[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13883

D.C. Docket No. 3:16-cv-00170-RV-HTC

PATRICIA LACOURSE,
Individually and as personal representative
of the Estate of Lt. Colonel Matthew LaCourse,

Plaintiff - Appellant,

versus

PAE WORLDWIDE INCORPORATED, et al.,

Defendants,

DEFENSE SUPPORT SERVICES LLC,
Witness 7,
Witness 8,
Witness 9,
JOHN DOES,
1 through 10 inclusive,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(November 17, 2020)

Before WILSON, NEWSOM, and ANDERSON, Circuit Judges.

NEWSOM, Circuit Judge:

This appeal requires us to decide whether and to what extent the Death on the High Seas Act, 46 U.S.C. §§ 30301-08, applies to Patricia LaCourse's wrongful-death action, in which she alleges that PAE Worldwide Incorporated failed to properly service and maintain the F-16 that her husband was flying when it crashed into the Gulf of Mexico. We must also determine whether PAE, which was operating under a services contract with the United States Air Force, is shielded from liability by the so-called "government contractor" defense.

For the reasons that follow, we hold that DOHSA governs LaCourse's action, that it provides LaCourse's exclusive remedy and preempts her other claims, and that PAE is entitled to the protection of the government-contractor defense.

I

A

The tragic story underlying this appeal began when an Air Force F-16 fighter jet departed Tyndall Air Force Base, east of Panama City, Florida, for a continuation-training sortie. The only person on board was the pilot, Matthew LaCourse, a retired Air Force Lieutenant Colonel employed as a civilian by the Department of Defense. The plan was for Lt. Col. LaCourse to

take the jet out over the Gulf of Mexico, perform a series of training maneuvers, and then return to Tyndall Unfortunately, he never came back. During the flight—for reasons the parties dispute—the F-16 crashed into the Gulf more than twelve nautical miles offshore. Sadly, Lt. Col. LaCourse was killed.

Five years prior to the accident, PAE's predecessor—Defense Support Services—had been awarded a contract with the Air Force to provide aircraft service and maintenance at Tyndall, including, as it turns out, on the F-16 that Lt. Col. LaCourse was flying when he crashed. In performing under the contract, PAE was required to follow detailed guidelines and adhere to specific standards, including Air Force Instructions (AFIs), Technical Orders (TOs), and Job Guides (JGs), all of which were prepared by or on behalf of the Air Force.

F-16s are equipped with two hydraulic systems: A and B. The systems operate independently of one another and are designed to allow the plane to continue to fly in the event that one of them fails. Beginning two months before the crash, the jet at issue here experienced a succession of problems that implicated one or both of its hydraulic systems. In particular, on separate occasions: (1) hydraulic fluid was discovered in the outboard flight-control accumulator gauge; (2) System B's hydraulically actuated landing gear twice failed to retract during flight; (3) a hydraulic system pressure-line clamp on System A broke; (4) System B's reservoir accumulator was found to be depleted; (5) a pre-flight control check revealed a hydraulic leak; (6) System A's

cockpit indicator showed no pressure and System B's flight-control accumulator pre-charge was low; and (7) both systems failed a "confidence run."[1] The F-16 was serviced and parts were repaired or replaced as these problems were identified.

On the day of the crash, the F-16 experienced two issues shortly before takeoff. First, the emergency-power unit took longer than expected to activate during the pre-flight check. Second, and more importantly for our purposes, the jet initially failed the "pitch-override check"—in which the pilot applies full pressure to the stick and presses a switch to make the stabilizers at the tail move a few inches or degrees in a nose-down direction. Despite these two "hiccups," as one witness called them, the jet ultimately passed all of its pre-flight checks, which indicated no problem with the hydraulic systems. The PAE mechanics who conducted the pre-flight checks were satisfied that the plane was safe to operate, and they released it for flight.

During the sortie, the F-16 performed a number of aerial maneuvers leading up to a "pitch-back"—an over-the-shoulder tactical maneuver in which the pilot uses the pitch axis to rejoin another aircraft. By all accounts, everything leading up to the pitch-back appeared normal—*i.e.*, no gauge, light, warning, or caution indicated any problem, and there were no reports of any vibrations, shakes, etc. The issue that led to the

[1] The district court assumed that each of these problems was related to the hydraulic systems for purposes of deciding LaCourse's claims on summary judgment but noted that this was "far from certain."

crash occurred at the end of the pitch-back maneuver—Lt. Col. LaCourse appeared to level off and there followed, as one witness described it, "a period of no data, no inputs, no control or . . . no maneuvers," at which point the jet entered a "pitch-down" from about 12,000 feet. There is no evidence that Lt. Col. LaCourse made any effort to eject or radio for help during his final descent.[2]

B

Lt. Col. LaCourse's widow and personal representative, Patricia LaCourse, filed this wrongful-death action and jury demand in Florida state court alleging state-law claims for negligence, breach of warranty, and breach of contract. PAE removed the case to federal court based on federal-officer jurisdiction, diversity jurisdiction, and jurisdiction under DOHSA—which, in relevant part, confers admiralty jurisdiction "[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas." 46 U.S.C. § 30302. Resisting PAE's removal, LaCourse disputed that federal jurisdiction existed on any basis.

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[2] Although it has no real bearing on the issues before us, it's worth noting—by way of background—that the parties vigorously dispute the crash's cause. LaCourse and her experts blame the F-16's dual-hydraulic system, as well as PAE's failure to discover, diagnose, and address the problems. PAE and its experts, by contrast, posit that Lt. Col. LaCourse suffered a G-induced loss of consciousness following the pitch-back.

Once in federal court, PAE moved for partial summary judgment, arguing that DOHSA governed LaCourse's suit and, accordingly, that any potential recovery should (per the statute) be limited to pecuniary damages. The district court granted PAE's motion and held that DOHSA applies and "provides the exclusive remedy for death on the high seas, preempts all other forms of wrongful death claims, and only permits recovery for pecuniary damages."

PAE then filed a motion to strike—or, in the alternative, for partial summary judgment—asking the district court to strike LaCourse's state-law breach-of-warranty and breach-of-contract claims, as well as her jury demand. The district court again granted PAE's motion, concluding that because DOHSA preempts all other wrongful-death causes of action, LaCourse's warranty and contract claims had to be stricken. The district court further held that because all that remained was the DOHSA claim, LaCourse was not entitled to a jury trial.

PAE subsequently moved for final summary judgment, contending that it was protected by the "government contractor" defense, which extends the United States' sovereign immunity to a federal-government contractor, thereby shielding it from civil liability, provided that, among other things, the contractor complies with reasonably precise government specifications. The district court once again agreed with PAE and granted it summary judgment on government-contractor grounds.

This is LaCourse's appeal.[3]

II

Before us, LaCourse argues that the district court erred in several ways. First, she contends that the court wrongly held that DOHSA governs this case—both (1) because by its plain terms DOHSA applies only when a death is caused by "wrongful act, neglect, or default occurring on the high seas," whereas the alleged negligence here occurred on land, and (2) because, in any event, her husband's plane crash lacked a "maritime nexus." Second, LaCourse argues that the district court erred in striking her breach-of-warranty and breach-of-contract claims because they don't seek

[3] As PAE points out, LaCourse's notice of appeal identified only two of the district court's three orders—the order striking her non-DOHSA claims and her jury demand (Doc. 90) and the order granting PAE final summary judgment based on the government-contractor defense (Doc. 134). The notice did not specifically state that LaCourse was also appealing the district court's initial order concluding that DOHSA applied and supplied her exclusive remedy (Doc. 74). LaCourse acknowledges the oversight in her reply brief, but as she explains, it is "well settled that an appeal is not lost if a mistake is made in designating the judgment appealed from where it is clear that the overriding intent was effectively to appeal." *KII Outdoor, LLC v. City of Trussville,* 465 F.3d 1256, 1260 (11th Cir. 2006) (citation omitted). LaCourse's intent to appeal all three orders is apparent from the briefing, and PAE addressed all three orders (and constituent issues) in its response. Moreover, and in any event, our review of the latter two orders necessarily requires us to review the district court's determination of DOHSA's applicability. So in short, LaCourse's oversight hasn't prejudiced either party and, based on our case law, it's appropriate to let it slide under the circumstances.

a remedy broader than DOHSA and therefore aren't preempted. Finally, she asserts that the district court improperly applied the government-contractor defense because PAE failed to show that it complied with the Air Force's reasonably precise specifications for maintaining the F-16.[4]

We will examine each contention in turn.[5]

A

The first question we must address is whether DOHSA applies to LaCourse's suit. The district court held that it does; LaCourse insists that it doesn't.

In relevant part, DOHSA's operative provision states that

> [w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas . . . the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible.

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[4] LaCourse also contends that the district court erred in striking her jury demand. But because—for reasons we'll explain—we hold that the district court's grant of summary judgment in PAE's favor is due to be affirmed, we needn't reach the jury-demand issue.

[5] "We review the district court's grants of partial summary judgment and summary judgment *de novo,* reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party, and applying the same standard as the district court." *Allison v. McGhan Med. Corp.,* 184 F.3d 1300, 1306 (11th Cir. 1999).

46 U.S.C. § 30302. DOHSA's applicability matters, among other reasons, because it limits a plaintiff's recovery to "compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought" and thereby forecloses recovery for emotional injury and punitive damages. *Id. §* 30303.

1

LaCourse first argues that the district court erred in holding that DOHSA applies because the "wrongful act, neglect, or default" asserted here—PAE's negligent maintenance of the F-16—did not "occur[] on the high seas," as the Act's plain language requires. Rather, she says, the alleged negligence occurred on land—when the jet was improperly serviced at Tyndall Air Force Base. Accordingly, LaCourse contends, DOHSA doesn't apply to her suit.

If we were writing on a clean slate, we would almost certainly agree. LaCourse is exactly right that, according to its language, DOHSA applies only when the "death of an individual is caused by wrongful act, neglect, or default occurring on the high seas." And she is also right that the alleged "wrongful act, neglect, or default" here occurred not "on the high seas," but on terra firma. Unfortunately for LaCourse, though, we are bound by controlling precedent to reject her plain-text argument. In *Offshore Logistics, Inc. v. Tallentire,* for instance, the Supreme Court observed that "admiralty jurisdiction is expressly provided under DOHSA *[where] the accidental deaths occurred beyond*

a marine league from shore." 477 U.S. 207, 218 (1986) (emphasis added). So too, in *In re Dearborn Marine Service, Inc.,* our predecessor court, whose decisions bind us,[6] recognized that "DOHSA has been construed to confer admiralty jurisdiction over claims *arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land."* 499 F.2d 263, 272 n. 17 (5th Cir. 1974) (emphasis added); *accord, e.g., Smith v. Pan Air Corp.,* 684 F.2d 1102, 1111 (5th Cir. 1982) ("[T]he simple fact that [plaintiff's] death occurred as a result of an aircraft crash into the high seas is alone enough to confer jurisdiction under the DOHSA. . . . [A]dmiralty jurisdiction has repeatedly been extended to cases in which death or injury occurred on navigable waters even though the wrongful act occurred on land. The place where the negligence or wrongful act occurs is not decisive.") (footnote omitted). It's not for the three of us to second-guess the correctness of *Offshore Logistics* or *Dearborn Marine.* Because we are bound by those decisions, we are constrained to agree with the district court that DOHSA applies despite the fact that PAE's alleged negligence occurred on land at Tyndall Air Force Base.

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LaCourse separately argues that DOHSA doesn't govern here because the plane crash that killed her

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[6] *See Bonner v. City of Prichard, 661* F.2d 1206, 1209 (11th Cir. 1981) (en banc).

husband lacked a "maritime nexus," which she insists is required by the Supreme Court's landmark admiralty decision in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972).

In that case, a plane flying from Ohio to Maine crashed into Lake Erie after striking a flock of seagulls shortly after takeoff. *Id.* at 250. Although the crew wasn't injured, the plane was a total loss, so its owners brought an action in admiralty, alleging negligence by several airport employees. *Id.* at 250-51. The Supreme Court held that maritime locality alone—there, Lake Erie's navigable waters—is not a sufficient predicate for admiralty jurisdiction in aviation-tort cases, and that "in the absence of legislation to the contrary," claims arising from airplane crashes are not cognizable in admiralty unless the alleged wrong bears "a significant relationship to traditional maritime activity"—i.e., has a maritime nexus. *Id.* at 268. Because the flight in *Executive Jet* "would have been almost entirely over land . . . within the continental United States" and was "only fortuitously and incidentally connected to navigable waters," the Court determined that it bore "no relationship to traditional maritime activity"—and, accordingly, that admiralty jurisdiction was lacking *Id.* at 272-73. LaCourse argues that, like the flight in *Executive Jet*, her husband's flight—which was intended to begin and end at Tyndall Air Force Base—was also only "fortuitously over water" and thus bore no significant relationship to "traditional maritime activity."

The problem with LaCourse's argument is that *Executive Jet* didn't involve DOHSA—there were no injuries, let alone any fatalities to support a wrongful-death claim. *Id.* at 250. And significantly, the Supreme Court was careful there to include a caveat when announcing its holding—namely, that a maritime nexus is required only "in the absence of legislation to the contrary." *Id.* at 268. And indeed, the Court in a footnote specifically identified DOHSA as an example of a statute that would constitute "legislation to the contrary." *Id.* at 274 n. 26.

If *Executive Jet* stood alone, LaCourse's maritime-nexus argument might still have a chance. In flagging DOHSA as an example of "legislation to the contrary," the Court suggested that the Act might apply only to flights that *require* traversing the high seas: "Some such flights, e.g., New York City to Miami, Florida, *no doubt* involve passage over 'the high seas beyond a marine league from the shore of any State.' To the extent that the terms of the Death on the High Seas Act become applicable to *such flights,* that Act, of course, is 'legislation to the contrary.' " *Id.* (emphasis added). Because Lt. Col. LaCourse's sortie didn't *require* him to fly over the ocean, the argument would go, it wasn't one of the "such flights" that the *Executive Jet* Court thought DOHSA would cover.

