Order of Justice Schoenfeld, issued in chambers on February 9,2000, allowing discovery to continue while the case remained on the trial calendar. Defendants again moved to strike and for assorted other relief, while plaintiffs cross-moved to preclude, to compel defendants to produce a witness with knowledge for deposition, and for depositions of certain out-of-state witnesses – among other things.

In his 28-page Order dated January 11,2001, Justice Schoenfeld formally allowed discovery to continue while the case remained on the trial calendar. The Court did direct,

however, that all discovery had to be concluded by March 9,2001, including, inter aha, depositions and physical examinations of the plaintiffs in New York City; Mr. Heller's depositions of two out-of-state witnesses who were allegedly knowledgeable about defendants' helicopters (depositions which in fact the Court had already authorized in a prior Order dated January 4, 2000, but which Mr. Heller had never set up); and a deposition of a party witness for defendants – to the extent possible, a person "with knowledge" "of the HSS-1's design, manufacture, maintenance, sales, servicing, repair and alteration to cargo lifting capabilities."

Mr. Heller once again failed to make the necessary arrangements to depose the two out-of-state witnesses. The fiasco attending the depositions and medical examinations of the plaintiffs in March-May 2001 has already been described in footnote 6, above. Finally, defendant's witness – retired Professional Engineer Leon Jacobson, who had worked for Sikorsky between 1953 and 1990, as, inter alia, its Director of Aircraft Design – was produced for deposition on January 25 and 26,2001. When the deposition broke off at 4:50 p.m. on the second day, Mr. Heller announced that he did not consider the EBT of Jacobson to be concluded. Nevertheless, Mr. Heller did not thereafter schedule its resumption; and he did not respond to defendants' counsel's letter of February 7,2001 offering to produce Mr. Jacobson to complete his deposition before the Court's March 9, 2001 deadline.

Defendants have now supplied a comprehensive dossier of printed materials, documenting the evolution of the subject helicopter's design. As a guide to these materials, Leon Jacobson has presented a 30-page Affidavit, dated July 18,2001. Plaintiffs in the meantime have also retained an engineering expert, one Robert J. Waldron, Ph.D., a metallurgist who specializes in the investigation of aircraft accidents – particularly ones involving helicopters. Dr. Waldron has

submitted a 9-page affidavit, dated November 16,2001, in which he basically subscribes to Mr. Nokes's theory of the case – viz., that both the electrical and mechanical *cargo* release systems "must have" malfunctioned in Ferdomo's helicopter, and that the release system in the aircraft had been badly designed, inter alia, for failing to have a redundant foot pedal on the co-pilot's side of the cockpit.

Mr. Jacobson and Dr. Waldron are in agreement regarding the evolution of the subject helicopter, which Dr. Waldron characterizes as "the military helicopter identified as BUNO 143941." The prototype, denominated XHSS-1, was conceived by Sikorsky Aircraft in or around 1952 as a military aircraft designed to assist in anti-submarine warfare. During the 1950s and thereafter, the U.S. Navy operated a Bureau of Naval Weapons Office ("BNWO') on the Connecticut premises of Sikorsky Aircraft, under the supervision of a civilian engineer named Leo Miller. Miller and ten other BNWO engineers worked closely with Sikorsky Aircraft engineers to ensure that the company's helicopter configurations conformed with the government's various aircraft detail specifications. This was necessary, inter alia, because the XHSS-1 family of helicopters was intended to be launched from Navy cruisers and carriers, for the purpose of, inter alia, seeking out and/or attacking enemy submarines.

Among the "offspring" *of* the XHSS-1 were the HUS-1 and the HSS-1. The HUS-1 model came equipped with an external cargo carrying sling, a sling installation, a cargo hook with an automatic load release (i.e., that would release the cargo when it touched the ground), and normal and emergency release controls inside the cockpit. The U.S. Navy Detail Specifications that Sikorsky was to follow in creating the Model HUS-I helicopter fill 150 pages.

