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05-1760-cv  
In re "Agent Orange" Prod. Liability Litig.

Also docket nos. 05-1509, 05-1693, 05-1694, 05-1695, 05-1696, 05-1698, 05-1700, 05-1737, 05-1771, 05-1810, 05-1813, 05-1817, 05-1820, 05-2450, 05-2451

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 &  
3 Boanerges, P.C., Houston, TX; MARK I. BRONSON,  
4 Newman, Bronson & Wallis, St. Louis, Missouri;  
5 GERSON H. SMOGER, Smoger & Associates, Oakland,  
6 California; MARK R. CUKER, Williams Cuker  
7 Berezofsky, Philadelphia, PA, for Plaintiffs-  
8 Appellants;

9 Christopher E. Buckey, Shanley, Sweeney, Reilly,  
10 & Allen, P.C., Albany, NY; David E. Cherry,  
11 Campbell, Cherry, Harrison, Davis & Dove, P.C.,  
12 Waco, TX; John H. Pucheu, Pucheu, Pucheu &  
13 Robertson, L.L.P., Eunice, LA; Bernard F. Duhon,  
14 Abbeville, LA; Robert B. Evans, III, Burgos,  
15 Evans & Wilson LLC, Metairie, LA; Nira T.  
16 Kersmich, Rochester, NY; Jeffrey D. Guerriero,  
17 Guerriero & Guerriero, Monroe, LA; Morris E.  
18 Cohen, Brooklyn, NY; James Russell Tucker,  
19 Dallas, TX (on the briefs), for Plaintiffs-  
20 Appellants.

21 ANDREW L. FREY, CHARLES A. ROTHFELD (Lauren R.  
22 Goldman, Christopher J. Houpt, of counsel),  
23 Mayer, Brown, Rowe & Maw LLP, New York, NY, for  
24 Defendants-Appellees.

25 John C. Sabetta, Andrew T. Hahn, Sr., Seyfarth  
26 Shaw LLP, New York, NY; Seth P. Waxman, Paul R.  
27 Q. Wolfson, Wilmer, Cutler, Pickering, Hale &  
28 Dorr, Washington, DC; Richard P. Bress, Latham &  
29 Watkins, Washington, DC; Michael M. Gordon, King  
30 & Spaulding LLP, New York, NY; William A.  
31 Krohley, William C. Heck, Kelley Drye & Warren  
32 LLP, New York, NY; James L. Stengel, Laurie  
33 Strauch Weiss, Orrick, Herrington & Sutcliffe  
34 LLP, New York, NY; Steven Brock, James V. Aiosa,  
35 Richard S. Feldman, Rivkin Radler LLP,  
36 Uniondale, NY; Lawrence D'Aloise, Jr., Clark,  
37 Gagliardi & Miller, White Plains, NY; Myron  
38 Kalish, New York, NY (on the brief), for  
39 Defendants-Appellees.

40 William A. Rossbach (Timothy M. Bechtel, of  
41 counsel), ROSSBACH, HART, BECHTEL, P.C.,  
42 Missoula, MT; P.B. Onderdonk, Jr., National  
43 Judge Advocate, The American Legion,  
44 Indianapolis, IN, for Amicus Curiae Veterans and  
45 Military Service Organizations.

46 Ian Heath Gershengorn (Lise T. Spacapan and  
47 Fazal R. Khan, on the brief), Jenner & Block  
48 LLP, Washington DC, for Amicus Curiae American  
49 Chemistry Council and Chlorine Chemistry  
50 Council.

51 Raphael Metzger, Metzger Law Group, Long Beach,  
52 CA, for Amicus Curiae Drs. Brian G. Durie, Devra  
53 Davis, Peter L. deFur, Alan Lockwood, David  
54 Ozonoff, Arnold J. Schechter, David Wallinga,  
55 Carl F. Cranor, The Council for Education and

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 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

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

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

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

#### 17 **BACKGROUND**

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

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<sup>1</sup> 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.



1 records, have been addressed in so many different judicial  
2 opinions over the years that we do not even attempt to list them  
3 here. See generally In re "Agent Orange" Prod. Liab. Litig.,  
4 304 F. Supp. 2d 404, 410-14 (E.D.N.Y. 2004) ("Agent Orange III  
5 Gov. Contractor Def. Op."). Neither do we undertake a detailed  
6 retelling of the history of or facts underlying this litigation.  
7 See id. at 407-22 (describing the history of Agent Orange  
8 lawsuits brought by Vietnam veterans).<sup>2</sup> Instead, we set forth  
9 below only what we think necessary for an understanding of our  
10 resolution of these appeals.

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

---

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup> 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

---

<sup>4</sup> 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.