But *Executive Jet* wasn't the Supreme Court's last word on DOHSA's application to aviation-based torts. Rather, as already explained, the Court held in *Offshore Logistics* that DOHSA applies to *all* cases—including aviation-related cases—in which a death

occurs on the high-seas. *See* 477 U.S. at 218. In the course of so holding, the Court explained the applicability (or non-applicability, as the case may be) of the maritime-nexus requirement in these terms: "[A]dmiralty jurisdiction is expressly provided under DOHSA [where] the accidental deaths occurred beyond a marine league from shore. *Even without this statutory provision,* admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity." *Id.* at 218-19 (emphasis added). Translation: Where a death occurs on the high seas, DOHSA applies, full stop; separately, in a non-DOHSA case, maritime jurisdiction might still exist, provided that there is a maritime nexus. To the extent that *Executive Jet*'s New-York-to-Miami footnote left any doubt, *Offshore Logistics* clarified that the occurrence of a death on the high seas is a sufficient condition to DOHSA's application—without any further maritime-nexus gloss.[7]

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[7] In support of her maritime-nexus argument, LaCourse points to *Miller v. United States,* 725 F.2d 1311 (11th Cir. 1984), in which we assumed (without actually considering or specifically deciding) that a maritime nexus may be required under DOHSA. *See id.* at 1315 (concluding that DOHSA provided jurisdiction over an aviation crash after determining that there *was* a maritime nexus on the facts of that case). We think it a full answer to *Miller* to recognize that it was decided before the Supreme Court clarified in *Offshore Logistics* that DOHSA imposes only a locality requirement, and not a separate maritime-nexus requirement. Other courts have distinguished *Miller* on precisely this basis, and we agree with their assessment. *See, e.g., Ventura Packers,*

In sum, then, we agree with the district court that DOHSA doesn't require a maritime nexus—and therefore, that because (on the Supreme Court's interpretation) the Act applies whenever a death occurs on the high seas, it governs LaCourse's wrongful-death suit.

B

Having concluded that DOHSA applies to LaCourse's action, we must now determine whether it provides her exclusive remedy, such that it preempts all other claims arising out of her husband's crash.

The district court concluded that LaCourse's breach-of-warranty and breach-of-contract claims—both of which she initially brought under Florida's Wrongful Death Act, Fla. Stat. § 768.16—had to be stricken on the ground that where DOHSA applies it

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Inc. v. F/V Jeanine Kathleen, 305 F.3d 913, 918 (9th Cir. 2002) (listing *Miller* as an example of how "several courts initially presumed" that DOHSA required a maritime nexus, but noting that those cases came before *Offshore Logistics* and that now, "the prevailing view holds that DOHSA established independent requirements for the exercise of admiralty jurisdiction"); *see also Palischak v. Allied Signal Aerospace Co.,* 893 F. Supp. 341, 345 & n.5 (D.N.J. 1995) (holding that "the requirement of a traditional maritime nexus is not a prerequisite to the exercise of admiralty jurisdiction pursuant to DOHSA," and (citing *Miller*) noting that "[w]e are unable to locate a single decision after [*Offshore Logistics*] in which a lower court required a maritime nexus before applying DOHSA"); *Bernard v. World Learning Inc.,* 2010 WL 11505188, at *8 n.14 (S.D. Fla. June 4, 2010) (acknowledging the circuit precedent in *Miller* but explaining that it was decided prior to *Offshore Logistics* and holding that a maritime nexus is no longer required in DOHSA cases).

"preempts all other forms of wrongful death claims." LaCourse contends that the district court erred because, she says, her state-law claims don't seek a remedy broader than DOHSA and therefore aren't preempted.

Again, while it seems to us that LaCourse might have the plain language on her side—in a section titled "Nonapplication," DOHSA expressly states that it "does not affect the law of a State regulating the right to recover for death," 46 U.S.C. § 30308—the controlling precedent is squarely against her. In particular, the Supreme Court held in *Offshore Logistics* that "in light of the language of the Act as a whole, the legislative history of [§ 30308's predecessor], the congressional purposes underlying the Act, and the importance of uniformity of admiralty law," the provision that is now codified at § 30308 "was intended only to serve as a jurisdictional saving clause, ensuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore." 477 U.S. at 221. And, the Court continued, once it is determined that § 30308 (or there, its predecessor) "acts as a jurisdictional saving clause, and not as a guarantee of the applicability of state substantive law to wrongful deaths on the high seas, the conclusion that the state statutes are pre-empted by DOHSA where it applies is inevitable." *Id.* at 232.

Put simply, under *Offshore Logistics,* § 30308 preserves only state-court jurisdiction—*not* state

substantive wrongful-death law—and where DOHSA applies, it preempts all other wrongful-death claims under state or general maritime law. Accordingly, we hold that the district court was correct to conclude that DOHSA forecloses LaCourse's breach-of-warranty and breach-of-contract claims.

C

Having concluded that DOHSA governs LaCourse's suit and supplies her exclusive remedy, we must now determine whether LaCourse's claim is barred by the so-called "government contractor" defense. Provided that certain conditions are met, that defense—a creation of federal common law—extends the United States' sovereign immunity to a government contractor, thereby protecting it against civil liability. In essence, it allows the contractor to escape liability on the ground that it was "just following orders." LaCourse asserts that the district court erred in applying the government-contractor defense because PAE failed to establish that it conformed to the government's reasonably specific maintenance procedures.[8]

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[8] LaCourse also argues that PAE shouldn't be entitled to immunity in this case because its maintenance contract with the Air Force specifically stated that PAE "shall be . . . responsible for all injuries to persons or damage to property that occurs as a result of its fault or negligence." But the allocation of liability between PAE and the government has nothing to do with PAE's immunity from liability to a third party. Given the point of the government-contractor defense—to allow the government to hire contractors to perform uniquely governmental duties without subjecting them to the risk of liability to third parties—it would make little

The Supreme Court fashioned the government-contractor defense in *Boyle v. United Technologies Corporation,* 487 U.S. 500 (1988). There, the Court held, in a suit alleging design defects in military equipment, that a private contractor could partake of the United States' sovereign immunity so long as the following three conditions were satisfied: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

Although *Boyle* dealt specifically with government procurement contracts, we extended its analysis to cover government *service* contracts in *Hudgens v. Bell Helicopters/Textron,* 328 F.3d 1329 (11th Cir. 2003). To account for the contextual switch from a design-defect case to a negligent-maintenance case, we rejiggered the defense's three elements as follows: "(1) the United States approved reasonably precise maintenance procedures; (2) [the contractor's] performance of maintenance conformed to those procedures; and (3) [the contractor] warned the United States about the dangers in reliance on the procedures that were known to [the contractor] but not to the United States." *Id.* at 1335.

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sense to interpret the contract language as LaCourse suggests. The far better—and we think obvious—reading is that the quoted text merely allocates liability between PAE and the Air Force, not liability between PAE and a third party.

Helpfully, the parties have narrowed the focus here. LaCourse concedes that the Air Force provided reasonably precise maintenance procedures, so there's no question that the first *Boyle/Hudgens* element is satisfied. And the district court held that the third element "does not apply because (as PAE has argued, and as the plaintiff has not disputed) there is no contention that PAE had knowledge that it withheld from the government," and neither party appears to take issue with that conclusion. So all seem to agree that the application of the government-contractor defense here turns on the second *Boyle/Hudgens* element—whether, in servicing the F-16, PAE conformed to the Air Force's reasonably precise maintenance procedures.

In its summary-judgment motion, PAE argued that its maintenance conformed to the government's reasonably precise procedures, and it cited an abundance of supporting evidence, including deposition testimony from multiple employees, an Accident Investigation Board maintenance member, and the Safety Investigation Board investigator. *See* Deposition of Timothy Davis at 7:20-8:11, 117:17-118:18 (testifying that all maintenance performed under the contract, including the service of Lt. Col. LaCourse's F-16, conformed to the Air Force's rules, regulations, and technical orders); *see also* Deposition of Michael Reeves at 106:4-106:18 (similar); Deposition of Michael Bogaert at 7:8-9:20 (similar); Deposition of AIB Investigator, Captain Michelle Chiaravelle at 26:10-26:17 (similar); Deposition of SIB Investigator, Senior Master Sergeant Marquell Fallin at 13:10-13:22, 19:8-19:23

(similar). In light of PAE's extensive evidence of compliance, the district court held that LaCourse failed to present evidence that PAE *violated* government procedures sufficient to create a genuine dispute of material fact.

In the "Statement of Facts" section of her opening brief on appeal, LaCourse identified three Air Force maintenance procedures under the subheading "The Defendant's Lack of Compliance with the Air Force's Specifications and Instructions." First, she stated that under AFI 21-101 ¶ 7.1, when there are system malfunctions of a "chronic nature" the aircraft "should" (her word) be impounded and prevented from flying until there are " 'investigative efforts' to uncover the root cause." Second, LaCourse said that under AFI 21-101 ¶ 7.5.4 an airplane "must" be impounded "following an uncommanded flight control movement," which she claims occurred when the stabilizers didn't move as directed during the final pre-flight check. Finally, she cited TO 1-1-300, which states that a procedure called a "functional flight check" is "normally" conducted following maintenance work and before an airplane is released to fly.

LaCourse's contention that PAE violated reasonably precise maintenance procedures—so as to foreclose its reliance on the government-contractor defense—fails on numerous grounds. As an initial matter, she has almost certainly abandoned her arguments based on the procedures she cites. We have repeatedly held that an appellant abandons an argument on appeal when she fails to "specifically and clearly identif[y]" it

or "plainly and prominently" raise it in her opening brief. *Access Now, Inc. v. Southwest Airlines Co.,* 385 F.3d 1324, 1330 (11th Cir. 2004); *Cole v. U.S. Att'y Gen.,* 712 F.3d 517, 530 (11th Cir. 2013). In particular, we will deem an appellant to have abandoned an argument where she makes only "passing references" to it in the background sections of her brief—or, for that matter, even the brief's argument section. *Sapuppo v. Allstate Floridian Ins. Co.,* 739 F.3d 678, 681-82 (11th Cir. 2014). Under our consistent precedent, LaCourse's scattered references to Air Force procedures in the "Statement of the Facts" section of her opening appellate brief—followed by a single (and vague) invocation of "AFI 21-101" on a single page in the "Argument" section—were insufficient to present a legal argument based on PAE's alleged noncompliance with them.

Moreover, and in any event, LaCourse's arguments fail on the merits. With respect to AFI 21-101 ¶ 7.1 and TO 1-1-300, it is enough to note that they merely permit, rather than require, impoundment and functional check flights, respectively, under specified circumstances. A government contractor doesn't violate reasonably precise maintenance procedures by taking a course of action—repair, replacement, retesting—that those procedures at least implicitly allow.[9]

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[9] LaCourse also asserted—albeit again only in the "Statement of Facts" section of her opening brief—that Lt. Col. LaCourse's F-16 "should" have been impounded for a "root cause" investigation. When pressed at oral argument about what procedure required such an investigation, LaCourse's counsel pointed to the following language in AFI 21-101 ¶ 7.1: "Impounding

Had LaCourse properly presented it, an argument based on AFI 21-101 ¶ 7.5.4—which, unlike the other two procedures on which she relies, *requires* impoundment following an "uncommanded flight control movement"—might have been somewhat stronger, but for reasons we will explain, even it would fail.

In resisting the application of the government-contractor defense, LaCourse cited testimony from Timothy Davis and Michael Bogaert—PAE employees tasked with the preflight checks on the day of the crash—both of whom testified that Bogaert (1) didn't see the stabilizers move as far as they should have during the initial pitch-override check and (2) instructed Lt. Col. LaCourse to repeat the sequence until the stabilizers performed properly. LaCourse contends that the jet should have been grounded after the first sequence. PAE counters that Bogaert's description of the check indicates that Lt. Col. LaCourse simply wasn't performing the sequence properly, not that there was any sort of issue with the control.

By way of background, here is the relevant portion of Bogaert's testimony:

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aircraft and equipment enables investigative efforts to systematically proceed with minimal risk relative to intentional/unintentional actions and subsequent loss of evidence." Oral Argument at 32:10. But even if LaCourse had developed this assertion into a legal argument outside of the background section of her brief, the cited language says nothing about a root-cause investigation, let alone a mandatory one.

> Q: During the pitch override check, did you see the horizontal stabs move at all?
>
> A: After I got on the headset, after when [Mr. Davis] had finished checking brakes, I got on a headset with [Lt. Col. LaCourse] and asked him if he had done it. He said yes. I told him I didn't see it. He said do you want me to do it again. I said yes, if you don't mind. At which point he tried to do it again, and they didn't move. And I asked him, are you holding the stick full forward, and he wasn't. He was just pushing, and they're reaching over and he's releasing his pressure on the stick, is my best guess. But I told him, no, [Lt. Col. LaCourse], that's not it, and asked him, are you holding the stick full forward as you hit that switch. And he did that, and it worked perfect. He released. I said that's what I was looking for, technique.

Even aside from abandonment, there are several problems with LaCourse's AFI 21-101 ¶ 7.5.4 argument. First, whereas that procedure triggers mandatory impoundment only upon the occurrence of an "uncommanded . . . movement," Bogaert's testimony describes (at most) the exact converse—a *commanded non-movement.* In particular, Bogaert recounted that he saw Lt. Col. LaCourse attempt to move the stabilizers by pushing the stick (the command) but explained that they initially "didn't move" (the non-movement). Accordingly, it's not at all clear to us that, by its plain terms, AFI 21-101 ¶ 7.5.4 even applies.

Second, LaCourse has pointed to no expert testimony or other evidence connecting attorney argument (or, more precisely, attorney factual recitation) to an actual AFI 21-101 ¶ 7.5.4 violation. Rather, she offers only lay testimony describing what happened during the test. She presents no expert (or even lay) testimony explaining *why* what happened constituted an "uncommanded flight control movement" triggering a mandatory impoundment. LaCourse's evidence, we think, is insufficient to permit a reasonable jury to find that PAE violated AFI 21-101 ¶ 7.5.4.

Finally, even under the most charitable reading, Bogaert's testimony describes not a breach of procedure, but a likely pilot error—Lt. Col. LaCourse, Bogaert said, simply wasn't performing the check properly. Bogaert explained that Lt. Col. LaCourse wasn't "holding the stick full forward" and that once he performed the check using the proper technique, it "worked perfect[ly]."

For all these reasons, even if LaCourse had properly presented an argument that PAE violated AFI 21-101 ¶ 7.5.4, we would reject it.

* * *

In sum, LaCourse failed to produce evidence sufficient to create a genuine issue of material fact that PAE violated government procedures. LaCourse's real argument seems to be that PAE's mechanics should have dug deeper into the F-16's hydraulic-related problems, because, had they done so, they would have discovered that the hydraulic systems were compromised.