The HSS-1 model at issue here, however, was a variant of the HUS-1. It was designed to

carry two pilots and two sonar operators if sent out on a "search," or two crewmen and two MK 43 torpedoes if dispatched to "attack." Unlike the HUS-1, the HSS-1 did not have an external cargo-carrying sling. Rather, with respect to the HSS-1, the U.S. Navy's Detail Specifications required only that "strength" would be provided in the fuselage in order to permit the possible future installation of a cargo sling. To quote plaintiffs' engineering expert, Dr. Waldron:

> The accident helicopter (BUNO 143941) was delivered to the U .S. Navy as a Model HSS-1 helicopter. The first HSS-1 helicopter was delivered to the U.S. Navy in March 1955. BUNO 143941 was delivered on December 9, 1957. The primary mission of the Model HSS-1 was as an anti-submarine search and attack helicopter.
>
> The HSS-1 model (including BUNO 143941) was not delivered to the U.S. Navy equipped with an external sling assembly. However, the design requirement specification ... did include [that] ... '[s]trength shall be provided in the fuselage structure for the possible future installation of a cargo sling capable of carrying 4000 pounds external load [later upgraded to 5000 pounds] ....[7]

When, on December 9, 1957, Sikorsky Aircraft delivered the instant HSS-1 BUNO 143941 to the Navy, the U.S. Navy inspector accepting shipment signed a document ("Form DD 250") certifying that the aircraft conformed to the government's contract specifications (i.e., the design dictated in "U.S.N. Detail Spec. SD-493-1-1 dated 26 April 1956"). See Exhibit 6 to Jacobson Affidavit. Before the government received the instant HSS-1, it had already taken delivery of 184 similar HSS-1's produced by Sikorsky Aircraft, and would subsequently take delivery of an additional 30.

It is not disputed that after the BUNO 143941 was delivered by defendants to the **U.S.** Navy on December 9, 1957, it was never returned to any Sikorsky Aircraft plant for any reason at

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[7]Aside from Mr. Nokes' conjecture in an Affidavit dated November 21, 2001 that "a jeep" usually weighs "approximately 2,200-2,300 pounds," there is no admissible evidence in the record of the actual weight of the jeep involved in the within accident. The jeep and both helicopters were completely destroyed in the accident.

any time. Rather, BUNO 143941 remained in the service of the U.S. Navy for the next 13 years, during which period the Navy modified and renamed BUNO 143941 several times before retiring it in 1970.

Of relevance to this lawsuit is the 1964-1966 conversion of the BUNO 143941 into an external cargo-carrying UH-34J. In the words of plaintiffs' expert, Dr. Waldron: "On December 5, 1964, BUNO 143941 was designated as a Model UH-34J. Conversion to a Model UH-34J included installation of an external cargo sling assembly which the HSS-1 was originally designed to accommodate." The modification was performed by Navy engineers, using Sikorsky-supplied drawings and parts which had previously been approved by the U.S. Navy for use in the Sikorsky HUS-1. The conversion included the U.S. Navy's own "Cargo Hooks Parts Kit," consisting of, ~~inter alia~~, a "Cargo Release Hook" manufactured by Eastern Rotorcraft Corp. of Willow Grove, Pennsylvania. Defendants admit that Sikorsky had supplied the original drawing on which Eastern Rotorcraft cargo release hook was based. However, BNWO had approved all of Sikorsky's drawings, and had similarly approved Eastern Rotorcraft's execution of the Sikorsky design. Indeed, the documentary evidence reflects that the Navy was aware of an alternative design which would have provided for a "dual" mechanical cargo release on the co-pilot's side of the cockpit, but expressly rejected it.

The BUNO 143941 was retired from Navy service in 1970 and sold to the Uruguayan government in 1971. By 1975, 830 Sikorsky helicopters were in the air around the world and, according to Mr. Jacobson's researches, not one of them had occasioned any report or complaint regarding "any incident or accident caused by the failure of any external cargo load from any helicopter."

