

2010 01G 3408

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION (GENERAL)

BETWEEN:

COUGAR HELICOPTERS INC.

FIRST PLAINTIFF

LLOYDS TSB GENERAL LEASING (NO. 20) LIMITED

SECOND PLAINTIFF

UNDERWRITERS AT LLOYD'S OF LONDON,  
ALLIANZ GLOBAL RISKS US INSURANCE COMPANY,  
WESTPORT INSURANCE CORPORATION,  
GLOBAL AEROSPACE UNDERWRITING MANAGERS,  
GCAN INSURANCE COMPANY,  
UNDERWRITERS AT LLOYD'S PER CATLIN CANADA INC., and  
AIG AVIATION INC.

THIRD PLAINTIFF

AND:

SIKORSKY AIRCRAFT CORPORATION

FIRST DEFENDANT

HELICOPTER SUPPORT, INC.

SECOND DEFENDANT

THE ATTORNEY GENERAL OF CANADA, IN RIGHT  
OF THE MINISTER OF TRANSPORT

THIRD DEFENDANT

STATEMENT OF CLAIM

THE PARTIES

1. The First Plaintiff Cougar Helicopters Inc. ("Cougar"), is incorporated pursuant to the *Canada Business Corporation Act*, R.S.C. 1985, c. C-44 as amended and registered as an Extra-Provincial Company pursuant to the *Corporations Act of the Province of*

Filed	June 24/10	DP
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*Newfoundland and Labrador*, having its registered and records office at 100 New Gower Street, Cabot Place, P.O. Box 5038, St. John's, Newfoundland, and its principal place of business at 40 Craig Dobbin Way, St. John's Newfoundland, from which it carries on the business of providing helicopter services to the offshore oil industry.

2. The Second Plaintiff Lloyds TSB General Leasing (No. 20) Limited ("Lloyds Bank") is a limited liability company incorporated under the laws of England and Wales, having its registered office at 25 Gresham Street, London EC2V 7HN. Lloyds Bank was in the business of providing financing for the purchase of assets including aircraft and helicopters.

3. The Third Plaintiff Underwriters at Lloyd's of London, Allianz Global Risks US Insurance Company, Westport Insurance Corporation, Global Aerospace Underwriting Managers, GCAN Insurance Company, Underwriters at Lloyd's per Catlin Canada Inc., and AIG Aviation Inc. were at all material times insurance underwriters of Cougar (collectively referred to as "Underwriters"), pursuant to Policy of Insurance No. AZ007808 (the "Policy").

4. The First Defendant, Sikorsky Aircraft Corporation ("Sikorsky") is a Delaware corporation with its principal place of business located at 6900 Main Street, Stratford, Connecticut 06615. Sikorsky is in the business of designing, manufacturing and selling helicopters worldwide, for use in civil and military settings.

5. The Second Defendant Helicopter Support, Inc. ("HSI") is a Connecticut corporation, with its principal place of business located at 124 Quarry Road, in Trumbull, Connecticut 06611. HSI was at all relevant times a wholly-owned subsidiary or division of Sikorsky established for the purpose of distributing Sikorsky products and providing support services to owners and operators of Sikorsky products including the S-92 helicopter.

6. The Third Defendant the Minister of Transport is a Minister of the Crown authorized pursuant to the *Aeronautics Act*, R.S.C. 1985 c. A-2 and Regulations thereto to regulate all matters relating to aviation in Canada and particularly to issue Type Certificates in respect of aeronautical products (the "Minister of Transport").

### **THE MATERIAL FACTS**

#### **The Accident**

7. On March 12, 2009, a Sikorsky Model S-92 helicopter, serial number 920048, bearing Canadian Registration C-GZCH (the "Helicopter") with 16 passengers and two crew on board was en route from St. John's, Newfoundland, to an offshore oil production facility, when the crew observed a loss of oil pressure in the main gearbox ("MGB").

8. The crew responded by promptly turning the Helicopter back towards St. John's. Before they could reach land, the MGB failed and the Helicopter crashed into the sea over the continental shelf of Canada (the "Accident"). All but one passenger died in the Accident.

9. The elapsed time between the observation by the crew of a loss of MGB oil pressure and the Accident was approximately 11 minutes.

10. The immediate cause of the Accident was the failure in fatigue mode of two of three titanium alloy studs designed to secure the oil filter bowl to the MGB of the Helicopter. The failure of the two studs resulted in the rapid loss of all lubricating oil from the MGB and the subsequent failure of the Helicopter's tail rotor drive gear.

11. At the time of the Accident, the Helicopter was being operated by Cougar under a sublease from CHC International Helicopters Inc. Cougar was the registered owner

of the Helicopter pursuant to the *Aeronautics Act*, R.S.C. 1985, c. A-2, as amended and regulations thereto.

12. At the time of the Accident, Lloyds Bank was the beneficial owner of the Helicopter.

### **The Design of the S-92**

13. Sikorsky designed and manufactured the model S-92 helicopter (the "S-92") including the MGB and its lubrication system.

14. The MGB is a critical and structural dynamic component of the S-92 which transmits power from the twin turbine engines to the main and tail rotors. It is continuously lubricated by a system which incorporates an oil filter contained within an oil filter bowl, which is attached to the MGB by three studs (the "Studs"). The operation of the MGB is critical to the continued safe flight of the Helicopter. A total loss of lubricant inflight will cause the destruction of the MGB and a loss of operational control of the helicopter subject only to the length of time during which the MGB may be capable of continuing to "run-dry" (i.e. run following a total loss of lubrication).

15. Sikorsky selected and specified the materials from which the components of the MGB and its related lubricating system are made. In particular, Sikorsky required the Studs to be fabricated from a titanium alloy.