But while what LaCourse and her experts believe PAE should have done differently surely has some bearing on the merits of her DOHSA-based negligence claim, it is irrelevant to the question whether PAE is protected by the government-contractor defense. All that matters on that score is whether PAE violated reasonably precise government procedures, and based on the evidence presented from both parties we conclude that it did not. Accordingly, we affirm the district court's decision that PAE is entitled to summary judgment on government-contractor grounds.

III

For the foregoing reasons, we hold that DOHSA applies to and governs LaCourse's case, that the Act provides her exclusive remedy, and that PAE is shielded from liability by the government-contractor defense. Accordingly, we affirm the district court's grant of summary judgment in favor of PAE.

AFFIRMED.

NEWSOM, Circuit Judge, with whom WILSON, Circuit Judge, joins, concurring:

I write separately to explain that, while I agree that we must follow existing precedent to hold that DOHSA applies to (and thereby supplies the exclusive wrongful-death remedy for) any claim arising out of a death occurring on the high seas—even where, as here,

the negligence alleged to have caused the death occurred on land—I do so holding my nose, as DOHSA's plain language is squarely to the contrary.

As a refresher, DOHSA's operative provision states in relevant part that "[w]hen the death of an individual is caused by a wrongful act, neglect, or default occurring on the high seas . . . the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible." 46 U.S.C. § 30302. LaCourse contends (1) that DOHSA applies only when the *negligence* occurred on the high seas, without respect to where the *death* occurred, and (2) that all here agree that the alleged negligence occurred on land, when the jet was improperly serviced at Tyndall Air Force Base. Accordingly, she insists, DOHSA doesn't govern her case.

LaCourse's logic, it seems to me, is unassailable. By its plain terms, DOHSA limits its application to instances in which the "wrongful act, neglect, or default occur[ed] on the high seas," regardless of where the resulting death occurred. Indeed, there is no reasonable reading of the Act by which the phrase "occurring on the high seas" modifies the word "death" rather than the phrase "wrongful act, neglect, or default." One needn't even resort to the canons to come to that conclusion—the plain, ordinary, and obvious meaning of the words is sufficient. (Having said that, the canons would lead to precisely the same determination. *See Nearest-Reasonable-Referent Canon,* Black's Law Dictionary (11th ed. 2019); Antonin Scalia & Bryan A.

Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012).)

Somehow, though, precedent—mounds of it, some of it binding on us—has whistled past the text's unmistakable focus of the location of the alleged negligence as the decisive factor for determining DOHSA's applicability. For instance—

- *Miles v. Apex Marine Corp.,* 498 U.S. 19, 25 (1990) ("DOHSA . . . create[ed] a wrongful death action for *all persons killed on the high seas*.")
- *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 218 (1986) ("Here, admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore.")
- *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 620 (1978) (noting that DOHSA creates "a remedy in admiralty for wrongful deaths more than three miles from shore")
- *In re Dearborn Marine Serv., Inc.,* 499 F.2d 263, 272 n. 17 (5th Cir. 1974) ("DOHSA has been construed to confer admiralty jurisdiction over claims arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land.")
- *Bergen v. F/V ST. PATRICK,* 816 F.2d 1345, 1348 (9th Cir. 1987) ("[DOHSA] has been held to refer to the site of an accident on the high

seas, not to where . . . the wrongful act causing the accident may have originated.")

- *Smith v. Pan Air Corp.,* 684 F.2d 1102, 1111 (5th Cir. 1982) ("[T]he simple fact that [plaintiff's] death occurred as a result of an aircraft crash into the high seas is alone enough to confer jurisdiction under the DOHSA. . . . [A]dmiralty jurisdiction has repeatedly been extended to cases in which death or injury occurred on navigable waters even though the wrongful act occurred on land. The place where the negligence or wrongful act occurs is not decisive.") (footnote omitted)

I could go on and on and on—this is but a small sampling of cases holding that DOHSA applies to any claim arising out of a death occurring on the high seas, wholly without regard to where the underlying negligence occurred. But again, that seems obviously wrong to me.

I'm not the first to recognize the textual disconnect. The Fifth Circuit, for instance, once remarked that "[a]t first glance, the plain text of this statutory provision seems to indicate that DOHSA is implicated only when the wrongful act precipitating death occurs on the high seas." *Motts* v. *M/V Green Wave,* 210 F.3d 565, 569 (5th Cir. 2000). But the court went on: "As subsequent courts have interpreted DOHSA, however, the statute's application is not limited to negligent acts that actually occur on the high seas. The Supreme Court has repeatedly noted that when the death itself occurs on the high seas, DOHSA applies." *Id.* My only

disagreement with the Fifth Circuit's assessment is the "[a]t first glance" part. I've read § 30302 over and over—glanced, peered, gawked, and glared—and I can't make it say anything other than that DOHSA applies when the alleged act of *negligence—rather* than the resulting *death—occurs* on the high seas.

So how did we get ourselves into this predicament—reading DOHSA to mean something that it obviously doesn't say? The answer, apparently, traces back to century-old admiralty law premised on a "consummation of the injury" theory. *See e.g., In re Dearborn Marine,* 499 F.2d at 274 ("Historically maritime jurisdiction has been measured by the locality of the wrong with locality defined as where the 'substance and consummation of the injury' took place.") (citing *The Plymouth,* 70 U.S. (3 Wall.) 20, 33 (1886)) (footnote omitted). Put simply, if a claim is premised on a negligence theory, the underlying negligence isn't complete until it is "consummated in an actual injury." *Lasky v. Royal Caribbean Cruises, Ltd.,* 850 F. Supp. 2d 1309, 1312 (S.D. Fla. 2012). So, the argument goes, a DOHSA claim for wrongful death based on negligent service—as we have here—accrues at the time and place where the allegedly wrongful act culminates in an actual injury (the high seas), not when and where the negligence itself allegedly occurred (at Tyndall Air Force Base).

That's fine. It's just not what the statute says. DOHSA doesn't say that the decedent's personal representative may bring an action "when the death of an individual *occurring on the high seas* is caused by

wrongful act, neglect, or default"; rather, it says that the personal representative can sue "[w]hen the death of an individual is caused by wrongful act, neglect, or default *occurring on the high seas*." 46 U.S.C. § 30302. End of story.

Bottom line: As in all cases, we should give effect to DOHSA's unambiguous language. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 476 (1992) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."). If it were up to me, I would hold that DOHSA doesn't apply here because the alleged negligence—the failure to properly maintain the F-16 that Lt. Col. LaCourse was piloting when he crashed—occurred on land, not on the high seas.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

PATRICIA LACOURSE, individually and as Personal Representative of the Estate of Lt. Col. Matthew LaCourse,
Plaintiff,

v.

DEFENSE SUPPORT SERVICES LLC, et al.,
Defendants.
/

Case No. 3:16cv170-RV/CJK

ORDER

(Filed Feb. 23, 2018)

Now pending before the court is a motion for partial summary judgment filed by defendant PAE Aviation Technical Services LLC, f/k/a Defense Support Services LLC (doc. 56). The plaintiff, Patricia LaCourse, has filed a response in opposition (Pl. Resp.), and the defendant has filed a reply in further support.

I. Standard of Review

Summary judgment is appropriate if all the pleadings, discovery, affidavits, and disclosure materials on file show that there is no genuine disputed issue of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c). The plain language of Rule 56(c) mandates the entry of summary

judgment, after adequate time for discovery and upon motion, against any party who fails to make a showing sufficient to prove the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Summary judgment is inappropriate "[i]f a reasonable factfinder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact[.]." *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306, 1315 (11th Cir. 2007). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). It is "genuine" if the record, viewed as a whole, could lead a reasonable fact finder to return a verdict for the non-movant. *Id.* In considering a motion for summary judgment, the non-movant's evidence is to be believed and all reasonable inferences drawn in its favor. *See Stephens v. DeGiovanni*, 852 F.3d 1298, 1313 (11th Cir. 2017) (citing *Anderson*, *supra*).

II. Background

A. *Facts*

The defendant's motion raises a pure issue of law, so the pertinent facts can be stated very briefly.

On November 6, 2014, a U.S. Air Force F-16 Fighting Falcon jet fighter (also known as a Viper) departed Tyndall Air Force Base, east of Panama City,

Florida, for a continuation training (CT) sortie. The only person on board was the pilot, Matthew LaCourse, a 58-year old retired Air Force Lieutenant Colonel employed as a civilian by the Department of Defense. During the flight—for reasons the parties dispute, but which are not relevant here—the jet crashed into the Gulf of Mexico more than twelve nautical miles from shore where, tragically, LaCourse was killed.

B. Procedural History

Patricia LaCourse, LaCourse's widow and personal representative of his estate, filed a wrongful death action in Florida state court against numerous individuals and corporate entities that reportedly serviced and performed maintenance on the jet prior to the crash, including the defendant. The complaint alleged that the aircraft had been negligently serviced/maintained before the flight, and it sought "all damages permitted by law in an amount in excess of five million dollars ($5,000,000). . . ." The defendant removed the action to this federal court based on admiralty jurisdiction and the Death on the High Seas Act (DOHSA).[1]

III. Discussion

DOHSA provides that:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on

[1] The notice of removal asserted federal officer and diversity jurisdiction as well.

> the high seas beyond 3 [now 12] nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.[2]

46 U.S.C. § 30302. The statute limits recovery to "fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought." 46 U.S.C. § 30303; *see also*, *e.g.*, *Dooley v. Korean Air Lines Co. Ltd.*, 524 U.S. 116,123 (1998) ("By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas."); *accord Martins v. Royal Caribbean Cruises, Ltd.*, 2017 WL 1345117, at *2 (S.D. Fla. 2017) ("DOHSA limits recovery to the pecuniary loss sustained by the individuals for whose benefit the action is brought. Therefore, DOHSA bars recovery for non-pecuniary damages, such as pain and suffering, mental anguish and loss of

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[2] As originally drafted in 1920, DOHSA applied to wrongful death "on the high seas beyond a marine league from the shore," i.e., beyond three nautical miles In 1988, President Reagan issued Proclamation 5928, "which . . . extended United States territorial waters from three to 12 miles." *In re Air Crash Off Long Island, New York, on July 17, 1996*, 209 F.3d 200, 209 (2d Cir. 2000). In light of this proclamation, DOHSA now applies to accidents occurring more than twelve nautical miles from the shore of any state. *Id.* at 213 ("the effect of the Proclamation is to move the starting point of the application of DOHSA from three to 12 miles from the coast").

society. The amount of permissible damages available [to plaintiffs] under DOHSA is extremely limited. . . ."); *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F. Supp. 2d 1309, 1312 (S.D. Fla. 2012) (noting "it is well-settled that where DOHSA applies, it preempts all other forms of wrongful death claims under State or general maritime law," and further noting "DOHSA does not permit Plaintiff to recover[ ] non-pecuniary damages") (citing multiple cases).

In its motion for summary judgment, the defendant seeks a ruling that this case falls under DOHSA and is subject to its statutory limitation on damages. Although the circumstances of LaCourse's death fit within the literal language of the statute—that is to say, he died more than twelve nautical miles from shore—the plaintiff contends that DOHSA does not apply to the facts of this case for two reasons: (1) the negligent service or maintenance of the aircraft "took place only on land and not on water, and certainly not more than 12 miles from the coast of Florida;" and (2) the flight was a military training sortie "intended to originate and terminate at the same spot, on land at Tyndall AFB Florida, and it did not have a maritime nexus." *See* Pl. Resp. at 14. I will address each argument in turn.

A. Location of the Alleged Negligence

The plaintiff acknowledges that LaCourse's death was on the high seas, but she maintains that the negligence was on land at Tyndall Air Force Base. *See* Pl.

Resp. at 8, 15. She contends that under the plain language of the statute, DOHSA only applies if death is caused by a "wrongful act, neglect, or default occurring on the high seas." *See id.* at 15 (quoting 46 U.S.C. § 30302). In other words, as plaintiff reads the statute, the *negligence*—and not necessarily the *death*—must occur at sea. *See id.*

The plaintiff's interpretation "is a plausible reading of the act's text, "*Hassanati v. International Lease Fin. Corp.*, 2011 WL 13177480, at *8 (C.D. Cal. 2011) (noting same), but it is unsupported by case law. *See id.* (citing and discussing multiple cases); *see also*, *e.g.*, *Motts v. M/V Green Wave*, 210 F.3d 565, 567, 569 (5th Cir. 2000) ("At first glance, the plain text of this statutory provision seems to indicate that DOHSA is implicated only when the wrongful act precipitating death occurs on the high seas. . . . As subsequent courts have interpreted DOHSA, however, the statute's application is not limited to negligent acts that actually occur on the high seas.") (citing multiple cases). Thus, as the former Fifth Circuit stated in *In re Dearborn Marine Serv.*, 499 F.2d 263 (5th Cir. 1974): "DOHSA has been construed to confer admiralty jurisdiction over claims arising out of airplane crashes on the high seas *though the negligence alleged to have caused the crash occurred on land*." *Id.* at 272 n.17 (emphasis added) (citing additional cases) (binding precedent under *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981)); *see also*, *e.g.*, *Motts*, *supra*, 210 F.3d at 567, 569-70 (noting "when the death itself occurs on the high seas, DOHSA applies," and that is so "even if a party's negligence is

entirely land-based"); *Ostrowiecki v. Aggressor Fleet*, 2008 WL 3874609, at *4 (E.D. La. 2008) ("In order for DOHSA to apply, the acts causing the death need not occur on the high seas as long as the death itself occurs there.")

As the Ninth Circuit has stated:

> [DOHSA] has been held to refer to the site of an accident on the high seas, not to where . . . the wrongful act causing the accident may have originated. It is therefore irrelevant that . . . decisions contributing to the St. Patrick's unseaworthiness may have occurred onshore or within territorial waters. DOHSA applies to plaintiffs' suits because the St. Patrick's accident causing death occurred on the high seas.

