

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

JERRY CADIGAN, and NANCY CATON  
CADIGAN, as the Proposed Administrators of  
the Estate of TREVOR NORRIS CADIGAN,  
deceased,

Plaintiffs,

-against-

LIBERTY HELICOPTERS, INC., a New York  
Corporation; NYONAIR, LLC, a New Jersey  
Limited Liability Company; MERIDIAN  
CONSULTING I CORPORATION, INC., a  
Delaware Corporation; RICHARD ZEMKE  
VANCE, a Connecticut resident; AIRBUS  
HELICOPTERS, S.A.S., a French Corporation;  
AIRBUS HELICOPTERS, INC.; a Delaware  
Corporation; and APICAL INDUSTRIES, INC.  
d/b/a DART AEROSPACE, a California  
Corporation;

Defendants.

INDEX NO.: 152286/2018

**ATTORNEY AFFIRMATION IN  
SUPPORT OF MOTION FOR  
OPEN COMMISSION AND  
ISSUANCE OF LETTER  
ROGATORY**

STATE OF NEW YORK     )  
                                  ) ss:  
COUNTY OF NEW YORK    )

**GENE K. KASKIW**, an attorney duly admitted to practice law before the Courts of the State of New York, hereby states the following to be true under penalties of perjury:

1. I am an attorney with the firm of LEWIS BRISBOIS BISGAARD & SMITH, LLP, attorneys for the Defendants LIBERTY HELICOPTERS, INC.; MERIDIAN CONSULTING I CORPORATION, INC.; and RICHARD ZEMKE VANCE (collectively, "Liberty" unless necessary to distinguish) in the above-captioned action. As such, I am fully familiar with the facts and circumstances surrounding the action herein.

2. This Affidavit is respectfully submitted in support of an Order, pursuant to CPLR §§ 3108, 3111 and 3113, granting an Open Commission for Liberty Helicopters to serve a subpoena *duces tecum* upon the custodian of documents of EuroTec Canada, Limited, within a principal place of business in the Country of Canada, Province of Ontario, as, upon information and belief, it possesses documentary evidence (physical and/or electronic), that is material and necessary to the defense of the claims; and for such other and further relief as this Court deems just, equitable and proper.

### FACTS

3. This is, inter alia, a wrongful death, negligence and products liability action commenced by Plaintiffs JERRY CADIGAN, and NANCY CATON CADIGAN, as the Proposed Administrators of the Estate of TREVOR NORRIS CADIGAN, deceased, as against Liberty Helicopters and other such Defendants as set forth in the caption, supra. A true and accurate copy of Plaintiffs' Amended Verified Complaint is annexed as Exhibit "A."

4. The matter arises from a helicopter accident on March 11, 2018 in the East River, New York, New York. The helicopter, an Airbus Eurocopter AS350B2 model registered N350LH, sustained a loss of power event which necessitated a water landing in the East River. Of the six persons on board, five perished, including plaintiffs' decedent, Trevor Norris Cadigan.

5. Prior to impact with the water, pilot Richard Vance activated the helicopter's emergency float system, designed to keep the helicopter afloat in the event of a forced landing on water, otherwise known as a ditching. After impact with the water, it became apparent that the right-hand side floats did not properly deploy, causing the accident helicopter to immediately list to the right, fill with water and capsize, inverted in the East River, with all six occupants still in the cabin.

6. Upon information and belief, EuroTec Canada sold an Emergency Float Kit, model number 20326-700, manufactured by co-defendant Apical Industries d/b/a Dart Aerospace, Inc., to

Liberty Helicopters in 2013. EuroTec Canada installed said system on the accident helicopter N350LH.

7. Based upon information in documents obtained by this office from client files, we are seeking information from the Document Custodian of EuroTec Canada, Limited, understood to be available at the following address:

Document Custodian of EuroTec Canada, Limited  
12 Innovation Drive Unit W  
Dundas, Ontario L9H 7P3 Canada

8. The foregoing address is outside the legal jurisdiction of the New York Supreme Court. As a result, an open commission is required for Liberty Helicopters to serve a subpoena on the Documents Custodian of EuroTec Canada Limited.

9. Review of documents maintained by Liberty revealed a letter from Dart Aerospace, the manufacturer of the emergency float system, addressed to a representative of EuroTec Canada, which references an installation of a component part of the float system in a non-standard location on the accident helicopter. See Exhibit B hereto.

10. Additionally, e-mail correspondence from Mr. Hoss Golanbari of EuroTec Canada directed to representatives of Liberty reference the deviation from the approved installation instructions published the manufacturer of the emergency float system. See Exhibit C hereto.

11. Because it appears a failure of the float system was a significant factor in the subject matter of this litigation, it is vital for Liberty Helicopters to secure documents related to the Dart Emergency Float Kit which was installed on the accident helicopter.

12. The foregoing Exhibits B and C strongly suggest that EuroTec Canada, Limited, possesses documents directly relevant to issues to be litigated in this matter.

13. EuroTec Canada Limited is not presently a party to this litigation, so the documents sought are not easily available through alternative means.

14. In view of the foregoing, it is respectfully submitted that the proposed non-party subpoena recipient possesses documentary evidence (physical and/or electronic), relevant to Liberty Helicopters' defense in the within action.

### ARGUMENT

15. The discovery sought from EuroTec Canada and its representatives is plainly "material and necessary" for the defense of the claims under CPLR § 3101, since issues pertaining to the emergency float system will undoubtedly be litigated at trial. Accordingly, Liberty Helicopters seek an open commission and letter rogatory pursuant to CPLR § 3108, substantially in the form provided, to obtain the foreign discovery.

