

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 07-06396 CW

DEBORAH GETZ, et al.,

Plaintiffs,

v.

THE BOEING COMPANY, et al.,

Defendants.

ORDER GRANTING
DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT

_____/

Defendants Honeywell International, Inc. (Honeywell), The Boeing Company (Boeing) and Goodrich Pump & Engine Control Systems, Inc. (Goodrich) have filed separate motions for summary judgment, arguing that Plaintiffs' claims are barred by the government contractor defense. Plaintiffs oppose the motions.¹ Having considered all of the papers filed by the parties and oral argument on December 10, 2009, the Court grants Defendants' summary judgment

¹Plaintiffs are thirty-three individuals who either were injured in the helicopter crash that gave rise to this case or were the heirs of individuals killed in the crash: Deborah Getz, Rodney Thomas, Mary Duffman, Sophia Duffman, Christine Vaughn, Brad Vaughn, Heather Vaughn, Taylin Vaughn, Jill Garbs, Doug Garbs, Paul Wilkinson, Felicia Wilkinson, Tyffanie Wilkinson, Carson Wilkinson, Robert J. Quinlan, Kathleen T. Quinlan, Julie Quinlan, Keely Quinlan, Madeline Quinlan, Erin Quinlan, Hershel McCants, Sr., Goldie Murphy, Shannon McCants, Trevor McCants, Kylie McCants, Jordan Lanham, Jerry Goldsmith, Ryanne Noss, Timothy Brauch, Chris Trisko, Mark Daniel Houghton, Chuck Isaacson and Brenda Isaacson.

1 motions.

2 BACKGROUND

3 On February 17, 2007, a United States Army Special Operations
4 Aviation Regiment (SOAR) MH-47E Chinook helicopter bearing Tail
5 #94-00472 crashed in the Zabul Province of Afghanistan. All
6 twenty-two individuals on board the helicopter were military
7 personnel. Plaintiffs are the survivors of the crash and the heirs
8 of the individuals who were killed in the crash. Defendants are
9 companies that designed, assembled, manufactured, inspected,
10 tested, marketed and sold the helicopter, its component parts and
11 related software and hardware.

12 The following facts regarding the details of the crash are
13 taken from the Army Regulation 15-6 Report of Proceedings by
14 Investigating Office/Board of Officers (Army Report), attached as
15 Exhibit A to the Brandi Declaration submitted in support of
16 Plaintiffs' opposition to Defendants' motion to dismiss. See
17 Docket No. 80. Included in this report are the findings of the
18 Army's Investigative Office (Investigative Findings), as well as
19 numerous attachments, such as aircraft maintenance reports, autopsy
20 reports, weather forecasting data, voice transcripts of pilot
21 communications, aircrew sworn statements and aircraft manual
22 extracts.

23 SOAR, the unit operating the helicopter at the time of the
24 crash, specializes in low-level night flying during combat and
25 rescue missions. On the day of the accident, the unit was
26 returning to its base in Bagram, Afghanistan along an "established
27 flight corridor" with two other helicopters after a mission to
28 "drop . . . off personnel to capture/kill someone in the Al-Qaeda

1 network" was cancelled. Army Report, Investigative Findings, 3(b);
2 Sworn Witness Statement taken at 11:09, at 1. According to one
3 eyewitness report, when the crew informed their commander that the
4 mission had been cancelled and they were planning to return to
5 base, the commander "agreed that [they] should recover to Bagram."
6 *Id.*, Sworn Statement taken at 14:30, at 1. The helicopter took off
7 after a Performance Planning Card was completed, indicating that
8 the aircraft could perform the mission, and the crew received two
9 favorable weather forecasts. *Id.*, Investigative Findings, 3(c);
10 Sworn Statement taken at 14:30, at 1. Sixty-four minutes into the
11 flight, the aircraft crashed, killing eight and injuring the
12 remaining fourteen people on board. *Id.*, Investigative Findings at
13 1(a), 2(e).

14 According to the Army Report, "the preponderance of evidence
15 indicates that the primary cause of the accident was the sudden
16 catastrophic failure of the number two engine." *Id.* at 1(c). The
17 Army Report's Investigative Findings indicate that "the single
18 remaining operational engine could not provide the power required
19 to maintain sustained flight." *Id.* However, the MH-47E Operator
20 Manual suggests that continued flight may have been possible with
21 only one working engine. *Id.*, MH-47E Operator Manual, section
22 9-2-7. According to the Army Report's findings, the pilot's
23 decision to enter an "avoid" range of 400 feet, rather than to
24 descend to a lower altitude, may have made continued flight
25 impossible. *Id.*, Investigative Findings, at 4(f)(2-3). The Army
26 Report lists a number of possible reasons why the pilot did not
27 descend to a lower altitude, including the facts that he "lost all
28 primary instrumentation in the last few seconds of flight," that

1 the "standby instrument displays [were] poorly located," and that
2 he "had no visual references" because of poor weather conditions.
3 Army Report, Investigative Findings, at 4.

4 Although the root cause of the helicopter's engine failure has
5 not yet been determined, investigators have ruled out Foreign
6 Object Damage (FOD). Id. at 3(f). Moreover, Army investigators
7 found no evidence of friendly or hostile fire in the "relatively
8 benign . . . valley" over which the helicopter was flying at the
9 time of the crash. Id. at 3(a). Although the Army Report's
10 Investigative Findings rule out icing damage as a possible cause of
11 the accident, the witness reports uniformly mention seeing serious
12 icing on the aircraft right before the crash. Id. at 3(e); Sworn
13 Statement taken at 9:50, at 1 ("I turned my lip light on and
14 discovered icing on the minigun"); Sworn Statement taken at 9:52,
15 at 1 ("I noticed precipitation coming in from the window and trace
16 amounts of icing on the lower FOD screen of the number two
17 engine"); Sworn Statement taken at 10:00, at 6 ("Heavy/severe icing
18 to the point of 'ghost' terrain painted on radar display").