## II. DISCUSSION:

### *A. Defendants' Motion for Leave to Amend their Answer:*

In Motion #35, defendants seek an order granting them leave to serve and file a Second Amended Answer adding two new "federal government contractor" and "contract specification" defenses, and granting them summary judgment dismissing plaintiffs' design defect, manufacturing defect and failure to warn claims. Plaintiffs have "cross-moved" to deny defendants' application, and for an order dismissing all of defendants' "military contractor defenses."

Defendants originally moved in 1992 to add as an eighth affirmative defense a claim that plaintiffs' action was barred by "the government contractor defense." In its Order dated March 24, 1992, the Court granted defendants' motion – although it instructed them to more specifically elaborate the new defense in their Amended answer, in light of the fact that plaintiffs' current theory of liability was that "the lifting mechanism with which the helicopters were equipped was [somehow] defective." Accordingly, the eighth Affirmative Defense in defendants' Amended Complaint, served on September 15, 1992, recited that the BUNO 143941 that Sikorsky had delivered to the U.S. Navy on December 9, 1957 conformed in all respects to the Navy's specifications, and was certified to be in compliance by the government official who had accepted delivery of the aircraft. Affirmative Defense #8 went on to allege that at no time subsequent to delivery did Sikorsky make any modifications to the aircraft; that at no time was it aware of any dangers attending its use that were unknown to the U.S. Navy; and that plaintiffs' lawsuits were barred in consequence.

In proposed Affirmative Defense #9, defendants underscore that they are similarly not liable for the U.S. Navy's 1964-1966 conversion of the BUNO from a non-cargo-carrying SH-34J

helicopter into a cargo-carrying **UH-34J** model, because the conversion was accomplished by the Navy in accordance with government specifications. Moreover, in proposed Affiiative Defense #10, defendants contend that to the extent that the original design and subsequent conversion were accomplished using Sikorsky drawings and/or equipment, Sikorsky is without liability because all such "drawings and/or equipment are [similarly] covered by the federal government contractor defense and the contract specification defense."

It is well established that "[a] party may amend his pleading ... at any time by leave of court ... Leave shall be freely given upon such terms as may be just ...." CPLR 3025. While "lateness" can pose an impediment to amendment, to defeat amendment the "lateness" must cause "significant prejudice" to the opposing party. See Abdelnabi v. New York City Transit Authority, 273 A.D.2d 114 (1"Dept. 2000); Prote Contracting Co.. Inc. v. Board of Education of the City of New York, 249 A.D.2d 178 (1st Dept. 1998).

Plaintiffs complain of the passage of more than 30 years since the happening of the within accident. However, the Court notes that the majority of the delays in the instant litigation are attributable to plaintiffs' counsel's tactics. For example, it was not until 1998 that plaintiffs began to narrow their theory of the case to "something wrong with the cargo release system," with the result that defendants were perforce delayed in articulating the details of their defense. In addition, the basic general "federal government contractor" defense was interposed in 1992, so that plaintiffs have been aware of the theory for ten years. The amendments proposed here merely amplify this original "contract specification defense," extending to the helicopter's subsequent modification the basic principle that when the government or a private person retains control over a product's final design and manufacture, then the contractor is not responsible to third parties for

the purchaser's choices – unless the plans and specifications are so apparently defective that a contractor of ordinary prudence would be put on notice that they were likely to cause injury. See, e.g., Bovle v. United Technologies Corp., 487 U.S. 500 (1988).

Since plaintiffs have not demonstrated how they are prejudiced or surprised by the proposed amendments, defendants' motion is granted to the extent that their answer is deemed to interpose Affiiative Defenses #9 and #10, nunc pro tunc.

