05-1760-CV

05-1509-CV, 05-1693-CV, 05-1694-CV, 05-1695-CV, 05-1696-CV,
05-1698-CV, 05-1700-CV, 05-1737-CV, 05-1771-CV, 05-1810-CV,
05-1813-CV, 05-1817-CV, 05-1820-CV, 05-2450-CV, 05-2451-CV

UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON, AND EMILY ELIZABETH STEPHENSON,

Plaintiffs-Appellants

v.

DOW CHEMICAL COMPANY; MONSANTO COMPANY; HERCULES INC.; OCCIDENTAL CHEMICAL CORPORATION; ULTRAMAR DIAMOND; MAXUS ENERGY CORP.; CHEMICAL LAND HOLDINGS, INC.; T-H AGRICULTURE & NUTRITION CO.; THOMPSON HAYWARD CHEMICAL CO.; HARCROS CHEMICALS, INC.; UNIROYAL, INC.; C.D.U. HOLDING, INC.; AND UNIROYAL CHEMICAL CORP.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF PANEL's SUMMARY JUDGMENT OPINION

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In Re: Joint Eastern and Southern District New York Asbestos Litigation, 897 F.2d 626, (2d Cir. 1990) ("*Grispo*") 1, 2, 11, 13, 14

Preliminary Statement Pursuant to FRAP 35 and 40

Rehearing or rehearing *en banc* is requested because the panel's decision[1] conflicts not only with the decision of the United States Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) but also with several prior decisions of this Circuit, including *In Re: Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, (2d Cir. 1990) ("*Grispo*"), *Lewis v. Babcock and Wilcox*, 985 F.2d 83 (2[d] Cir. 1993), and *Densberger v. United Technologies Corporation*, 297 F.3d 66 (2[d] Cir. 2002), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. The impact of the panel's decision involves a question of exceptional importance. By markedly expanding the government contractor defense, not only will victims of Agent Orange lose their rights but so might thousands of others exposed to asbestos and other cancer-causing toxins.

Although the panel technically affirmed the District Court's ruling, it rejected all of its key findings of fact. Once these factual findings were reversed,[2] *Boyle* and

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[1] Hereinafter this will be designated as "Op." followed by a page number. The *Bauer* [05-1693-cv] opening and reply briefs will be designated "AB" and "RB." The *Isaacson* [05-1820-cv] opening and reply briefs will be designated "AI" and "RI." The *Stephenson* [05-1760-cv] opening and reply briefs will be designated "AS" and "RS." Appellants' Appendix will be designated "A."

[2] For instance, the District Court found that the government knew the defendants' manufacturing processes were producing 2,4,5-T with high levels of dioxin. The panel found that the government did *not* know what processes Defendants used to manufacture 2,4,5-T. *Compare* 304 F. Supp. 2d at 438, 443

Grispo required it to hold that summary judgment could not be granted on the first prong of the government contractor defense, while *Boyle* and *Densberger* mandated reversal on the third prong. Instead, the panel radically expanded the "government contractor defense," *extending Lewis* beyond recognition and adding new grounds inconsistent with *Boyle.*

1. **The Panel's Findings Regarding Prong 3 Contradict Defendants' Material Fact 4 and Mandate Denial of Summary Judgment**

In *Boyle* at *511*, the Supreme Court set forth a three pronged test which a government contractor must satisfy to benefit from the Defense. Defendants tracked *Boyle* in their "Material Facts as to Which There is No Genuine Issue to be Tried": 1) "Defendants supplied "Agent Orange" to the United States pursuant to contract;" 2) "The United States approved reasonably precise specifications for 'Agent Orange'" (*Boyl*e prong 1); 3) "The 'Agent Orange' manufactured by Defendants conformed to those specifications" (*Boyle* prong 2); and 4) "The United States knew as much or more than Defendants about the dangers in the use of 'Agent Orange" (based on Boyle prong 3).[3]

---

with Op. 47-48.

[3] *See* A135-136. Notwithstanding Defendants' non-compliance with Rule 56.1, which the panel flags at Op. 14, FN. 7, Plaintiffs addressed the "Material Facts" as they were presented by the Defendants. AB8, RB5. These were the only "undisputed facts" listed in Defendants' summary judgment motions in *Isaacson* and *Stephenson*. In their summary judgment motions filed one year later, the

Because the panel's discussion of the first prong stated that the government reordered the product with "knowledge" of a "defect," – i.e. its toxicity – it is necessary to discuss Prong 3 first. This is where the panel describes in detail the dangers known or unknown to the government. In its analysis of Prong 3, the panel expressly found that the evidence relating to Defendants' "Material Fact" 4 *did not* support summary judgment. In Op. 41-42, 50, 45, 45, FN 21, and FN22, respectively, the panel held as follows:

> We doubt that the defendants can establish as a matter of law on the present record ... that they shared the knowledge of the dangers of which they were aware with the government and that the government had far more knowledge about the dangers of Agent Orange in its planned use. Each is intensely factual and hotly disputed. ...
>
> We acknowledge that there may well have been some aspects of the dangers of Agent Orange resulting from the trace presence of dioxin that personnel of one or more of the defendants were aware of that members of the military may not have known ....
>
> There is, indeed, ample evidence that the defendants were concerned about the health effects of dioxin, specifically chloracne and liver damage, of their workers." ... "also temporary nerve damage (Monsanto) and unspecified "systemic injury" (Dow)" ... "[v]ery conceivably [could] be a potent carcinogen.

Indeed, these findings directly contradicted the district court's ruling that the government's "knowledge and information was at all times greater than that of defendants." 304 F. Supp. 2d at 428-429.

Defendants added a "Material Fact" related to product warnings. A8333-A8342.

This should have ended the summary judgment enquiry, as *Boyle* was intended to prevent contractors from withholding potential health risks:

> The third requirement is imposed because 'in its absence the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability.' Op. 20, citing Boyle at 51.

Instead, the panel ruling was admittedly not grounded in *Boyle* at all. At Op. 44, the panel jettisons *Boyle*'s objective comparative knowledge determination, opting for what it purports to be a *pre-Boyle* subjective determination of whether the undisclosed information was "substantial enough to influence the military decision" regarding the purchase and use of Agent Orange.

Yet, even under this entirely new standard, there is abundant evidence that the Defendants themselves thought that it would be highly material to the government's decision-making process. As Defendant Hercules wrote in summarizing a secret meeting with Defendant Dow, AS32, A5681:

> They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen and if the government learns of this the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation ...

At the same time, without telling the government, Dow developed a "test to determine dioxin levels" and started to implement some "techniques to reduce dioxin levels during the manufacturing process" that it had long known about. In Re: Agent Orange, 565 F. Supp. 1263, 1268-1270. As a result, contrary to the panel's

interpretation of pre-*Boyle* law, Judge Pratt denied summary judgment on the very basis the panel granted it: "One question of fact is whether this knowledge, if disclosed to the government, might have made a difference in the government's decision- making process." *Id.*

The panel's conclusion that full and complete disclosure wouldn't have made a difference cites no testimonial support. By contrast, Wayne Vandeventer, an Air Force officer responsible for contract specifications for Agent Orange, testified that he would have wanted to have known about dioxin and expected the chemical companies to have told him about its existence in 2,4,5-T. SR20, A6454-2. When first informed of the presence of the toxic contaminant dioxin *in 1970*, Dr. Robert Darrow, one of those responsible for recommending 2,4,5-T, stated that he and other relevant government personnel were "surprised when we got the information" and that "the feeling was there that it should have been disclosed before." A6064-6065. Nor does the panel explain why, in direct response to this revelation, 2,4,5-T use was suspended in April 1970. RS84.

The panel attempts to justify the vast amount of information not disclosed to the government about the "systemic problems" and the potential of dioxin being a "potent carcinogen" by concluding that these are "not enough to convince a reasonable factfinder that ... the defendants knew that trace amounts of dioxin in Agent Orange might prove to be a carcinogen for those not involved in manufacturer

or direct handling."[4] Op. 47 FN. 22. This attempt to justify the Defendants' intentional secrecy goes beyond the scope of *Boyle* and ignores the district court's ruling that foreseeability would neither be a part of the summary judgment determination nor even a subject upon which the Plaintiffs would be allowed to conduct discovery. (*See* p.15, *infra.*) On January 26, 2004, the district court stated:

> The Court: As I understand it, I am not going to address causation either on the motion to remand or on the motion for summary judgment .. I do not wish to get into the issue of causality on this motion. If I have to get into the issue of causality, **I will then have to reopen this whole matter and give the plaintiffs an opportunity to get involved in causation and in risk and in foreseeability by defendants and by the government.** A11607, A11624 (emphasis added)

For the panel to rely on such causation grounds now -- when the lower court did not even entertain them --denies the veterans fundamental due process.