19 The Army Report also lists several factors that may have
20 contributed to the severity of the accident, including "a potential
21 component and or system failure of the engine fuel system, poor
22 weather (WX) forecasting and monitoring capabilities in
23 Afghanistan, . . . and improper pilot inputs." Id. at 1(c).
24 Witness Reports focus especially on the failure of the weather
25 forecasting in predicting what one passenger called "the worst
26 weather conditions I have encountered in 20 years." Id., Sworn
27 Statement taken at 10:00, at 6. The Army Report's Investigative
28 Findings state that "the unforecast weather requirements were a

1 significant contributing factor and had a profound impact on how
2 the PIC [pilot in command] reacted to the situation." Id.,
3 Investigative Findings, at 4(b). The Investigative Findings
4 reported no evidence, however, that "the inaccurate weather
5 forecasts and observations were due to human error." Id. at 3(d).

6 There is no evidence that the mission was poorly planned or
7 that the unit failed to maintain the equipment properly. Id. at
8 3(b),(g). The engine was only seven months old, and had shown no
9 signs of weakness in any prior flight crew inspection. Id. at
10 3(g). However, there had been past reports of other engine
11 failures on Chinook aircraft prior to this incident. Id. at
12 4(a)(1).

13 Plaintiffs allege three separate defect claims relative to the
14 helicopter and its component parts: design defect, manufacturing
15 defect and defect based upon a failure to warn:

16 the Helicopter and its components parts, including but not
17 limited to, the engines and FADEC, the DECU, and the
18 computer hardware and software related thereto, were
19 defective and unreasonably dangerous as those terms are
20 defined under California law by reason of defects in design
21 and manufacture and failure of the Defendants to give
22 adequate and proper warnings of the dangers existing
23 therein, and adequate instructions regarding the avoidance
24 of such dangers in the use and maintenance of the Helicopter
25 and its component parts.

26 Amd. Comp. ¶ 85.² Plaintiffs are seeking monetary damages from
27 Defendants for wrongful death, bodily injuries, and loss of
28 consortium based on the legal theories of negligence, strict
product liability, and breach of express and implied warranty.

26 ²FADEC (Full Authority Digital Engine Control) is a system
27 that controls the engine's fuel flow; DECU (Digital Engine Control
28 Unit) is mounted in the helicopter cabin and is a component of the
FADEC system. The "E" in these acronyms is sometimes said to refer
to "Electronic."

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods:

The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its

1 ultimate burden of persuasion at trial.
2 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
3 1099, 1106 (9th Cir. 2000).

4 If the moving party discharges its burden by showing an
5 absence of evidence to support an essential element of a claim or
6 defense, it is not required to produce evidence showing the absence
7 of a material fact on such issues, or to support its motion with
8 evidence negating the non-moving party's claim. Id.; see also
9 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
10 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
11 moving party shows an absence of evidence to support the non-moving
12 party's case, the burden then shifts to the non-moving party to
13 produce "specific evidence, through affidavits or admissible
14 discovery material, to show that the dispute exists." Bhan, 929
15 F.2d at 1409.

16 If the moving party discharges its burden by negating an
17 essential element of the non-moving party's claim or defense, it
18 must produce affirmative evidence of such negation. Nissan, 210
19 F.3d at 1105. If the moving party produces such evidence, the
20 burden then shifts to the non-moving party to produce specific
21 evidence to show that a dispute of material fact exists. Id.

22 If the moving party does not meet its initial burden of
23 production by either method, the non-moving party is under no
24 obligation to offer any evidence in support of its opposition. Id.
25 This is true even though the non-moving party bears the ultimate
26 burden of persuasion at trial. Id. at 1107.

27 Where the moving party bears the burden of proof on an issue
28 at trial, it must, in order to discharge its burden of showing that

1 no genuine issue of material fact remains, make a prima facie
2 showing in support of its position on that issue. UA Local 343 v.
3 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That
4 is, the moving party must present evidence that, if uncontroverted
5 at trial, would entitle it to prevail on that issue. Id. Once it
6 has done so, the non-moving party must set forth specific facts
7 controverting the moving party's prima facie case. UA Local 343,
8 48 F.3d at 1471. The non-moving party's "burden of contradicting
9 [the moving party's] evidence is not negligible." Id. This
10 standard does not change merely because resolution of the relevant
11 issue is "highly fact specific." Id.

12 DISCUSSION

13 The military contractor defense³ is an affirmative defense;
14 Defendants have the burden of establishing it. Snell v. Bell
15 Helicopter Textron, Inc., 107 F.3d 744, 746 (9th Cir. 1997). In
16 this summary judgment motion, the issue before the Court is whether
17 Defendants are "entitled to judgment as a matter of law, i.e.,
18 whether no reasonable jury could fail to find that the defense had
19 been established." Id.; see Boyle, 487 U.S. at 514.

20 The Supreme Court established the government contractor
21 defense in Boyle v. United Technologies Corporation, 487 U.S. 500,
22 512 (1988). In Boyle, a Marine helicopter pilot's survivors sued
23 the government-contracted manufacturer of the helicopter, alleging
24 defects in the escape hatch mechanism. Id. at 502-03. The Court

25
26 ³The defense is also known as the "government contractor
27 defense." In the Ninth Circuit, however, it is only available to
28 contractors who design and manufacture military equipment. See
Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450 (9th Cir.
1990). For purposes of this order, the Court uses the phrases
interchangeably.