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

3 The amount of dioxin contained in a particular batch of  
4 Agent Orange varied depending on the production method used by  
5 its manufacturer. See In re "Agent Orange" Prod. Liab. Litig.,  
6 818 F.2d 145, 150, 173 (2d Cir. 1987) ("Agent Orange I Settlement  
7 Op."), cert. denied, 484 U.S. 1004 (1988); In re "Agent Orange"  
8 Prod. Liab. Litig., 818 F.2d 187, 189 (2d Cir. 1987) ("Agent  
9 Orange I Opt-Out Op."), cert. denied, 487 U.S. 1234 (1988). The  
10 defendants knew at the time they were manufacturing Agent Orange  
11 that dioxin was a byproduct and that it could cause certain kinds  
12 of harm under certain conditions. Various government agencies  
13 and officers assessed the toxicity of the defoliating agents,  
14 including Agent Orange, being used in Vietnam. Precisely what  
15 knowledge the government and the defendants possessed and when  
16 they came to have it is in dispute.

#### 17 I. Overview of Agent Orange Litigation

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

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

15           Because of what we termed "formidable hurdles" to the  
16 plaintiffs' claims, id. at 174, we affirmed the district court's  
17 approval of the settlement at what -- even at a total of \$180  
18 million -- we termed "nuisance value," equivalent to "at best  
19 only a small multiple of, at worst less than, the fees the  
20 chemical companies would have had to pay to their lawyers had  
21 they continued the litigation." Id. at 171. The Plaintiffs in  
22 287 cases opted out of the class and thereby the settlement.

23           Thereafter, the district court granted the defendants'  
24 motion for summary judgment in those opt-out actions "on the  
25 alternative dispositive grounds that no opt-out plaintiff could  
26 prove that a particular ailment was caused by Agent Orange, that  
27 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").<sup>5</sup> 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.<sup>6</sup>

## 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

---

<sup>5</sup> 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).

<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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

---

<sup>7</sup> 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://ww1.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.

<sup>8</sup> 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.

1 Agent Orange I in ruling on defendants' summary judgment motion.  
2 Having done so, it concluded that the government contractor  
3 defense barred both the design defect and failure-to-warn claims.  
4 Agent Orange III Gov't Contractor Def. Op., 304 F. Supp. 2d at  
5 441-42. As to plaintiffs' manufacturing defect claims, the court  
6 concluded that they were barred because the defendants' products  
7 conformed to the government's specifications. Id. at 442.

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

19 Thereafter, the district court ordered that all files  
20 relating to Agent Orange sent to the National Archives pursuant  
21 to court order following Agent Orange I be returned to the  
22 district court and made available to the plaintiffs for their  
23 review. The magistrate judge assigned to the case then denied  
24 all requests for additional non-MDL discovery, although the  
25 district court subsequently granted the plaintiffs access to "up  
26 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;<sup>9</sup> (2) the denial of their requests for  
14 additional discovery; and (3) the denial of the Stephensons'  
15 motion to amend.<sup>10</sup>

## 16 DISCUSSION

### 17 I. Summary Judgment

#### 18 A. Standard of Review

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<sup>9</sup> 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).

<sup>10</sup> 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.

1           We review the district court's grant of summary  
2 judgment de novo, "construing the evidence in the light most  
3 favorable to the non-moving party and drawing all reasonable  
4 inferences in its favor." Allianz Ins. Co. v. Lerner, 416 F.3d  
5 109, 113 (2d Cir. 2005). "We will affirm the judgment only if  
6 there is no genuine issue as to any material fact, and if the  
7 moving party is entitled to a judgment as a matter of law." Id.  
8 (citing Fed. R. Civ. P. 56(c)).

9 B. The Government Contractor Defense

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

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

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<sup>11</sup> 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."

1 extent that a private person would be liable under the law of the  
2 place where the conduct occurred." Id. at 511 (citing 28 U.S.C.  
3 § 1346(b)). The Act's discretionary function exception, however,  
4 carves out from that authorization "'[a]ny claim . . . based upon  
5 the exercise or performance or the failure to exercise or perform  
6 a discretionary function or duty on the part of a federal agency  
7 or an employee of the Government, whether or not the discretion  
8 involved be abused.'" Id. (quoting 28 U.S.C. § 2680(a))  
9 (brackets in original).

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

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

27 Id. Accordingly, the Court said,

28 permitting "second-guessing" of these  
29 judgments through state tort suits against  
30 contractors would produce the same effect  
31 sought to be avoided by the FTCA  
32 exemption. . . . To put the point  
33 differently: It makes little sense to  
34 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.<sup>12</sup>

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<sup>12</sup> 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.

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          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.<sup>13</sup> 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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<sup>13</sup> 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,<sup>14</sup> 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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<sup>14</sup> "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.<sup>15</sup>

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.<sup>16</sup> We are tasked only with

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<sup>15</sup> 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).