Bergen v. F/V St. Patrick, 816 F.2d 1345, 1348 (9th Cir. 1987); *accord Zapata v. Royal Caribbean Cruises Ltd.*, 2013 WL 1296298, at *4 (S.D. Fla. 2013) ("DOHSA cases have never distinguished between negligent acts or omissions occurring on land and those occurring at sea. Accordingly, the question ofwhether RCCL's alleged wrongful acts or omissions occurred on land or on high seas is irrelevant, and DOHSA provides the only remedy to Plaintiff.") (citing *Balachander v. NCL (Bahamas), Ltd.*, 800 F. Supp. 2d 1196, 1201 (S.D. Fla. 2011) (same)); *Bernard v. World Learning, Inc.*, 2010 WL 11505188, at *8 (S.D. Fla. 2010) (noting "DOHSA applies where an accident and death occur on the high seas, regardless of whether death was proximately caused by negligence on land"). As then-district (now

circuit) Judge Marcus observed in *Moyer v. Rederi*, 645 F. Supp. 620 (S.D. Fla. 1986): "authority is clear that a cause of action under DOHSA accrues at the time and place where an allegedly wrongful act or omission was consummated in an actual injury, not at the point where previous . . . negligence allegedly occurred." *Id.* at 627; *Varner v. Celebration Cruise Line*, 2015 WL 12868132, at *2 (S.D. Fla. 2015) (citing *Moyer*); *Lasky*, *supra*, 850 F. Supp. 2d at 1312 (same); *Fojtasek v. NCL (Bahamas) Ltd.*, 613 F. Supp. 2d 1351, 1354 (S.D. Fla. 2009) (same).

One oft-cited case, *Lacey v. L. W. Wiggins Airways*, 95 F. Supp. 916 (D. Mass. 1951), is factually very similar to ours. The defendant in that case was under contract to inspect and service an airplane at Logan International Airport prior to take off. The airplane later crashed into the sea, killing the pilot, and the decedent's estate brought suit alleging that the "failure to inspect the plane, or negligent inspection of the plane, or failure to inform the owner of a defect discovered, while the craft was on land, resulted in an accident on the high seas which caused the death of the [pilot]." *Id.* at 917. The district court stated there (exactly as plaintiff has argued here): "It appears that the phrase 'occurring on the high seas' . . . is adjectival of 'wrongful act, neglect, or default', rather than of 'death'. . . . The statute is taken to mean, therefore, that the wrongful act, neglect or default which caused the death must have occurred on the high seas if a right of action is to exist." *Id.* at 918. However, the court then proceeded to ask: "What is the import of 'wrongful

act, neglect, or default occurring on the high seas?' " *Id.* It answered that question as follows:

> The court concludes that when the statute speaks of "wrongful act, neglect, or default occurring on the high seas", it contemplates the substance of the occurrence which resulted in death and gave rise to a right to recover. The substance of the occurrence here was not merely the act or omission to act attributable to the respondent while the craft was on land. If the respondent failed to make a proper inspection of the craft, or failed to remedy a defect properly, or failed to notify the owner of defects discovered during inspection and repair, the effect of such failure was not spent until the plane fell to the sea. It appears from the allegations in the [complaint] that the wrongful act was consummated wholly upon the water where the victim met his death. There is no "shore flavor" whatever to the substance of the occurrence, the consummation of the wrongful act as distinguished from its origin. Using the language of Mr. Justice Butler, delivering the opinion of the Supreme Court in [*Vancouver S.S. Co. v. Rice*, 288 U.S. 445, 448 (1933)], the foundation of the right to recover is a wrongful act or omission taking effect on the high seas. *This is a maritime tort [under DOHSA], and upon it the [plaintiff's] claim rests.*

Id. (emphasis added); *see also Brown v. Eurocopter S.A.*, 38 F. Supp. 2d 515, 517 (S.D. Tex. 1999) (noting *Lacey* is "often cited" for this "instructive language").[3]

None of the cases that plaintiff has cited are to the contrary. *See* Pl. Resp. at 17. For example, she quotes *Lasky*, *supra*, 850 F. Supp. 2d at 1312, which in turn quoted *Moyer*, *supra*, 645 F. Supp. at 627, wherein the courts noted that 'the right to recover for death depends upon the law of the place of the act or omission that caused it *and not upon that of the place where death occurred*.'" However, as the defendant points out in its reply memorandum, that quoted sentence was made in the context of cases where a *mortal injury* occurred on the high seas, and those courts held that

[3] The foregoing case law is just a small sample of the cases holding that DOHSA is not limited to negligence at sea. There are numerous others. In *In the Matter of the Complaint v. Sea Star Line*, 2016 WL 6609219 (M.D. Fla. 2016), for example, a cargo ship sank near the Bahamas and thirty-three people were killed. Several of their estates filed suit under the Florida Wrongful Death Act and maritime law, alleging negligence by both the ship captain and the shipowners. The captain argued that "DOHSA provides the exclusive relief against him in this case because the deaths occurred on the high seas," while plaintiffs argued in reply that "DOHSA does not apply" because they alleged that some of the negligence occurred on land while the ship was docked in the Port of Jacksonville. *See id.* at *1-3. Citing several of the cases noted above, Judge Schlesinger wasted little time holding that "case law makes clear that DOHSA applies where death . . . occurs on the high seas, regardless of where other acts of negligence may have occurred before . . . the fatal accident." *Id.* at *3; *see also*, *e.g.*, *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982) (holding that DOHSA applied to fatal aircraft crash at sea and stating "the place where the negligence or wrongful act occurs is not decisive").

DOHSA applied even though the decedent survived long enough to make it to the shore. Thus, applying those two cases here would mean if LaCourse had initially survived the crash but later succumbed to his injuries while on land, *DOHSA would still apply.* The cases do not say that DOHSA only applies if the underlying negligence occurred on the high sea. In fact, as earlier noted, they literally say the opposite. *Moyer*, 645 F. Supp. at 627 ("authority is clear that a cause of action under DOHSA accrues at the time and place where an allegedly wrongful act or omission was consummated in an actual injury, not at the point where previous . . . negligence allegedly occurred"); *see also Lasky*, 850 F. Supp. at 1312 (quoting same).

Consequently, the plaintiff's argument that DOHSA does not apply because she alleges negligence on land at Tyndall Air Force Base must be rejected.

B. *Maritime Nexus*

In *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), an airplane took off from Cleveland, Ohio, heading for Portland, Maine. Shortly after take off, the aircraft struck a flock of seagulls, and the birds were ingested into the engine, which caused the plane to almost completely lose power and crash into the navigable waters of Lake Erie. The crew was not injured, but the aircraft soon sank and was declared a total loss. Subsequently, the owners brought an action against the City of Cleveland in admiralty for loss of

the plane, alleging negligence by the airport, airport manager, and air traffic controller. The district court dismissed the case, holding that it was not "cognizable in admiralty"—despite that most of the damage to the aircraft occurred only after and because it sank in navigable water—and the Sixth Circuit affirmed. The plaintiffs appealed to the Supreme Court. In affirming, the Court held that a two-part test must be satisfied for there to be admiralty jurisdiction on the facts of that case: (1) the alleged wrong must have occurred or been located on or over "navigable waters," and, importantly, (2) it must "bear a significant relationship to traditional maritime activity." *Id.* at 268. Because the airplane in *Executive Jet* was to fly from Cleveland to Portland (which means it "would have been almost entirely over land . . . within the continental United States"), the Supreme Court found that it was "only fortuitously and incidentally connected to navigable water," and thus it bore "no relationship to traditional maritime activity." *Id.* at 272-73.

For her second argument, the plaintiff contends that DOHSA is not applicable to this case because there is no admiralty jurisdiction under *Executive Jet*. Specifically, she argues that because LaCourse's sortie was intended to begin and end at the same spot on land at Tyndall Air Force Base—and it was merely "fortuitously over water" at the time of the crash—it, too, did not have a significant relationship to "traditional maritime activity." *See generally* Pl. Resp. at 16-22. This argument must be rejected, however, because "the maritime nexus requirement has been explicitly

adopted only for torts occurring on the navigable waters within the United States *and not for torts occurring on the high seas*." *Palischak v. Allied Signal Aerospace Co.*, 893 F. Supp. 341, 344-45 (D.N.J. 1995) (citing *Executive Jet*, 409 U.S. at 268) (emphasis added).

Furthermore, the Supreme Court stated in *Executive Jet* that a maritime nexus is only required "in the absence of legislation to the contrary," and it expressly stated in footnote 26 that DOHSA was such a statute:

> Some [flights between points within the continental United States], *e.g.*, New York City to Miami, Florida, no doubt involve passage over "the high seas beyond a marine league from the shore of any State." *To the extent that the terms of the Death on the High Seas Act become applicable to such flights, that Act, of course, is "legislation to the contrary*."

409 U.S. at 268, 274 & n.26 (emphasis added). Thus, as the Second Circuit has noted:

> Appellant argues that it was error for the District Court to rule that her wrongful death claim was governed by the Death on the High Seas Act, 46 U.S.C. § 761 et seq. ("DOHSA"). Although she concedes that the circumstances of Mayer's death clearly fall within the literal language of DOHSA, she nevertheless urges that DOHSA should apply only if the alleged wrong bears a significant relationship to traditional maritime activity. *See Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972). In *Executive Jet*, the Supreme Court

> emphasized that the nexus requirement is a predicate for admiralty jurisdiction in cases where there is no controlling statute to the contrary. *Id.* at 268, 271. *DOHSA is specifically mentioned to illustrate such a statute. Id.* at 271 n.20, 274 n.26.

Mayer v. Cornell University, 107 F.3d 3, 4 (2d Cir. 1997) (emphasis added). The Fifth Circuit has similarly stated:

> the Court in *Executive Jet* noted that the federal courts are to apply the two-pronged test for admiralty jurisdiction "in the absence of legislation to the contrary." DOHSA qualifies as "legislation to the contrary." So even if the two-pronged test for admiralty jurisdiction has not been met, DOHSA confers federal admiralty jurisdiction where the injury or accident resulting in death occurred while the decedent was at sea.

Motts, *supra*, 210 F.3d at 571 (internal citation omitted); *see also*, *e.g.*, *Wolf v. Tico Travel*, 2011 WL 5920918, at *3 n.3 (D.N.J. 2011) (relying on footnote 26 in holding that "[b]ecause DOHSA applies . . . the Court need not go through an *Executive Jet* analysis"); *Bernard*, *supra*, 2010 WL 11505188, at *8 n.14 (noting "DOHSA does not require a maritime nexus") (collecting multiple cases); *accord Palischak*, *supra*, 893 F. Supp. at 345 (stating that "the two-pronged test referred to in *Executive Jet* . . . only applies in the absence of a statute to the contrary, and the Supreme Court in *Executive Jet* repeatedly and explicitly emphasized that DOHSA was such a statute . . . therefore,

the requirement of a traditional maritime nexus is not a prerequisite to the exercise of admiralty jurisdiction pursuant to DOHSA") (quoting *Friedman v. Mitsubishi Aircraft Int 1*, 678 F. Supp. 1064, 1065 (S.D.N.Y. 1988)); *Kunreuther v. Outboard Marine Corp.*, 757 F. Supp. 633, 634 (E.D. Pa. 1991) (quoting *Friendman* and holding same).

The plaintiff acknowledges footnote 26 in *Executive Jet*, but because that case involved property damage and not wrongful death, she dismisses it as mere dicta. *See* Pl. Resp. at 20 & n.3. There are at least two problems with this.

First, as the Eleventh Circuit has stated, "there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). Dicta from the Supreme Court "'is not something to be lightly cast aside.'" *Id.* (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997)); *see also United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980) ("We are not bound by dicta, even of our own court . . . Dicta of the Supreme Court are, of course, another matter."); *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) (stating that "[e]ven though that statement by the Supreme Court . . . was dictum, it is of considerable persuasive value").

Second, and more importantly, as the district court noted in *Palischak*, *supra*, 893 F. Supp. at 345, "any confusion on this issue was cleared up" fourteen years after *Executive Jet* when the Supreme Court decided

Offshore Logistics v. Tallentire, 477 U.S. 207 (1986). In *Tallentire*, the Court plainly stated that "admiralty jurisdiction is expressly provided under DOHSA" when wrongful death occurs more than three (now twelve) nautical miles off the shore. *See* 477 U.S. at 218. Following that decision, and as the previously-cited cases make clear, federal courts have frequently (and, as far as I can tell, *uniformly*) held that a maritime nexus is not required for such deaths to fall within the statute. *See, e.g.*, *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 918 (9th Cir. 2002) (noting "several courts initially presumed" the maritime nexus requirement, but *post-Tallentire* "the prevailing view holds that DOHSA established independent requirements for the exercise of admiralty jurisdiction"); *Motts*, *supra*, 210 F.3d at 570-71 & n.4 ("the correct view" *post-Tallentire* is "DOHSA supplies admiralty jurisdiction independent of any doctrinal test," therefore, "the two-pronged test for admiralty jurisdiction [does not have to be] met"); *see also Palischak*, *supra*, 893 F. Supp. at 345 & n.5 (holding "the requirement of a traditional maritime nexus is not a prerequisite to the exercise of admiralty jurisdiction pursuant to DOHSA," and noting "[w]e are unable to locate a single decision after *Tallentire* in which a lower court required a maritime nexus before applying DOHSA").[4]

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[4] The plaintiff has cited two district court cases that applied *Executive Jet*'s maritime nexus test to fatal plane crashes on the high seas. *See* Pl. Resp. at 22 (citing *Brons v. Beech Aircraft Corp.*, 627 F. Supp. 230 (S.D. Fla. 1985), and *Hayden v. Krusling*, 531 F. Supp. 468 (N.D. Fla. 1982)). *Brons*, in turn, relied on *Miller v. United States*, 725 F.2d 1311 (11th Cir. 1984), where the Eleventh

In light of the foregoing law, it is irrelevant whether LaCourse's F-16 bore a "significant relationship to traditional maritime activity." What matters is that at the time of the crash it is undisputed he was more than twelve nautical miles from shore. That is all that is required under DOHSA. As the Fifth Circuit has succinctly stated: 'The simple fact that [the decedent's] death occurred as a result of an aircraft crash into the high seas is alone enough to confer jurisdiction under the DOHSA.'" *Motts*, *supra*, 210 F.3d at 569 (quoting *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982)); *see also id.* at 570 n.2 (a finding that "admiralty jurisdiction could exist under DOHSA without a maritime nexus" has been described as "consistent with DOHSA' s framework and purpose") (citation omitted).