16. The use of titanium studs to secure the oil filter bowl was a departure from Sikorsky's practice of manufacturing similar gearboxes using steel studs or bolts.

17. At all relevant times it was well known to Sikorsky that:

- (a) titanium is lighter than steel but is not as ductile and is more susceptible to galling;

- (b) steel studs have a higher fatigue life than titanium studs;
- (c) fatigue cracks within titanium are difficult to detect and propagate more rapidly than fatigue cracks in steel; and
- (d) titanium studs are less capable of resisting vibratory stress than steel studs.

18. The Studs were subjected to extraordinary vibratory stress caused by Sikorsky's design of the S-92.

19. Following the Accident, Sikorsky admitted that the use of titanium studs to secure the oil filter bowl on the S-92 was not the best practice, stating "*steel studs provide improved fatigue properties in this application as compared to titanium*".

20. The oil filter designed by Sikorsky was too large for the oil filter bowl causing incorrect pre-loading of the Studs as the nuts which held the filter bowl in place were tightened on the Studs. Incorrect pre-loading created higher stresses in the Studs.

21. The oil filter trapped particles of such fineness that it regularly became clogged, requiring its frequent replacement and the corresponding removal and reinstallation of the oil filter bowl. This procedure was required more frequently than Sikorsky had anticipated and increased the stresses on the Studs.

22. Sikorsky failed to design the S-92 MGB and its related lubrication system to withstand the operational conditions to which it knew or should have known they would be subjected.

23. At all material times Sikorsky knew or should have known that the design of the S-92 MGB and its related lubrication system posed an unreasonably high risk of failure and that a resulting loss of lubrication could cause a catastrophic accident.

### The Certification of the S-92

24. In or about December of 2002, the S-92 was certified by the Federal Aviation Administration ("FAA") to meet Federal Aviation Regulations (FAR's) Part 29.

25. On or about February 7, 2005, the S-92 was awarded its Canadian Type Certification No. H-105 by the Minister of Transport pursuant to the Canadian Aviation Regulation Part V Subpart 21 "*Approval of the Type Design or a Change to the Type Design of an Aeronautical Product*".

26. By approving the Type Design of the S-92, the Minister of Transport certified that the S-92 was airworthy under Canadian standards and authorized its operation in Canada.

27. Certification under FAR's Part 29 requires the manufacturer of a helicopter to meet the requirements of 14 FAR 29.927(c), which addresses the reliability of the lubrication system as follows:

*(c) Lubrication System Failure. For lubrication systems required for proper operation of rotor drive systems, the following apply:*

*(i) Category A. Unless such failures are extremely remote, it must be shown by test that any failure which results in loss of lubricant in any normal use lubricating system, will not prevent continued safe operation, although not necessarily without damage, at a torque and rotational speed prescribed by the applicant for continued flight, for at least 30 minutes after perception by the flight crew of the lubrication system failure or loss of lubricant."*

28. In the course of the certification process, Sikorsky tested the S-92 MGB and determined that without oil it could not run for longer than 11 minutes. Sikorsky made no attempt to re-design the MGB and its related lubrication system to improve its run-dry

capability nor did it design a supplementary emergency lubrication system or impose operational limits on the Helicopter restricting flights to less than 11 minutes from a suitable landing place.

29. Instead, Sikorsky represented to the FAA and to the Minister of Transport that the MGB complied with 14 FAR 29.927(c) on the basis that a failure of the lubrication system of the S-92 was "extremely remote" as that term is defined by the FAA.

30. The term "extremely remote" is defined in Chapter 3 of the FAA System Safety Handbook to mean:

"Qualitative: Not anticipated to occur to each item during its total life. May occur a few times in the life of an entire system or fleet.

Quantitative: Probability of occurrence per operational hour is less than one times ten to the minus seventh but greater than one times ten to the minus ninth."

31. This standard contemplates less than one failure every 10 million operational hours.

32. As a result of this decision by Sikorsky, the certification of the S-92, the reliability of the MGB and the safety of the S-92 depended upon the accuracy of Sikorsky's analysis of the safe life of the MGB lubrication system rather than its empirical testing of the MGB which had demonstrated that the MGB did not meet the 30 minute loss of lubrication certification requirement under 14 FAR 29.927(c).

33. Sikorsky's analysis was flawed. In particular it failed to take into account the high risk of failure which was inherent in its design of the MGB and its related lubrication system.

34. Sikorsky assessed the probability of a failure of the lubrication system without giving any or any adequate weight to the high cost which a failure posed to the operators, crews and passengers of the S-92.

35. The Minister of Transport knew or should have known the basis upon which the S-92 MGB had been certified when he issued Certification No. H-105.

#### **Promotion and Sale of the S-92**

36. Sikorsky first sold the S-92 commercially in 2004. At that time, Sikorsky faced direct competition from Eurocopter, which was simultaneously marketing its model EC225 helicopter (the "EC225"), which was in many respects comparable to the S-92 and which, like the S-92 had been designed for the offshore oil transport service mission.

37. From at least 2000, Sikorsky aggressively marketed and promoted the sale of the S-92 through the use of advertising brochures, technical publications and media interviews. In these ways, Sikorsky repeatedly represented in the United States, in Canada and worldwide that:

- (a) the S-92 was "an eminently safe helicopter which set new standards for helicopter safety";
- (b) the S-92 was the first helicopter "fully certified to latest FAA Part 29 requirements";
- (c) the S-92 was equipped with a "high durability main gearbox" which had a "30 minute run-dry" capability, that is, it could operate safely for 30 minutes following a total loss of lubrication;
- (d) the design of the S-92 was "flaw/damage tolerant"; and
- (e) the S-92 was highly reliable and particularly suited for the offshore oil transport service mission.