Also granted is defendants' application to correct paragraph 2 of their answer. As is apparent from documentation served upon the plaintiffs in 1998, the BUNO 143941 that defendants delivered to the U.S. Navy on December 9, 1957 was a model HSS-1, not an H-34.

***B. Defendants' Motion for Summary Judgment:***

***1) Threshold issues:***

Plaintiffs protest that defendants' summary judgment motion should be denied because it was served more than 120 days after they filed their (third) Note of Issue on February 16,2000. CPLR 3212(a).

As a threshold matter, the 120-day limit was enacted to discourage "the practice of 'eleventh hour' summary judgment motions" made on the eve of trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 128-129 (2000); Cibener v. Citv of New York, 268 A.D.2d 334 (1st Dept. 2000). Here, a trial is not imminent, as "discovery" has been continuing notwithstanding the filing of a Note of Issue. See Gonzalez v. Mag Leasing Corp., supra. Accordingly, the policy that prompted the enactment of the 120-day time limitation is not at issue.

Moreover, the Court has authority to permit a party to serve a motion for summary judgment more than 120 days after the filing of a Note of Issue when "good cause" is shown for

tardiness in bringing the motion. See, Luciano v. Apple Maintenance & Services, Inc., 289 A.D.2d 90 (1st Dept. 2001); CPLR 3212 (a). The court's discretion in determining adequate cause is broad, and it may extend the time period to permit a belated but meritorious motion in the interest of judicial economy where the opposing party has not manifested any prejudice. McKay v. Ciani, 280 A.D.2d 808, 809 (3rd Dept. 2001), leave denied 96 N.Y.2d 713 (2001). As has been repeatedly emphasized, a motion for summary judgment should not be denied on technical grounds without regard to the merits of the application. See Milne v. Cheema, 270 A.D.2d 165 (1st Dept. 2000). As will be discussed below, defendants' application is meritorious, and plaintiffs have failed to present any evidence raising a triable issue of fact as to their entitlement to judgment as a matter of law. Further, plaintiffs have not indicated how they are prejudiced by the delay. Accordingly, the Court rules, in an exercise of its discretion, that the instant summary judgment motion is not "too late" even though served more than 120 days after plaintiffs' filing of a Note of Issue.

Nor is defendants' motion "premature" because of "incomplete discovery" – plaintiffs' alternative argument. The Court notes that according to Justice Schoenfeld's Order of January 11,2001, all discovery was required to be concluded by March 9,2001. The record currently before the Court is now complete with regard to: (a) the details of BUNO 143941's design, parts and equipment when Sikorsky Aircraft delivered it to the U.S. Navy in 1957 as an HSS-1; (b) the subsequent U.S. Navy operational and modification history of BUNO 143941; and (c) the origin, character, design and components of the exterior cargo carrying system and hook installed in the subject aircraft in 1964-1966. Plaintiffs, in contrast, have failed to adhere to Justice Schoenfeld's discovery schedule, have failed to adduce any cognizable evidence supporting their design defect,

manufacturing defect or failure to warn claims, and have failed even to identify what outstanding "discovery" would, at this late date, aid them in refuting defendants' case.

Additionally, defendants are not barred from moving for summary judgment on the ground that they have made a prior unsuccessful motion for this relief. Voluminous materials have been submitted on the instant motion which satisfactorily resolve a number of factual questions that remained unsettled at the time of defendants' prior application. See Sansol Indus.. Inc. v. 345 East 56" Street Owners. Inc., 276 A.D.2d 370 (1st Dept. 2000); Freeze Right Refrigeration and Air Conditioning Services, Inc. v. City of New York, 101 A.D.2d 175 (1st Dept. 1984). For example, when it affirmed the denial of defendants' prior motion for summary judgment in June of 2000, the First Department noted that "disclosure on the issues of design[, installation] and manufacture [of the helicopter's external cargo carrying system] is incomplete." Staiano v. United Technologies Corp. of New York, 273 A.D.2d 162 (1st Dept. 2000). The record is now replete with evidence as to how the accident helicopter and its external cargo carrier were designed, manufactured and installed. Finally, the instant summary judgment application is based on a legal theory ("contract specification defense") different from the one advanced on the prior summary judgment motion ("causation"). See Santini v. Alexander Grant, Inc., 272 A.D.2d 271 (1st Dept. 2000).