Circuit presumed that a maritime nexus may be required under DOHSA. *See id.* at 1315 (concluding that DOHSA provided jurisdiction over aviation crash after finding that there *was* a maritime nexus on the facts of that case). But, as several courts have noted—including at least one district court in this circuit—those decisions were all *pre-Tallentire. See Ventura Packers*, *supra*, 305 F.3d at 918 (listing *Miller* as an example of the "several courts [that] initially presumed" DOHSA required a maritime nexus, but noting the cases were before *Tallentire); Palischak*, *supra*, 893 F. Supp. at 345 (citing *Miller* and *Brons* and noting same); *see also Bernard*, *supra*, 2010 WL 11505188, at *8 n.14 (S.D. Fla. 2010) (acknowledging the circuit precedent in *Miller*, but noting it was "decided prior to *Tallentire*" and a maritime nexus is no longer required).

IV. Conclusion

As stated above, the plaintiff's claims are subject to DOHSA. Because DOHSA provides the exclusive remedy for death on the high seas, preempts all other forms of wrongful death claims, and only permits recovery for pecuniary damages, the plaintiff must proceed under that statute and is barred from seeking non-pecuniary damages in this action. To that extent, the defendant's motion for partial summary judgment (doc. 56) is GRANTED.

DONE and ORDERED this 23rd day of February 2018.

/s/ Roger Vinson
ROGER VINSON
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

PATRICIA LACOURSE, individually and as Personal Representative of the Estate of Lt. Col. Matthew LaCourse,
Plaintiff,

v.

DEFENSE SUPPORT SERVICES LLC, et al.,
Defendants.
/

Case No. 3:16cv170-RV/CJK

ORDER

(Filed Oct. 31, 2018)

On November 6, 2014, a U.S. Air Force F-16 Fighting Falcon jet fighter (also known as a Viper) departed Tyndall Air Force Base, east of Panama City, Florida, for a continuation training (CT) sortie. The only person on board was the pilot, Matthew LaCourse, a 58-year old retired Air Force Lieutenant Colonel employed as a civilian by the United States Department of Defense. During the flight, the jet crashed into the Gulf of Mexico more than 12 nautical miles from shore where, tragically, LaCourse was killed.

Patricia LaCourse, LaCourse's widow and personal representative of his estate, filed a wrongful death action in Florida state court against numerous individuals and corporate entities that allegedly serviced and performed maintenance on the jet prior to

the crash, including defendant Defense Support Services LLC. The plaintiff alleged that the defendant negligently serviced or maintained the aircraft before take-off and that said negligence caused the crash. The complaint asserted three wrongful death-based claims: "Wrongful Death Caused by Negligence" (Count 1); "Wrongful Death Caused by Breach of Warranty" (Count 2); and "Wrongful Death Caused by Breach of Contract" (Count 3). The plaintiff sought "all damages permitted by law in an amount in excess of five million dollars ($5,000,000)," and she requested a jury trial.

The defendant timely removed the action to this federal court based on several jurisdictional bases, including federal officer and diversity jurisdiction. In addition, the defendant's notice of removal asserted jurisdiction based on the Death on the High Seas Act (DOHSA). *See, e.g.*, *Motts v. M/V Green Wave*, 210 F.3d 565, 569 (5th Cir. 2000) ("The simple fact that [the decedent's] death occurred as a result of an aircraft crash into the high seas [more than 12 nautical miles from shore] is alone enough to confer jurisdiction under the DOHSA.' "). However, the plaintiff disputed that there was federal jurisdiction in this case on *any* basis (doc. 22 at 1-3 & ¶4). Subsequently, the defendant moved for partial summary judgment, seeking a ruling from the court (1) that plaintiff's claims *did* fall under DOHSA, and (2) that, pursuant to the statute, any potential recovery would be limited to pecuniary damages. The plaintiff opposed the motion.

By order dated February 23, 2018, I granted the defendant's motion for partial summary judgment on

both contested points, expressly holding that "the plaintiff's claims are subject to DOHSA" and that "DOHSA provides the exclusive remedy for death on the high seas, *preempts all other forms of wrongful death claims*, and only permits recovery for pecuniary damages." *See* Order at 13 (emphasis added).

The defendant has now filed a motion to strike (or, in the alternative, a motion for partial summary judgment), asking that I strike (or grant summary judgment as to) the plaintiff's breach of warranty and breach of contract claims and her jury demand (doc. 82). The plaintiff filed a response in opposition (doc. 83); the defendant filed a reply to that response (doc. 84); the plaintiff filed a supplement in further opposition (doc. 86); and the defendant then filed a supplemental reply (doc. 87).

With respect to the breach of warranty and breach of contract claims (both of which arise out of the alleged wrongful death), they must obviously be stricken. My previous ruling that DOHSA applies and "preempts all other forms of wrongful death claims" is the law of the case. Order at 13; *see also id.* at 3-4 (citing and quoting *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F. Supp. 2d 1309, 1312 (S.D. Fla. 2012) (noting "it is well-settled that where DOHSA applies, it preempts all other forms of wrongful death claims under State or general maritime law") (citing multiple cases)).

Consequently, all that remains in this case is the DOHSA claim. That means the jury demand must be stricken, too. *See, e.g.*, *Tallentire v. Offshore Logistics,*

Inc., 800 F.2d 1390, 1391 (5th Cir. 1986) (specifically holding that where the "sole predicate" for liability is DOHSA, the plaintiff "is not entitled to a jury trial") (citing *Curry v. Chevron, USA*, 779 F.2d 272, 274 n.1 (5th Cir. 1985) ("DOHSA actions are brought in admiralty and as such no trial by jury may be had.")); *Reistetter v. Royal Caribbean Cruises Ltd.*, 2008 WL 5397139, at *1 n.2 (S.D. Fla. 2008) ("It is clear that Plaintiff's claims arising under [DOHSA] are cognizable only in admiralty, with no right to trial by jury.") (citing *Tallentire*, *supra*, and *Neenan v. Carnival Corp.*, 2001 WL 91542 (S.D. Fla. 2008)); *McAleer v. Smith*, 791 F. Supp. 923, 930 (D.R.I. 1992) ("DOHSA claims are generally tried by the Court sitting without a jury"); *Friedman v. Mitsubishi Aircraft Int'l Inc.*, 678 F. Supp. 1064, 1065-66 (S.D.N.Y. 1988) (rejecting plaintiff's contention that she was entitled to trial by jury in a DOHSA action because there was diversity of citizenship; holding that "since DOHSA provides a remedy in admiralty, admiralty principles are applicable and a DOHSA plaintiff has no right to a jury trial of wrongful death claims") (citations omitted); *Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459, 1471-72 (D.R.I. 1986) (no jury trial for DOHSA claims). *But see Lasky*, *supra*, 850 F. Supp. 2d at 1313-15 (surveying the law and stating that plaintiff could potentially be entitled to a jury trial by a federal court sitting in admiralty over DOHSA cause of action if *the plaintiff* asserted "an independent basis for diversity jurisdiction and/or

a concurrent claim that entitles Plaintiff to a jury trial," neither of which is present here).[1]

The defendant's motion (doc. 82) is GRANTED, and the plaintiff's breach of warranty and breach of contract claims, along with her jury demand, are stricken.

DONE and ORDERED this 31st day of October 2018.

/s/ Roger Vinson
ROGER VINSON
Senior United States
District Judge

[1] Assuming that plaintiff is not entitled to a jury trial as of right (and I just said she is not), the plaintiff alternatively requests that I empanel "an advisory jury to promote judicial economy." This request is denied without discussion.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

PATRICIA LACOURSE, individually and as Personal Representative of the Estate of Lt. Col. Matthew LaCourse,
Plaintiff,

v.

Case No. 3:16cv170-RV/HTC

DEFENSE SUPPORT SERVICES LLC, et al.,
Defendants.
/

ORDER

(Filed Aug. 29, 2019)

On November 6, 2014, a U.S. Air Force F-16 fighter jet departed from Tyndall Air Force Base, near Panama City, Florida, to join up with an F-4 fighter jet—which was playing the part of a drone—for a continuation training sortie. The only person on board the F-16 was the pilot, Matthew J. LaCourse, a 58-year-old retired Air Force Lieutenant Colonel employed as a civilian by the Department of Defense. Tragically, the aircraft crashed into the Gulf of Mexico toward the end of the sortie and LaCourse was killed.

The plaintiff, Patricia LaCourse, is LaCourse's widow and was designated the personal representative of his estate. She brought this wrongful death action in

Florida state court against the defendant, PAE Aviation Technical Services (PAE), a company that was under contract with the government to provide service and maintenance on aircraft at Tyndall, including the F-16 (hereinafter, the Mishap Aircraft).[1] PAE timely removed the lawsuit to this federal court.[2]

Discovery is now closed and PAE moves for final summary judgment (doc. 96) (Def. Mot.). PAE contends in this motion that it is immune from liability based upon the government contractor defense. The plaintiff filed a response in opposition to the motion (doc. 108) (Pl. Resp.), and PAE filed a reply to the response (doc. 111) (Def. Reply). In support of their respective pleadings, the parties filed a very large number of documents. These documents—which total approximately 6,700 pages—include, *inter alia:*

(1) Maintenance records for the Mishap Aircraft (doc. 108-10) (Maint. Rec.).

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[1] The contract was actually awarded to PAE's predecessor, Defense Support Services LLC (DSS), which was the original named defendant in this action. Because PAE took over the contract when it purchased the company—and DSS no longer exists—I will refer to the contractor/defendant as PAE for purposes of this order.

[2] The plaintiff initially sued three other PAE-related entities as well, but they were voluntarily dismissed shortly after the lawsuit was removed (docs. 19, 20, 21). She also sued several individual "John Doe" defendants, but fictitious-party pleading is generally not allowed in federal court. *See*, *e.g.*, *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1318 n.4 (11th Cir. 2015). Thus, PAE is the only defendant in this case.

(2) Deposition testimony of several PAE employees, including Timothy Davis (doc. 95-4, 5) (T. Davis Dep.); Michael Reeves (doc. 95-12) (Reeves Dep.); Michael Bogaert (doc. 95-20) (Bogaert Dep.); and Steve Davis (doc. 108-8) (S. Davis Dep.).

(3) Deposition testimony of Captain Michelle Chiaravalle, maintenance member on the Air Force's Air Combat Command Accident Investigation Board (AIB) (doc. 95-26) (Chiaravalle Dep.).

(4) Deposition testimony of Senior Master Sergeant Marquell DeOngelo Fallin, an investigator on the Air Force's Safety Investigation Board (SIB) (doc. 95-1) (Fallin Dep.).

(5) Deposition testimony of the plaintiff's four expert witnesses, Scott E. Stutler (doc. 95-32) (Stutler Dep.); Frederic G. Ludwig Jr. (doc. 95-33) (Ludwig Dep.); Gary Kibbee (doc. 95-34) (Kibbee Dep.); and Kent W. Ewing (doc. 95-35) (Ewing Dep.), and their respective expert reports (docs. 108-19, 108-15, 108-17, 108-20).

By Order and Notice dated March 4, 2019, the parties were directed to file any and all additional evidentiary material by March 19, 2019 (doc. 121). Neither side did so.[3] I later held an oral argument on May 23,

[3] Although no additional evidence was filed in response to my March 4th Order and Notice, PAE did file a "Notice of Specific Page and Line Designations of Plaintiffs Experts" to highlight specific portions of the plaintiff's earlier-filed expert testimony (doc. 125). In abundance of caution, and because of

2019. *See* Transcript of Oral Argument, dated May 23, 2019 (doc. 129) (Tr.). At the end of oral argument, I took the motion for summary judgment under advisement and stated that this order would follow.

I. Standard of Review

Summary judgment is appropriate if all the pleadings, discovery, affidavits, and disclosure materials on file show that there is no genuine disputed issue of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against any party who fails to make a showing sufficient to prove the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Summary judgment is inappropriate if a reasonable factfinder evaluating all of the evidence could draw more than one inference from the facts, and if that inference raises a genuine issue of material fact. *See*, *e.g.*, *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306, 1315 (11th Cir. 2007) (citations omitted). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). It is "genuine" if the record, viewed as a whole, could lead a

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their significance to this case, I read the deposition testimonies of the plaintiffs four expert witnesses in full—all 1012 pages.

reasonable factfinder to return a verdict for the non-movant. *Id.*

In considering a motion for summary judgment, the record must be construed in the light most favorable to the non-movant; her evidence must be believed; and all reasonable inferences must be drawn in her favor. *Allen*, 495 F.3d at 1315; *see also*, *e.g.*, *United States v. Onabanjo*, 351 F.3d 1064, 1065 n.1 (11th Cir. 2003). But this favorable construction is not unlimited. In opposing summary judgment, the non-movant "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Transcontinental Gas Pipe Line Co. LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049*, 910 F.3d 1130, 1154 (11th Cir. 2018) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). If the evidence produced by the non-movant is "'merely colorable, or is not significantly probative, summary judgment may be granted.'" *Id.* (quoting *Anderson*, 477 U.S. at 249-50).

Unsupported statements by counsel made in briefs and at oral argument are not evidence. *See*, *e.g.*, *Green v. School Bd. of Hillsborough Cty., Fla.*, 25 F.3d 974, 979 (11th Cir. 1994); *United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir. 1990); *accord United States v. Cardona*, 302 F.3d 494, 497 (5th Cir. 2002) ("arguments in brief[s] are not evidence"). It follows therefrom that attorney arguments alone cannot preclude summary judgment. *See Rich v. Dollar*, 841 F.2d 1558, 1565 & n.5 (11th Cir. 1988) (reversing denial of

summary judgment for defendant where the district court relied on "assertions in the memorandum prepared by Rich's counsel rather than upon the factual showing submitted under oath by Rich"); *accord, e.g.*, *Taylor v. Holiday Isle, LLC*, 561 F. Supp. 2d 1269, 1275 n.11 (S.D. Ala. 2008) ("Unadorned representations of counsel in a summary judgment brief are not a substitute for appropriate record evidence."); *Smith v. Housing Auth. of City of Prichard*, 2007 WL 735553, at *6 n.14 (S.D. Ala. 2007) ("These assertions [by plaintiff in opposition to summary judgment] are unaccompanied by citations to the record, and lack support therein. Of course, mere unsupported representations of counsel do not constitute evidence that may be considered on summary judgment.") (quoting *Nieves v. University of Puerto Rico*, 7 F.3d 270, 276 n.9 (1st Cir. 1993) ("Factual assertions by counsel in motion papers, memoranda, briefs, or other such 'self-serving' documents, are generally insufficient to establish the existence of a genuine issue of material fact at summary judgment."); *Bowden ex rel. Bowden v. Wal-Mart Stores*, 124 F. Supp. 2d 1228, 1236 (M.D. Ala. 2000) ("opinions, allegations, and conclusory statements of counsel do not substitute for evidence" on summary judgment)).