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[4] Factually, this analysis suffers in several ways. First, many service personnel did directly and regularly handle Agent Orange during the course of its widespread spraying in Vietnam. Secondly, even if defendants did not know for *certain* that dioxin caused cancer, they *did* know that dioxin's toxicity was positively scary: "one of the most toxic materials known," and "the most toxic chemical they have ever experienced." AS 34, 41. It is preposterous to rule, as a matter of law, that the government contractor defense did not require them to tell this to the government. Further, requiring positive knowledge of known human carcinogenicity will give any manufacturer of a known toxin a "free pass "for decades. As a rule, human cancer has a latency from exposure of twenty to forty years, a fact which the district court long understood. 597 F. Supp. 740 , 795 (1984). Because 2,4,5-T was not widely used until the late 1940's, AB14-AB15, carcinogenicity would not have begun to be demonstrable until after Agent Orange use was discontinued. It took until 1994 for the National Academy of Sciences, Institute of Medicine to conclude that Agent Orange caused cancer in Vietnam veterans. RB21-23.

The panel's decision frustrates the policy behind the third prong of *Boyle* which was intended to insure that the manufacturer would not "**withhold knowledge of risks**." 487 U.S. at 512. (emphasis supplied) This requires "a substantial showing that the manufacturer informed the government of known risks in the use of its product." *Carley v. Wheeled Coach*, 991 F.2d 1117, 1127 (3rd Cir. 1993). As the panel states at FN18, "[t]he government's discretionary determination must be a fully informed one." The panel's decision creates a perverse incentive for manufacturers to withhold risks[5] by permitting them to argue afterwards that the concealed facts weren't material.

It is also the polar opposite of this court's ruling in *Densberger, supra,* which found that a reasonable jury could conclude that the manufacturer's additional warning of dangers, even if *already known* to the government, could cause the government to treat the product differently. ("It is possible that if the army had been warned of the danger of which it already knew, it might have warned the pilots, and would have done so even if, absent a warning, it *had* failed to caution them." *Id.* at 73. (italics original) By contrast, the *Agent Orange* panel ruled that no reasonable jury could conclude that the failure to warn of dangers, even when *unknown* to the

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[5] The panel's concerns about the costs to the government are misplaced. The fact that this information was hidden from the government has cost the government many hundreds of millions in order to compensate Vietnam veterans who were exposed to Agent Orange. *See*, e.g., RB12.

government, would make a difference in whether and how the government would use a product. Obviously, if a reasonable jury could find warning of dangers *already known* could make a difference, it would be even more reasonable to find that warning of dangers *not already known* could make a difference. These two cases cannot stand together.

2. The Panel's Decision Stretches the First Prong of *Boyle*, Requiring "Reasonably Precise Specifications," Beyond Recognition

In *Boyle* at 512, the Supreme Court explained why Prong 1 requires the approval of "reasonably precise specifications":

> "The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – *i.e.,* they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself."

As noted at Op. 21, Plaintiffs maintained that the features at issue were not considered by the Government because: 1) the contracts included no specifications regarding the toxic impurity dioxin; and 2) the defect was caused by the defendants' chosen manufacturing methods. AB8, AS7. Plaintiffs were supported by the unchallenged affidavits of two experts, Dr. Harry Ensley, a chemical expert on the manufacture of 2,4,5-T (A3241-3243, A3953-A3966, AI47-48) , and Ralph Nash, a nationally renowned authority on government contracts (A6989-A7000, A10347-A10355, AI46-47). The panel at Op. 31 *agreed entirely* with Plaintiffs:

The defendants do not contest that the government's **contractual specifications**

> for Agent Orange are **silent regarding the method of manufacturing** or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced.. ...
> Indeed, **they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.**

Unlike the lower court, the panel concluded at p.33

> [There is a] **triable issue of fact** as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel. (Emphasis added)

Again, this should have ended the enquiry. Defendants failed to establish the necessary "significant conflict" between contract specifications and state law duties regarding design required by Boyle.[6] 487 US at 508-509. AS25.

Instead, the panel disregarded both its quotation of *Boyle* at Op. 20 ("assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.") and at 23 (government must have "made a discretionary determination about the material it obtained that related to the defective design feature at issue."). It held that because the government's unsophisticated testing of the

---

[6] Plaintiffs, supported by the affidavit of Dr. Ensley, contended that the defendants should have manufactured their 2,4,5-T with lower temperatures and longer hold times, which would have resulted in a far safer product. AS22, AS25, RS11, RS57-58, A3953-3966. Plaintiffs describe this as a manufacturing defect. AB43-56. At 29, FN 15 the panel redefines this as a "design defect." However it is described, the evidence is clear that it was never considered by the government. (In this light, the panel's statement at 17, FN 9 that "the plaintiffs' briefs make no arguments regarding the district court's findings as to their ... manufacturing defect claims" is both curious and inaccurate. *See* AB43-56, AS27-28.)

product showed "no health hazard," Op. 36 – even though their tests could not even detect dioxin[7] and were not designed to show dioxin's long term health effects -- the government somehow *retroactively* implicitly approved "the design feature in question." Op. 38, 39. Thus, the court granted summary judgment even though "defendants do not rely on a contractual duty to demonstrate the required conflict between federal interests and state law," Op. 39, FN 18, and abandoned *Boyle* in holding that the government contractor defense does not require "a conflicting, express contractual duty." Op. 38. The panel concluded that the "reasonably precise specification" prong could be jettisoned whenever the government later reorders "the same product **with knowledge of its relevant defects**," because this "plays the identical role in the defense as listing specific ingredients, processes, or the like." Op. 38. (Emphasis added).

Boyle says nothing of the kind. It concerns itself with disclosure at the time the contract is formed. Moreover, the panel never explains what "defect" the government supposedly approved; indeed, the panel stated that the government approved the product precisely because *it did not find a defect*. Op. 36. It is axiomatic that the

[7] All of the Defendants regularly tested their products for the level of dioxin contamination. The government by contrast did not know even that such a test could be performed until 1970. AB37-AB38, RS28.

government cannot ratify a defect which it fails to discover.[8] Ruling that mere reordering without knowledge of a defect, without requiring the contractor to perpetuate the defect, is a "precise specification" stretches Prong 1 beyond any conceivable breaking point. Any government reorder of a defective product would satisfy the government contractor defense, even if the defect was not mandated by the contract and the government was ignorant of the defect, merely because the product passed any inadequate government safety test.

The panel purports to justify this gross deviation from *Boyle* and *Grispo*, p. 12-14 *infra*, by relying on *Lewis, supra*, holding that once the government tests a chemical product in *any* way for *any* harm, it immunizes the manufacturer. It does this through a tortured reading of the word "any" in the *Lewis* decision at Op. 37, citing 985 F 2d. at 89.

> "We hold that when the [g]overnment reordered the specific Babcock cable, with the knowledge of its alleged design defect, the [g]overnment approved reasonably precise specifications for that product such that the manufacturer qualifies for the military contractor defense for *any* defects in the design of the product."(Emphasis added by the panel).

As will be shown, the word "any" in the quote above can only mean "any design

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[8] The panel's asserted defect ignores the panel's own conclusion that the manufacturers never told the government of the multiple health hazards of dioxin contamination in 2,4,5-T, nor how the government's conclusion that Agent Orange was harmless resulted in part from the manufacturers' blatant misrepresentation that none of the workmen in their factories have shown any ill effect." *Compare* Op. 47-48 with A4624, AS43, RS73, RS74, RS80.

defect known to the government when it reordered the product."

In *Lewis* the original parachute cable specifications allowed the contractor to use different types of corrosion protection. The coating the contractor selected adequately protected the steel as long as it was not cut. 985 F.2d at 84. When the government learned that cable became corroded after being cut, the government chose to change its maintenance manual to warn against cutting the cable's coating during maintenance operations and redesigned the windshield to further avoid cutting the cable's coating. *Id* at 85. At the same time, however, the government ordered replacement of the cut cable with the same part – the cable which was susceptible to corrosion if the protective coating was cut – and did so with full knowledge of the design defect in the "reasonably precise specification.". *Id* at 89.

Lewis held that once the government specifically ordered a part knowing the precise nature of the design specification, and hence the "defect," *Boyle* was satisfied. Thus, the *Lewis* contractor could not possibly comply with the order unless it supplied the product with the defect. In *Agent Orange*, by contrast, as the panel itself states, the product ordered could or could not be defective, depending solely on the contractor's choice of the manufacturing process, while the government did not even know of the "design defect" – the dioxin contamination resulting from the manufacturing process. *Lewis* does not apply at all.

Even more significant, the panel's conclusion is irreconcilable with

Grispo, supra. In *Grispo,* the defendants, asbestos manufacturers, had a far stronger defense than that offered here. The Navy was fully aware of both the dangers posed by asbestos and that the manufacturers provided no warnings on the packaging, but it still independently decided not to provide this information to the workers. 897 F.2d at 631-633. Indeed, when the asbestos manufacturers offered to issue warnings on the packaging specified by the contract, the Navy responded that "we do not believe any specification changes are needed". *Id* at 633. Nonetheless, this court ruled that the first element of the government contractor defense, requiring the government to approve "reasonably precise specifications," can only be invoked where the government's specifications limit "the contractor's ability to accommodate safety in a different fashion." Because the government did not "(stand) in the way of manufacturers issuing warnings on their own," they were not entitled to summary judgment on the government contractor defense. *Id* at 633.