<sup>16</sup> 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

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

18 They concluded

19 in summary and after careful review of  
20 toxicological data related to 2,4-D and  
21 2,4,5-T plus the knowledge as to the manner  
22 these materials have been used for  
23 defoliation in military situations in  
24 Southeast Asia, . . . that no health hazard  
25 is or was involved to men or domestic animals  
26 from the amounts or manner these materials  
27 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.<sup>17</sup>

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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<sup>17</sup> 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

1 which the contractor defense is asserted] is within the area  
2 where the policy of the 'discretionary function' would be  
3 frustrated" absent the availability of the defense. Boyle, 487  
4 U.S. at 512. Although the Court used the term "reasonably  
5 precise specifications," we think that, as in Lewis, reordering  
6 the same product with knowledge of its relevant defects plays the  
7 identical role in the defense as listing specific ingredients,  
8 processes, or the like.

9 In Boyle, the alleged state law duty of care was  
10 "precisely contrary to the duty imposed by the [g]overnment  
11 contract." Id. at 509. But the opinion did not hold that a  
12 conflicting, express contractual duty was required for the  
13 contractor defense to preempt state law. The issues as framed by  
14 the Boyle Court were not narrowly about duties imposed by  
15 contract; they were more broadly about federal policies and  
16 interests and the exercise of federal discretion, in the face of  
17 contrary state law, in furthering them. See id. at 507  
18 ("Displacement will occur only where . . . a 'significant  
19 conflict' exists between an identifiable 'federal policy or  
20 interest and the [operation] of state law.'" (quoting Wallis v.  
21 Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (brackets in  
22 original) (emphasis added)); see also id. at 509 (stating that  
23 even where federal contractual and state tort duties were  
24 "precisely contrary," "it would be unreasonable to say that there  
25 is always a 'significant conflict' between the state law and a  
26 federal policy or interest" (emphasis added)).

1           The government's "uniquely federal interest," id. at  
2 504, in fully taking advantage of its ability to determine what  
3 level of risks and dangers must be tolerated in order to achieve  
4 a particular military goal need not be belabored. See Agent  
5 Orange I Opt-Out Op., 818 F.2d at 191 ("Civilian judges and  
6 juries are not competent to weigh the cost of injuries caused by  
7 a product against the cost of avoidance in lost military  
8 efficiency. Such judgments involve the nation's geopolitical  
9 goals and choices among particular tactics . . . ."). We pause  
10 only to note that the federal interest implicated by the lawsuits  
11 here is not only the ordinary need to ensure the government's  
12 "work" gets "done," Boyle, 487 U.S. at 505, but the ability to  
13 pursue American military objectives -- in this case, protection  
14 of American troops against hostile fire.

15           The government made an express determination, based on  
16 the knowledge available to it at the time, that Agent Orange as  
17 then being manufactured posed no unacceptable hazard for the  
18 wartime uses for which it was intended, and that the product  
19 should continue to be manufactured and supplied to it. In light  
20 of this exercise of discretion, we read Boyle to require  
21 displacement of any alleged state law rules to the contrary.<sup>18</sup>

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<sup>18</sup> We note that the second and third Boyle requirements remain essential to proving the government contractor defense even where, as here, the defendants do not rely on a contractual duty to demonstrate the required conflict between federal interests and state law. The government's discretionary determination about the design defect alleged was necessarily made in the shadow of the government's expectations regarding the product it expected to receive. Defendants therefore must



1           2. Compliance with Specifications. The plaintiffs'  
2 challenge to the defendants' ability to demonstrate the second  
3 requirement for Boyle protection -- compliance with the  
4 contracts' specifications -- does not warrant extensive  
5 discussion. Nothing about the presence of dioxin in trace  
6 amounts within the 2,4,5-T component of Agent Orange rendered the  
7 Agent Orange delivered to the government non-compliant with its  
8 contractual obligations. The plaintiffs' own expert agrees.  
9 See Aff. of Harry Ensley (Feb. 6, 2004), at ¶ 20 ("[T]he 2,4,5-T  
10 the government purchased could contain varying amounts of such  
11 impurities as . . . dioxin . . . , yet still be in compliance  
12 with the government's specifications . . . ."). There is no  
13 allegation that the government received Agent Orange with 2,4,5-T  
14 present in anything other than the proportions and purity levels  
15 called for by the terms of the contracts. The second requirement  
16 is therefore met as a matter of law. See Miller, 275 F.3d at  
17 420-21 (rejecting same argument made by civilian plaintiffs  
18 seeking compensation for injuries allegedly caused by Agent  
19 Orange).

20           3. Defendants' Warnings About Known Dangers. The final  
21 Boyle requirement for the invocation of the government contractor  
22 defense is that the defendants demonstrate that they "warned the  
23 United States about the dangers in the use of the equipment that

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demonstrate that the product it delivered to the government was precisely what the government requested. The third prong is likewise unaffected: The government's discretionary determination must be a fully informed one.