(the "Representations")

38. Sikorsky made the Representations with the intention that they would be relied upon by potential customers of the S-92 and particularly by helicopter operators and pilots engaged in the offshore oil industry including Cougar in selecting the S-92 over the EC225 and other available models, who would reasonably rely upon Sikorsky's Representations without knowing they were false and without any means of independently verifying them.

39. Cougar did not know the Representations were false and did in fact rely upon them in selecting the S-92 for offshore operations, and Cougar's pilots reasonably relied upon the Representations in calculating the "run-dry" capability of the Helicopter.

40. The representation by Sikorsky that the S-92 MGB had a "30 minute run-dry" capability was:

- (a) false as demonstrated by Sikorsky's own testing;
- (b) made by Sikorsky solely for the purpose of promoting sales of the S-92 in competition with other helicopter models which did have a 30 minute run-dry capability; and
- (c) dangerously misleading and made by Sikorsky intentionally, recklessly, willfully and without regard to the lives and safety of the operators and pilots of the S-92 including Cougar, who relied upon the representation to believe that they had at least 30 minutes of flying time remaining following a total loss of MGB lubrication.

41. In or about March of 2007, Sikorsky produced to its customers a comparison of the S-92 and the EC225. In that comparison and under the heading "Areas of S-92 & EC225 Parity", Sikorsky stated "*both have 30 minute run-dry transmissions*". Sikorsky made this statement intentionally knowing it to be untrue for the sole purpose of promoting sales of the S-92 in competition with the EC225 helicopter.

### Post-Certification Experience of the S-92

42. At all relevant times Sikorsky and HSI were capable of and did monitor the performance, maintenance and field experience of the S-92 fleet which by the date of the Accident numbered approximately 100 aircraft which had accumulated a total of less than 500,000 operational hours.

43. As a manufacturer of aviation products and pursuant to U.S. and Canadian Government directives, Sikorsky and HSI, as its distributor and service provider, had ongoing duties to warn their customers and operators of the S-92 of:

- (a) flaws or defects in the S-92 and its component parts;
- (b) any requirement to remove any component parts identified as defective or unsafe;
- (c) any requirement to install new components in order to mitigate identified defects in design; and
- (d) any operational limitations required to mitigate new risks identified from field experience.

44. Sikorsky and HSI were obliged to carry out these duties to warn in good faith and with that degree of urgency and clarity required by the nature of the detected hazard and the magnitude of the risk which it posed.

45. On June 1, 2005, the FAA issued an Airworthiness Directive to respond to a reported incident of an S-92 in-flight loss of MGB oil pressure. In AD 2005-12-03, the FAA ordered the replacement of the MGB lubrication/scavenge pump vespel spline adapters before further flight to *"prevent loss of lubrication to the MGB which could cause failure (to gears) resulting in loss of power to the rotor system and subsequent loss of control of the helicopter"*. Notwithstanding this incident of an in-flight loss of oil pressure, Sikorsky took no steps to re-evaluate its calculation that a failure of the lubrication system was "extremely remote".

46. On or about July 2, 2008, Sikorsky and HSI learned of the inflight failure of two of the three titanium Studs used to attach the filter bowl assembly to the MGB of an S-92 operating in Australia (the "July 2, 2008 Incident"), with the resulting sudden and total loss of oil from the MGB – precisely the same series of events that caused the Accident.

47. In the July 2, 2008 Incident the failure occurred over land and the crew were able to carry out a successful emergency landing prior to failure of the MGB.

48. From the circumstances of the July 2, 2008 Incident, Sikorsky and HSI knew or should have known that the analysis upon which Sikorsky had relied to establish that the failure of the lubrication system of the S-92 was "extremely remote" was flawed and that the S-92 did not comply with the requirements of 14 FAR 29.927(c).

49. As a result of investigations which followed the July 2, 2008 Incident, Sikorsky and HSI knew or should have known that Sikorsky's design of the MGB and related lubrication system contained defects and particularly that the titanium studs were unsuited for the purpose for which they had been designed and were being used.

50. As a result of the July 2, 2008 Incident, Sikorsky and HSI knew or should have known:

- (a) that the S-92 was not safe to operate and was not airworthy;
- (b) that the S-92 did not meet the certification requirements of FAR's Part 29;
- (c) that there was an unacceptable and increasing risk that the MGB of the S-92 could experience a total loss of lubrication;
- (d) that the consequences of this risk were particularly severe for operators who were engaged in the offshore oil industry flying passengers long distances over open ocean;
- (e) that the MGB of the S-92 had a run-dry capability of no more than 11 minutes;

- (f) that a loss of lubrication from the MGB inflight created an unreasonable and unacceptable risk of a catastrophic accident with death and injury to passengers and crew.

51. Sikorsky failed to advise its customers of these facts. Instead, it introduced into the Aircraft Maintenance Manual a revised protocol for the inspection of the titanium studs which Sikorsky and HSI knew or should have known was both impractical and inadequate to mitigate the risk of an inflight failure of the MGB.

52. On January 28, 2009, more than six months following the July 2, 2008 Incident, Sikorsky finally issued an Alert Service Bulletin No. 92-63-014 (the "January ASB"), in which it instructed S-92 operators to replace the MGB filter bowl assembly mounting titanium studs with steel mounting studs. In the January ASB, Sikorsky states:

*"Undetected damage to an oil filter stud can lead to failure of the stud. Enhanced procedures are being added to the maintenance manual to help identify potentially damaged studs. To further enhance reliability of this connection, the titanium studs are being replaced with steel."*

53. Although Sikorsky stated in the January ASB that "compliance is essential", it extended the time for compliance to 1250 flight hours or one year from the issue date of the January ASB regardless of the service time of the Studs.