Yet, at Op. 33, the panel disregards the exact same finding:

> [There is a] "triable issue of fact as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel."

Clearly, it is *Grispo*'s holding, not the panel's, which is consistent with *Boyle's* mandate that the government contractor defense does not apply if "the contractor could comply with both his contractual obligations and the state prescribed duty of care." 487 US at 509. This includes manufacturing methods, as stated in *Grispo* at

631: "government contracts often may focus upon product content and design while leaving other safety-related decisions, such as the method of product manufacture." This is certainly true here where the government did not even know how the Defendants manufactured their 2,4,5-T. Under *Grispo,* this fact, on its own, would have been more than sufficient to defeat summary judgment.[9]

As the *Grispo* court held, "Boyle's requirement of 'reasonably precise specifications' mandates that the federal duties be imposed upon the contractor ... Stripped to its essentials, the military contractor's defense under Boyle is to claim 'The government made me do it.'" *Id.* at 630, 632. (Emphasis in the original) : Here, the panel dispensed with what *Grispo* described as the essence of the defense by granting judgment to the defendants even though it acknowledged that there was an issue of fact over whether the government "made them do it." Because the *Agent Orange* panel's ruling cannot be reconciled with *Grispo*, asbestos manufacturers, and other companies which supply defective products to the government will now be shielded from liability whether or not their contracts allow them to "accommodate safety in a different fashion".

3. <u>The Panel Improperly Affirmed the Lower Court's Discovery Denial</u>

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[9] *Grispo* explicitly noted that the government contractor defense as defined in *Boyle* was far narrower than that established by the Second Circuit in *In Re: Agent Orange Product Liability Litigation*, 818 F.2d 145 (2nd Cir. 1987) (Cert. Denied), 484 U.S. 1004 (1988), 897 F.2d at 634-635. This panel's government contractor analysis eviscerates *Grispo* and retreats to pre- *Boyle* law of 1987.

The panel's affirmance of the lower court's denial of discovery (principally of depositions taken in other cases) because the plaintiffs failed to "tailor their request to materials reasonably expected to produce relevant non-duplicative information," Op. 54, is also irreconcilable with the facts. As required by Rule 56(f), Plaintiffs submitted an affidavit specifically identifying multiple lawsuits, many of which were filed after the conclusion of the Agent Orange MDL, concerning the Defendants' knowledge of the dangers of dioxin and the forseeability of its cancer-causing effects. This could have supplied information critical to the panel's own prong 3 analysis. AI51-54. Plaintiffs case for more discovery was at least as great as that in *Meloff v. New York Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995), where this court reversed summary judgement when discovery was denied. Given Defendants failure to even brief this issue, Op. 53, the panel's finding is inexplicable.

CONCLUSION

This court should rehear the decision of the panel, because the rule it adopted allows a contractor to walk away from state law liability even when there is no countervailing federal interest. This pre-empts the field whenever a government contract is involved, which is precisely what *Boyle* sought to avoid. Viet Nam veterans who suffer from crippling and lethal diseases as a result of their service to this nation deserve better from the constitutional system they fought to protect.

Respectfully submitted,

Dated: March 20, 2008

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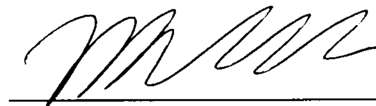

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Exhibit
A

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued: June 18, 2007 Final Submission: August 3, 2007

5 Decided: February 22, 2008)

6
7 ---

8 In re "Agent Orange" Product Liability
9 Litigation

10 ---

11 J. MICHAEL TWINAM,

12 Plaintiff-Appellant,

13 - v - 05-1509-cv

14 DOW CHEMICAL COMPANY, et al.,

15 Defendants-Appellees.

16 ---

17 ROBERT S. BAUER and SANDRA J. BAUER,

18 Plaintiffs-Appellants,

19 - v - 05-1693-cv

20 DOW CHEMICAL CO., et al.,

21 Defendants-Appellees.

22 ---

23 SHERYL A. WALKER, ERIC C. WALKER, A Minor, By his Mother and Next Friend on
24 behalf of SHERYL A. WALKER, STEPHEN J. WALKER, WILLIAM HAMILTON and ESTHER M.
25 HAMILTON, His Wife, Individually and on Behalf of All Others Similarly
26 Situated,

27 Plaintiffs-Appellants,

28 - v - 05-1694-cv

29 DOW CHEMICAL CO., et al.,

30 Defendants-Appellees,

1 DOES 1-100,

2 Defendants.

3 --

4 SHERMAN CLINTON STEARNS and DORTHA MONYENE STEARNS,

5 Plaintiffs-Appellants,

6 - v - 05-1695-cv

7 DOW CHEMICAL COMPANY, et al.,

8 Defendants-Appellees.

9 --

10 WILMER PLOWDEN JR.,

11 Plaintiff-Appellant,

12 - v - 05-1696-cv

13 DOW CHEMICAL CO., et al.,

14 Defendants-Appellees.

15 --

16 CHARLES T. ANDERSON,

17 Plaintiff-Appellant,

18 - v - 05-1698-cv

19 DOW CHEMICAL COMPANY, et al.,
20
21 Defendants-Appellees,

22 PFIZER, INC., et. al.,

23 Defendants.

24 --

25 LINDA FAYE CLOSTIO-BREAUX, RACHEAL M. BREAUX, JOEY M. BREAUX, APRIL R. BREAUX,
26 STACY M. BREAUX, ERIC J. BREAUX, and SCOTT M. BREAUX,

27 Plaintiffs,

28 CHARLES J. BREAUX,

29 Plaintiff-Appellant,

30 - v - 05-1700-cv

31 DOW CHEMICAL COMPANY, et al.,

32 Defendants-Appellees.

33 --

1 THOMAS G. GALLAGHER,

2 Plaintiff-Appellant,

3 - v - 05-1737-cv

4 DOW CHEMICAL CO. and OCCIDENTAL CHEMICAL CORP.,

5 Defendants-Appellees.

6 --

7 DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON and
8 EMILY ELIZABETH STEPHENSON,

9 Plaintiff-Appellants,

10 - v - 05-1760-cv

11 DOW CHEMICAL CO., et al.,

12 Defendants-Appellees.

13 --

14 CASEY J. SAMPEY, JR.,

15 Plaintiff-Appellant,

16 - v - 05-1771-cv

17 DOW CHEMICAL CO., et al.,

18 Defendants-Appellees.

19 --

20 CHRISTINE NELSON, Individually and on behalf of her deceased husband, FRANKLIN
21 NELSON, REGINALD WILLIAMS, KAREN HOLLAND, FRANKLIN NELSON JR. and SHALISA
22 NELSON,

23 Plaintiffs-Appellants,

24 - v - 05-1810-cv

25 DOW CHEMICAL CO., et al.,

26 Defendants-Appellees.

27 --

28 HENRY C. KIDD and SHIRLEANE J. KIDD,

29 Plaintiffs-Appellants,

30 - v - 05-1813-cv

31 DOW CHEMICAL CO., et al.,

32 Defendants-Appellees.

33 --

34 WILLIE WILLIAMS JR., and RITA WILLIAMS,

1 Plaintiffs-Appellants,

2 - v - 05-1817-cv

3 DOW CHEMICAL CO., et al.,

4 Defendants-Appellees.

5 --

6 JOE ISAACSON and PHYLLIS LISA ISAACSON,

7 Plaintiffs-Appellants,

8 - v - 05-1820-cv

9 DOW CHEMICAL CO., et al.,

10 Defendants-Appellees.

11 --

12 VICKEY S. GARNCARZ,

13 Plaintiff-Appellant,

14 - v - 05-2450-cv

15 DOW CHEMICAL CO., et al.,

16 Defendants-Appellees.

17 --

18 JACK RICHARD PATTON,

19 Plaintiff-Appellant,

20 - v - 05-2451-cv

21 DOW CHEMICAL CO., et al.,

22 Defendants-Appellees.

23 --

24
25 Before: MINER, SACK, and HALL, Circuit Judges.

26 Appeals from final judgments of the United States
27 District Court for the Eastern District of New York (Jack B.
28 Weinstein, Judge) granting summary judgment to the defendants,
29 orders denying certain requests for discovery, and the order
30 denying the Stephenson plaintiffs' motion to amend their
31 complaint.

1 Affirmed.

2 JAMES BOANERGES, Cooper, Sprague, Jackson &
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53 Davis, Peter L. deFur, Alan Lockwood, David
54 Ozonoff, Arnold J. Schecter, David Wallinga,
55 Carl F. Cranor, The Council for Education and

1 Research on Toxic, and the Lymphoma Foundation
2 of America.

3

4 SACK, Circuit Judge:

5 More than thirty-five years ago, the United States
6 military stopped using Agent Orange and related chemicals as
7 defoliants to prosecute the war in Vietnam. This appeal is but
8 the latest chapter in a thirty-year struggle by the litigants,
9 their counsel, and judges of the United States District Court for
10 the Eastern District of New York and of this Court to bring to
11 just legal closure to the alleged consequences of that use.