1 were known to [them] but not to the United States." Boyle, 487  
2 U.S. at 512. The plaintiffs make essentially two arguments in  
3 this regard: (1) that the defendants knew more about the hazards  
4 of 2,4,5-T than did the government, but failed to warn the  
5 government about them; and (2) that even if some members of the  
6 government had some knowledge regarding the dangers of dioxin,  
7 Boyle requires that for the defense to be applicable, the actual  
8 contracting officials must have such knowledge, and those  
9 involved in the specification process for Agent Orange knew  
10 nothing about 2,4,5-T's hazards.

11 The thrust of the defendants' response is that (1) none  
12 of the plaintiffs claim an injury of the sort that was a danger  
13 known by anyone at the time of Agent Orange's production; (2) as  
14 to dangers about which the defendants were aware, the evidence  
15 demonstrates as a matter of law that they shared that knowledge  
16 with the government; and (3) irrespective of what the defendants  
17 knew about Agent Orange in general, the government had far  
18 greater knowledge than the defendants about Agent Orange and the  
19 dangers posed by its intended use in Vietnam.

20 We doubt that the defendants can establish as a matter  
21 of law on the present record either the second or third of their  
22 contentions -- that they shared the knowledge of dangers of which  
23 they were aware with the government and that the government had  
24 far more knowledge about the dangers of Agent Orange in its

1 planned use. Each is intensely factual and hotly disputed.<sup>19</sup> We  
2 think that the record is clear, however, that the defendants did  
3 not fail to inform the government of known dangers at the time of  
4 Agent Orange's production of the type that would have had an  
5 impact on the military's discretionary decision regarding Agent  
6 Orange's toxicity. We therefore conclude that the defendants  
7 have established Boyle's third requirement as a matter of law.

8 Boyle mandates that to obtain the benefit of the  
9 government contractor defense, a contractor must inform the  
10 government about known "dangers in the use of the equipment."  
11 Boyle, 487 U.S. at 512. But the Boyle Court was silent as to  
12 what types of risks rise to the level of dangers that must be  
13 disclosed. Prior to Boyle, we were of the view that  
14 manufacturers need disclose to the government only those hazards  
15 that (1) are "based on a substantial body of scientific  
16 evidence"; and (2) create dangers likely "serious enough to call  
17 for a weighing of the risk against the expected military  
18 benefits," that is, "substantial enough to influence the military

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<sup>19</sup> We concluded in Agent Orange I, based on much the same record now before us, that "the critical mass of information about dioxin possessed by the government during the period of Agent Orange's use in Vietnam was as great as or greater than that possessed by the chemical companies." Agent Orange I Opt-Out Op., 818 F.2d at 193. The Fifth Circuit, relying in large part on our Agent Orange I determination, concluded the same. See Miller, 275 F.3d at 421. But we are required to review the factual record anew as it is presented to us, not as it was presented to a different panel twenty years ago. And we note, as we did in Agent Orange I, that we were in 1987 without the benefit of briefing by the parties on this subject. Agent Orange I Opt-Out Op., 818 F.2d at 190.

1 decision to use the product." Agent Orange I Opt-Out Op., 818  
2 F.2d at 193. Until now, neither we nor the Supreme Court has  
3 been called upon to decide, post-Boyle, what constitutes  
4 "knowledge" of a "danger" that would trigger a duty to inform as  
5 to the "equipment" being ordered.

6 This much is plain: Boyle did not contemplate  
7 requiring disclosure of any and all potential risks by the  
8 contractor to the government, irrespective of their relation to  
9 the governmental discretionary decision at issue. The Boyle  
10 Court was concerned primarily with protecting the government's  
11 ability to assume certain kinds of risks without assuming the  
12 costs of liability for those risks. See Boyle, 487 U.S. at 511-  
13 12. It protected this ability by ensuring that where the  
14 government accepts such a risk knowingly, a state law that would  
15 require finding that same risk unacceptable must be displaced.  
16 We therefore do not think that the Boyle Court meant that a  
17 defendant seeking the protection of the defense was required to  
18 demonstrate that it had shared all known hazards with the  
19 government, irrespective of whether those hazards allegedly not  
20 conveyed would have had an impact on the government's exercise of  
21 discretion about the design defect alleged. It would be  
22 impractical to require that a manufacturer compile and present to  
23 the government in advance a list of each and every risk  
24 associated with a product it is producing for the government.  
25 The operation of a tank or a transport plane -- more so the  
26 manufacture and use of a chemical agent -- involves, at the

1 extremities, virtually limitless risks. Even if it were possible  
2 to generate such complete lists, their comprehensiveness would  
3 overwhelm government decision makers with largely irrelevant  
4 data, extending the time and costs associated with federal  
5 contracting and obscuring those risks most likely to have an  
6 impact on contracting decisions. A rule that required full  
7 disclosure of all possible risks to anyone would be contrary to  
8 Boyle's underlying rationale of protecting the federal interest  
9 in "getting the Government's work done." Id. at 505.