54. In the January ASB, Sikorsky failed to:

- (a) alert operators to the severity of the July 2, 2008 Incident and the demonstrated fact that a total loss of lubrication from the MGB was not an "extremely remote" event;
- (b) warn operators that the S-92 MGB had no more than an 11 minute run-dry capacity and particularly that it did not have the "30 minute run-dry" capability as advertised and promoted by Sikorsky;
- (c) ground the S-92 worldwide fleet and mandate and immediate replacement of the titanium studs with steel studs;
- (d) alert operators to the urgency of the requirement to replace the Studs; and

- (e) warn operators that failure of the Studs could lead to sudden and complete loss of MGB lubrication.

55. By Purchase Order dated February 19, 2009, Cougar responded to the January ASB by ordering from HSI the parts and tools necessary to carry out the replacement of the Studs. HSI failed to ship the parts and tools ordered by Cougar until March 16, 2009, four days after the Accident.

56. From at least the July 2, 2008 Incident, Sikorsky and HSI were aware that the titanium studs were susceptible to fatigue cracking and failure. They were aware that fatigue cracking of the titanium studs could result in the total loss of lubricant from the MGB at the filter bowl. They were aware that the total loss of lubricant from the MGB could cause a catastrophic loss of the aircraft with possible death and injury to passengers and crew. By failing to take prompt and adequate action to mitigate those risks, Sikorsky and HSI assumed full responsibility for those potential losses, which materialized in the Accident.

57. The failure of Sikorsky and HSI to respond promptly and effectively to the unsafe condition of the S-92 MGB and its related lubrication system was careless, deliberate and/or willful and solely prompted by its concern for its own commercial reputation and the potential loss of sales of the S-92 in a competitive helicopter market. The Defendants' failure to ensure the continued airworthiness and safety for flight of the S-92 demonstrated a callous disregard for the risk of death or injury to crews and passengers of the S-92.

58. The S-92 involved in the July 2, 2008 Incident was owned and operated by Canadian Helicopters International, a Canadian operator. Accordingly, the Canadian Transportation Safety Board participated in the investigation of the July 2, 2008 Incident.

59. The Minister of Transport was informed by the Canadian Transportation Safety Board of the July 2, 2008 Incident. As the sole government authority in Canada responsible for the regulation of aviation matters and particularly the certification of the S-92 in Canada and through certification for the airworthiness and safety of the S-92 in Canada, the Minister of Transport knew or should have known from and after the July 2, 2008 Incident that the S-92 no longer met certification requirements in Canada and was not airworthy.

60. The Minister of Transport received a copy of the January ASB and knew, or should have known from that document, that the S-92 no longer met certification requirements in Canada and was not airworthy.

#### **Sikorsky's Revision of the S-92 Flight Manual**

61. At all material times, Sikorsky published the Rotorcraft Flight Manual for the S-92 (the "RFM"). The RFM requires the approval of the FAA. The RFM contains emergency procedures and particularly procedures to be followed by air crew in the event of an impending MGB failure.

62. Prior to September 2008, the RFM identified loss of MGB oil pressure as an indicator of an impending MGB failure which required an emergency landing.

63. Notwithstanding the July 2, 2008 Incident, on September 26, 2008, Sikorsky issued Safety Advisory SSA-S92-08-006 (the "September SSA") in which it stated that *"It has been determined that some of the indications for an impending gearbox failure currently listed in the Rotorcraft Flight Manual are not representative of the MGB performance/capability during a malfunction"*. In the September SSA, Sikorsky specifically identified the new criteria for an impending MGB failure as:

- “1. an increase in power required at a constant collective setting;
2. yaw kicks; and
3. unusual vibrations or unusual noise ...”

64. In February 2009, in Anaheim, California, Sikorsky convened a Flight Operations Group meeting including Cougar flight operations personnel. At that meeting, Sikorsky confirmed that it was proceeding to revise the RFM, stating specifically “*FAA and Sikorsky agreed on wording*” to delete the loss of MGB oil pressure as a criteria to “land immediately”.

65. By advising operators including Cougar that, with the approval of the FAA, loss of MGB oil pressure would no longer be an indicator of an impending MGB failure, Sikorsky knowingly introduced into the S-92 emergency procedures ambiguity and uncertainty which Sikorsky knew or should have known would affect the decision making ability of any S-92 pilots who experienced loss of MGB oil pressure.

66. The statements made by Sikorsky at the Flight Operations Group Meeting in 2009 that the FAA had agreed to delete the loss of MGB oil pressure as a criteria to “land immediately” was untrue and was made by Sikorsky to give added authority to the changes in the S-92 emergency procedures without regard to the impact which such a statement would have on the state of mind of S-92 pilots who experienced a loss of MGB oil pressure.

67. The announcement by Sikorsky of changes to the S-92 emergency procedures by removing loss of MGB oil pressure as an indicator of an impending MGB failure was wilfully negligent and reckless and made by Sikorsky without regard for its own knowledge that the S-92 MGB would fail within 11 minutes of the total loss of lubrication.

68. The total loss of MGB lubricant is communicated to the flight crew in the cockpit of an S-92 as a loss of MGB oil pressure.

69. On March 12, 2009, the first indication observed by the crew of the Helicopter of any problem was a loss of MGB oil pressure. Upon that observation, and in all the circumstances, the crew elected not to ditch the Helicopter but immediately turned the Helicopter towards the nearest landfall, which was well within 30 minutes flying time. The Helicopter crashed within 11 minutes of the observation of loss of MGB oil pressure. The crew observed none of the criteria for impending failure of the MGB referred to in the September SSA until seconds before the Accident.