1 held that "state law which holds Government contractors liable for
2 design defects in military equipment does in some circumstances
3 present a 'significant conflict' with federal policy and must be
4 displaced." Id. The Court described one such circumstance as
5 "when (1) the United States approved reasonably precise
6 specifications; (2) the equipment conformed to those
7 specifications; and (3) the supplier warned the United States about
8 the dangers in the use of the equipment that were known to the
9 supplier but not the United States." Id. When these requirements
10 are met a government contractor cannot be held liable under state
11 law. Id. "The first two elements of the defense are intended to
12 insure that it is indeed a discretionary decision on the part of
13 the government that is being immunized." Butler v. Ingalls
14 Shipbuilding, Inc., 89 F.3d 582, 584 (9th Cir. 1996) (citing Boyle,
15 487 U.S. at 512). "The third is intended to ensure that the
16 contractor has fully conveyed all information necessary to allow
17 the government to make a fully informed decision." Id. (citing
18 Boyle, 487 U.S. at 512-13).

19 The rationale for the Boyle Court's decision was as follows:

20 We think that the selection of the appropriate design
21 for military equipment to be used by our Armed Forces is
22 assuredly a discretionary function within the meaning of
23 [the Federal Tort Claims Act]. It often involves not merely
24 engineering analysis but judgment as to the balancing of
25 many technical, military, and even social considerations,
26 including specifically the trade-off between greater safety
27 and greater combat effectiveness. And we are further of the
28 view that 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.
The financial burden of judgments against the contractors
would ultimately be passed through, substantially if not
totally, to the United States itself, since defense
contractors will predictably raise their prices to cover, or
to insure against, contingent liability for the
Government-ordered designs. To put the point differently:

1 It makes little sense to insulate the Government against
2 financial liability for the judgment that a particular
3 feature of military equipment is necessary when the
Government produces the equipment itself, but not when it
contracts for the production.

4 Id. at 511-12 (internal citation omitted).

5 The Ninth Circuit has summarized the rationale of the
6 government contractor defense as follows:

7 Stripped to its essentials, the military contractor's
8 defense under Boyle is to claim, 'The Government made me do
9 it.' Boyle displaces state law only when the Government,
10 making a discretionary, safety-related military procurement
11 decision contrary to the requirements of state law,
incorporates this decision into a military contractor's
contractual obligations, thereby limiting the contractor's
ability to accommodate safety in a different fashion.

12 In re Hawaii Fed. Asbestos Cases, 960 F.2d 806, 813 (9th Cir. 1992)
13 (internal citations and quotations omitted).

14 In the present case, each Defendant is alleged to be
15 responsible for manufacturing and designing different components of
16 the subject helicopter. Therefore, the Court will address the
17 government contractor defense for each Defendant separately.

18 II. Defendant Honeywell

19 Plaintiffs seek to hold Defendant Honeywell liable under state
20 tort law for its role in designing, manufacturing and failing to
21 provide adequate warnings with respect to the T55-GA-714A engines
22 on board the subject helicopter. The Court concludes that the
23 government contractor defense applies to these claims and,
24 therefore, these claims are preempted.

25 A. Approval of Reasonably Precise Specifications

26 The first prong of Boyle requires the existence of two
27 factors: reasonably precise specifications and governmental
28 approval of them. Snell, 107 F.3d at 747; Gray v. Lockheed

1 Aeronautical Sys. Co., 125 F.3d 1371, 1377 (11th Cir. 1997).

2 "Where government approval of reasonably precise specifications has
3 been found as a matter of law, the evidence established exercise of
4 judgment by the government in the design of the particular feature
5 at issue." Snell, 107 F.3d at 747. Yet, if "the government
6 contractor exercised the actual discretion over the defective
7 feature of the design, then the contractor will not escape
8 liability via the government contractor defense" Id. at
9 748 (internal quotations and citations omitted).

10 Simply approving or "rubber stamping" a design will not
11 satisfy the first Boyle prong. Butler v. Ingalls Shipbuilding,
12 Inc., 89 F.3d 582, 585 (9th Cir. 1996); Snell, 107 F.3d at 748
13 ("The mere signature of a government employee on the 'approval
14 line' of a contractor's working drawings, without more, does not
15 establish the government contractor defense."). "When the
16 Government merely accepts, without any substantive review or
17 evaluation, decisions made by a government contractor, then the
18 contractor, not the government, is exercising discretion.'" Butler,
19 89 F.3d at 585 (quoting Trevino v. General Dynamics Corp.,
20 865 F.2d 1474 (5th Cir. 1989), cert. denied, 493 U.S. 935 (1989);
21 see also McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450 (9th Cir.
22 1983) ("When only minimal or very general requirements are set for
23 the contractor by the United States the rule is inapplicable. The
24 situation is different where the United States reviewed and
25 approved a detailed set of specifications."). The government
26 itself need not prepare the specifications. Boyle, 487 U.S. at 513
27 ("The design ultimately selected may well reflect a significant
28 policy judgment by Government officials whether or not the

1 contractor rather than those officials developed the design.”).

2 Additionally, mere performance standards, as opposed to design
3 specifications, do not constitute “reasonably precise
4 specifications.” Hawaii, 960 F.2d at 813 (specifications must
5 require more than “just a certain level of performance”).
6 Compliance with performance standards is not necessarily
7 incompatible with state law. Thus, there is no conflict between
8 state products liability and a contractor’s duties under its
9 government contract and no displacement of state law.

10 If, for example, the United States contracts for the
11 purchase and installation of an air conditioning-unit,
12 specifying the cooling capacity but not the precise manner
13 of construction, a state law imposing upon the
14 manufacturer of such units a duty of care to include a
15 certain safety feature would not be a duty identical to
16 anything promised the Government, but neither would it be
17 contrary. The contractor could comply with both its
18 contractual obligations and the state-prescribed duty of
19 care. No one suggests that state law would generally be
20 pre-empted in this context.