10 We therefore adhere to our pre-Boyle precedent. We  
11 conclude, much as we did before Boyle was decided, that a  
12 defendant may satisfy the third Boyle requirement if it  
13 demonstrates that it fully informed the government about hazards  
14 related to the government's exercise of discretion that were  
15 "substantial enough to influence the military decision" made.  
16 Agent Orange I Opt-Out Op., 818 F.2d at 193. The defendants can  
17 demonstrate a fully informed government decision by showing  
18 either that they conveyed the relevant known and "substantial  
19 enough" dangers, id., or that the government did not need the  
20 warnings because it already possessed that information,  
21 see Lewis, 985 F.2d at 89-90 ("There is no requirement that  
22 appellees inform the Air Force of dangers already known to the  
23 Air Force.").

24 Here, the plaintiffs allege that the defendants knew of  
25 dioxin's hazards but failed to inform the government of them.  
26 The documents to which they cite for this proposition, however,

1 pertain almost universally to the risk of chloracne (a severe  
2 skin disease) and liver damage to workers manufacturing Agent  
3 Orange. These risks, the manufacturers thought, were created by  
4 the dioxin "impurity" that resulted from producing  
5 trichlorophenol, a component of 2,4,5-T. See, e.g., V.K. Rowe,  
6 Test. for the 2,4,5-T Hr'g (undated), at 28 (referring to dioxin  
7 build-up in trichlorophenol manufacture), PA 3501-02.; Mem. of  
8 V.K. Rowe, Dow Chemical Co., at 1 (Jun. 24, 1965) ("Rowe Jun.  
9 1965 Mem.") (referring to dioxin "impurities" present in  
10 trichlorophenol that could be "carried through into the T acid").

11 There is, indeed, ample evidence that the defendants  
12 were concerned about the health effects of dioxin, specifically  
13 chloracne<sup>20</sup> and liver damage,<sup>21</sup> on their workers. Tests were

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<sup>20</sup> As to the dangers related to chloracne, the documents submitted show that knowledge of the risk varied among manufacturers. Not all manufacturers had experienced chloracne outbreaks. Among those that did, it was not clear that dioxin was in the final products emanating from the contaminated plant. See V.K. Rowe, Test. for the 2,4,5-T Hr'g (undated), at 28-29 (indicating testing of Dow trichlorophenol and 2,4,5-T following 1964 chloracne outbreak in manufacturing plant revealed no "chloracnegens," and that source of outbreak was contaminated waste oil, "not exposure to trichlorophenol"). Dow thought that dioxin concentrations of less than one part per million presented no chloracne hazard to workers or consumers, Rowe Jun. 1965 Mem., at 1, and changed its production process such that the concentration of dioxin in its Agent Orange would be reduced to the point where, in its view, the hazard would be eliminated.

<sup>21</sup> Variance among the defendants regarding their knowledge of the risks of liver damage to humans was similar to that related to chloracne, with some, but not all, of the defendants aware that animal tests showed liver damage was a possible result of direct exposure to dioxin and that there was liver damage among workers engaged in manufacturing 2,4,5-T. There were also isolated instances of other health concerns arising from manufacturing processes -- for example, temporary nerve damage (Monsanto) and unspecified "systemic injury" (Dow). See

1 conducted that involved exposing animals to pure dioxin, which  
2 revealed some "severe response[s]," see Report on the Chloracne  
3 Problem Meeting on March 24, 1965 (Mar. 29, 1965) ("Mar. 29  
4 Report"), at 5; similar tests performed on humans some years  
5 later using a one-percent dioxin solution that resulted in skin  
6 lesions, see Letter of Albert M. Kligman to V.K. Rowe, Dow  
7 Chemical Co. (Jan. 23, 1968) PA 3732. At least two defendants  
8 considered whether the dioxin in trichlorophenol's manufacture  
9 would be manifest in the trichlorophenol itself or in the end  
10 products containing trichlorophenol, see, e.g., id. at 4; Mem.,  
11 Dow Chem. Co. (Mar. 10, 1965) ("Mar. 10 Dow Mem."), Mem. from  
12 E.L. Chandler, Diamond Shamrock Co. ("Chandler Mem.") (Jul. 9,  
13 1962), but the danger with which they were concerned was limited  
14 to the possibility of a chloracne outbreak among those handling  
15 it, see Mar. 10 Dow Mem. (discussing possible need to take  
16 precautions that would "prevent injury" akin to what had been  
17 taken following past incidents of chloracne outbreaks); Chandler  
18 Mem. (indicating two commercial customers had claimed chloracne  
19 problems with "Diamond esters," one of which had no similar  
20 problems with other manufacturers' product). There is no  
21 evidence to which we have been directed or that we have otherwise  
22 found that the defendants' knowledge of 2,4,5-T's risks extended  
23 to dioxin as a carcinogen, as a toxin that potentially might  
24 cause diseases long after exposure, or as a significant health

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Deposition Excerpts of Dr. Wallace, at 2468; Rowe Jun. 1965 Mem.  
at 1. None of the documents reveal knowledge of any such danger  
to non-workers.