***2) Szibstantive issues:***

In Boyle v. United Technologies Corp., supra, the U.S. Supreme Court held that a court could not impose tort liability on a U.S. government contractor for design defects in military equipment pursuant to state law where (1) the United States had approved reasonably precise specifications for the equipment; (2) the equipment conformed to those specifications; and (3) the

contractor warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The "government contractor immunity" defense is derived from the government's immunity from suit where the performance of a discretionary function is at issue. Boyle. supra at 511. The selection of an appropriate design for military equipment for use by the Armed Forces has been identified as a quintessentially discretionary function. Id.

Boyle Prong #1: "Reasonably precise specifications approved by the government" (plaintiffs' "design defect" theory):

The government need not itself have prepared the challenged equipment's specifications to be considered to have approved them. See Trevino v. General Dynamics, 865 F.2d 1474, 1480 (5" Cir. 1989), cert. denied 493 U.S. 935 (1989) ("substantive review" of technology by government sufficient to trigger defense). In this case, however, it is clear from defendants' submissions – and, indeed, it is equally clear from plaintiffs' submissions – that the U.S. Navy approved reasonably precise specifications for the original BUNO 143941 helicopter that it accepted in 1957, and that it was the U.S. Navy which decided upon the design of the external cargo sling and hook assembly that was installed in 1964-1966.

That the government did not merely "review," but rather actively participated in the original design and construction of the aircraft as a whole is evidenced by the existence of elaborate Navy Detail Specification manuals that the contractor was obliged to follow in creating its series of submarine-tracking helicopters during the 1950's. Government participation in the design phase of the aircraft's engineering also is apparent from the active, on-site involvement of engineers like Leo Miller of the Navy's Bureau of Naval Weapons Office during the early years of

the helicopter's development. See In Re Air Disaster at Ramstein Air Base, Germany, on August 29, 1990, 81 F.3d 570 (5th Cir. 1996), cert. denied 519 U.S. 1028 (1996). Defendants have thus demonstrated that this is not merely a case where the U.S. government simply and without more "rubber stamped" a drawing submitted to it by the contractor. Cf. Snell v. Bell Helicopter, Inc., 107 F.3d 744 (9" Cir. 1997); Trevino v. General Dynamics, supra. cert. denied 493 U.S. (1989).

Plaintiffs' counsel's objection that the basic design was Sikorsky's, and that components of the helicopter still bear Sikorsky decals or "proprietary certificates," overlooks the fact that

> military hardware does not suddenly spring into being from initial design and procurement specifications, but evolves through drawings, blueprints and mockups agreed upon by the parties. The ultimate design of the product is determined not only by the original procurement and contract specifications, but also by specific quantitative engineering analysis developed during the actual production process. *** The Navy reserved the right to reject drawings and to require revisions and modifications. These working drawings, and not simply the general qualitative specifications from the procurement stage, comprise 'the reasonably precise Specifications' contemplated by Boyle....

Kleeman v. McDonnell Douglas Corp., 890 F.2d 698 (4th Cir. 1989). In other words, a design may have both started out and ended up with a "Sikorsky" proprietary designation, but may have undergone numerous modifications dictated by Navy engineers along the way.

The Boyle Court expressly rejected another, related theory relied on by plaintiffs, namely, that liability might attach depending on how much of a design was ultimately traceable to the contractor versus how much was dictated by the government. Id. at 513. Rather, according to Boyle, a contractor will be completely immunized in all instances where the government actually participated in discretionary design decisions affecting the choice of technology – either by designing the product itself, or by approving the specifications prepared by the contractor. See also Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1315 (11th Cir. 1989), cert. denied 494

U.S. 1030 (1990); cf. Shaw v. Gruman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), *cert,* denied 487 U.S. 1233 (1988), overruled by Bovle. supra.