21 Boyle, 487 U.S. at 509.

22 Plaintiffs argue that the Honeywell T55-GA-714A engine is
23 simply a “stock” or “off the shelf” product. Opp. at 15. The
24 evidence does not support this characterization. The T55-GA-714A
25 engine was “developed on the basis of involved judgments made by
26 the military [and not] in response to the broader needs and desires
27 of end-users in the private sector.” Hawaii, 960 F.2d at 811.
28 Simply because the T55-GA-714A derives from a “common core” that
also has commercial application does not remove the engine from the
government contractor defense. See In re “Agent Orange” Prod.
Liab. Litig., 517 F.3d 76, 90 (2d Cir. 2008) (Agent Orange not a
“stock” product because finished product resulted from governmental
discretion, even though commercially available component chemicals

1 were not originally developed for military use). Even when
2 commercial and military products are similar, highly relevant
3 differences can exist that would support a finding that the
4 government had direct and detailed control over the military
5 version.

6 In May, 1984, Honeywell's predecessor, Lycoming, and the Army
7 began working together to build the T55-L-713 helicopter engine
8 model. With the addition of the Full Authority Digital Engine
9 Control (FADEC), the engine was designated the T55-L-714. The
10 evidence shows that the Army and Lycoming continuously communicated
11 back and forth during the development of the T55-L-714
12 specifications. DiGiovanni Decl. at ¶ 5. Nothing was included in
13 the T55-L-714 engine that was not approved by the Army. Id. at
14 ¶ 407. The Army provided Lycoming with clear specifications as to
15 the requirements to build a turbine engine -- Military
16 Specification AV-E-8593D entitled, "Specifications: Engines,
17 Aircraft, Turboshaft and Turboprop." Morgan Decl. at ¶ 9, Exh. 4.
18 The T55-GA-714A Engine Prime Item Development Specification (PIDS)
19 was prepared in January, 1999 by Allied Signal⁴ to comply with, and
20 was drafted based on, Military Specification AV-E-8593D. Id. at
21 ¶ 9.

22 Through its Aviation Engineering Directorate (AED), the Army
23 determined and developed the design and qualification requirements
24 for the T55-GA-714A. Powelson Decl. at ¶ 5. During the AED
25 qualification process for the engine, AED reviewed contractor
26 submittals, evaluated design analyses and reports and attended many
27

28 ⁴Allied Signal owned the turbine engine division of Lycoming.

1 formal and informal design review and technical interchange
2 meetings aimed at meeting the design and qualification requirements
3 for the engine. Id. at ¶¶ 6-7. In July, 1999, once the PIDS was
4 drafted, Allied Signal completed the T55-GA-714A Qualification
5 Substantiation Report. Morgan Decl. at ¶ 11. The report describes
6 the numerous tests that were undertaken to ensure compliance with
7 the PIDS. Morgan Decl., Exh. 5. The report also notes all of the
8 tests that were furnished to the government throughout the testing
9 process. Id. In December, 1999, Allied Signal merged with
10 Honeywell and took the name Honeywell International, Inc. In July,
11 2002, after the report concluded that the T55-GA-714A engine
12 satisfactorily complied with the tests, the Army directly certified
13 that Honeywell had "successfully completed the applicable design
14 analysis and test requirement" of the PIDS. Morgan Decl. at ¶¶ 11-
15 12. The Army also granted a Qualification Rating to Honeywell for
16 the T55-GA-714A engine line, which demonstrates the government's
17 involvement in the development and qualification process for the
18 engines. Id. Further, the Army did extensive flight testing as
19 part of the qualification for the T55-GA-714A engine. Habchy Dep.
20 92:12-93:4.

21 In sum, the T55-GA-714A engine was not merely "rubber stamped"
22 by the government. The Army was heavily involved throughout the
23 qualification process of the T55-GA-714A engine. Its involvement
24 continued through the entirety of the development process including
25 testing and installation. This is precisely the type of "back and
26 forth dialogue culminating in approval," and "continuous exchange
27 between the contractor and the government" required to satisfy
28 Boyle's first condition. Butler, 89 F.3d at 585. The undisputed

1 evidence establishes that the government approved reasonably
2 precise specifications for Honeywell's T55-GA0714A engine.
3 Therefore, Honeywell has proved that, as a matter of law, it satisfies
4 the first prong of Boyle.

5 B. Conform to Specifications

6 The second prong of Boyle requires that the equipment
7 conformed to the specifications approved by the government. Boyle,
8 487 U.S. at 512. This prong is satisfied if the government is
9 involved in the design and development of a particular product and
10 accepts the product. See Butler, 89 F.3d at 585-86; Kerstetter v.
11 Pac. Scientific Co., 210 F.3d 431, 435-36 (5th Cir. 2000)
12 ("Extensive government involvement in the design, review,
13 development and testing of a product, as well as extensive
14 acceptance and use of the product following production, is evidence
15 that the product line generally conformed with the government-
16 approved specifications."). A mere allegation that the product is
17 defective does not create a triable issue as to whether the product
18 failed to conform to specifications. See Oliver v. Oshkosh Truck
19 Corp., 96 F.3d 992, 1000-01 (7th Cir. 1996).

20 Here, Honeywell satisfies this prong. The government executed
21 a DD Form 250, which certifies that each article delivered was
22 inspected and conformed to the specifications and standards
23 established by the Army. Morgan Decl. ¶¶ 22-23, Exh. 10-11. In
24 relevant part, the DD Form 250 states:

25 WE CERTIFY that all articles delivered under this shipper
26 have been inspected and found to conform in all respects,
27 except for authorized deviations, to all applicable
28 blueprints, specifications, and standards, and that evidence
of this determination, including chemical and physical test
reports as required, is on file and subject to examination
. . . .

1 Id., Exh. 10. Before a DD Form 250 is signed, a government
2 representative extensively inspects the engine and reviews the
3 documentation concerning the operation of the engine. Morgan Dep.
4 40:14-41:15. This evidence establishes that the Honeywell engine
5 conformed to the specifications approved by the government. Miller
6 v. Diamond Shamrock Co., 275 F.3d 414, 420 (5th Cir. 2001) (“[T]he
7 government’s issuance of a DD Form 250, Material Inspection and
8 Receiving Report, further establishes the item’s conformity.”)