70. Sikorsky made the representations in the September SSA and the February 2009 Flight Operations Group Meeting intending that they would be relied upon by flight operations personnel including those of Cougar, who did rely upon them.

#### **Post-Accident Events**

71. On March 20, 2009, Sikorsky issued an Alert Service Bulletin No. 92-63-014A (the "March ASB") requiring the immediate removal of the titanium mounting studs and replacing them with steel mounting studs.

72. The FAA grounded the entire S-92 fleet worldwide.

73. On March 23, 2009, the FAA issued an Emergency Airworthiness Directive No. 209-07-53, containing the following statement:

*"This Emergency Airworthiness Directive (AD) is prompted by the failure of two main gearbox filter bowl assembly mounting studs (Studs) that were found broken during a fatal accident investigation in Canada. Prior to the accident, the manufacturer was investigating a July 2008 incident that also involved broken studs. In both cases, the broken studs resulted in rapid loss of oil. The failures have been tied to fretting and galling of the original titanium studs; therefore, we are requiring the removal of all titanium studs and replacement with steel studs. We are issuing this Emergency AD to prevent failure of a stud which could result in rapid loss of oil, failure of*

*the main gearbox, and subsequent loss of control of the helicopter. ...*

*This unsafe condition is likely to exist or develop on other helicopters of the same type design. Therefore, this AD requires, before further flight, replacing titanium studs with steel studs. ..."*

74. On March 19, 2009, the FAA issued a Special Airworthiness Information Bulletin to address the September SSA stating:

*"Sikorsky Aircraft issued Sikorsky Safety Advisory (SSA) SSA-S92-08-006, dated September 26, 2008. This SSA for the Sikorsky S-92A helicopter suggested forthcoming FAA Rotorcraft Flight Manual (RFM) changes pertaining to main gearbox emergency procedures. The FAA has not approved these changes. A series of difficulties including a recent fatal accident in Canada has highlighted these procedures for review and possible revision. The information in the Sikorsky SSA was premature and may not be appropriate. ..."*

75. Parts and tooling necessary to replace the titanium studs with steel studs, which had been unavailable following the January ASB were delivered to Cougar by HSI four days after the day of the Accident.

76. As a result of the Accident, Cougar's S-92 operations in Newfoundland and Labrador were shut down for a period of more than three months initially by the grounding order of the FAA and subsequently by Cougar's oil company customers who refused to permit the transportation of workers by S-92s until they were satisfied that Sikorsky had addressed all problems with the MGB and its related lubrication system.

77. Within one year of the Accident, Sikorsky redesigned the entire MGB, filter and filter bowl assembly.

**DUTY OF CARE / STANDARD OF CARE**

78. At all relevant times the Defendants knew that Cougar was engaged in the offshore oil industry and employed the Helicopter as well as other S-92s in its fleet to transport passengers on long flights to remote drilling facilities over open ocean.

79. As a manufacturer of aviation products, Sikorsky and its distributor and service provider HSI owed a duty of care to the Plaintiffs and to all consumers of its products to take reasonable care in the design and manufacture of their products and services to ensure that they are safe and free from any defects at all times over their operational lives.

80. The test of reasonable care to be met by Sikorsky, as a manufacturer of aviation products, is a reflection of the critical nature of aircraft design and aircraft components and the high standards of safety commonly practiced throughout the aviation industry.

81. Sikorsky, as a manufacturer of aviation products, owed to the Plaintiffs and to all consumers of its products an ongoing duty to monitor their operational performance and to warn of, and provide a remedy for, detected defects, limitations and dangerous conditions with that degree of urgency required to effectively mitigate the risk posed by the defect or dangerous condition.

82. HSI as a supplier, distributor, vendor of helicopter components and service provider for Sikorsky had a duty of care to its customers to ensure that the Helicopter was airworthy at all times and that the products for which it was responsible were airworthy and free from defects.

83. HSI as a supplier, distributor and vendor of helicopter components had at all times a duty of care to its customers including Cougar to warn them of any defects or dangerous conditions detected in the Helicopter and parts which it supplied or for which it was responsible.

84. By virtue of the *Aeronautics Act (supra)*, the Minister of Transport was responsible for all matters connected with aeronautics in Canada including particularly the certification of aircraft in Canada.

85. By virtue of his statutory responsibilities, the Minister of Transport owed a duty of care to the general public to ensure that aircraft operated in Canada met minimum standards and further to ensure that the manufacturers of aircraft which had been certified in Canada continued to meet all standards and criteria upon which certification in Canada had been granted.

86. The Minister of Transport, his agents, officers and employees are bound to undertake diligently and with all possible reasonable skill and timeliness the duties of care which flow from his statutory obligations.

87. In particular, the Minister of Transport owed a duty of care to S-92 operators in Canada to monitor the performance of Canadian S-92s to ensure that the S-92 was safe and remained in compliance with Canadian certification requirements and to ground the S-92 if it did not.