16. CPLR § 3120 expressly authorizes the issuance of commissions and/or letters rogatory to subpoena documents located outside the state of New York. Furthermore, CPLR §§ 3101 and 3102 specifically permit obtaining said disclosure where, as here, there are special circumstances, i.e., the importance of the records; the impact on the issues of liability and damages which warrant granting Liberty Helicopters' motion. See also Roeck v. Columbia-Greene Medical Center, 248 A.D.2d 921, 670 N.Y.S.2d 269 (3rd Dep't 1998); New England Mut. Life Ins. Co. v. Kelly, 113 A.D.2d 285, 496 N.Y.S.2d 8 (1st Dep't 1985); William Iselin & Co., Inc. v. Continental Ins. Co., 101 A.D.2d 720, 475 N.Y.S.2d 29 (1st Dep't 1984).

17. The Court has the power to grant an open commission to obtain foreign discovery via subpoena. See Direct Media/DML, Inc. v. Rubin, 258 A.D.2d 290 (1st Dep't 1999); Morgan v. Dell Pub. Co., 185 A.D.2d 876, 878 (2d Dep't 1992) ("Where service of a subpoena outside the State will be ineffective to compel a witness to appear at a deposition, CPLR § 3108 makes the open commission available to secure such disclosure").

18. The standard is a liberal one, and an open commission should be granted so long as the testimony and documentary evidence sought are "material and necessary" to the prosecution or

defense of the action. *Id.*, at 878 (“CPLR article 31, of which CPLR § 3108 is a part, is to be construed liberally to effect its goal of full disclosure of ‘all evidence material and necessary in the ... defense of an action’ (CPLR § 3101(a)); see also *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403”); see also *Walborsky v. Wolf*, 28 A.D.2d 1120 (1st Dep’t 1967)(“defendant, if he so desires, should, in the discretion of the court, be permitted, at his own expense, to conduct an oral cross-examination of the witness”).

19. Indeed, New York Courts have consistently found that where a party seeks to take the deposition of an out of state witness, CPLR § 3108 affords that party the process to seek permission and obtain the necessary discovery. See *Kelleher v. Mazzaro*, 175 A.D.2d 352, 352 (3d Dep’t 1991)(finding that there is no question that CPLR § 3108 authorizes the taking of oral depositions outside the State, particularly where the testimony sought is critical to the issue of damages and because ‘oral interrogation is a more effective method for eliciting information at an examination before trial’); see also *Laverdi v. Baker*, 126 A.D.3d 1355, 1355 (4th Dep’t 2015)(affirming an order which granted the motion of defendants for an open commission and letters rogatory for the deposition a nonparty witness); *Pauzar v. Children’s Hosp. of Buffalo*, 167 A.D.2d 933 (4th Dep’t 1990)(Supreme Court did not abuse its discretion in ordering an open commission to take the testimony of an out-of-State, nonparty witness pursuant to CPLR § 3108..

20. Here, the non-party entity’s principal place of business is in Canada, province of Ontario, and is likely the location of documentary evidence crucial to Liberty Helicopters’ defenses to plaintiffs’ allegations, as well as the specifically-identified matters herein. To facilitate the service of foreign subpoenas, Canadian practice typically requires an order of commission and letters rogatory from the issuing state (herein New York) be provided. See generally, Canada Evidence Act, R.S.C., 1985, c. C-5.

21. Liberty has identified a Commissioner in Toronto, Ontario, Canada, whom it has directed to collect documents facilitate the depositions of the witnesses sought herein. That proposed Commissioner is:

Katherine Ayre, Esq.  
Borden Ladner Gervais LLP  
Bay Adelaide Centre, East Tower  
22 Adelaide St W  
Toronto, ON, Canada M5H 4E3

22. Accordingly, the instant motion should be granted under the authorities set forth.

23. For all of the foregoing reasons, Liberty Helicopters respectfully requests that an Order be granted directing the issuance of an Open Commission (in the form annexed hereto as Exhibit D) and letter rogatory (in the form annexed hereto as Exhibit E), concerning the proposed subpoena *duces tecum* (in the form annexed hereto as Exhibit F). The subpoena ultimately will be identical in scope but may be amended to select an appropriate date, time and location, and may be to conform to the rules and procedures of the country of Canada, province of Ontario, as necessary.

**WHEREFORE**, Defendants LIBERTY HELICOPTERS, INC.; MERIDIAN CONSULTING I CORPORATION, INC.; and RICHARD ZEMKE VANCE, respectfully request that this Court issue an Order:

- a) pursuant to CPLR §§ 3108, 3111 and 3113, granting an Open Commission for Liberty Helicopters to serve a subpoena *duces tecum* upon EuroTec Canada, Limited, with principal place of business in the Province of Ontario, Canada, as it may possess certain documentary evidence (physical and/or electronic), that is material and necessary to the defense of the claims;
- b) Appointing as Commissioner:

Katherine Ayre, Esq.  
Borden Ladner Gervais LLP  
Bay Adelaide Centre, East Tower

22 Adelaide St W  
Toronto, ON, Canada M5H 4E3

- c) directing the Commissioner to return the documents produced in response to the subpoena to Lewis Brisbois Bisgaard & Smith LLP, One Riverfront Plaza, Suite 800, Newark, New Jersey 07102; and
- d) for such other and further relief as this Court deems just, equitable and proper.

/s/ Gene K. Kaskiw

Gene K. Kaskiw, Esq.

Sworn to before me this

16<sup>th</sup> day of August, 2018



Notary Public

**LISA VIGILANTI**  
A Notary Public of New Jersey  
My Commission Expires May 11, 2020