9 Plaintiffs assert that Honeywell, as well as all Defendants,
10 have failed to meet this prong because, during the investigation
11 after the crash, the Army wrote to Defendants as follows:

12 [A] FADEC/DECU Electrical Interface Control Document was
13 apparently never written during the design, development,
14 and testing of the FADEC system. Action Item 33/34
15 directly requested that Boeing and Honeywell provide the
16 Aircraft to DECU and the Engine to DECU I/O, respectively,
contractually required to be delivered back in 1988. We
are still waiting for the a [sic] copy of the data
delivered by either company that met that specific
contractual obligation.

17 Malloy Decl. Exh. O, TBC 144343. Plaintiffs argue that this letter
18 is evidence that Defendants failed to meet a contractual obligation
19 and, therefore, cannot prove as a matter of law that their
20 equipment conformed to the specifications approved by the
21 government. Plaintiffs fail to provide any context for this
22 letter. It is not clear whether the letter pertains to any issues
23 relevant to the case. Plaintiffs do not put forth any evidence
24 that the “contractually required” document concerns the validity of
25 the government-approved acceptance test procedure, which the DECU
26 passed twice. Nor does this letter address whether the DECU
27 conformed to design specifications. Moreover, Plaintiffs have not
28 presented any evidence that Honeywell designed or manufactured the

1 FADEC or DECU. Thus, no reasonable jury could infer from this
2 letter that Honeywell equipment did not conform to the
3 specifications approved by the government.

4 C. Dangers Known To Contractor But Not the Government

5 The third prong of Boyle requires that the contractor have
6 warned the government about dangers in the use of the product that
7 were known to the contractor, but not to the government. Boyle,
8 487 U.S. at 512. Boyle does not require the contractor to warn the
9 government of every possible danger, only those actually known to
10 it and not the government. Id.

11 Plaintiffs argue that the T55-FA-714A engine may have failed
12 due to excessive water ingestion and that Honeywell did not warn
13 the Army about such a danger. This type of engine failure is
14 called flame out. Honeywell argues that it did not need to warn
15 the Army about the dangers of the engine flaming out when it
16 ingested water because the Army already knew of this danger. See
17 Oliver, 96 F.3d at 1001 ("We are unable to conclude that Oshkosh
18 was aware of any danger associated with the configuration of the
19 fuel tanks and exhaust system that the Marine Corps was not. There
20 is no indication that Oshkosh possessed any greater knowledge than
21 the Marine Corps concerning the likelihood of an exhaust-ignited
22 fuel tank fire."). The Court agrees. In a general sense, the Army
23 had long known that certain events, such as flying in icing
24 conditions, may cause a turbine engine to flame out. Herman Decl.,
25 Exh. 8, 9. Further, since its publication in 1995, the Army had
26 possessed a report produced by the Advisory Group for Aerospace
27 Research & Development of the North Atlantic Treaty Organization,
28 which found that water ingestion can cause an engine flameout.

1 Id., Exh. 10. Army representatives from the Aviation Engineering
2 Directorate also testified that certain weather conditions could
3 cause a T55-GA-714A engine to shut down. McCall Dep. at 146:19-
4 147:7; 158:10-18. The Army knew that it could have requested that
5 an auto relight system be added to the T55-GA-714A engine, to
6 prevent engine flameout, because the Army had added that feature to
7 other helicopters within its fleet.⁵ Herman Decl., Exh. 13, 45:5-
8 19; McCall Dep. 45:12-17. Further, the Army also knew that it
9 could have requested that a continuous ignition be included in the
10 specifications for the T44-GA-714A engine.⁶ Herman Decl., Exh. 5,
11 17:9-12; Powelson Decl. at ¶ 11.

12 Moreover, Plaintiffs have not presented any evidence that
13 Honeywell had received, and did not disclose to the Army, customer
14 complaints of (1) any engine malfunction based on weather,
15 (2) performance issues related to weather or (3) engine flameout as
16 a result of ingestion of snow, rain, slush or ice. Rossi Dep.
17 52:16-21; 60:9-12; 63:23-64:8. To Honeywell's knowledge, "there's
18 never been an incident of a flameout reported on this engine" until
19 this accident. Id. at 61:15-16. Therefore, the Court concludes
20 that Honeywell knew of no danger with respect to flameout of the
21 T44-GA-714A engine due to water ingestion that was not known by the
22 Army. Accordingly, the third prong of Boyle is met. Because
23 Honeywell has proved, as a matter of law, all three prongs of

24
25 ⁵An auto relight system senses when the flame of an engine has
26 gone out and automatically rekindles the flame without pilot input.

27 ⁶A continuous ignition system is a pilot-activated switch
28 which causes the engine's ignition system to run continuously,
thereby rekindling the flame in an engine should it extinguish for
any reason.

1 Boyle, the government contractor defense applies to the tort claims
2 against it arising from the manufacture and design of the T44-GA-
3 714A engine.

4 II. Goodrich

5 Plaintiffs seek to hold Defendant Goodrich Pump & Engine
6 Control Systems, Inc. liable on state tort claims for its role in
7 designing, manufacturing and failing to provide adequate warnings
8 with respect to the Full Authority Digital Electronic Control
9 system (FADEC), which controls the engine's fuel flow and includes
10 the Digital Electronic Control Unit (DECU). The Court concludes
11 that the government contractor defense applies to these claims and,
12 therefore, these claims are preempted.

13 A. Approval of Reasonably Precise Specifications

14 Plaintiffs argue that the Army had absolutely no involvement
15 with the initial design of the FADEC and DECU, the products
16 Goodrich allegedly designed. Perks Decl. ¶¶ 7, 25-29, 37-38;
17 McCall Dep. at 124:12-125:5. Defendants do not disagree. The
18 initial FADEC and DECU designs to which Plaintiffs refer were for a
19 similar FADEC-equipped engine, which was procured by the United
20 Kingdom for Royal Airforce Chinook helicopters. However, the FADEC
21 and DECU at issue in this case were not the Royal Airforce
22 versions, but models specifically developed for and approved by the
23 U.S. Army.