12 We explain below why these sixteen unconsolidated
13 appeals are now before us and why, in our view, the government
14 contractor defense applies to bar these claims. In the course of
15 doing so, we consider the discovery limitations imposed by the
16 district court and that court's denial of the Stephenson
17 plaintiffs' motion to amend their complaint. By an opinion
18 written by Judge Hall also filed today, we decide that those of
19 the sixteen cases that were originally filed in state court were
20 properly removed by the defendants to federal court. A third
21 decision by the panel, written by Judge Miner, addresses the
22 separate issues related to the use of Agent Orange raised on
23 appeal in Vietnam Assoc. for Victims of Agent Orange/Dioxin v.
24 Dow Chemical Co., No. 05-1953-cv.

25 The plaintiffs pursuing this appeal are United States
26 military veterans or their relatives who allege that myriad
27 injuries, mostly forms of cancer, were caused by the veterans'
28 exposure to the chemical defoliant "Agent Orange" during service

in Vietnam.[1] They assert that the district court erred in concluding that the government contractor defense -- which protects government contractors from state tort liability under certain circumstances when they provide defective products to the government -- applied to bar the plaintiffs' claims. The plaintiffs contend further that the district court abused its discretion by denying them discovery beyond what was available in files from prior Agent Orange litigation. We disagree with the plaintiffs on both counts.

We also conclude that it was error to deny the Stephensons' motion to amend their complaint. In light of our conclusion that the defendants are entitled to invoke the government contractor defense, however, we find the error to be harmless.

We therefore affirm the judgments of the district court in all respects.

BACKGROUND

The cases concerning the United States military's acquisition and use of Agent Orange during the Vietnam War, of which these are but a relative few, and their massive factual

[1] Plaintiff Garncarz is the only plaintiff who alleges harmful exposure to Agent Orange outside of Vietnam. She contends that her husband died from conditions resulting from his exposure to Agent Orange along the Korean Demilitarized Zone. She does not, however, raise any distinct arguments arising out of her husband's alleged exposure in Korea. We therefore consider her case, for present purposes, as indistinguishable from the others before us.

records, have been addressed in so many different judicial opinions over the years that we do not even attempt to list them here. See generally In re "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 404, 410-14 (E.D.N.Y. 2004) ("Agent Orange III Gov. Contractor Def. Op."). Neither do we undertake a detailed retelling of the history of or facts underlying this litigation. See id. at 407-22 (describing the history of Agent Orange lawsuits brought by Vietnam veterans).[2] Instead, we set forth below only what we think necessary for an understanding of our resolution of these appeals.

Agent Orange was one of several chemically similar herbicides[3] used by the United States government during the Vietnam War in connection with "Operation Ranch Hand," the code name for the military's efforts to defoliate various areas in Vietnam. See In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 19 (E.D.N.Y. 2005) ("Between 1961 and 1971, herbicide mixtures . . . were used by the United States and Republic of Vietnam . . . forces to defoliate forests and mangroves, to clear

[2] The Court's opinion in Vietnam Assoc. for Victims of Agent Orange/Dioxin v. Dow Chem. Co., – F.3d –, 2008 WL –, 2008 LEXIS App. –, No. 05-1953-cv (2d Cir. 2008), filed today, sets forth in some detail, based on the record in that litigation, the history of the employment of Agent Orange and related chemicals to prosecute the war in Vietnam.

[3] The several formulations were, like Agent Orange, named according to the color-coded band on the drums containing the chemicals. Since Agent Orange was the most widely deployed, the parties refer to all the herbicides collectively as "Agent Orange" unless the particular circumstance requires that the agents be distinguished. We adopt the same convention.

1 perimeters of military installations and to destroy 'unfriendly'
2 crops, as a tactic for decreasing enemy armed forces[']
3 protective cover and food supplies."). The government purchased
4 the defoliants from the defendants-appellees in the instant
5 appeals pursuant to various government contracts.[4] As the
6 defoliation campaign intensified, many of the contracts were
7 subjected to various government directives entered pursuant to
8 the Defense Production Act of 1950, see 50 U.S.C. app. § 2061 et
9 seq., and regulations promulgated pursuant thereto. The
10 government characterized delivery of Agent Orange as part of the
11 prosecution of military action, which enabled the defendants to
12 procure otherwise scarce materials and equipment necessary to
13 produce it. Agent Orange III Gov. Contractor Def. Op., 304 F.
14 Supp. 2d at 424-25.

15 The Agent Orange delivered to the government was a
16 mixture of two different herbicides: 2,4-D (2,4-
17 Dichlorophenoxyacetic acid) and 2,4,5-T (2,4,5-
18 Trichlorophenoxyacetic acid). The contracts required that the
19 chemicals be nearly 100% pure and that they be combined in
20 roughly equal proportions.

21 The manufacture of 2,4,5-T produced, as a byproduct,
22 trace elements of the toxic chemical dioxin (2,3,7,8-
23 Tetrachlorodibenzo para dioxin (TCDD)). The plaintiffs allege

[4] Most of these contracts have been produced to the plaintiffs, but some are difficult to read in the form in which they survive, and, as discussed below, some are missing.

that it is dioxin that caused the injuries of which they now complain.

The amount of dioxin contained in a particular batch of Agent Orange varied depending on the production method used by its manufacturer. See In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 150, 173 (2d Cir. 1987) ("Agent Orange I Settlement Op."), cert. denied, 484 U.S. 1004 (1988); In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 187, 189 (2d Cir. 1987) ("Agent Orange I Opt-Out Op."), cert. denied, 487 U.S. 1234 (1988). The defendants knew at the time they were manufacturing Agent Orange that dioxin was a byproduct and that it could cause certain kinds of harm under certain conditions. Various government agencies and officers assessed the toxicity of the defoliating agents, including Agent Orange, being used in Vietnam. Precisely what knowledge the government and the defendants possessed and when they came to have it is in dispute.

I. Overview of Agent Orange Litigation

The plaintiffs now before us on appeal represent a small fraction of the many Americans who have pursued legal claims arising out of the government's use of Agent Orange to fight the Vietnam War. See generally Agent Orange III Gov. Contractor Def. Op., 304 F. Supp. 2d at 410-14 (listing more than one hundred Agent-Orange-related decisions); see also, e.g., id. at 407-23 (detailing the history of Agent Orange litigation involving Vietnam veterans). Their claims find their roots in the "Agent Orange I" litigation, the veterans' class action begun in the late 1970s and settled in 1984.

In those cases, the Judicial Panel on Multidistrict Litigation designated the United States District Court for the Eastern District of New York as the Multidistrict Litigation ("MDL") court for all federal Agent Orange-related cases brought by military veterans of various countries. Thereafter, first Judge Pratt and then Judge Weinstein presided over proceedings involving approximately 600 litigants, hundreds of thousands of putative class members, several years of motion practice (including motions for class certification), and one appeal to this Court. On the eve of trial of those cases, the defendants and class representatives reached what was then thought by the parties and the courts to be a final global settlement of Agent Orange-related cases in the amount of $180 million. Agent Orange I Settlement Op., 818 F.2d at 152-55.

Because of what we termed "formidable hurdles" to the plaintiffs' claims, id. at 174, we affirmed the district court's approval of the settlement at what -- even at a total of $180 million -- we termed "nuisance value," equivalent to "at best only a small multiple of, at worst less than, the fees the chemical companies would have had to pay to their lawyers had they continued the litigation." Id. at 171. The Plaintiffs in 287 cases opted out of the class and thereby the settlement.

Thereafter, the district court granted the defendants' motion for summary judgment in those opt-out actions "on the alternative dispositive grounds that no opt-out plaintiff could prove that a particular ailment was caused by Agent Orange, that no plaintiff could prove which defendant had manufactured the

1 Agent Orange that allegedly caused his or her injury, and that
2 all the claims were barred by the military contractor defense."
3 Agent Orange I Opt-Out Op., 818 F.2d at 189 (internal citations
4 omitted).

5 From 1987 through 1997, the settlement fund, which,
6 with interest and other augmentations, eventually grew to about
7 $330 million was distributed to, inter alios, some 291,000 class
8 members who filed claims prior to the 1994 cutoff date. Agent
9 Orange III Gov. Contractor Def. Op., 304 F. Supp. 2d at 421.
10 Meanwhile, two sets of plaintiffs who had been members of the
11 original plaintiff class and who were therefore entitled to
12 receive settlement payments, but whose injuries had manifested
13 after their opportunity to opt out of the class action had
14 expired, filed class actions on behalf of themselves and other
15 similarly situated veterans. The district court decided that
16 because the plaintiffs were class members, their claims were
17 barred, and we affirmed. In re "Agent Orange" Prod. Liab.
18 Litig., 996 F.2d 1425, 1439 (2d Cir. 1993) ("Agent Orange II"),
19 overruled in part on other grounds by Syngenta Crop Protection,
20 Inc. v. Henson, 537 U.S. 28, 34 (2002).