In an alternative argument, plaintiffs' counsel devotes many pages of his attorney's affirmation in support of his clients' "cross-motion" to an exposition of the theory, apparently of his own devising, that the BUNO 143941 is "descended" from an original "civilian" S-58 helicopter dating from 1952, with the result that the "government contractor" defense is inapplicable. Aside from the fact that there is no expert affirmation supporting this contention, it appears from, inter alia, the "helicopter genealogy" that counsel appends to his "cross-motion'' papers (the authenticity of which is unclear) that "S-58" was originally the generic designation of a whole family of (mostly military) helicopters, including the HSS-1. The "genealogy" reflects that a specific cargo-carrying "S-58," which might or might not be a civilian aircraft, was a cousin and not a direct progenitor of the XHSS-1. The XHSS-1 was the father or grandfather of the HSS-1 at issue here. See Plaintiffs' Exhibit 11. It is worthy of note that nowhere in the Report of plaintiffs' engineering expert, Dr. Waldron, is such a theory supported. Instead, Dr. Waldron expressly refers to the subject BUNO 143941 throughout his discussion of it as a "military helicopter." Indeed, Dr. Waldron relates on page 3 of his November 16, 2001 "Report" that

> U.S. Federal Aviation Administration (FAA) documents verify that the models HSS-1 and UH-34J are the same basic helicopter. Surplus military helicopters such as the HSS-1 can be certified by the FAA and enter the commercial market. The FAA Helicopter Specification No. 1H11 ... includes a list of military models which are eligible for certification as a civil model. Both the HSS-1 (original delivery configuration of BUNO 143941) and the UH-34J (fmal 'modified' configuration) are eligible to be certified as the same civil model, i.e., the S-58B.

In any event, even if it were true that the subject military helicopter had evolved from an earlier civilian prototype, this would not alter the fact that, after years of engineering "give and take"

with the Navy, Sikorsky's final product incorporated Navy specifications.

Accordingly, it is clear from all of the evidence summarized above that defendants have satisfied prong #1 of the Boyle test, in that they have demonstrated that the government promulgated "reasonably precise specifications" for the design of the subject aircraft as well as for the later-installed external cargo harness and hook, both by actively engaging in the development process and in "substantively reviewing" the finished product.

Boyle prong #2: "The equipment conformed to the specifications" (plaintiffs' "manufacturing defect" theory):

As was held in Kerstetter, supra, a plaintiff claiming injury due to a product's nonconformance with a government specification must allege more than that the ultimate design feature does not achieve its intended goal. The complained-of "manufacturing defect" must exist independently of the design itself, and must result from a deviation from the required military specifications. Extensive government involvement in the design, review, development and testing of a product, as well as extensive acceptance and use of the product following production, is evidence that the product line generally conformed with the government-approved specifications. See In Re Air Disaster at Ramstein Air Base, Germany, on August 29, 1990, supra.

The Navy's issuance to Sikorsky of its DD 250 form officially accepting the original aircraft on December 9, 1957 constitutes evidence that the BUNO 14291 conformed to the government's specifications. See Harduvel v. General Dynamics Corp., supra; Hendrix v. Bell Helicopter Textron, Inc., 634 F.Supp. 1551 (N.D. Tex. 1986) (issuance by government of DD250 acceptance "conclusively established" that helicopter conformed to contract specifications). Moreover, the fact that the U.S. government operated HSS-1 aircraft, as well as HUS-1 and UH-

34J equipment -- all of which were essentially identical to the BUNO 143941 at issue here -- for more than a decade before the happening of this accident serves to establish, without more, that the Sikorsky equipment conformed to specifications, and that the government was as aware of any difficulties with the aircraft as Sikorsky was. See Smith v. Xerox *Corp.*, 866 F.2d 135 (5th Cir. 1989) (government's acceptance and extended use of product establishes product's conformity with government specifications). Finally, as indicated, in 1964-1966 U.S. Navy engineers selected the external cargo sling assembly design for the subject BUNO 143941, installed it themselves, and operated the modified aircraft in the field for many years before the happening of this accident. The defendants therefore have satisfied the second prong of the Boyle test, in that all of the evidence in the record supports the conclusion that the helicopter, as modified, conformed to government specifications.