#### **SIKORSKY'S NEGLIGENCE**

88. The Plaintiffs plead that the damages which they suffered as a result of the Accident were caused by the breach of duty, negligence, gross negligence, negligent

misrepresentation, recklessness and wilful misconduct of Sikorsky, particulars of which include but are not limited to:

- (a) it designed, built and sold into the stream of commerce the S-92 which was not airworthy;
- (b) it did not use best design practices in the design of the S-92 MGB and its related lubrication system;
- (c) it designed into the S-92 MGB and its related lubrication system defects and weaknesses which caused the MGB to experience a sudden and total loss of lubricant;
- (d) it incorporated into the design of the S-92 MGB and its related lubrication system design features which it knew from past experience were inadequate, inappropriate and/or defective;
- (e) it specified the use of titanium alloy for the fabrication of the Studs when it knew or should have known that titanium alloy was not a safe or appropriate material for that application;
- (f) it designed the oil filter and the oil filter bowl for use in the S-92 MGB and its related lubrication system so that they required frequent replacement and interfered with the pre-loading of the Studs;
- (g) it designed the S-92 MGB and its related lubrication system without taking into consideration the high levels of vibration to which they were subjected;
- (h) it failed to design the MGB and its related lubrication system on the S-92 to comply with the Federal Aviation Regulations under which the helicopter was certified;
- (i) it failed to design the S-92 MGB with at least a 30 minute run-dry capacity;
- (j) it failed to restrict the operation of the S-92 to flights within 11 minutes of a suitable landing place;
- (k) it conducted and relied upon a flawed risk analysis to establish that a complete loss of lubricant from the S-92 MGB was "extremely remote";
- (l) it failed to design the S-92 MGB so that the possibility of a complete loss of lubricant was "extremely remote";
- (m) it represented to its customers including the Plaintiffs that the S-92 had a "30 minute run-dry capacity" when it knew that this was not true;
- (n) it failed to monitor adequately or at all the field experience of the S-92;
- (o) it failed to respond appropriately to the July 2, 2008 Incident;
- (p) it failed to react to the July 2, 2008 Incident with the degree of urgency required of a manufacturer of aviation products;

- (q) it failed to warn its customers and particularly the Plaintiffs that a high risk existed of failure of the S-92 MGB as a result of loss of lubricant;
- (r) it failed to advise its customers and particularly the Plaintiffs after July 2008 that the S-92 MGB did not have a 30 minute run-dry capacity;
- (s) after July 2008 it failed to promptly redesign the S-92 MGB and its related lubrication system;
- (t) in January 2009 it issued the January ASB which failed to effectively mitigate the risk of failure of the MGB and misled operators including the Plaintiffs to believe the replacement of the titanium studs was not a matter of urgency;
- (u) it failed to ensure that the tools and components necessary to carry out a replacement of the titanium studs were immediately available to its customers and particularly to the Plaintiffs so that they could promptly replace the titanium studs;
- (v) it introduced changes to the RFM which were ambiguous and likely to mislead operators and pilots into the belief that a loss of MGB oil pressure was not an indication of imminent failure of the MGB;
- (w) it proceeded to change the S-92 emergency procedures by proposing the removal of loss of MGB oil pressure as an indicator of imminent MGB failure when it knew that the S-92 MGB would fail within 11 minutes of a total loss of lubricant;
- (x) it represented to its customers including the Plaintiffs that the FAA had approved the removal from the RFM of loss of MGB oil pressure as an indication of imminent failure of the MGB when it knew that this was not true; and
- (y) it failed to advise its subsidiary HSI of the defects in the S-92 MGB and its related lubrication system and particularly it failed to advise HSI that the Studs contained material defects which required their immediate replacement.

89. Cougar relied upon the misrepresentations made negligently by Sikorsky and suffered losses as a result.

#### **FRAUDULENT MISREPRESENTATION**

90. Following the July 2, 2008 Incident, Sikorsky continued to promote and sell the S-92 on the basis that it was eminently safe and suitable for the mission of transferring workers offshore when it knew or should have known that this was not true. In doing so, Sikorsky acted in bad faith with reckless disregard for the safety of its customers, including

Cougar and its passengers, employees, property and reputation solely for the purposes of earning revenues from the continuing sales of the S-92.

91. By promoting and advertising the S-92 as having a "30 minute run-dry" capacity, Sikorsky fraudulently misrepresented to buyers and operators the airworthiness and flight safety of the S-92. Such false pretense was made solely for the purpose of earning sales revenue and without regard for the safety of its customers including Cougar and its employees and passengers.

92. Particularly, in its comparison of the S-92 with the EC225, Sikorsky falsely made the statement that "both have 30 minute run-dry transmissions" knowing that it was a misrepresentation of the capability of the S-92, made for the express purpose of deceiving prospective customers and operators including Cougar so that they would buy or use the S-92 in preference to the EC225 helicopter.

93. Cougar relied upon the fraudulent misrepresentations of Sikorsky and suffered losses as a result.

94. From at least the July 2, 2008 Incident, Sikorsky delayed requiring the immediate replacement of the titanium studs for commercial reasons at the expense of the Plaintiffs and the passengers and crew who died or were injured in the Accident.

#### **HSI'S NEGLIGENCE**

95. The Plaintiffs plead that the damages which they suffered as a result of the Accident were caused by the negligence of HSI, particulars of which include but are not limited to

- (a) it failed to warn Cougar that the titanium Studs were defective and required immediate replacement;

- (b) it failed to maintain a supply of tools and parts readily available to Cougar so that Cougar could replace the Studs; and
- (c) it failed to respond promptly to Cougar's order for the tools and components necessary to carry out the replacement of the Studs.

#### ACQUISITION OF THE HELICOPTER

96. Lloyds Bank purchased the Helicopter from Sikorsky on or about April 12, 2007 pursuant to the terms of a New Helicopter Sales Agreement dated January 29, 2004 between CHC Helicopter Corporation and Sikorsky, as revised by a Novation Agreement of unknown date between Lloyds Bank, Sikorsky and CHC Helicopter Corporation.

97. Cougar acquired the Helicopter as sub-lessee from CHC Helicopters International Inc. ("CHC") pursuant to an Aircraft Lease, General Terms Agreement and an Aircraft Specific Lease Agreement, all dated March 13, 2007 (the "Sub-lease").

98. It was a term of the Sub-lease that Cougar would be responsible for all risks associated with any loss of or damage to the Helicopter throughout the term of the Sub-lease.