21 Shortly after the settlement fund distributions were
22 completed, the third, and instant, series of lawsuits was
23 initiated. These were brought by two of the sixteen plaintiffs
24 now before us, the Isaacsons and Stephensons, who had not been
25 members of the original plaintiff class. These veterans and
26 their families alleged injuries that resulted from exposure to
27 Agent Orange but did not manifest until after the 1994 cutoff

1 date for filing settlement claims in the original actions. In a
2 2001 opinion, we held that the district court had erred in
3 deciding that the plaintiffs' claims were barred by the Agent
4 Orange I settlement. Stephenson v. Dow Chem. Co., 273 F.3d 249,
5 261 (2d Cir. 2001) ("Agent Orange III").[5] We concluded that a
6 conflict existed between the plaintiffs and the class
7 representatives because the representatives had permitted the
8 settlement fund to terminate without a provision for post-1994
9 claimants such as these plaintiffs. Id. at 260-61 (relying on
10 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) and Amchem Prods.,
11 Inc. v. Windsor, 521 U.S. 591 (1997)). As a result, the
12 plaintiffs were not adequately represented by the class, and
13 Agent Orange I did not prevent them from pursuing their claims.
14 Id. at 261.[6]

15 II. The Instant Appeals

16 On remand, the Stephensons and Isaacsons were
17 eventually joined by fourteen other sets of plaintiffs alleging
18 Agent Orange injuries first discovered after the 1994 cutoff

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[5] We also held that the defendants had properly removed the Isaacson case from state to federal court. Id. at 256-57. As explained in the companion opinion, see Stephenson v. Dow Chem. Co., 346 F.3d 19, 21 (2d Cir. 2003), this holding was subsequently vacated by the Supreme Court and remanded to the district court for a further determination as to the propriety of removal. See Dow Chem. Co. v. Stephenson, 539 U.S. 111, 112 (2003).

[6] At oral argument, we requested supplemental briefing on the question of whether we are bound by our decision in Agent Orange III to conclude that these plaintiffs are not bound by the settlement agreement addressed in Agent Orange I. We received the parties' submissions on August 3, 2007. In light of our disposition regarding the government contractor defense, however, we decline to reach the issue.

1 date. The cases were not consolidated, but the district court
2 conducted simultaneous proceedings and applied rulings in the
3 Stephenson and Isaacson cases to each of the others. Together,
4 the plaintiffs raised three tort claims under various state laws:
5 design defect, failure to warn, and manufacturing defect.

6 Six days after our mandate issued in Agent Orange III,
7 the defendants moved in the district court for summary judgment
8 against the Stephensons and Isaacsons.[7] At about the same time,
9 the Stephensons moved to amend their complaint.

10 On February 9, 2004, several days after receiving
11 voluminous submissions from the plaintiffs and two weeks after
12 oral argument, the district court issued four decisions, two of
13 which -- one granting the defendants' motion for summary judgment
14 and the other denying the Stephensons' motion to amend -- are now
15 before us on appeal.[8] Even though only the motions for summary
16 judgment in Stephenson and Isaacson were before it, the district
17 court considered all the evidence put forth by the parties in

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[7] Although not expressly raised by the appellants or noted by the district court, the defendants' Rule 56.1 Statement appears to have been in blatant violation of Local Rule 56.1, which requires summary judgment movants to list each undisputed material fact "followed by citation to evidence which would be admissible . . . ." S.D.N.Y. & E.D.N.Y. Local R. 56.1(a), (d), available at http://www1.nysd.uscourts.gov/rules/rules.pdf. The defendants' approach to compliance with this rule has rendered our task of determining on appeal whether there are genuine issues of disputed material fact considerably more difficult than it should have been.

[8] The district court also denied plaintiffs' motion to strike certain of defendants' affidavits and exhibits -- a ruling the plaintiffs did not appeal -- and found removal of the state court cases proper. Judge Hall's companion opinion addresses this latter ruling.

Agent Orange I in ruling on defendants' summary judgment motion. Having done so, it concluded that the government contractor defense barred both the design defect and failure-to-warn claims. Agent Orange III Gov't Contractor Def. Op., 304 F. Supp. 2d at 441-42. As to plaintiffs' manufacturing defect claims, the court concluded that they were barred because the defendants' products conformed to the government's specifications. Id. at 442.

In granting the motion for summary judgment, however, the district court noted that the plaintiffs had complained of "difficulties in obtaining evidence for their position," an "understandable" problem in light of the passage of time between exposure and injury. Id. "To ensure due process," id., therefore, Judge Weinstein charted a distinctly unusual course -- he permitted discovery, never undertaken by Agent Orange III litigants in light of the timing of prior appeals and the defendants' motion, to continue through August 10, 2004, and he set a motion schedule for an anticipated motion for reconsideration based on the results of that discovery. Id.

Thereafter, the district court ordered that all files relating to Agent Orange sent to the National Archives pursuant to court order following Agent Orange I be returned to the district court and made available to the plaintiffs for their review. The magistrate judge assigned to the case then denied all requests for additional non-MDL discovery, although the district court subsequently granted the plaintiffs access to "up to six complete deposition transcripts utilized in non-MDL 381

1 cases claimed by plaintiffs to shed light on relevant knowledge
2 of defendants."
3 On November 3, 2004, the plaintiffs in Stephenson and
4 Isaacson, as anticipated, filed a motion for reconsideration of
5 the district court's order granting summary judgment. On
6 November 16, 2004, the district court, without awaiting response
7 from the defendants, denied the plaintiffs' motion. In re
8 "Agent Orange" Prod. Liab. Litig., 344 F. Supp. 2d 873, 874-75
9 (E.D.N.Y. 2004). It further ordered the defendants to "submit a
10 specific judgment in favor of each named defendant against each
11 named plaintiff whose claims arise from service in the Armed
12 Forces of the United States," thereby rendering the court's
13 judgment in Stephenson and Isaacson applicable to each of the
14 fourteen additional plaintiffs now before us on appeal. Id. at
15 875.
16 Following a motion by the Bauer plaintiffs, who argued
17 that granting the motion for summary judgment was inappropriate
18 because, inter alia, the procedural posture of their case had
19 rendered them unable to respond to the defendants' motion, all
20 plaintiffs were ultimately given until February 28, 2005, to
21 submit additional papers supporting their position that summary
22 judgment should not have been granted. Oral argument was held on
23 February 28. On March 2, 2005, the district court summarily
24 reaffirmed its November 16, 2004 Order. In re "Agent Orange"
25 Prod. Liab. Litig., No. 79 MD 381, 2005 WL 483416, at *1

1 (E.D.N.Y. Mar. 2, 2005). Separate judgments of dismissal in each
2 action were then filed.

3 More than a year before, in February 2004, the district
4 court had denied the Stephensons' motion to amend their complaint
5 to add additional defendants and several new causes of action.
6 Stephenson v. Dow Chem. Co., 220 F.R.D. 22, 25-26 (E.D.N.Y.
7 2004). Although the defendants had never answered the
8 Stephensons' original complaint, filed pro se in the Western
9 District of Louisiana, the motion to amend was denied on a
10 variety of grounds. Id.

11 The plaintiffs appeal. Before us are challenges to (1)
12 the district court's grant of the motion for summary judgment as
13 to their design claim only;[9] (2) the denial of their requests for
14 additional discovery; and (3) the denial of the Stephensons'
15 motion to amend.[10]

16 **DISCUSSION**

17 I. Summary Judgment

18 A. Standard of Review

[9] Because the plaintiffs' briefs make no arguments regarding the district court's findings as to their failure-to-warn or manufacturing defect claims, we deem these claims to have been abandoned. See Hughes v. Bricklayers & Allied Craftworkers Local #45, 386 F.3d 101, 104 n.1 (2d Cir. 2004).

[10] Not all of the plaintiffs have raised the same arguments on appeal. Because the defendants have grouped the plaintiffs together as one unit in opposing this appeal, and because by Order dated September 15, 2005, we granted the plaintiffs permission to rely on the arguments made by one another, we here treat each issue raised on appeal by one plaintiff, with the exception of the Stephensons' motion to amend, as having been raised by all.

We review the district court's grant of summary judgment de novo, "construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor." Allianz Ins. Co. v. Lerner, 416 F.3d 109, 113 (2d Cir. 2005). "We will affirm the judgment only if there is no genuine issue as to any material fact, and if the moving party is entitled to a judgment as a matter of law." Id. (citing Fed. R. Civ. P. 56(c)).

B. The Government Contractor Defense

Almost twenty years ago, in Boyle v. United Technologies Corp., 487 U.S. 500 (1988), the Supreme Court recognized the government contractor defense,[11] a federal common law doctrine. The Court concluded that the "uniquely federal interest[]" of "getting the Government's work done" requires that, under some circumstances, independent contractors be protected from tort liability associated with their performance of government procurement contracts. Id. at 504-05.