24 In 1987, the Army began developing requirements for its
25 Special Operations Forces FADEC- and DECU-equipped engine to be
26 operated on the MH-47E Chinook helicopter. Gentile Decl. ¶ 6. The
27 army awarded a development and qualification contract to
28 Honeywell's predecessor, Lycoming, which was the primary military

1 contractor of the development of the engine. Id. at ¶ 7.
2 Subcontractors in the program included Goodrich's predecessor
3 (Chandler Evans), which was subcontracted for the development of
4 the FADEC. Id. Goodrich manufactured one component of the FADEC,
5 the hydromechanical assembly, which was mounted on the engine; and
6 Goodrich subcontracted with Hawker Siddeley (which is now ATEC)⁷
7 for development and manufacture of another component of the FADEC,
8 the DECU. Id.

9 The Army's AED underwent lengthy back-and-forth discussions
10 with these contractors to evaluate the engine and its components,
11 including the FADEC and DECU, during its development. Powelson
12 Decl. ¶¶ 5-7; Gentile Decl. ¶¶ 14-24. The AED also reviewed and
13 evaluated all the design analyses, reports, and test plans that the
14 military contractors submitted to the Army pursuant to contract
15 requirements. Id. The AED attended numerous formal and informal
16 design review and technical interchange meetings with the military
17 contractors to discuss whether the engine, including the FADEC and
18 DECU components, complied with the Army's specifications, design
19 standards and requirements. Powelson Decl. ¶ 7; Gentile Decl.
20 ¶¶ 15, 21, 22, 24.

21 Goodrich's specific tasks in the development of the FADEC for
22 the U.S. Army's Special Operations Forces engine development
23 program were outlined in a statement of work. Gentile Decl. ¶ 8,
24 Exh. H. This statement of work, approved by the Army AED, details
25 the contractually required tasks, and associated costs, for
26

27 ⁷The claims against Defendant ATEC were dismissed based on a
28 lack of personal jurisdiction. March 10, 2009 Order, Docket No.
156.

1 designing and producing the FADEC, including development of
2 specifications, qualification tests, manufacturing of hardware and
3 a description of the data and reports required during this phase of
4 the development program. Id. The Army required that the failure
5 modes and effect of the FADEC be analyzed as part of the
6 qualification process. This analysis was provided to and approved
7 by the Army. Gentile Decl. ¶¶ 32-33. The AED ultimately approved
8 the specifications for the FADEC-equipped engine and determined
9 that it complied with the Army's design and performance criteria.
10 Powelson Decl. ¶ 8; Gentile Decl. ¶¶ 17, 27.

11 In 2001, the Army decided to procure the FADEC directly from
12 Goodrich, rather than subcontracting through Honeywell. Gentile
13 Decl. ¶ 28; Powelson Decl. ¶ 9. Before being shipped, the FADEC
14 had to pass government-required Acceptance Test Procedures, which
15 were verified by government representatives stationed at Goodrich's
16 facility. Gentile Decl. ¶¶ 27-30; Powelson Decl. ¶ 9.

17 No evidence supports Plaintiffs' theory that the Army simply
18 adopted the design of the FADEC and DECU used by the United Kingdom
19 for Royal Airforce Chinook helicopters. The evidence shows that,
20 before the Army contracted for the FADEC- and DECU-equipped engine,
21 its representatives reviewed all hardware and software
22 qualification reports, data and specifications; and, in fact, the
23 Army rejected an initial draft of the FADEC Specification 111613,
24 citing several technical concerns. In sum, Goodrich has proved
25 that the Army was substantially involved in the design process of
26 the relevant components and that it approved of reasonably precise
27 specifications as required under the first prong of Boyle.

28

1 B. Conform to Specifications

2 For the same reasons that Honeywell has provided, Goodrich
3 satisfies the second prong of Boyle. Goodrich's products were
4 subjected to, and passed, government approved and required tests,
5 both before they were delivered to the Army, and again after the
6 accident. Gentile Decl. ¶¶ 29, 31, Exh. GG, LL. Additionally,
7 government representatives stationed at Goodrich's facility also
8 verified that the equipment conformed to contract requirements and
9 signed Material Inspection and Receiving Report DD Form 250 for the
10 FADECs before the products were shipped to the Army. Gentile Decl.
11 ¶ 30, Exhs. H, II and JJ; see Miller, 275 F.3d at 420. Moreover,
12 as noted above, the Army letter cited by Plaintiffs as evidence
13 that Goodrich failed to meet a contractual obligation to furnish
14 particular data to the Army does not create a triable issue of fact
15 as to whether its equipment conformed to the specifications
16 approved by the government. Malloy Decl., Exh. O.

17 C. Dangers Known To Contractor But Not the Government

18 Goodrich, including its predecessor, Chandler Evans, disclosed
19 to the Army all dangers relating the use of the FADEC that were
20 known to them. Gentile Decl. ¶ 32. The Army required that
21 Goodrich perform an analysis of the failure modes, effects and
22 criticality (FMECA) of the FADEC. Gentile Decl. ¶ 33. The purpose
23 of this analysis is to verify design integrity, identify and
24 quantify failure modes and document the reliability risks. Id.
25 The Army reviewed and approved of the FMECA that Goodrich conducted
26 on the FADEC system. Id. The Army process for tracking
27 deficiencies in military equipment is through the issuance of the
28 Airworthiness Impact Statement. Powelson Decl., ¶ 5. That no such

1 statement was ever issued for the subject FADEC is further evidence
2 that Goodrich did not know of any specific deficiencies concerning
3 the FADEC, let alone that Goodrich failed to disclose these
4 deficiencies.