Thus, a party opposing summary judgment must point to specific portions in the record where *evidence* of a genuine disputed issue of fact can be found. *See* Fed. R. Civ. P. 56(c)(1)(A) (party asserting that a fact is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored

information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials"); *accord* N.D. Fla. Loc. R. 56.1(F) (parties on summary judgment "must include pinpoint citations to the record evidence supporting each factual assertion"); *see also A.L. v. Jackson County School Bd.*, 635 F. App'x 774, 786-87 (11th Cir. 2015) ("'district court judges are not required to ferret out delectable facts buried in a massive record'" and, therefore, they are not required to "'mine'" the record looking for evidence that wasn't cited by the parties) (citations omitted).

II. Background

Except as otherwise noted, the following facts are undisputed or, if disputed, resolved in the plaintiff's favor where supported by evidence in the record. In fact, as will be seen, most of these facts come from the plaintiff's own expert witnesses.

On March 3, 2009, PAE was awarded a contract with the government to provide aircraft service and maintenance at Tyndall Air Force Base (doc. 86-1). In performing under the contract, PAE was required to follow very detailed guidelines and adhere to specific standards, including Air Force Instructions (AFIs) and Technical Orders (TOs), all of which were prepared by, or on behalf of, the Air Force. *See* Affidavit of David Olson, dated November 15, 2018 (doc. 96-2) (Olson Aff.), at ¶¶ 7-19.

F-16s are equipped with two hydraulic systems: System A and System B. *See* Ludwig Dep. at 131-32. The systems are independent of one another and designed to allow the pilot to continue flying the aircraft if one of the systems fails. *Id.*; *see also id.* at 162 (agreeing that if one system goes down and the other one is operating as it should, "the pilot will not even notice a discrepancy in the handling"). Beginning in September 2014—two months before the crash—the Mishap Aircraft experienced several problems that implicated one or both of its hydraulic systems. *See* Stutler Dep. at 244-45 (testifying that the hydraulic issues began in mid-September 2014). These problems are as follows:

- On September 11th, the outboard hydraulic flight control accumulator gauge had hydraulic fluid in it.
- On September 17th, the Mishap Aircraft's hydraulically actuated landing gear (which is part of System B) did not retract during a flight.
- On October 22nd, a hydraulic system pressure line clamp broke on System A.
- On October 27th, there was a second in-flight failure in System B when the landing gear on the Mishap Aircraft once again failed to retract.
- On October 29th, the System B reservoir accumulator was depleted.
- On October 31st, the Mishap Aircraft was manned up with the intent to fly, but a

> hydraulic leak was discovered during the flight control check and the mission was aborted before it took off.
>
> • Also on October 31st, System A had no pressure indication in the cockpit, and the System B flight control accumulator pre-charge was low.
>
> • On November 3rd, PAE servicers performed a "confidence run" and both System A and System B failed.

See, *e.g.*, Maint. Rec. at 2-3, 8-11, 13-14; S. Davis Dep. at 69-70, 117-20, 129; *accord* Pl. Resp. at ¶ 33 (citing the Mishap Aircraft's maintenance records and summarizing these same "hydraulic system related failures").[4]

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[4] The plaintiff goes on to identify an additional hydraulic "problem" in her summary that I did not list above. Specifically, during the maintenance performed on November 3rd, the PAE servicers broke a tool (a scribe) and lost a 2-inch long part of the tool inside the Mishap Aircraft. As a result, the aircraft was impounded to allow for an investigation and to find the missing tool. Although the plaintiff notes that the Mishap Aircraft was impounded because of the missing scribe, that is not a hydraulic problem; and her expert witness, Scott Stutler, has testified that the impound was "proper" and "good maintenance." *See* Stutler Dep. at 278-79. Accordingly, I did not include the lost tool and subsequent impound in the list of "hydraulic system related failures."

As for the other problems that are listed above, I will assume for purposes of this order that they were all related to the hydraulic systems (because that is what plaintiff's experts have opined), but that is far from certain. Take, for example, the failure of the landing gear to retract on September 17th. Although Stutler stated in his expert report that the failure of the landing gear to

All of the foregoing problems were addressed and corrected as they presented. *See* Maint. Rec. at 2-3, 8-11, 13-14. Thus, for example, PAE mechanics replaced the broken clamp and gauge, and they installed two new accumulators. *See id.*; *see also*, *e.g.*, Bogaert Dep. at 58-63. After PAE installed the new accumulators, the mechanics ran a 24-hour "leak and bleed" check to ensure that they were working properly and not leaking. *See* Bogaert Dep. at 61-63. Notably, the plaintiff doesn't appear to claim that the corrective actions identified in the maintenance records had not actually been done, nor does she claim that they were done improperly. *See* Ludwig Dep. at 76-77 ("Q: Do you intend to express any opinion that the maintenance performed . . . by PAE itself was inappropriate? They put the wrong accumulator on, for example? They put the wrong piece in? They followed the wrong procedure

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retract was a hydraulic problem (doc. 108-19), he conceded at deposition under questioning by defense counsel that the landing gear failed due to a faulty solenoid, which is "an electrical piece of equipment" and "not a hydraulic valve." *See* Stutler Dep. at 240; *see also id.* at 240-41 (further conceding that the landing gear issue "related to an electrical problem"). He later tried to rehabilitate his testimony on this point during cross examination by the plaintiff's counsel when he testified that the landing gear problem was "actually electric hydraulic" because there *could* have been vibrations in the hydraulic system that were "sending a bad signal on the electrical side of the solenoid." *See id.* at 332-33, 335-36. However, as Stutler went on to admit on re-direct, he has no evidence that it happened here and he has never heard, seen, or read of it ever happening anywhere else. *See id.* at 336-38; *see also id.* at 339 ("Q: [I]n all of your experience and all of your years and your deployments and being at Homestead and all of your experience with F-16s, have [you ever] heard of that scenario happening where vibrations caused a solenoid to fail? A: Specifically, no.").

or protocol? A: No. Q: Do you have any information from any source that the records that you have seen that indicate the maintenance that was performed are, in fact, untrue? A: No."); *accord id.* at 144-47 (testifying that there is no allegation that PAE "missed a leak, an overflow, a noise, [or] anything," and conceding that the maintenance work they did "appear[s] to have been done properly"); Kibbee Dep. at 267 ("Q: . . . [Y]ou're not coming in as an expert to testify that the maintainers improperly installed a part? A: No . . . Q: Put it in backwards . . . [or] something—A: No.") Instead, as will be discussed further *infra*, the gist of plaintiff's claim is that PAE should have treated the hydraulic issues as a chronic problem, grounded the Mishap Aircraft, and sent it for additional ("depot- level") maintenance. *See* Ewing Dep. at 61-62, 172-76 (testifying that PAE mechanics "changed a gauge here, they changed an actuator there," but the underlying problem was "something deeper" that warranted grounding and further maintenance); *see also*, *e.g.*, Stutler Dep. at 150-54, 281-83; Ludwig Dep. at 75-76, 145-46, 160, 176, 183.

On the day of the crash, there were two issues with the Mishap Aircraft shortly before takeoff. First, the emergency power unit (EPU) took longer than expected to come on during the pre-flight check, but it eventually came on and passed the check. *See* T. Davis Dep. at 34. Next, there was an issue with the pitch override (PO) check, which requires the pilot to apply full pressure on the stick and press the PO switch to make the stabilizers at the tail move a few inches or degrees in a nose-down direction. *See id.* at 42-44; *see also* Stutler Dep. at 133-34; Fallin Dep. at 216-17. The

Mishap Aircraft failed the PO check two times before passing it on the third try. *See* Bogaert Dep. at 71-74; *see also* T. Davis Dep. at 42-53.

Despite these two issues (or "hiccups," *see* T. Davis Dep. at 42-43), the Mishap Aircraft passed all of its pre-flight checks, there was no indication of a problem with the hydraulic systems, and the plaintiff's experts agree that everything appeared to be normal (or at least they are aware of no evidence to suggest that things did not appear normal). *See*, *e.g.*, Ewing Dep. at 57-58, 88, 93-94; Stutler Dep. at 185-89, 201-03; Ludwig Dep. at 100-02, 144-47.[5] The PAE mechanics who

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[5] The only thing plaintiff's experts have identified as *possibly* indicating a hydraulic problem on the day of the crash concerned the failed PO checks. *See* Ludwig Dep. at 104 (opining that the failed PO checks were an "indicator that there's something possibly wrong, knowing what I know about [the] previous hydraulic issues, even though they seemingly may be unrelated"); Ewing Dep. at 57-58, 84-85 (opining that the failed PO checks could have been a "notification" that there was a hydraulic problem). PAE has pointed to evidence, however, suggesting that the failed checks were actually the result of pilot error. Specifically, Bogaert testified that:

> After I got on the headset, after when Tim had finished checking brakes, I got on a headset with Matt and asked him if he had done [the PO check]. He said yes. I told him I didn't see it. He said do you want me to do it again. I said yes, if you don't mind. At which point he tried to do it again, and they didn't move. And I asked him, are you holding the stick full forward, and he wasn't. He was just pushing, and they're reaching over and he's releasing his pressure on the stick, is my best guess. But I told him, no, Matt, that's not it, and asked him, are you holding the stick full forward as you hit that switch. And he did that, and it worked perfect. He

conducted the pre-flight checks were all satisfied that the Mishap Aircraft was safe to fly and released it for its final flight. LaCourse then taxied the aircraft down the runway and took off to meet up with the F-4.

During the flight, the Mishap Aircraft performed a number of aerial maneuvers leading up to a "pitch back," which is an over-the-shoulder tactical maneuver where the pilot uses the pitch axis to rejoin another aircraft. *See* Ewing Dep. at 22. From all accounts, everything leading up to the pitch back appeared normal, *i.e.*, there was no gauge, light, warning, or caution indicating any problems, and there were no reports of any vibrations, shakes, or "sponginess in the controls." *See id.* at 125-26 (agreeing that "the aircraft appeared to be functioning properly on engine start, taxi out, end of runway, takeoff, initial join-up with the F-4, and flight out to the Gulf, all of the steps before this pitch back"); *see also* Kibbee Dep. at 279, 296 (agreeing that there were no "warning lights going off in the cockpit" during the flight because if there had been they would have been "picked up on the flight data or crash flight data recorder," and conceding there was "no report by the pilot or the chase plane next to him, or anyone, once the airplane took off, of any control issues, any erratic operation, any vibrations felt, anything to indicate [a

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> released. I said that's what I was looking for, technique.

See Bogaert Dep. at 73. Nevertheless, because we are here on summary judgment, I must (and do) accept the plaintiff's evidence on this point as true and assume that the initial failed PO checks were *possibly* related to hydraulic problems.

problem]"). The problem occurred at the end of the pitch back maneuver. *See*, *e.g.*, Ludwig Dep. at 72 (testifying that the problem presented "during the termination of his pitchback . . . as he is finishing the maneuver"); Ewing Dep. at 126, 128 (testifying that everything appeared to be "okay until the last part of the flight," *i.e.,* "at the conclusion of the pitch-back").[6]

After the conclusion of the pitch back, LaCourse appeared to level off and there was "a period of no data, no inputs, no control or . . . no maneuvers." *See* Ewing Dep. at 24-25. The Mishap Aircraft then entered a "pitch-down" from about 12,000 feet. *See id.* at 25-32. LaCourse apparently made no effort to eject from the aircraft or make a radio call during the descent. *See*, *e.g.*, Ludwig Dep. at 73, 108. At about 1,500 feet, "the aircraft went wings level and went to military power and pulled slightly degree within 6 ½ Gs," after which it hit the water. *See id.* at 72; *see also* Ewing Dep. at 32.

The AIB investigated the crash and concluded that:

> According to the results of the investigation, the mishap occurred during intercept training

[6] The "pitch back" has been described as a variation of an "Immelmann" [Ewing Dep. at 23-24 (referring to the maneuver as "a slashing Immelmann")], which is a standard aerobatic maneuver taught to military pilots. *See*, *e.g.*, Flight Training Instruction, Naval Air Training Command (2019), available at: https://www.cnatra.navy.mil/local/docs/pat-pubs/P-764.pdf. It requires a rollout at the top of a loop, so that the aircraft makes a high-G pull up and then a 180 degree roll at the top [*see id.*], both of which can possibly cause the pilot to experience vertigo or black out.

> with another aircraft. While attempting to intercept the other aircraft, LaCourse performed a series of aircraft dynamic maneuvers that stimulated fluid in his inner ear canals which are responsible for perceptions of gravity, balance, movement and direction. As a result, he misperceived his angle of bank, angle of pitch and general position and became spatially disoriented, which resulted in his crash.

News Release, U.S. Air Force, Release No. 020915 (September 8, 2015), available at: http://www.airforcemag.com/DRArchive/Documents/2015/September%202015/091015aibfl6.pdf.

Unsurprisingly, the parties disagree about the cause of the crash. The plaintiff believes that it was caused by a dual-hydraulic failure due to nitrogen in the hydraulic system. Specifically, her experts have opined that the accumulators allowed nitrogen to leak into and contaminate the hydraulic system reservoir (either due to faulty seals on both new accumulators or because the nitrogen was not fully "purged" during the leak and bleed check), so that when the Mishap Aircraft performed its series of aerial maneuvers, the nitrogen got "sucked" into the two hydraulic pumps simultaneously (in the form of foam "bubbles"), which caused both accumulators to fail and rendered the flight controls non-responsive. *See* Kibbee Dep. at 108-09, 161-66, 288-96; Ewing Dep. at 56-57, 66, 126-28, 174, 184-85; Stutler Dep. at 115, 205, 301; Ludwig Dep. at 71-74, 98-99. According to this theory, the contamination occurred "days before the flight and continuing,

and then continuing through pre-flight, taxi, and initial part of the flight also." Ewing Dep. at 56-57; *accord* Kibbee Depo. at 125-26 (testifying that it's "entirely possible" the accumulators were leaking nitrogen on November 3rd, three days before the flight).

As previously indicated, the plaintiff does not allege that the maintenance and service that PAE performed on the Mishap Aircraft was itself negligent. She does not allege, for example, that the PAE mechanics installed the accumulators incorrectly or that they had seen (or should have seen) that the accumulators were leaking nitrogen. *See* Ewing Dep. at 58 ("Q: [D]uring the final inspection of the aircraft, the release of the aircraft, the preflight by the pilot, the engine start, and the taxi out, am I correct you do not believe there were any indications of this contaminated hydraulic system? A: None that I could tell.") Instead, the plaintiff believes that the PAE mechanics should have dug deeper into the Mishap Aircraft's hydraulic-related problems, and if they had they would have discovered the hydraulic system was compromised.