The Court looked to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"), for guidance. Id. at 509-12. Under the FTCA, Congress waived sovereign immunity for the government insofar as Congress "authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the

[11] The defense is referred to in the case law as the "government contractor defense" or the "military contractor defense." For purposes of this opinion, we refer to it as either the "government contractor defense" or simply the "contractor defense."

extent that a private person would be liable under the law of the place where the conduct occurred." Id. at 511 (citing 28 U.S.C. § 1346(b)). The Act's discretionary function exception, however, carves out from that authorization "'[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.'" Id. (quoting 28 U.S.C. § 2680(a)) (brackets in original).

The Boyle Court concluded that the protection for discretionary action taken by federal agencies and employees implies some measure of similar protection for government contractors even though they are themselves non-governmental entities. The Court noted that the exercise of government discretion is inherent to military contracting:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.

Id. Accordingly, the Court said,

> permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. . . . To put the point differently: It makes little sense to insulate the Government against financial

1 liability for the judgment that a particular
2 feature of military equipment is necessary
3 when the Government produces the equipment
4 itself, but not when it contracts for the
5 production.

6 Id. at 511-12 (citation omitted). The defense thus protects
7 government contractors from the specter of liability when the
8 operation of state tort law would significantly conflict with the
9 government's contracting interest. Id. at 507.

10 Adopting the reasoning employed in several previous
11 court of appeals decisions, the Court limited "the scope of
12 [state law] displacement" to instances in which "(1) the United
13 States approved reasonably precise specifications [for the
14 allegedly defectively designed equipment]; (2) the equipment
15 conformed to those specifications; and (3) the [contractor who
16 supplied the equipment] warned the United States about the
17 dangers in the use of the equipment that were known to the
18 supplier but not to the United States." Id. at 512. The first
19 two requirements "assure that the suit [from which protection is
20 sought] is within the area where the policy of the 'discretionary
21 function' would be frustrated -- i.e., they assure that the
22 design feature in question was considered by a Government
23 officer, and not merely by the contractor itself." Id. The
24 third requirement is imposed because "in its absence, the
25 displacement of state tort law would create some incentive for
26 the manufacturer to withhold knowledge of risks, since conveying
27 that knowledge might disrupt the contract but withholding it
28 would produce no liability." Id. The Court therefore

1 "adopt[ed] this provision lest [its] effort to protect
2 discretionary functions perversely impede them by cutting off
3 information highly relevant to the discretionary decision." Id.
4 at 512-13.

5 The plaintiffs here contend that the defendants cannot,
6 at least as a matter of law at the summary judgment stage,
7 satisfy any one of the three requirements.

8 1. Reasonably Precise Specifications.

9 The plaintiffs argue that the defendants have not
10 established the first Boyle requirement -- that "the United
11 States approve[] reasonably precise specifications," 487 U.S. at
12 512 -- because: (1) Agent Orange procurement contracts contained
13 no specifications regarding the defective feature, dioxin; (2)
14 there is at least a genuine issue of material fact regarding
15 whether Agent Orange was a commercially available product whose
16 specifications were created by the defendants rather than the
17 government, whose involvement was minimal; and (3) the alleged
18 defect was unrelated to the contractual specifications for
19 2,4,5-T because it was the defendants' chosen manufacturing
20 processes -- with which the government was not involved and which
21 were not integral to contract compliance -- that caused dioxin to
22 be present.[12]

[12] The plaintiffs also complain that because the defendants cannot produce every contract between them and the government for Agent Orange, it is impossible for the defendants to prove what contractual specifications they were subject to under the missing contracts and, therefore, impossible for the defendants to meet their burden of proof under the government contractor defense.

1 The first argument concerns the proper conception of
2 the complained-of defect and can readily be resolved. The second
3 and third arguments are, in distinct ways, about how the
4 government exercised its discretionary authority: The second
5 argument asks whether the government was involved in the
6 contractual process to the extent that Boyle requires; while the
7 third asks us to determine in what context the government must
8 exercise its discretion for the government contractor defense to
9 apply. To conduct this third inquiry, we must determine the
10 source of the "conflict" between the government's interests and
11 state tort law that is required for the defense to apply.

12 **a. The complained-of defect**

13 The plaintiffs assert that because the contracts at
14 issue contain no specifications whatsoever with regard to the
15 dioxin, the government exercised no discretionary authority over
16 that which is the subject of their state tort litigations, as a
17 successful defense based on Boyle requires. Their argument
18 misconceives the nature of what the contracts in question were
19 about and defines the alleged defective design too narrowly.

This argument is without merit for many reasons. We note here only that although it is true that a defendant who had no way to demonstrate what specifications were within the contract or contracts at issue would likely have difficulty successfully asserting the contractor defense, the plaintiffs here do not attempt to rely on particular contracts or to distinguish one contract from another. None of their arguments regarding the first Boyle prong rely on the specifications of a particular contract versus the specifications of another. The plaintiffs therefore have not demonstrated that the inability to produce each and every contract is relevant to the applicability of the government contractor defense for the Agent Orange contracts as a whole.

1 The contracts at issue provided for the defendants to
2 supply Agent Orange. The Agent Orange was allegedly defective
3 because it contained excessive trace amounts of dioxin, which
4 were present as a result of the manufacture of a specified Agent
5 Orange component, 2,4,5-T. The dioxin -- while a defect of
6 2,4,5-T -- was not itself defective, nor did it exist within
7 Agent Orange apart from the 2,4,5-T therein.[13] It was therefore
8 the 2,4,5-T that was alleged to be defective, not the dioxin.

9 **b. The government approved specifications for a**
10 **uniquely tailored product**

11 The plaintiffs contend that the defendants cannot
12 demonstrate that the government exercised its discretionary
13 authority to create the Agent Orange specifications that are
14 contained in the contracts. The government contractor defense
15 protects federal contractors solely as a means of protecting the
16 government's discretionary authority over areas of significant
17 federal interest such as military procurement. Defendants
18 asserting the defense must demonstrate that the government made a
19 discretionary determination about the material it obtained that
20 relates to the defective design feature at issue. Where the
21 government "merely rubber stamps a design, . . . or where the
22 [g]overnment merely orders a product from stock without a
23 significant interest in the alleged design defect," the
24 government has not made a discretionary decision in need of
25 protection, and the defense is therefore inapplicable. Lewis v.

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[13] Pure lead, without defect, may be a defect of a child's painted toy.

1 Babcock Indus., Inc., 985 F.2d 83, 87 (2d Cir.) (citing Trevino
2 v. Gen. Dynamics Corp., 865 F.2d 1474, 1480, 1486 (5th Cir.),
3 cert. denied, 493 U.S. 935 (1989), and Boyle, 487 U.S. at 509)
4 (internal quotation marks omitted), cert. denied, 509 U.S. 924
5 (1993). If the government buys a product "off-the-shelf" -- "as-
6 is" -- the seller of that product cannot be heard to assert that
7 it is protected from the tort-law consequences of the product's
8 defects. Where the government is merely an incidental purchaser,
9 the seller was not following the government's discretionary
10 procurement decisions.

11 Here, the plaintiffs contend that the government
12 rubber-stamped its approval of the defendants' suggested
13 specifications, which, in turn, were simply combinations of off-
14 the-shelf, commercially available herbicides. They say that Dow
15 Chemical owned the patents for certain aspects of the herbicides'
16 component parts and that many different defendants manufactured
17 and sold 2,4,5-T and 2,4-D in various combinations as early as
18 1948, with some of the formulations including the same 50%
19 mixture as Agent Orange. As a result, the plaintiffs assert,
20 there are at least triable issues of fact as to whether (1) Agent
21 Orange and related herbicides were "stock" products, rather than
22 products tailored to the government's needs; and (2) even if the
23 herbicides were not commercially available products, Agent
24 Orange's components were devised by the defendants without the
25 significant government input necessary to meet the first Boyle
26 requirement.

1 As to the former, the plaintiffs do not dispute the
2 defendants' assertions that 2,4,5-T and 2,4-D were not
3 commercially available at the same high concentrations as that
4 contained in Agent Orange. The Stephensons, for example, concede
5 that 2,4,5-T was not commercially available in concentrations
6 greater than 55%. See Final Reply Br. for Pl.-Appellants, 05-
7 1760-cv, at 67-68. Agent Orange, by contrast, contained 2,4,5-T
8 at greater than 90% purity levels. See, e.g., Aff. of William A.
9 Krohley, counsel for defendant Hercules Inc., Oct. 27, 2004
10 ("Krohley Aff."), Exh. 11 (July 19, 1963 military specification).
11 Moreover, as the Fifth Circuit aptly noted in unrelated
12 Agent Orange litigation, the fact that a product supplied to the
13 government comprises commercially available component parts says
14 nothing about whether the finished product resulted from the
15 exercise of governmental discretion as to its design. "[A]ll
16 products can eventually be broken down into various off-the-shelf
17 components." Miller v. Diamond Shamrock Co., 275 F.3d 414, 420
18 (5th Cir. 2001); see also In re Joint Eastern and Southern Dist.
19 New York Asbestos Litig., 897 F.2d 626, 638 (2d Cir. 1990)
20 ("Grispo") (Miner, J., concurring) ("[T]he [g]overnment
21 prescription of how [stock] items should be combined and packaged
22 [is] the key to the military contractor defense . . . .").
23 As to the latter argument -- the plaintiffs' contention
24 that there was no significant government input -- the plaintiffs
25 misperceive the nature of the government involvement necessary to
26 invoke the contractor defense. That the component chemicals were

1 not developed for military use in the first instance, that some
2 aspects of their composition were patented, and that the
3 defendants may have proposed certain specifications to the
4 government, are not determinative. Boyle explicitly contemplated
5 government reliance on manufacturers' expertise in making a fully
6 informed decision as to what to order. See Boyle, 487 U.S. at
7 513. "[I]t is necessary only that the government approve, rather
8 than create, the specifications . . . ." Carley v. Wheeled
9 Coach, 991 F.2d 1117, 1125 (3d Cir.), cert. denied, 510 U.S. 868
10 (1993); see also Boyle, 487 U.S. at 513 ("The design ultimately
11 selected may well reflect a significant policy judgment by
12 [g]overnment officials whether or not the contractor rather than
13 those officials developed the design.").