99. It was a further term of the Sub-lease that Cougar would obtain, pay for and maintain full insurance on the Helicopter during the term of the Sub-lease and would protect the interests of Lloyds Bank as owner of the Helicopter.

100. Pursuant to the Sub-lease, Cougar accepted delivery of the Helicopter from Sikorsky on April 12, 2007, on which date Cougar issued a Certificate of Acceptance to CHC pursuant to the Sub-lease.

### HSI'S BREACH OF CONTRACT

101. On or about April 12, 2007, Cougar entered into a New Helicopter Total Assurance Program Contract with HSI as "Service Provider" for a term of five years from April 12, 2007 to April 21, 2012 (the "TAP Agreement").

102. Pursuant to Part II, Section 1 of the TAP Agreement, HSI's obligation was:

*"(a) during the term of this Agreement, Service Provider shall, as required to keep the helicopter airworthy and serviceable, repair or replace Covered Parts for the helicopter which are:*

*(i) defective in material, or workmanship. ..."*

103. The term "Covered Parts" is defined in Exhibit A to the TAP Agreement as:

*"Covered Parts in this Agreement means and includes all parts included in and on the Helicopter delivered under the Helicopter Sales Agreement, including all Airframe, powertrain assemblies, blades and avionics parts ..."*

104. At all relevant times, HSI knew or should have known that the S-92 MGB and its related lubrication system had inherent design flaws and defects which rendered the S-92 un-airworthy and unfit for the purposes for which it was intended.

105. In particular, HSI knew or should have known from at least the July 2, 2008 Incident that the titanium studs designed by Sikorsky to secure the oil filter bowl to the MGB were defective in material and should have been replaced by steel studs. At no time prior to the Accident did HSI advise Cougar of the defect inherent in the MGB and related lubrication system of the Helicopter, nor did it recommend or seek to replace the Studs which were defective in material.

106. HSI was in breach of its obligations to Cougar under the TAP Agreement in that it:

- (a) willfully, recklessly and intentionally failed to provide the support which Cougar had contracted and paid for;
- (b) willfully, recklessly and intentionally failed to keep the Helicopter airworthy;
- (c) willfully, recklessly and intentionally failed to keep the Helicopter serviceable for the purposes for which HSI knew it was intended;
- (d) willfully, recklessly and intentionally failed to replace the Studs;
- (e) willfully, recklessly and intentionally failed to maintain an adequate or any store of component parts;
- (f) willfully, recklessly and intentionally failed to deliver to Cougar parts and tools necessary to replace the Studs in a timely manner.

### **NEGLIGENCE OF THE MINISTER OF TRANSPORT**

107. As the sole Canadian government authority responsible for regulating aviation matters in Canada, the Minister of Transport was negligent in the exercise of his statutory duties and obligations. Particulars of such negligence include but are not limited to the failure of the Minister of Transport:

- (a) to monitor the performance of the S-92 and particularly incidents and accidents involving the S-92 to ensure that it complied with the terms and conditions of its certification in Canada;
- (b) to warn Canadian operators following the July 2, 2008 Incident that the S-92 was no longer in compliance with certification requirements in Canada and was not airworthy;
- (c) to ground the S-92 in Canada following the July 2, 2008 Incident until Sikorsky had taken steps to bring the S-92 into compliance with certification requirements;
- (d) to order the immediate grounding of the S-92 in Canada in response to the January ASB;
- (e) to carry out its statutory and regulatory authorities in a reasonable manner and in the best interest of aviation safety.

### **DAMAGES**

108. By reason of the conduct of the Defendants set forth above, the Plaintiffs suffered damages.

109. The Plaintiffs claim damages for the destruction of the Helicopter. The Helicopter was declared a constructive total loss as a result of damage sustained to it in the Accident. The Helicopter had no significant salvage value.

110. Underwriters indemnified Cougar under the Policy and paid the sum of USD \$23,550,000 being the agreed value of the Helicopter under the Policy. Pursuant to its obligation under the Aircraft Lease General Terms Agreement Cougar instructed Underwriters to pay directly from the insurance proceeds the sum of USD \$21,751,127 to Lloyds Bank, the beneficial owner of the Helicopter.

111. In addition, the Plaintiffs claim all damages consequent upon the destruction of the Helicopter and the events surrounding the destruction of the Helicopter.

112. The Plaintiffs claim damages for all amounts which they have or will pay in respect of the costs associated with recovering, storing and disposing of the wreckage of the Helicopter.

113. Cougar claims special damages which it suffered as a consequence of the Accident and as a result of the negligence and breach of contract of the Defendants as follows:

- (a) loss of profits in the amount of \$326,020, representing Cougar's net loss of profits due to the extended shutdown of its St. John's operations as a direct result of the Accident and Sikorsky's failure to satisfy Cougar and its customers of the safety of the MGB;
- (b) the cost of providing search and rescue flights in the amount of \$13,223, representing Cougar's costs in operating rescue flights from St. John's to the Accident site;
- (c) loss of its hull deductible under the Policy in the amount of \$100,000 USD;
- (d) the cost of increased insurance premiums resulting from the Accident in the amount of \$700,000, representing the increase of premiums over one year. This claim will be re-assessed prior to trial to include the cost of continued

increased insurance premiums attributable to the Accident over subsequent years;

- (e) the costs of participating in the investigation of the Accident by the Transportation Safety Board in the amount of \$13,800;
- (f) the costs of public relations and media management in the amount of \$96,333, required by Cougar to respond to the Accident and to public questions concerning the safety of the S-92;
- (g) the costs of participating in the Offshore Helicopter Safety Inquiry in the amount of \$312,618 to the date of this Statement of Claim. The full amount of this claim will be calculated as at the date of trial;
- (h) costs incurred in responding to the families of deceased passengers and crew, including travel, memorial, funeral and other costs in the amount of \$159,965; and
- (i) administrative costs incurred in maintaining its business operations throughout the grounding of aircraft following the Accident including additional payroll, travel costs and expenses in the amount of \$362,384.