PAE succinctly summarizes and dismisses the plaintiff's experts' theory of the crash as follows:

> Their speculative opinions are: that because there was a crash there must have been air in the hydraulic system, even though the hydraulic system functioned for start up, run up, taxi out, end of runway, takeoff, join-up, initial flight maneuvers including G-turns, first attempted drone join-up, and the second attempted join-up all the way to the point of the

> "pitch back" maneuver, and at that point, somehow, mysteriously, air foamed in the hydraulic fluid causing both systems to fail, but only until the last moment before impact, when Decedent pulled back on the stick and the hydraulic system functioned again and moved the flight surfaces, and Decedent went to full throttle—all while Decedent made no radio call and no ejection despite at least 10,000 feet of altitude at the beginning of the event.

Def. Reply at ¶ 5. PAE's expert believes that LaCourse suffered a G-induced loss of consciousness after the pitch back and that caused the crash (doc. 108-21 at 41).

Ultimately, I don't have to resolve the disagreement about the cause of the crash because it is irrelevant to the government contractor defense that PAE has raised on summary judgment. Thus, I can and do assume for purposes of this order only that the crash was caused by the dual hydraulic failure that the plaintiff has proposed.[7]

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[7] Although I have accepted the plaintiff's theory of the crash solely for purposes of this order, her theory is highly questionable for several reasons. First, despite that F-16s have been around since the mid-70s—and over 4,500 of them have been built—the plaintiff's experts have all conceded that they have never seen (or heard of) an in-flight dual hydraulic failure due to pre-flight contamination or excess nitrogen in the hydraulic systems. *See*, *e.g.*, Ewing Dep. at 163; Stutler Dep. at 109-13; Ludwig Dep. at 132-33, 173; Kibbee Dep. at 161-63; *see also id.* at 241 ("Q: Do you know if Northrop or General Dynamics, or anybody who operates and maintains F-16s, have ever seen the scenario you described

III. Discussion

A. Government Contractor Defense

The government contractor defense was first established by the Supreme Court in the seminal decision of *Boyle v. United Technologies Corp.*, 487 U.S. 500

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today here of the foaming, the ingestion, and both systems failing, and the degradation, leading to a crash? A: Never heard of that before."). Nor did the plaintiff's experts run any tests or conduct (or read) any studies or analyses to see if such a thing was even possible. *See* Ewing Dep. at 163-64; Ludwig Dep. at 167-68; Kibbee Dep. at 107, 275-76.

Of course, just because something hasn't happened before (and no tests have been conducted to see if it could) doesn't by itself mean that it *couldn't* happen. But even if I were to apply the old adage that "there's a first time for everything," there is no evidence that it actually happened here. *See*, *e.g.*, Stutler Dep. at 114-15, 205-06 (admitting that there is "no evidence" of contamination in the form of "nitrogen in the hydraulics," and conceding that there isn't "any evidence" that nitrogen in the hydraulics—if it did exist—"affected the flight controls"). To be sure, the plaintiff's lead hydraulics expert, Gary Kibbee, was specifically asked during his deposition if he could point to "any shred of evidence" to suggest that there was "contamination of either hydraulic system," and he replied: "No, I cannot." *See* Kibbee Dep. at 276; *accord id.* at 293-94 ("Q: So isn't contamination in the system purely speculative theory at this point? A: . . . Yes, it is. I have no evidence of it . . . You're right."). Therefore, as plaintiff's own experts have acknowledged, "it's entirely possible the aircraft was airworthy at takeoff" [*see* Ludwig Dep. at 185], and it's possible there was never any "degradation of the flight control system" at all. *See* Kibbee Dep. at 280-81.

For these and other reasons, PAE has filed a separate motion to exclude Kibbee's testimony and opinions pursuant to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). I will resolve that motion by separate order.

(1988). Because of its significance to our case, I will discuss and quote from *Boyle* at length.

On April 27, 1983, David A. Boyle, a United States Marine helicopter copilot, was killed when a helicopter he was flying in crashed off the coast of Virginia Beach, Virginia, during a training exercise. Although Boyle survived the impact of the crash, he drowned after he was unable to push through the helicopter's emergency escape hatch. His father later brought a diversity action in federal court against the Sikorsky Division of United Technologies Corporation (Sikorsky), a private company that built the helicopter for the military pursuant to a contract. The suit alleged design defect.[8]

The jury returned a verdict for the plaintiff and awarded him $725,000, but the Fourth Circuit reversed. The Court of Appeals ruled that Sikorsky was immune from suit under the "military contractor defense" (also known as the government contractor defense). The defense was recognized in several jurisdictions, but it had been applied inconsistently. The Supreme Court granted the plaintiff's petition for writ of certiorari to resolve the inconsistency.

Writing for a 5-4 majority, Justice Scalia began with the following:

> Petitioner's broadest contention is that, in the absence of legislation specifically immunizing Government contractors from liability for

[8] The plaintiff alleged that the escape hatch was defectively designed insofar as it opened out instead of in, and thus was ineffective in a submerged craft due to water pressure.

> design defects, there is no basis for judicial recognition of such a defense. We disagree. In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, or a direct conflict between federal and state law. But we have held that a few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."

487 U.S. at 504 (multiple citations omitted). The Court found that the facts of *Boyle* implicated "two areas" that involve uniquely federal interests: (1) the obligations to and rights of the United States government under its contracts, and (2) civil liability of federal officials for actions taken in the course of their duty. *Id.* at 504-05.

The Court was careful to note, however, that the presence of a uniquely federal interest is not the end of the analysis:

> That merely establishes a necessary, not a sufficient, condition for the displacement of state law. Displacement will occur only where, as we have variously described, a "significant conflict" exists between an identifiable "federal policy or interest and the operation of state law," or the application of state law

> would "frustrate specific objectives" of federal legislation.

Id. at 507 (citations and footnote omitted). As for how it is to be determined whether a "significant conflict" exists:

> There is . . . a statutory provision that demonstrates the potential for, and suggests the outlines of, "significant conflict" between federal interests and state law in the context of Government procurement. In the FTCA [Federal Tort Claims Act], Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred. 28 U.S.C. § 1346(b). It excepted from this consent to suit, however,
>
> > "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).
>
> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many

> technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.

Id. at 511-12 (citation and footnote omitted). Ultimately, a "significant conflict" will be said to exist (and therefore the contractor will have immunity from suit) when the following three elements have been satisfied:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the

> supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not the United States.

Id. at 512.

One author has described the rationale for *Boyle* this way:

> In *Boyle*, and in government contractor defense cases generally, although the government is the "villain," the contractor and the injured plaintiff are the "victims" of that villainy. Thus, when a contractor produces a product that conforms with reasonably precise specifications provided or approved by the government, so long as the contractor has no knowledge of the danger or, having such knowledge, shares it with the government, it is the government, and not the contractor, that is ultimately responsible for the defects of that product. In these circumstances, the contractor can assert with regard to the defect, "The government made me do it." Furthermore, in spite of the government's negligence in providing improper specifications, the FTCA provides immunity from any liability to the government. This is the result under the discretionary function exception to the FTCA because [per *Boyd*] "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [that] provision." The consequence of the discretionary function exception is that if the

> injured plaintiff is to have any judicial remedy it would have to come in an action against the contractor.
>
> If the plaintiff recovers from the innocent contractor due to the government's immunity, the contractor cannot seek indemnification from the culpable government. This inequity contributes significantly to the need for the government contractor defense to protect the contractor.

David Seidelson, *The Government Contractor Defense and the Negligent Contractor: The Devil Made Me Do It*, 7 Widener J. Pub. L. 259, 262-63 (1998).

As noted above, *Boyle* dealt with the procurement of an allegedly defectively designed product; it did not address whether the government contractor defense would apply (as in this case) to a services contract. The Eleventh Circuit addressed that issue in *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003).

The defendant in *Hudgens* (DynCorp) was under contract with the government to service aircraft at Fort Rucker Army Base in Alabama, and it overlooked a fin spar crack on a helicopter that subsequently crashed and injured the pilot and co-pilot. The district court granted summary judgment for the defendant based on the government contractor defense, and the plaintiffs appealed, arguing that the defense didn't apply to a military aircraft services contract.

The Eleventh Circuit recognized that *Boyle* involved a procurement contract, and not a services contract. *See* 328 F.3d at 1334. The panel concluded, however, that the rationale *of Boyle* did not turn on the particular type of contract at issue but, rather, it turned on whether subjecting the contractor to liability under state law "would create a significant conflict with a unique federal interest." *Id.* As to that question, the court concluded that the same "unique federal interest" recognized in *Boyle* was "manifest in the present case." *Id.* And thus, the court continued, "[h]olding a contractor liable under state law for conscientiously maintaining military aircraft according to specified procedures would threaten the government officials' discretion in precisely the same manner as holding contractors liable for departing from design specifications." *Id.* The court then went on to say:

> The Supreme Court's references to "specifications" reflects the nature of the case before it in *Boyle*, which involved an alleged defect in the design of a military helicopter's escape hatch. In the context of the present [services contract] case, we rearticulate the defense's three elements to foreclose liability under state tort law if (1) the United States approved reasonably precise maintenance procedures; (2) DynCorp's performance of maintenance conformed to those procedures; and (3) DynCorp warned the United States about the dangers in reliance on the procedures that were known to DynCorp but not to the United States.

Id. at 1335. Applying those elements to the facts presented, the Eleventh Circuit held that DynCorp was entitled to judgment based on the government contractor defense.

B. Analysis

I will begin by briefly addressing the plaintiff's threshold argument that it is not appropriate for me to undertake the three-factor *Boyle/Hudgens* analysis because the government contractor defense is foreclosed by the terms of PAE's contract with the government. *See* Pl. Resp. at I 80-81. Quoting from the contract, the plaintiff argues that PAE has no immunity in this case because the contract required that PAE "'shall be . . . responsible for all injuries to persons or damage to property that occurs as a result of its fault or negligence.'" *Id.* at ¶ 24. Thus, the plaintiff asks: "How can the government contractor defense shield a contractor from liability when the contract itself expressly provides that the contractor is liable for its own faults and negligence? The answer, Plaintiff suggests, is that it cannot." *Id.* at ¶ 30.

PAE responds by arguing that:

> Defendant cannot by contract with the government eliminate immunity under the government contractor defense. *Such immunity exists to prevent government contractors like Defendant from passing on the cost of risk arising from performance of uniquely governmental activities.* There are few activities more uniquely governmental than repair and

> maintenance of military aircraft performing military missions. *Allocation of liability between Defendant and the government in the contract has nothing to do with immunity from liability to a third party, which the government would receive if it had maintained the mishap aircraft and Defendant should receive for doing the exact same thing.*

Def. Reply. at ¶ 3 (emphasis added). I agree with PAE. There is no question that if the Air Force had maintained the Mishap Aircraft then it would have been immune from this suit Immunity under the government contractor defense exists, at least in part, to save the federal government money by allowing it to hire contractors to do the same job without the contractors incurring the risk of liability to third parties. As Judge Jack Weinstein has observed:

> The government contractor defense is essentially based on the concept that the government told me to do it, and knew as much or more than I did about possible harms, so I can stand behind the government (which cannot be sued because of its immunity). It is designed in part to save the government money in its procurement costs because suppliers, less concerned with the risk of suits, can eliminate some difficult insurance factors from cost projections.

In re Agent Orange Prod. Liability Litig., 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005). In light of the purpose of the government contractor defense (to prevent the pass-through of costs), it would make little sense

to interpret the contract language as the plaintiff suggests. I believe PAE is correct that the quoted language merely allocated liability between PAE and the government, but it did not speak to liability between PAE and a third party.

Thus, I hold that the three-factor test from *Boyle/Hudgens* applies to this case. The question I must decide is whether those three elements have been satisfied. If they have, then PAE is immune from this suit and is entitled to summary judgment. If they haven't, then PAE is not immune and summary judgment must be denied.

As for (1)—whether the United States approved reasonably precise maintenance procedures—the plaintiff concedes that the first factor has been satisfied. *See* Pl. Resp. at ¶ 82 n.12 (conceding that the AFIs and TOs "are reasonably precise specifications that applied to the maintenance of the mishap aircraft"); Tr. at 10 (conceding same). As for (3)—whether PAE warned the United States about the dangers in reliance on the procedures that were known to it but not to the United States—this factor does not apply because (as PAE has argued, and as the plaintiff has not disputed) there is no contention that PAE had knowledge that it withheld from the government. *See*, *e.g.*, *Brinson v. Raytheon Co.*, 571 F.3d 1348, 1351 (11th Cir. 2009) (declining to address third factor where "Brinson has not argued that RAC failed to prove the third prong"); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1322 (11th Cir. 1989) (holding that third *Boyle* factor was satisfied as a matter of law where

"[t]here is no evidence that General Dynamics had knowledge it withheld").

Consequently, as the plaintiff has agreed, the question on summary judgment ultimately comes down to whether factor (2) has been satisfied. *See* Pl. Resp. at ¶ 82. That is, I must decide if there is a genuine disputed issue of material fact as to whether PAE's maintenance on the Mishap Aircraft conformed to—or fell below—the AFIs and TOs that PAE was required to follow. Before turning to that question, I need to address a preliminary issue.