5 Plaintiffs argue that Goodrich generally knew more about the
6 FADEC than the Army. Perks Decl. ¶¶ 5-38. Even if this were true,
7 it would not contradict the fact that Goodrich disclosed all of the
8 risks known to it. Plaintiffs also fault Goodrich for not
9 incorporating an auto-relight function into the engine, given the
10 engine's susceptibility to flameout as a result of water ingestion.
11 However, as the Court noted above, the Army was aware of the
12 availability of an auto-relight option, but specifically chose not
13 to include it on the Special Operations Aviation Regiment Chinook
14 helicopters. Powelson Decl. ¶ 11.

15 For the foregoing reasons, the government contractor defense
16 applies to the tort claims against Goodrich arising from its role
17 in designing and manufacturing the FADEC and DECU systems.

18 III. Boeing

19 Plaintiffs also seek to hold Defendant The Boeing Company
20 liable under state tort law for its role in designing,
21 manufacturing and failing to provide adequate warnings with respect
22 to the MH-47E subject helicopter. The Court concludes that the
23 government contractor defense applies to these claims and,
24 therefore, Plaintiffs' claims are preempted.

25 A. Approval of Reasonably Precise Specifications

26 In Plaintiffs' opposition to Boeing's summary judgment motion,
27 Plaintiffs repeat the same arguments that they make in their
28 opposition to Honeywell's and Goodrich's summary judgment motions.

1 These arguments fail against Boeing in much the same way as they
2 did against Honeywell and Goodrich.

3 Plaintiffs argue that the Army merely rubber-stamped the
4 Boeing design and that the PIDS issued with respect to the
5 helicopter was a performance specification and not a design
6 specification. Plaintiffs do not rebut Boeing's evidence that the
7 PIDS issued for the helicopter, and the documents incorporated
8 within the PIDS describe "every single design detail for the
9 Accident Aircraft." Gionta Decl. ¶ 15; see also id., Exh. 1.
10 Further, Plaintiffs have not produced any evidence that the PIDS
11 was a performance rather than a design specification. In fact,
12 Plaintiffs' primary supporting declarant, Malcolm Perks, does not
13 even specifically refer to the Boeing aircraft PIDS, and instead
14 focuses on the Honeywell engine PIDS. Moreover, Plaintiffs'
15 reliance on deposition testimony is misplaced because it also
16 relates only to the engine PIDS, not the aircraft PIDS. Malloy
17 Decl., Exh. J; Morgan Dep. 54:8-9.

18 Further, the engines, FADEC and DECU installed on the accident
19 helicopter were not the ones installed when Boeing delivered the
20 aircraft to the Army. They were not even the same model of
21 engines, FADECs or DECUs. Plaintiffs claim that this doesn't
22 matter because the MH-47E PIDS "expressly authorized the use of new
23 and redesigned parts," thereby incorporating within the terms of
24 the PIDS any parts that might be used on the aircraft later.
25 Opposition at 23:38-24:1. However, the "Interchangeability and
26 Replacement" section of the PIDS upon which Plaintiffs rely applies
27 to the CH-47D aircraft, not the MH-47E.

28 Plaintiffs incorrectly claim that the subject MH-47E aircraft

1 was originally manufactured for the Shah of Iran, not for the U.S.
2 Army. Opposition at 1, 4. As stated in the aircraft's DD Form
3 250, the subject MH-47E was delivered in 1994, fifteen years after
4 the Shah was deposed. Gionta Decl. ¶ 16. The subject helicopter
5 was re-manufactured from a used CH-47C, which had been intended for
6 the Shah, into a MH-47E in 1992. Id. at ¶ 5.

7 Plaintiffs also argue that "the MH-47E is essentially a stock
8 product" and, as such, could not have been approved as the result
9 of reasonably precise specifications. Although Boeing makes many
10 commercial aircraft, it has never produced a commercial version of
11 the MH-47E. The uncontroverted evidence provided by Boeing proves
12 that it worked with the Army for many years to develop the MH-47E.
13 In sum, Plaintiffs have not raised a triable issue of fact that
14 would counter Boeing's evidence that the government approved
15 reasonably precise specifications for the MH-47E. See Gionta
16 Decl., Exh. 4; Gionta Supp. Decl. ¶ 16.

17 B. Conform to Specifications

18 Like Honeywell's and Goodrich's, Boeing's contract with the
19 government required that the Army execute a DD Form 250 "Material
20 Inspection and Receiving Report" for each aircraft in order to
21 document conformance to the Army's specifications. Executing a DD
22 Form 250 is not just a "rubber stamp" of approval of Boeing's
23 product. It is the culmination of a process that occurs over an
24 extended period of time, which includes constant Army oversight
25 during production and Army access to manufacturing facilities,
26 records, test documents, inspection reports, material
27 certifications, engineering reports and the aircraft. The Army
28 then conducts a final inspection of the aircraft and performs a

1 paperwork audit to ensure that all inspections and certifications
2 are valid. After the final inspection, the aircraft undergoes a
3 test flight. Once all of these steps are taken, the Army executes
4 a Form DD 250. Here, the Army signed this form for the accident
5 aircraft on November 15, 1994.

6 Further, Plaintiffs have not presented evidence that the
7 aircraft was defectively manufactured or that the government
8 inspectors failed to detect the defect. The government accepted
9 the helicopter and used it for thirteen years following delivery.
10 During that period of time, the Army never informed Boeing that the
11 subject aircraft failed to conform to applicable specifications.
12 Kaplan Decl. ¶ 14.

13 Moreover, as noted above, the Army letter cited by Plaintiffs
14 as evidence that Boeing failed to meet a contractual obligation to
15 furnish particular data to the Army does not create a triable issue
16 of fact as to whether its equipment conformed to the specifications
17 approved by the government. Malloy Decl., Exh. O. Plaintiffs have
18 not pointed to any requirement, in the Army's contract with Boeing
19 or in the MH-47E specifications, that Boeing furnish this data to
20 the Army. For all of these reasons, Boeing has satisfied the
21 second prong of Boyle.