In a case like this one, where a "federal government contract" defense is legitimately raised, Prong #2 of the Bovle inquiry replaces conventional State law product liability analysis usually applied to "manufacturing defect" claims. However, the reasoning is analogous. Indeed, even if State law were to be applied, plaintiffs have failed to articulate any facts or submit any evidence tending to prove that BUNO 143941 suffered from any manufacturing defects attributable to defendants. In other words, there has been no proof that Sikorsky faded to manufacture its helicopter in conformity with its approved design, or that its subsequently-installed external cargo components were irregular -- in the absence of which there can be no claim of a manufacturing defect, even under State law. See Lombard v. Centrico, Inc., 161 A.D.2d 1071 (3rd Dept. 1990); Shelden v. Hample Equip. Co., 89 A.D.2d 766 (3rd Dept. 1982), aff'd 59 N.Y.2d 618 (1983) ("since there was no direct proof of any defect in the [appliance that

injured plaintiff], plaintiff was required to exclude all causes of the accident not attributable to defendants"). A manufacturing defect cannot be inferred where the evidence is equally consistent with nonliability as with liability. Sheldon, supra.

Boyle prong #3: "Contractor's duty to warn government about dangers not known to the government (plaintiffs' "failure to warn" theory):

As Boyle makes clear, a military contractor is obliged to warn only the U.S. government about those equipment dangers that are known to the contractor but not to the government. See Kerstetter v. Pacific Scientific Co., 210 F.3d 431 (5th Cir., 2000), cert. denied 531 U.S. 919 (2000); Tate v. Boeing Helicopters, 140 F.3d 654 (6th Cir. 1998) ("Tate II"); Tate v. Boeing Helicopters, 55 F.3d 1150 (6th Cir. 1995) ("Tate I"); Trevino v. General Dynamics Corp., supra. Such a contractor has no obligation to "warn" remote, third-party users.

In addition, a contractor can satisfy prong #3 of the Boyle test if it shows that it had no "actual" knowledge of the alleged design defect that purportedly caused an accident. That is, a contractor is immunized from state tort liability even in cases where it did not warn of a latent defect that neither it nor the government considered at all during the design and manufacturing process. Kerstetter v. Pacific Scientific Co., supra. Here, defendants have produced uncontradicted evidence that Sikorsky had no record of any complaints about the cargo-releasing mechanism at issue, and so had no knowledge of any peril about which it should have alerted the U.S. Navy.

Plaintiffs argue that defendants fail to satisfy prong #3 of the Boyle test in that Sikorsky knew or had reason to know that the failure to incorporate a redundant mechanical cargo release at the co-pilot's foot would prove dangerous when the crew needed to jettison external cargo

during an emergency, when the pilot would foreseeably be preoccupied with more pressing matters. It is plaintiffs' contention that the omission of this second foot pedal constitutes a "design defect," and that Sikorsky's failure to bring it to the U.S. Navy's attention amounts to concealment of a danger known to the supplier but not to the United States. However, as related above, when the Navy undertook to install an external cargo sling assembly on the BUNO 143941 in 1964-1966, it expressly rejected a design that would have included a co-pilot's-side foot-pedal cargo-release. Had the absence of this co-pilot's side foot pedal posed an actual danger, it is reasonable to assume that the Navy would have become aware of it during the several years that it used the modified helicopter before retiring it. See In Re Air Disaster at Ramstein Air Base, Germany, on August 29, 1990, supra: Zinck v. ITT *Corp.*, 690 F.Supp. 1331 (S.D.N.Y. 1988). Plaintiffs have accordingly failed to show that the helicopter or its cargo-releasing mechanism suffered from any "actual" problems that were known to the manufacturer but not to the United States.