14 The extent of the defendants' involvement in suggesting
15 specifications or the defendants' reliance on previously attained
16 industry expertise in doing so is thus not conclusive. The
17 government exercises adequate discretion over the contract
18 specifications to invoke the defense if it independently and
19 meaningfully reviews the specifications such that the government
20 remains the "agent[] of decision." Grispo, 897 F.2d at 630; see
21 also Stout v. Borg-Warner Corp., 933 F.2d 331, 336 (5th Cir.)
22 (government issued reasonably precise specifications when it
23 reviewed contractor's detailed drawings several times and
24 evaluated test models), cert. denied, 502 U.S. 981 (1991);
25 Harduvel v. Gen. Dynamics Corp., 878 F.2d 1311, 1320 (11th Cir.
26 1989) (government issued reasonably precise specifications for F-

1 16 fighter aircraft having approved its design following
2 "continuous back and forth" with contractor), cert. denied, 494
3 U.S. 1030 (1990).
4 With respect to Agent Orange, the record contains, for
5 example, a memorandum dated February 22, 1963, regarding "Ester
6 Specifications for U.S. Army Biological Laboratories," written by
7 an employee of one of the defendants, that discussed a February
8 8, 1963, meeting called "to satisfy the U.S. Army about
9 specifications and typical physical properties on the next type
10 of blend they [sic] will be purchasing." Mem. from I.F. Hortman
11 to, inter alios, S.D. Daniels and W.A. Kuhn (Feb. 22, 1963), at
12 1. It indicated that an effort to permit use of a different n-
13 butyl ester from 2,4,5-T was "impossible at this time because the
14 Army had studied only the normal esters," and that, therefore,
15 the chemical company would have to present the proposed change
16 directly to "the commanding officer, U.S. Army Biological
17 Laboratories and Dr. Charles Minarick, Chief of Crops Division"
18 for approval. Id. And notes from a 1968 meeting between
19 government officials and representatives of several of the
20 defendants indicate that the government insisted on a test for
21 chemical composition despite "much resistance to this added
22 requirement on the part of the Industry [sic]" as well as on a
23 98% purity level for the 2,4,5-T ester. Memorandum of R.A.
24 Guidi, Diamond Alkali Co. (Feb. 20, 1968), at 1-2.

1 We conclude, based on the evidence in the extensive
2 record that has been brought to our attention,[14] that no
3 reasonable jury could find that the government did not exercise
4 sufficient discretion for it to have been said to have "approved"
5 specifications for the herbicides. The government was plainly
6 the "agent[] of decision," Grispo, 897 F.2d at 630, with respect
7 to Agent Orange's contractually specified composition.

8 **c. The government made a discretionary**
9 **determination regarding Agent Orange's toxicity**

10 The next question, and we think it to be a more
11 difficult one, is whether the government made a discretionary
12 determination that created the conflict between the federal
13 government's interests and the defendant's state law duties that
14 is necessary to invoke the government contractor defense. The
15 plaintiffs argue that the defendants could have manufactured
16 Agent Orange that produced either dioxin-free or nearly dioxin-
17 free 2,4,5-T by employing the lower-temperature manufacturing
18 process developed and used by a German manufacturer, C.H.
19 Boehringer Sohn. This process, the plaintiffs say, would have
20 permitted the defendants to comply with their federal contractual
21 duties and deliver a less toxic defoliating agent, albeit at a
22 somewhat slower rate. As a result, the plaintiffs argue, the
23 defendants could have met both their federal duties and their

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[14] "Fed. R. Civ. P. 56 does not impose an obligation [on the court considering a motion for summary judgment] to perform an independent review of the record to find proof of a factual dispute." Amnesty America v. Town of West Hartford, 288 F.3d 467, 470 (2d Cir. 2002).

1 state tort-law duties; the direct conflict contemplated by Boyle

2 is absent; and the first requirement for the contractor defense

3 therefore cannot be established.[15]

4 (i) Analysis. In determining whether the government

5 made a discretionary decision that would create the type of

6 conflict between tort law and government interests contemplated

7 by Boyle, we are not called upon to assess the merits of the

8 alleged state tort law violation.[16] We are tasked only with

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[15] The plaintiffs at times refer to the defendants' failure to use the Boehringer process as resulting in a "manufacturing" defect. Not so. The plaintiffs allege a defective process, not that the process used was somehow erroneously applied. They therefore allege a design defect. As the Eleventh Circuit noted,

> [the] distinction between "aberrational" defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. Stated another way, the distinction is between an unintended configuration, [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results[,] [a design defect].

Harduvel, 878 F.2d at 1317 (internal citation omitted).

[16] Although not dispositive here, we nonetheless note that the plaintiffs' argument regarding the defendants' purported failure to use state-of-the-art manufacturing processes would appear problematic in ways that do not affect our decision as to the applicability of the government contractor defense as a matter of law, but which might present insurmountable obstacles were we to remand for consideration of the plaintiffs' claims on their merits. For example, documents that are part of the record on appeal indicate that the Dow Chemical Company purchased the proprietary information for the Boehringer process in December 1964 and began using it in its chemical plants two years later. See Mem. from J.D. Doedens, Chemicals Dep't, Dow Chem. Co. (Mar. 1, 1965), at 2; Mem. from K.E. Coulter, Midland Division Research & Dev., Dow Chem. Co. (Apr. 25, 1967), at 2. The plaintiffs do not explain how they can seek to hold Dow Chemical liable for Agent Orange produced using the method they now contend should have been used by all manufacturers at all relevant times, or how they might seek to distinguish among manufacturers or between

1 determining whether the government's discretionary actions with
2 respect to the allegedly defective design and the _alleged_ state
3 law tort duty conflict. If they do, the first _Boyle_ requirement
4 is met; if they do not, the government contractor defense does
5 not apply, and we must return the case to the district court for
6 trial on its merits. _Cf._ _Grispo_, 897 F.2d at 627 n.1 (noting
7 that appeal of summary judgments pertaining to applicability of
8 the contractor defense did "not raise the question whether New
9 York law imposes a duty to warn under the[] facts [of the case],
10 or whether a failure to warn was the proximate cause of the
11 [plaintiffs'] alleged injuries.").

12 The first _Boyle_ requirement is designed to ensure that
13 "a conflict with state law exists." _Lewis_, 985 F.2d at 86. We
14 have observed that, therefore, "answering the question whether
15 the [g]overnment approved reasonably precise specifications for
16 the design feature in question necessarily answers the question
17 whether the federal contract conflicts with state law." _Id._ at
18 87. If such specifications are present, the contractor's federal
19 contractual duties will inevitably conflict with alleged state

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particular manufacturers' batches of herbicides in proving that their exposure to the defoliants caused the injuries about which they now complain. _See_ _Agent Orange I Opt-Out Op._, 818 F.2d at 189 (noting the "undisputed facts that the amount of dioxin in Agent Orange varied according to its manufacturer and that the government often mixed the Agent Orange of different manufacturers and always stored the herbicide in unlabeled barrels"). Nor is it clear that under these circumstances, the defendants' knowledge dating from the late 1950s that the Boehringer plant was using a new manufacturing process would necessarily translate into a state law tort duty to have adopted it themselves.

1 tort duties to the contrary because complying with the federal
2 contract will prevent compliance with state tort law as the
3 plaintiffs have alleged that it exists. See id. Alternatively,
4 where a "contractor could comply with both its contractual
5 obligations and the state-prescribed duty of care," displacement
6 "generally" would not be warranted, and state law would apply.
7 Boyle, 487 U.S. at 509.