22 C. Dangers Known To Contractor But Not the Government

23 Plaintiffs argue that Boeing was required to warn the Army of
24 dangers known to it about the engine as well as about the aircraft.
25 However, the third prong in Boyle requires the "manufacturer" of a
26 product sold to the Army to warn of hazards in the use of the
27 product it manufactured. Because Boeing manufactured the aircraft
28 and not the engine, its only obligation under Boyle was to inform

1 the Army of the hazards in the use of the aircraft, not in the use
2 of its engines.

3 Further, as noted above, it is not enough for Plaintiffs to
4 argue that Boeing generally had greater knowledge about the
5 aircraft than the Army. Superior knowledge alone will not defeat
6 the third prong under Boyle. The uncontroverted evidence
7 establishes that both Boeing and the Army knew that the engine on
8 the MH-47E could flame out from water ingestion, and that the Army
9 was aware of any hazards of the MH-47E known by Boeing. Therefore,
10 Boeing satisfies the third prong of Boyle.

11 For the foregoing reasons, the government contractor defense
12 applies to the tort claims against Boeing arising from its role in
13 designing and manufacturing the MH-47E helicopter.

14 IV. Failure to Warn Claim

15 The complaint, when read broadly, includes a separate failure
16 to warn claim against all Defendants. Plaintiffs generally allege
17 that Defendants' products were defective because of Defendants'
18 failure to include adequate warnings and instructions as to the
19 dangers of their products. See Amd. Comp. at ¶¶ 85, 90, 103.
20 However, Plaintiffs never specifically state the warnings that
21 Defendants should have provided.

22 The government contractor defense applies to failure to warn
23 claims where a defendant, in making its decision whether to provide
24 a warning, acted "in compliance with reasonably precise
25 specifications imposed on it by the United States." Snell, 107
26 F.3d at 749 (internal quotations and citations omitted). The issue
27 here is whether Defendants' obligations under their contracts with
28 the government were in conflict with their performance of whatever

1 duty state law might have imposed on them. See id.

2 If the government did not require Honeywell "to do anything
3 with respect to the placement of warnings" on its product, the
4 government contractor defense does not apply. Hawaii, 960 F.2d at
5 813. However, a conflict exists where the government imposes
6 requirements regarding the placement of warnings, "'thereby
7 limiting the contractor's ability to accommodate safety in a
8 different fashion.'" Id.

9 Here, Defendants have shown that "the government considered
10 the appropriate warnings, if any, that should accompany the
11 product," Tate v. Boeing Helicopters, 55 F.3d 1150, 1156 (6th Cir.
12 1995), and that it "approved reasonably precise specifications"
13 constraining Defendants' ability to comply with whatever duty to
14 warn they may have had. See Butler, 89 F.3d at 586.

15 The Army was solely responsible for creating an operator's
16 manual for each aircraft and that manual is the exclusive means of
17 communicating procedures and limitations to the aircrew. The MH-
18 47E PIDS provides, "3.26.3.2 Flight and Maintenance Instructions.
19 'A copy of an operators manual[,] a pilots checklist and an AVUM
20 maintenance manual shall be provided (by the government) for each
21 production aircraft.'" Gionta Decl., Exh. 4 at TBC 01150. The
22 manual states, "This manual contains the complete operating
23 instructions for the MH-47E helicopter. . . . The observance of
24 limitations, performance, and weight and balance data provided is
25 mandatory." Supp. Bell Decl., Exh. 1 at TBC 01237. Moreover, as
26 noted above, Defendants have shown that they knew of no danger from
27 their products that was not known by the Army.

28 Because the manual is the exclusive source of instructions,

1 procedures and limitations for the MH-47E helicopter and because
2 the manual is created by the Army itself, there is a conflict
3 between the Army specifications and Plaintiffs' failure to warn
4 claim. As stated above, Defendants acted in accordance with the
5 mandatory PIDS requirements when they manufactured and delivered
6 their products to the Army. Any alleged defects in the manual
7 regarding a failure to warn are the result of the Army's actions,
8 not Defendants'. Thus, Plaintiffs' failure to warn claim is also
9 barred by the government contractor defense.

10 V. Rule 56(f)

11 Rule 56(f) of the Federal Rules of Civil Procedure provides
12 that the court may deny or continue a motion for summary judgment
13 "[i]f a party opposing the motion shows by affidavit that, for
14 specified reasons, it cannot present facts essential to justify its
15 opposition." The requesting party must show (1) it has set forth
16 in affidavit form the specific facts it hopes to elicit from
17 further discovery, (2) the facts sought exist and (3) the sought-
18 after facts are essential to oppose summary judgment. Family Home
19 and Finance Center, Inc. v. Federal Home Loan Mortgage Corp., 525
20 F.3d 822, 827 (9th Cir. 2008). Plaintiffs request a continuance of
21 these motions pursuant to Federal Rule of Civil Procedure 56(f) in
22 order to depose Robert DiGiovanni, Dennis Powelson and Ronald
23 Gionta. Plaintiffs argue that they have not had the opportunity to
24 question these people about their declarations. Plaintiffs'
25 supporting declaration does not identify any specific facts they
26 would elicit during depositions of these witnesses. Plaintiffs
27 merely speculate that deposing these individuals would uncover
28 facts that contradict those relied upon in Defendants' motions.

1 Accordingly, the Court denies this request.

2 CONCLUSION

3 For the foregoing reasons, the Court grants Defendants'
4 motions for summary judgment.⁸ Docket Nos. 186, 188, 195. The
5 clerk shall enter judgment and the parties shall bear their own
6 costs.

7 IT IS SO ORDERED.

8
9 Dated: 01/21/10

Claudia Wilken

CLAUDIA WILKEN
United States District Judge

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⁸To the extent that the Court relied upon evidence to which the parties objected, the objections are overruled. The Court did not rely on any inadmissible evidence in reaching its decision. To the extent the Court did not rely on evidence to which the parties objected, the objections are overruled as moot.