Conclusion:

Defendants are entitled to dismissal of all of plaintiffs' design defect claims, since they have demonstrated without serious opposition that they manufactured and delivered a product that was designed in accordance with "reasonably precise" government specifications. They are also entitled to dismissal of plaintiffs' "manufacturing defect" claims, because the U.S. Navy certified that the product met with its requirements upon accepting it, and the Navy thereafter modified the helicopter in accordance with its own plans and designs. Finally, defendants have demonstrated their entitlement to dismissal of plaintiffs' "failure to warn" claims, by showing that the contractor did not fail to alert the United States about dangers in the design and/or use of the

equipment that were known to it but not to the United States. See Beckles v. General Electric Co., 248 A.D.2d 575 (2nd Dept. 1998), leave denied 92 N.Y.2d 805 (1998).[8]

Accordingly, it is

ORDERED that that branch of defendants' motion which seeks leave to amend their answers herein is granted, and the amended answers in the proposed form annexed to the moving papers shall be deemed served nunc pro tunc upon service of a copy of this order with notice of entry; and it is further

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'Parenthetically, it is worthy of note that even without the government contractor defense, plaintiffs have no case. Plaintiffs' entire theory of this case is based upon the unfounded assumption that when one of the "belts" securing the jeep to the helicopter snapped open, the pilot and the co-pilot instinctively resorted to their electrical releases to no avail, and that the pilot then stomped on the mechanical release pedal near his right foot, also without result. On this record, plaintiffs' theory is pure speculation. There is no evidence that the pilot or co-pilot ever attempted to release the jeep and that the "release" systems failed. In fact, there are any number of possibilities for how this accident happened. For example, the Uruguayan pilots might have been poorly trained, might not have known of the existence of the releases, or might have panicked and bailed out of the aircraft before trying them. It is equally possible that the jeep was overweight, or that it was incorrectly secured to the cargo hook, such that no amount of pushing on the "releases" would have jettisoned the vehicle. Perhaps, too, the helicopter had been poorly maintained during the roughly one year that it was in the possession of the Uruguayan government, so that the "release" and other systems were in disrepair. Finally, even assuming that the release systems malfunctioned, the plaintiffs do not explain how or why the co-pilot's foot-pedal, had one existed, would have survived the shut-down. Accordingly, plaintiffs' theory that a second foot-pedal near the co-pilot's seat would somehow have saved the day, and that its absence constituted an "inherently dangerous" design defect, is little more than fanciful conjecture.

The lack of evidence on these critical issues is entirely attributable to plaintiffs. That is, plaintiffs' counsel has over all these years failed to, inter alia, obtain statements regarding what went on in the cockpit from the Pilot and the Co-Pilot – both of whom survived the crash; faded to obtain from them, or indeed from anybody, a precise description of the arrangement of switches and dials in the cockpit, which Mr. Heller conclusorily insists was "confusing" and therefore "defective"; failed to interview the "ground crew" who fastened the jeep to the helicopter; failed to provide evidence of the pilot's and co-pilot's training; and failed to unearth witnesses to the weight of the jeep and the maintenance of the aircraft.

ORDERED that that branch of defendants' motion which seeks summary judgment on the basis of their government contractor defenses is granted, and the complaints are dismissed in their entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that all other motions and cross-motions pending before the Court in these actions are denied as academic'; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 8, 2002
New York, New York

SHIRLEY WERNER KORNREICH

[9] The Court has considered but declines to address, as moot, the remaining arguments raised by plaintiffs on these motions.