It is clear from reading the full testimonies of plaintiff's experts—all of whom are highly experienced and well credentialed in their respective fields—that there are numerous things they would have done differently. For example, Kibbee believes the guideline for the leak and bleed test should have been written differently. *See* Kibbee Dep. at 255-60 ("I would write it better than—I would write it a little bit differently. . . . I'd go longer . . . I would write it that way.").[9]

[9] An important point bears noting with respect to the leak and bleed test. As previously stated, Kibbee's theory of the case is that both accumulators failed (either pre-flight or during the flight) because they were leaking nitrogen when they were installed days prior. *See* Kibbee Dep. at 165-66, 288-96. He was asked by defense counsel during deposition that if the accumulators were leaking when they were installed "wouldn't you expect that to show up when they were pre-charged, and then on a leak and bleed check for 24 hours?" *Id.* at 166. Kibbee answered as follows: "No. . . . Because the way the TO is written, it doesn't say to check these things 24 hours later. It just says do it real fast, and then pressure goes back to 1600, and then you're done, *so [there is] nothing in a TO that would pick this up.*" *Id.* (emphasis

Stutler believes that "a common sense mechanic" should have gone above and beyond what the AFIs or TOs required. *See* Stutler Dep. at 286; *see also id.* at 276-77 (conceding that no TO precluded PAE mechanics from asking LaCourse to repeat the initially failed PO tests before takeoff, but opining that sometimes mechanics should "troubleshoot a little bit further beyond what the TOs say"). And several of the experts testified about their personal opinions and about what they would have done if they had been at Tyndall that day. *See*, *e.g.*, Stutler Dep. at 150-52 (testifying that "if it was me, I would [have] put a red X in the orders" and grounded the aircraft based upon its maintenance history, but answering "I can't" when asked to point to where in the AFIs or TOs that was required); *id.* at 281-82 ("Personally, yes, I would have [grounded the Mishap Aircraft]. . . . [but] I'm only speaking for myself. . . . I can only speak on my behalf. Yes, I would have."); Ludwig Dep. at 76 ("If I saw repeat gripes in probably excess of three, I would not be wanting that airplane to fly. I'd be very much concerned."); *see also* Ewing Dep. at 176 (testifying "I would have put that plane down on the hangar deck of my carrier" until the

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added); *accord id.* at 258 (testifying that the guideline as written "would not pick up . . . this accumulator problem"). Whether the TO should (or could) have been written differently so that the mechanics would have caught the alleged nitrogen leak is, arguably, a drafting problem with the TO. But it says nothing about whether PAE *complied* with the TO, which is the only thing that matters here.

"root cause" of the hydraulic problem was "fully discovered").[10]

While the foregoing expert testimony (and other similar testimony from their depositions) may bear on the question of negligence, it is irrelevant to the issue I must decide. The question isn't whether the AFIs and TOs were properly written, whether a reasonable mechanic should have gone beyond them, or whether and to what extent the plaintiff's expert witnesses would have done things differently. Stated simply, it's irrelevant whether the Mishap Aircraft could (or even should) have been grounded and sent for "deeper" maintenance. The *only* question I must decide is whether there is a genuine disputed issue of material fact as to whether PAE's maintenance conformed to the AFIs and TOs as written.

In its motion for summary judgment, PAE argued that its maintenance on the Mishap Aircraft conformed to the AFIs and TOs it was required to follow, and it cited deposition testimony from several employees, the AIB maintenance member, and the SIB

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[10] Ewing further testified that the "biggest things" indicating a hydraulic problem was the fact that both accumulators were replaced, and he said that PAE should have sought "technical assistance from Lockheed." *See* Ewing Dep. at 143, 174. But he answered "I don't know . . . I can't answer that" when asked to identify an AFI and/or TO that required PAE to call Lockheed for technical assistance. *See id.* at 144; *accord* Stutler Dep. at 107 ("Q: . . . Do you know of any particular FI section or JG section or, for that matter, any Air Force written TO, regulation, or guide that says there is a limit on the number of times a hydraulic accumulator can be changed? A: I'll say no.").

investigator to that effect. *See* Def. Mot. at ¶¶ 22-27 (citing T. Davis Dep. at 117; Reeves Dep. at 106; Bogaert Dep. at 100; Chiaravalle Dep. at 26; Fallin Dep. at 13, 15, 19, 35-36, 231).[11] Relying on this testimony, PAE further argued "[t]here is no evidence that Defendant ever deviated from the reasonably precise specifications set forth in the Contract, TOs, or other applicable U.S. Air Force regulations or standards, and, in fact, Defendant submits [that the foregoing evidence] is uncontroverted that Defendant complied with the Contract, TOs and applicable USAF requirements." *See id.* at ¶ 28; *see also id.* at ¶ 49 (stating "none of Plaintiff's experts have identified any specific TO or other regulation that Defendant failed to follow"). PAE then continued in its motion:

> Assuming and setting aside the highly speculative opinions of Plaintiff's experts as to whether or not a hydraulic malfunction even occurred, which led to or caused this crash, and even if we assume that such a failure did

[11] Captain Chiaravalle and Senior Master Sergeant Fallin, in particular, testified that their respective AIB and SIB investigations made *factual determinations* that the Mishap Aircraft had been maintained in compliance with Air Force guidelines and standards. *See* Chiaravalle Dep. at 26 (the AIB factually determined "that the aircraft was being maintained per Air Force TOs, AFIs, and requirements"); Fallin Dep. at 13, 15, 19, 35-36, 231 (the SIB factually determined that PAE was utilizing Air Force requirements; that PAE was not using any non-Air Force requirements, TOs, or standards in maintaining the aircraft; that there was no procedure that was missed or a part that was not installed; that PAE used Air Force pre-flight checklists; and that there wasn't "anything out of the norm of what you would expect from an active duty Air Force maintenance entity").

> occur in flight, there is no procedure, guideline, or U.S. Air Force regulation that would require additional in depth troubleshooting, additional "grounding" as it has been referred to by Plaintiff's experts, or additional return to "depot level" maintenance. *Plaintiff cannot cite a specific TO, guideline, or U.S. Air Force requirement that Defendant allegedly breached.*

Id. at ¶ 50 (emphasis added).

To create a genuine disputed issue of material fact in light of PAE's evidence, the plaintiff was required in her response in opposition to come forward with evidence that PAE *did* violate an Air Force guideline or standard. However, she did not cite any evidence in her response that is inconsistent with PAE's evidence. *See*, *e.g.*, Pl. Resp. at ¶ 84 (arguing that PAE's "repeated, systematic and chronic failures" in maintenance were "in direct violation of reasonably precise and applicable Air Force procedures," but citing no actual evidence to support that argument).[12]

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[12] The plaintiff didn't produce any evidence of her own on this point, but she did appear to challenge the *weight* that should be afforded to PAE's evidence. For example, as noted, Captain Chiaravalle testified that the AIB made a factual determination that the Mishap Aircraft had been maintained pursuant to all relevant "Air Force TOs, AFIs, and requirements," but the plaintiff notes that Captain Chiaravalle answered "I don't know" forty six (46) times in response to *other* questions during her deposition. *See* Pl. Resp. at ¶¶ 90-92. Whether and to what extent Captain Chiaravalle was being an "evasive" and "typical" Air Force "bureaucrat" when responding to other questions, however, does not contradict her deposition testimony—or similar testimony from

Although the plaintiff didn't cite any evidence in her response in opposition to summary judgment on this point, she did claim that PAE had breached two Air Force guidelines: AFI 21-101 and TO 1-1-300. *See* Pl. Resp. at ¶¶ 34-45, 84; *accord* Tr. at 10-11 (wherein plaintiff's counsel argued "[t]here are two very specific instructions that are in dispute in the Motion for Summary Judgment, and that is Technical Order 1-1-300 and Air Force Instruction 21-101"); *see also* Plaintiff's Motion to Strike Air Force Opinions, Undisclosed Expert Opinions, and Other Inadmissible Evidence from Defendant's Motion for Final Summary Judgment, filed February 21, 2019, at ¶ 12 (doc. 120) ("Plaintiff respectfully suggests that the Court's summary judgment inquiry should focus on the reasonably precise specifications that Defendant did not comply with: Air Force Instruction (AFI) 21-101 and Technical Order (TO) 1-1-300").

In relevant part, AFI 21-101 sets out when an aircraft may be impounded:

> **7.1. Aircraft and Equipment Impoundment.** Aircraft or equipment is impounded when intensified management is warranted due to system or component malfunction or failure of a serious or chronic nature. . . . Impounding aircraft and equipment enables investigative efforts to systemically proceed

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other individuals, including PAE employees—that PAE's maintenance conformed to all relevant Air Force guidelines and standards. *See also* Olson Aff. at ¶ 8 (testifying that PAE provided maintenance "conforming" to the government requirements).

> with minimal risk relative to intentional/unintentional actions and subsequent loss of evidence.

TO 1-1-30 covers "check flights" after an aircraft has undergone maintenance work, and it provides in pertinent part that:

> **4.1.** . . . Check flights are normally conducted following maintenance work and prior to release of the aircraft for operational use. For the purpose of this instruction, to ensure aircraft is airworthy, primary aircraft systems are those affecting engines; flight controls; landing gear; and those systems affecting the basic Instrument Flight Rules (IFR) capability of the aircraft (*i.e.*, pitot static; compasses; attitude references, air data computers, etc.).

A fair reading of AFI 21-101 is that it authorizes aircraft impoundment, but it's discretionary and not required, and the same can be said of the check flight described in TO 1-1-30. Nevertheless, the plaintiff has argued that both guidelines were violated. But that is all she has presented: attorney *argument.* And as earlier noted, that is not enough to avoid summary judgment. Nowhere in her response in opposition does she cite actual *evidence* to support her argument that PAE violated AFI 21-101 or TO 1-1-300. She has not, for example, cited her experts on this issue. In fact, full review of their testimony indicates the experts were largely unfamiliar with the AFIs and TOs.

Stutler testified that he had not read or reviewed "any portions" AFI 21-101, and thus it did not play "any

part" in his opinions in the case. *See* Stutler Dep. at 77-78; *see also id.* at 106 (testifying that there were no TOs that he had any "particular interest in"). Ludwig answered "I'm not going to" when asked if he was planning to "render any opinions as to whether or not PAE was . . . following Air Force technical orders[.]" *See* Ludwig Dep. at 166. And Kibbee testified that he was "not familiar" with many of the TOs—he was provided some of them but not "the full set"—which led to the following exchange: "Q: Well, let me ask this way: In the TOs you've been given, can you point me to any TO that you believe my clients did not follow? A: No, I can't do that." *See* Kibbee Dep. at 87, 119; *accord* Tr. at 71 (where defense counsel noted that when the plaintiff's experts were asked about the TOs at their deposition "expert after expert said, 'I can't tell you exactly what they breached. I can't tell you specifically. I can't tell you which TO.' Several of the key experts of the Navy, well respected pilots said, 'I haven't even reviewed them.' ").[13]

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[13] The plaintiff's fourth expert, Kent Ewing, didn't directly and explicitly say during deposition that PAE violated AFI 21-101 and/or TO 1-1-300, but he did testify that in his opinion the Mishap Aircraft should have been impounded and only released after a functional check flight. *See* Ewing Dep. at 141-44. As to the former, he testified that he had read "words to the effect" in "121-101" [*sic*] that an aircraft should be impounded if there are "continuous repairs that are made that are not satisfactory." *See id.* at 144. But he did not know (and offered no opinion as to) what the Air Force defines as "continuous repairs that are not satisfactory." *See id.* As to the latter, he didn't cite TO 1-1-300 at all, and in fact didn't know what would be included in an *Air Force* functional check flight under that provision:

It is also worth noting that *after* PAE filed its motion for summary judgment on the government contractor defense (in which it argued that "none of Plaintiff's experts have identified any specific TO or other regulation that Defendant failed to follow," *see* Def. Mot. at ¶ 49), the plaintiff did not submit any post-motion/post-deposition affidavits or other evidence from her experts that mentioned AFI 21-101 and/or TO 1-1-3 00—even though my March 4th Order and Notice

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> Q: If this aircraft had had a functional check flight, functional check pilot had taken it out, started it, just like Mr. LaCourse did, flown it around the pattern, brought it back and landed it, would it have been appropriate to release?
>
> A: Only if it had been conducted as a functional check flight in accordance with the TO or whatever the Air Force calls it for a functional check flight— . . .
>
> Q: What would a functional check flight post-maintenance include?
>
> A: *I don't know. I know what it would be in the Navy.* I know what it would be in my experience. It would include all the maneuvers that the airplane is supposed to be designed for. *So it's a pretty extensive document in the Navy*, post-maintenance check flight.

Id. at 141-42 (emphasis added). Because this testimony is not "significantly probative" and leaves, at most, a "metaphysical doubt" as to whether PAE violated AFI 21-101 and/or TO 1-1-300, it is not sufficient to defeat summary judgment. *See*, *e.g.*, *Transcontinental Gas Pipe Line Co. LLC*, 910 F.3d at 1154. Indeed, it is telling that the plaintiff didn't even cite or rely on this vague testimony in her response in opposition to summary judgment or suggest that it created a genuine disputed issue of material fact.

explicitly granted her leave to file additional evidence.[14]

After close and careful review, I conclude that the plaintiff has not produced evidence sufficient to create a genuine disputed issue of material fact as to whether PAE's maintenance of the Mishap Aircraft conformed to the Air Force's reasonably precise standards and guidelines. The uncontradicted evidence is that it did. Therefore, PAE has met all three prongs of the

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[14] The plaintiff also failed to cite any evidence at the summary judgment hearing, which didn't go unnoticed by defense counsel. *See*, *e.g.*, Tr. at 37 ("[T]he key, we believe, is the fact that Plaintiff cannot cite to anyone who has testified or a report from an expert . . . that says [PAE violated AFI 21-101 and TO 1-1-300]. So really we're on a Motion for Summary Judgment where it's the dearth of evidence from Plaintiff's side, or lack of it, that we believe supports the summary judgment"); *id.* at 39 ("And without that expert testimony that ties the links in the chain, the Plaintiff does not have sufficient factual basis on which to go forward with their case. We believe, in a nutshell, that that is really what our motion is directed at, Your Honor."); *id.* at 63-64 ("What the Plaintiff has to bring forward in this case is proof by—and we've had a lot of us lawyers talking about things, but there's no testimony of any witness that says, 'I read Air Force 21-101, I read 1-1-300, and this maintenance squadron, or contractor in the place of a squadron, was the one required to perform a functional check flight, and they failed to do so."); *id.* at 65 (pointing out that attorneys "don't get to testify" and noting that "there's no witness" who testified that PAE violated AFI 21-101 and/or TO 1-1-300, and without such evidence "we don't have a case that can proceed" because "[t]he time for advancing Rule 26 disclosures or amending them is gone. The depositions have been taken. The witnesses can't now contradict or expand their testimony to include new theories. We are here with what we have.").

Boyle/Hudgens test and is immune from this suit based on the government contractor defense.

IV. Conclusion

For the above reasons, PAE's motion for summary judgment (doc. 96) must be, and is, hereby GRANTED. The Clerk is directed to enter judgment in favor of PAE, along with taxable costs, and close this case.

DONE and ORDERED this 29th day of August 2019.

/s/ Roger Vinson
ROGER VINSON
Senior United States District Judge