1 risk (apart from chloracne) to those exposed to herbicides  
2 containing 2,4,5-T being used as such, in wartime conditions or  
3 otherwise, except for workers manufacturing them or their  
4 component chemicals.<sup>22</sup>

5 How much the government knew about the workplace  
6 dangers associated with production of 2,4,5-T while it was  
7 considering the use of and ordering Agent Orange is unclear. The  
8 minutes from the 1963 meeting at Edgewood Arsenal contained  
9 references to a lack of workplace incidents involving 2,4-D and  
10 2,4,5-T. April 1963 Meeting Minutes at 4, Appendix A. The  
11 domestic safety record of herbicides containing these two  
12 chemicals, including the manufacturers' alleged reports to the  
13 Department of Agriculture regarding the absence of ill effects

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<sup>22</sup> As to the specific subject of dioxin as a carcinogen, the Dow Chemical Company testified before Congress that its numerous tests and experiments regarding dioxin's toxicity did not examine the chemical's carcinogenicity. Test. of Dr. Julius E. Johnson, Vice President, Dow Chemical Co., Apr. 7 and 15, 1970, at 371. The plaintiffs do point us to a memorandum written by Monsanto's medical director, R. Emmet Kelly, in which he expresses the need to "minimize the presence of this known chloracne agent" because dioxin "[v]ery conceivably [could] be a potent carcinogen." Mem. from R. Emmet Kelly, Monsanto Company (Mar. 30, 1965). But this "conception" alone -- without any context as to its basis or the relationship between the harms of dioxin in its pure form versus the trace amounts of the chemical found within Agent Orange -- is not enough to convince a reasonable factfinder that dioxin was a known carcinogen at the time of Agent Orange's production or, more importantly, that the defendants knew that the trace amounts of dioxin in Agent Orange might prove to be a carcinogen for those not involved in its manufacture or direct handling. See Agent Orange I Opt-Out Op., 818 F.2d at 193 ("[T]he fact that dioxin may injure does not prove the same of Agent Orange . . ."). We express no view regarding whether the defendants might have done more to investigate dioxin's dangers, as it is well beyond the purview of our inquiry. Cf. Kerstetter v. Pac. Sci. Co., 210 F.3d 431, 436 (5th Cir. 2000) (discussing relationship between contractor defense and latent defects).



1 from the herbicides on their workers, was also relayed to the  
2 President's Science Advisory Committee in a May 1963 briefing  
3 entitled "Possible Health Hazard of Phenoxyacetates as Related to  
4 Defoliation Operations in Vietnam." At least two domestic  
5 manufacturers, however, had already experienced chloracne  
6 breakouts and other problems among its workers.

7 The documents make clear, however, that the military  
8 was concerned about the likely effect on those exposed to the  
9 herbicides in the manner in which they were, and were to be, used  
10 in Vietnam. This is hardly surprising. The principal purpose of  
11 Agent Orange was to attempt to protect American troops from  
12 attack by limiting vegetation around American facilities and  
13 emplacements that could provide cover to enemy combatants. To  
14 that extent, the chemical agents were to be used on American and  
15 allied positions, not those of the Viet Cong.

16 And the undisputed record with respect to dangers that  
17 were posed by the use of Agent Orange is that during the entirety  
18 of the production of Agent Orange, the defendants knew only that  
19 it was possible that those handling herbicides containing 2,4,5-T  
20 might develop the skin disease chloracne. The Edgewood  
21 participants, including delegates from various branches of the  
22 government, military and civil, were aware of this type of risk.  
23 See April 1963 Meeting Minutes at 5 (AmChem representative  
24 related experiences of "industrial firms making . . . continuous  
25 field applications over very large areas" and noted "skin  
26 sensitization was the maximum effect produced" in "probably one

1 out of a thousand persons"). Yet the government continued to  
2 order Agent Orange in the manner specified in the procurement  
3 contracts.

4           If the government had decided to manufacture Agent  
5 Orange, as it considered doing for a period during the late  
6 1960s, the defendants might well have been required more fully to  
7 inform the government of all the possible dangers associated with  
8 the manufacture of the chemical (none of them, incidentally,  
9 being malignancies). The record suggests that they were prepared  
10 to do so. See "Plan 'Orange' Production," Dow Chemical Co. (Apr.  
11 20, 1967), at 3 (stating that "[a] serious potential health  
12 hazard to production workers is involved in the production of  
13 2,4,5-T" and noting that its "knowhow regarding elimination of  
14 the hazard" could be made available to the government), attached  
15 to Letter from A.P. Beutel, Vice Pres., Dir. of Gov't Affairs,  
16 Dow Chemical Co., to H.G. Fredericks, Deputy Dir. of Procurement  
17 and Production, Edgewood Arsenal (Apr. 20, 1967).