8 The defendants do not contest that the government's
9 contractual specifications for Agent Orange were silent regarding
10 the method of manufacture or that the government harbored no
11 preference, expressed or otherwise, regarding how the herbicides
12 were to be produced. See, e.g., Appellees' Br. at 36-37.
13 Indeed, they admit that they were under no federal contractual
14 duty to produce Agent Orange using any particular manufacturing
15 process or with any particular reference to the resulting
16 toxicity levels. See id. at 96-97, 99 (characterizing lack of
17 specifications regarding method of manufacture or toxicity levels
18 as discretionary omission and conceding that "omitted
19 specifications do not constitute contractual duties"). The
20 defendants argue instead that the government's Agent Orange
21 procurement contracts nevertheless created a conflict with their
22 alleged state tort duty to manufacture the herbicides
23 differently. The defendants reason that the documentary evidence
24 establishes as a matter of law that the manufacture of dioxin-
25 free Agent Orange was impossible and that, in any event, they
26 could not have complied with their procurement contracts with the

1 government had they used the slower, less efficient, Boehringer
2 method. They contend further that the government ordered the
3 herbicides with full knowledge of the relevant dangers, which,
4 they say, is equivalent to the government having approved a
5 reasonably precise specification about that danger. Id. at 91-
6 99, 102-04.

7 But the documents cited by the defendants as to the
8 inevitability of dioxin content in Agent Orange -- including
9 declarations by the Environmental Protection Agency that dioxin
10 in some very small amounts was "unavoidable" and that the
11 "potential risks" of harm to humans outweighed any benefits of
12 continued use of commercially available 2,4,5-T, see EPA Notice
13 of the Denial of Applications for Federal Registration of
14 Intrastate Pesticide Products Containing 2,4,5-T, 45 Fed. Reg.
15 2,898, 2,899 (Jan. 15, 1980); EPA Decision and Emergency Order
16 Suspending Registrations for the Forest, Rights-of-Way, and
17 Pasture Uses in 2,4,5-T, 44 Fed. Reg. 15,874, 15,874 n.1 (Mar.
18 15, 1979) -- do not refute what we understand to be the thrust of
19 the plaintiffs' argument: that had the defendants used the
20 Boehringer method, the Agent Orange they produced would have
21 contained no then-detectable amounts of dioxin. In that event,
22 the plaintiffs allege, the lower levels of dioxin would have
23 avoided much, if perhaps not all, of the harm allegedly suffered
24 as a result of the presence of dioxin in Agent Orange.

25 The documents submitted to the district court also do
26 not establish as a matter of law that there was an inherent

1 conflict between use of the Boehringer process and compliance
2 with defendants' contractual obligation to the government. Dow
3 Chemical adopted and used the Boehringer method, or something
4 like it, see Mem. from J.D. Doedens, Chemicals Dep't, Dow Chem.
5 Co. (Mar. 1, 1965), at 2; Mem. from Alex Widiger, Midland
6 Division Research & Dev., Dow Chem. Co. (Apr. 25, 1967), at 2, at
7 the time the government was requesting Agent Orange in increasing
8 quantities and sequestering the entire domestic market for 2,4,5-
9 T. This change in manufacturing method and its timing at least
10 raises a triable issue of fact as to whether the defendants could
11 have complied with their contractual obligations to the
12 government while using what the plaintiffs contend was a process
13 that would have resulted in a defoliating agent substantially
14 less dangerous to military personnel.

15 And so we must determine whether the government did in
16 fact, as the defendants argue, approve of the toxicity levels
17 present in Agent Orange in a manner that would create the
18 necessary conflict with the alleged state law tort duty such that
19 the latter must be displaced. We think that it did.

20 We have previously concluded that where the government
21 contracts for the purchase of a product with knowledge that the
22 product has an arguable defect, it is considered to have approved
23 "reasonably precise specifications" for that product, with the
24 known defect, for purposes of the first Boyle requirement.
25 Lewis, 985 F.2d at 89. In Lewis, the government reordered a
26 cable that connected a parachute to the crew module of an Air

1 Force fighter jet with knowledge that the coating that protected
2 the steel cable was prone to cuts, resulting in cable corrosion.
3 Id. at 85. Although the government during its initial order had
4 not made a discretionary decision about which materials should be
5 used in constructing the cable, it subsequently ordered
6 replacement cables even after an Air Force investigation into the
7 corroded cables had revealed the problem with the protective
8 coating, reasoning that changes to its maintenance manual would
9 sufficiently alleviate the risk of harm. Id. In light of this
10 considered attention by the government to the precise defect
11 alleged, we concluded that the cable could not be characterized
12 as a stock item and that the "contractor's decision regarding the
13 materials to be used for the cable" could not be "second-
14 guess[ed]." Id. at 89. We did not discuss whether or how the
15 contractor had been alerted to the government's investigation or
16 the reasons for its reordering, nor whether the contract for
17 replacement cables also omitted reference to the material used to
18 construct them, as had the original cable contract. "Based on
19 the reorder" alone, we said, "the contractor c[ould] claim: 'The
20 [g]overnment made me do it.'" Id. (quoting Grispo, 897 F.2d at
21 632).

22 Here, similarly, the record discloses that the
23 government explicitly evaluated the alleged design defect (toxic
24 2,4,5-T), and thereafter continued to order "replacement"
25 herbicides. The government examined the toxicity of what the
26 plaintiffs contend was the most toxic Agent Orange variant used

in Vietnam -- Agent Purple -- and determined that it posed no unacceptable hazard. See Tr. of Oral Arg. at 24 (plaintiffs' attorney's comments regarding Agent Purple's toxicity). On April 26, 1963, the Army conducted a meeting at its Edgewood (Maryland) Arsenal "to evaluate the toxicity of a[n herbicide] mixture known as 'Purple.'" Minutes of a Meeting Held to Discuss and Evaluate the Toxicity of 2,4-D and 2,4,5-T Compounds (Apr. 26, 1963) ("April 1963 Meeting Minutes"), at 3. Their analysis required reaching a conclusion "about dose levels and hazards to health of men and domestic animals from 2,4-D and 2,4,5-T based on the medical literature and unpublished data of various research laboratories." Id. Those in attendance included officials from various branches of the military and various other government agencies, and representatives from manufacturers Dow Chemical and AmChem Products. Id. at 2. The group heard various presentations on the subject. At the end of the meeting, the participants adopted "acute toxicity" figures for Agent Purple. They concluded

> in summary and after careful review of toxicological data related to 2,4-D and 2,4,5-T plus the knowledge as to the manner these materials have been used for defoliation in military situations in Southeast Asia, . . . that no health hazard is or was involved to men or domestic animals from the amounts or manner these materials were used . . . .

1 Id. at 5. Thereafter, the government continued to contract with
2 the defendants for purchase of the same and similar defoliating
3 agents.[17]

4 In other words, the Army examined the toxicology data
5 available to it and concluded that Agent Orange's components,
6 2,4,5-T and 2,4-D -- in the formulation that the government, in
7 its discretion, used when ordering it, and as it was then being
8 manufactured -- posed "no health hazard" and were, at least under
9 the circumstances of international armed conflict, suitable for
10 use in Southeast Asia. Since the government continued to order
11 Agent Orange after having evaluated its toxicity levels and
12 declared them acceptable, we "cannot second-guess" the
13 manufacturers' decision to produce the agents in the manner that
14 they did. Lewis, 985 F.2d at 89. Because "[t]he imposition of
15 liability under state law would constitute a significant conflict
16 with the [g]overnment's decision" that the defoliants used in
17 Vietnam as they were produced by the defendants posed no

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[17] The government also evaluated the toxic effects of 2,4,5-T at other points during its use in Vietnam. For example, just several weeks after the Edgewood meeting, on May 9, 1963, the President's Scientific Advisory Committee was briefed on the "Possible Health Hazard of Phenoxyacetates As Related to Defoliation Operations in Vietnam." The Bionetics Study -- a government-sponsored research project that included research into the health effects of 2,4,5-T -- also began in 1963. It was this research that ultimately triggered, among other curtailments of 2,4,5-T's use, cessation of the defoliation campaign. Dr. R.A. Darrow, Fort Detrick, "Historical, Logistical, Political and Technical Aspects of the Herbicide/Defoliant Program, 1967-1971," at 20-22.

1 unacceptable hazard, id., we conclude that the first Boyle
2 requirement is met.

3 (ii) The Grispo language. There is language in Grispo
4 that seems to require something more: that when the government
5 "mak[es] a discretionary, safety-related military procurement
6 decision contrary to the requirements of state law," it
7 "incorporate[] th[e] decision into a military contractor's
8 contractual obligations." Grispo, 897 F.2d at 632. But we
9 concluded in Lewis that the government's order of replacement
10 Babcock cables with knowledge of the risks to pilots associated
11 with the defect in question was itself sufficient to prevent
12 "second-guess[ing]" of the manufacturer's choice to continue
13 using the same cable coating, even though nothing in Lewis
14 suggests either (1) that the government included in the re-order
15 contract a specification instructing that the suspect material be
16 used, or (2) that the defendant manufacturer had been apprised of
17 the government's investigation of the alleged corrosion problem.
18 See Lewis, 985 F.2d at 89 ("We hold that when the [g]overnment
19 reordered the specific Babcock cable, with knowledge of its
20 alleged design defect, the [g]overnment approved reasonably
21 precise specifications for that product such that the
22 manufacturer qualifies for the military contractor defense for
23 any defects in the design of that product." (emphasis added)).

24 Insofar as there is a tension between the two cases, we
25 think it is resolved by Boyle. In framing the first Boyle
26 requirement, the Boyle Court sought to "assure that the suit [in