114. The Plaintiffs claim from Sikorsky punitive damages in an amount proportionate to its reckless behavior and willful misconduct and to the damages which it caused and sufficient to deter Sikorsky from again placing its own commercial interests ahead of aviation safety generally and particularly the safety of its customers, their employees and passengers.

115. The Plaintiffs claim from the Defendants their damages plus HST thereon, as appropriate, and pre-judgment and post-judgment interest and their costs of this action.

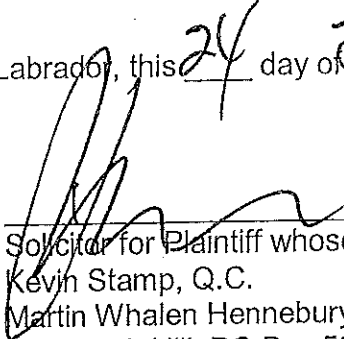
116. The First Defendant (Sikorsky) is to be served outside the Province of Newfoundland and Labrador at its said address for service without leave pursuant to Rule 6.07(1)(h) as the within proceeding is one which arises from torts committed within the Province of Newfoundland and Labrador and within the joint jurisdiction of the Governments of Newfoundland and Labrador and of Canada pursuant to the *Atlantic Accord Implementation Acts* of Newfoundland and Labrador and of Canada. Furthermore, service

upon the First Defendant is permitted pursuant to Rule 6.07(1(m), as the First Defendant is a necessary and property party to the within action.

117. The Second Defendant (HSI) is to be served outside the Province of Newfoundland and Labrador at its said address for service without leave pursuant to Rule 6.07(1)(f) as the within proceeding is one which arises from a breach of contract committed within the Province of Newfoundland and Labrador, and Rule 6.07(1)(h) which also arises from torts committed within the Province of Newfoundland and Labrador and within the joint jurisdiction of the Governments of Newfoundland and Labrador and of Canada pursuant to the *Atlantic Accord Implementation Acts* of Newfoundland and Labrador and of Canada. Furthermore, service upon the Second Defendant is permitted pursuant to Rule 6.07(1(j), as the Second Defendant is a necessary and property party to the within action.

THE PLAINTIFFS PROPOSE that the place of trial be St. John's, Newfoundland.

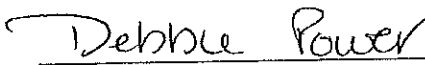
DATED at St. John's, Newfoundland and Labrador, this 24 day of June, 2010.

  
Solicitor for Plaintiff whose address for service is:  
Kevin Stamp, Q.C.  
Martin Whalen Hennebury Stamp LLP  
15 Church Hill, PO Box 5910  
St. John's, Newfoundland A1C 5X5

TO: The Defendants  
or  
Solicitor for the Defendants

ISSUED at St. John's, Newfoundland and Labrador this 24<sup>th</sup> day of June, 2010.

Seal of the court.

  
Registrar  
Court Clerk

2010 01G \_\_\_\_\_

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION (GENERAL)

BETWEEN:

COUGAR HELICOPTERS INC.

FIRST PLAINTIFF

LLOYDS TSB GENERAL LEASING (NO. 20) LIMITED

SECOND PLAINTIFF

UNDERWRITERS AT LLOYD'S OF LONDON,  
ALLIANZ GLOBAL RISKS US INSURANCE COMPANY,  
WESTPORT INSURANCE CORPORATION,  
GLOBAL AEROSPACE UNDERWRITING MANAGERS,  
GCAN INSURANCE COMPANY,  
UNDERWRITERS AT LLOYD'S PER CATLIN CANADA INC., and  
AIG AVIATION INC.

THIRD PLAINTIFF

AND:

SIKORSKY AIRCRAFT CORPORATION

FIRST DEFENDANT

HELICOPTER SUPPORT, INC.

SECOND DEFENDANT

THE ATTORNEY GENERAL OF CANADA, IN RIGHT  
OF THE MINISTER OF TRANSPORT

THIRD DEFENDANT

**Notice to Defendants**

You are hereby notified that the plaintiffs may enter judgment in accordance with the statement of claim or such order as, according to the practice of the Court, the plaintiffs is are entitled to, without any further notice to you unless within 45 days, after service hereof upon you, you cause to be filed in the Registry of the Supreme court of Newfoundland and Labrador at St. John's a defence and unless within the same time a copy of your defence is served upon the plaintiff's solicitor at the plaintiff's solicitors stated address for service.

Provided that if the claim is for a debt or other liquidated demand you pay the amount claimed in the statement of claim and the sum of \$ \_\_\_\_ ( or such sum as may be allowed on taxation) for costs to the plaintiff's solicitors within \_\_\_\_ days from the service of this notice upon you, then this proceeding will be stayed.

TO: The Defendants  
or  
Solicitors for the Defendants

**Endorsements**

RECEIVED on \_\_\_\_\_, the \_\_\_\_ day of \_\_\_\_\_, 2010.

This statement of claim and attached notice to defendants was served by me on the defendants, at \_\_\_\_\_, on \_\_\_\_\_ the \_\_\_\_ day of \_\_\_\_\_, 2010, before the hour of \_\_\_\_ in the \_\_\_\_ noon.

Endorsed on \_\_\_\_\_ the \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
(signed)

\_\_\_\_\_  
(address)

\_\_\_\_\_