18           We conclude, however, that no reasonable factfinder  
19 could find that the defendants had knowledge of a danger that  
20 might have influenced the military's conclusion that "operational  
21 use" of Agent Orange posed "no health hazard . . . to men or  
22 domestic animals," April 1963 Meeting Minutes, at 3, 5, and its  
23 presumably related decision to continue to purchase Agent Orange  
24 as it was then being produced by the defendants. We find  
25 nothing in the record to support an assertion that the  
26 defendants "cut[] off information highly relevant

1 to . . . discretionary decision[s]" of the government, Boyle, 487  
2 U.S. at 513, i.e., that they possessed knowledge of dangers  
3 unknown to the government that, had they been shared, might have  
4 influenced the government's decision regarding the extent of the  
5 hazard posed by use of Agent Orange or its choice to continue its  
6 use.

7 We acknowledge that there may well have been some  
8 aspects of the dangers of Agent Orange resulting from the trace  
9 presence of dioxin that personnel of one or more of the  
10 defendants were aware of that members of the military may not  
11 have known, at least contemporaneously. We cannot conceive of a  
12 long-term relationship between the military and a civilian  
13 contractor in which complete equivalence of knowledge at all  
14 times in the relationship can be expected or could be  
15 established. But nothing in the record of which we are aware  
16 would create a triable issue of fact as to whether there was  
17 never-disclosed knowledge of a sort that might have influenced  
18 the government's decision-making process regarding Agent Orange  
19 as it was used in Vietnam.

20 Accordingly, we conclude that the defendants have  
21 established as a matter of law the third requirement of Boyle.

22 \*\*\*

23 We feel obliged to note, finally, what seems to us to  
24 be obvious: The question raised by government contractor defense  
25 cases arising in the context of contracts for military agents and  
26 equipment is the extent to which contractors are protected when

1 they provide materials designed to assist the government in  
2 obtaining what are ultimately military objectives -- in this case  
3 the principal objective being to protect members of the armed  
4 forces from enemy attack. Considerations of the validity of  
5 those objectives and the reasons for which the military seeks  
6 them are far beyond the competence of this Court. Our  
7 determination as to the protection of a military contractor must  
8 be made using the same principles regardless of the nature of the  
9 military conflict in which they are pursued, or the extent to  
10 which it is controversial or enjoys popular support.

## 11 II. Discovery Rulings

12 The plaintiffs also appeal from the discovery  
13 limitations imposed by the district court during the months  
14 following its initial February 9, 2004, decision granting the  
15 defendants' motion for summary judgment. We review discovery  
16 rulings for abuse of discretion. Wood v. FBI, 432 F.3d 78, 82  
17 (2d Cir. 2005).

18 As we have noted, the district court's February 9,  
19 2004, government contractor defense opinion granted the  
20 plaintiffs a six-month discovery period and permission to seek  
21 reconsideration of its summary judgment ruling. Shortly  
22 thereafter, the plaintiffs requested "the documents from all of  
23 the other litigation that these [defendants] have been involved  
24 in, involving the same pesticides and the same type of claims."  
25 Tr. of Civil Conference Before The Hon. Joan M. Azrack at 10.  
26 They did so without having attempted review of the MDL record.

1 Id. at 16. The defendants objected on the grounds that documents  
2 from other cases were likely to be largely irrelevant to the  
3 question of the applicability of the government contractor  
4 defense, duplicative of MDL materials where relevant in any  
5 event, and overly burdensome to produce. Id. at 13-14.

6 On March 2, 2004, Magistrate Judge Azrack denied the  
7 request, ruling that the plaintiffs first had to familiarize  
8 themselves with the MDL record before requesting additional  
9 documents. On March 19, 2004, Judge Weinstein granted the  
10 plaintiffs access to six deposition transcripts from non-MDL  
11 cases.

12 The plaintiffs now argue that the district court abused  
13 its discretion by limiting the plaintiffs to the documents  
14 produced in the MDL during the 1980s and six subsequent  
15 depositions. They assert that in the intervening period, the  
16 defendants have been sued by other end-users of their commercial  
17 herbicides, citizens exposed to industrial contamination from the  
18 herbicides' production, and their workers. Discovery in these  
19 cases, they contend, was more extensive than the discovery  
20 against the defendants that occurred during the 1980s and would  
21 be germane to the defendants' knowledge of the adverse health  
22 effects caused by their herbicides. They list thirteen other  
23 cases involving three defendants (Dow Chemical, Monsanto, and  
24 Hercules) and various government hearings from which they suspect  
25 discovery and papers would be helpful. Beyond broad claims that  
26 the discovery in those cases was more focused on the defendants'

1 knowledge as compared with the MDL, however, the plaintiffs do  
2 not cite specific bases for a conclusion on our part that the  
3 documents would differ materially from the voluminous documents  
4 available to them through the MDL. The defendants do not respond  
5 to the plaintiffs' discovery-related arguments.

6 The Federal Rules of Civil Procedure permit parties to  
7 "obtain discovery regarding any matter, not privileged, that is  
8 relevant to the claim or defense of any party," Fed. R. Civ. P.  
9 26(b) (1), but a district court may limit discovery if, among  
10 other things,

11 it determines that: (i) the  
12 discovery sought is unreasonably  
13 cumulative or duplicative, or is  
14 obtainable from some other source  
15 that is more convenient, less  
16 burdensome, or less expensive; (ii)  
17 the party seeking discovery has had  
18 ample opportunity by discovery in  
19 the action to obtain the  
20 information sought; or (iii) the  
21 burden or expense of the proposed  
22 discovery outweighs its likely  
23 benefit . . . .

24 Id. R. 26(b) (2) (C). A district court has wide latitude to  
25 determine the scope of discovery, and "[w]e ordinarily defer to  
26 the discretion of district courts regarding discovery matters."  
27 Maresco v. Evans Chemetics, Div. of W.R. Grace & Co., 964 F.2d  
28 106, 114 (2d Cir. 1992). A district court abuses its discretion  
29 only "when the discovery is so limited as to affect a party's  
30 substantial rights." Long Island Lighting Co. v. Barbash, 779  
31 F.2d 793, 795 (2d Cir. 1985). A party must be afforded a

1 meaningful opportunity to establish the facts necessary to  
2 support his claim. Id.

3           The plaintiffs here have failed to demonstrate that the  
4 district court's rulings limiting the scope of discovery  
5 constituted an abuse of discretion. We think the district court  
6 reasonably concluded that the MDL files were likely the best  
7 source regarding the information the plaintiffs' sought:  
8 defendants' knowledge of 2,4,5-T's risks at the time of  
9 production. The plaintiffs' motion to Judge Azrack was an  
10 unlimited and unfocused request for many thousands of additional  
11 documents, made without any attempt to review what was already  
12 available to them or to tailor their request to materials  
13 reasonably expected to produce relevant, non-duplicative  
14 information. Accordingly, the district court's limitations were  
15 well within its discretion under Rule 26.

16           III. Stepensions' Motion to Amend

17           Finally, the Stepensions challenge the district court's  
18 denial of their motion to amend their complaint. Federal Rule of  
19 Civil Procedure 15(a), as in effect at the time of the court's  
20 order, provided that "[a] party may amend the party's pleading  
21 once as a matter of course at any time before a responsive  
22 pleading is served. . . . Otherwise a party may amend the  
23 party's pleading only by leave of court or by written consent of  
24 the adverse party; and leave shall be freely given when justice  
25 so requires." Id. "We review the determination of a district  
26 court to deny a party leave to amend the complaint under Fed. R.

1 Civ. P. 15(a) for abuse of discretion." McCarthy v. Dun &  
2 Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007).

3 Here, at the time of the Stephensons' motion, the  
4 defendants had not filed an answer to their complaint.  
5 Stephenson, 220 F.R.D. at 24. Accordingly, the Stephensons were  
6 entitled to amend their complaint as a matter of right without  
7 leave of the district court, because "a motion is not a  
8 responsive pleading," 6 Charles Alan Wright, Arthur R. Miller &  
9 Mary Kay Kane, Federal Practice and Procedure § 1483, at 584 (2d  
10 ed. 1990); see id. at 586 ("Nor does a summary judgment motion  
11 made before responding [to plaintiff's complaint] have any effect  
12 on a party's ability to amend under the first sentence of Rule  
13 15(a)."); accord, e.g., Zaidi v. Ehrlich, 732 F.2d 1218, 1219-20  
14 (5th Cir. 1984); Miller v. Am. Exp. Lines, Inc., 313 F.2d 218,  
15 218-19 & n.1 (2d Cir. 1963). Because the defendants had not  
16 filed a responsive pleading when the Stephensons sought to amend  
17 their complaint, the district court erred in denying the  
18 amendment.

19 We conclude, however, that in light of our finding  
20 regarding the government contractor defense, the district court's  
21 erroneous denial of the Stephensons' motion was harmless.  
22 Repleading could not avoid the application of the government  
23 contractor defense and, therefore, remand to permit the amendment  
24 would be futile. See Sinicropi v. Nassau County, 601 F.2d 60, 62  
25 (2d Cir. 1979) (concluding that even if district court had erred  
26 in denying motion to amend, any error would be harmless because



1 the proposed amendment would have been barred by res judicata),  
2 cert. denied, 444 U.S. 983 (1979); cf. Unlaub Co., Inc. v.  
3 Sexton, 568 F.2d 72, 78 (8th Cir. 1977) (concluding any abuse of  
4 discretion by district court in failing to permit defendant to  
5 amend his answer was harmless because "[n]one of the matters set  
6 forth in the proposed amended answer would affect the result").

7 **CONCLUSION**

8 For the foregoing reasons, we affirm the judgments of  
9 the district court.