

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 20-608-cv

JESSICA T. BADILLA, CONSORCIA A. CASTILLO,
AND ACEA M. MOSEY, ERIE COUNTY PUBLIC
ADMINISTRATOR, AS CO-ADMINISTRATORS OF
THE ESTATE OF BERNARDO G. CASTILLO, DE-
CEASED, JOSEPHINE R. ELBANBUENA, AND
ACEA M. MOSEY, ERIE COUNTY PUBLIC ADMIN-
ISTRATOR, AS CO-ADMINISTRATORS OF THE ES-
TATE OF WILO M. ELBANBUENA, MICHELLE S.
MEDINA, AND ACEA M. MOSEY, ERIE COUNTY
PUBLIC ADMINISTRATOR, AS CO-ADMINISTRA-
TORS OF THE ESTATE OF NILO T. MEDINA, DE-
CEASED, NELA A. PADURA, AND ACEA M. MO-
SEY, ERIE COUNTY PUBLIC ADMINISTRATOR,
AS CO-ADMINISTRATORS OF THE ESTATE OF
EDUARDO P. PADURA, DECEASED, INGRID S.
BULOS, AND ACEA M. MOSEY, ERIE COUNTY
PUBLIC ADMINISTRATOR, AS CO-ADMINISTRA-
TORS OF THE ESTATE OF HENRY BELTRAN BU-
LOS, DECEASED, ACEA M. MOSEY, ERIE
COUNTY PUBLIC ADMINISTRATOR, AS CO-AD-
MINISTRATORS OF THE ESTATE OF RENE BA-
DILLA, DECEASED,
Plaintiffs-Appellants,

v.

(1a)

MIDWEST AIR TRAFFIC CONTROL SERVICE,
INC., A KANSAS CORPORATION
Defendant-Appellee.

Filed: August 9, 2021

Before: SACK, CHIN, and LOHIER, Circuit Judges.

OPINION

SACK and LOHIER, Circuit Judges.

In October 2010, a civilian flight (“Flight 662”) crashed into a mountain near Kabul Afghanistan International Airport (“KAIA”), killing all on board. The estates of the crew members and pilots of Flight 662 brought state-law wrongful death claims against Midwest Air Traffic Control Service, Inc. (“Midwest”) and others, alleging in relevant part that a Midwest air traffic controller had negligently provided instructions to Flight 662’s pilot that put the flight on a collision course with mountainous terrain surrounding KAIA.

Following discovery, the District Court (Frank P. Geraci, Chief Judge) granted Midwest’s motion for summary judgment on the grounds that (1) the Plaintiffs-Appellants’ claims against Midwest, a military contractor, were preempted by the combatant activities exception to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671 et seq.; and (2) Midwest neither had a duty to provide “terrain separation” for the flight nor proximately caused the accident. For the reasons set forth below, we **VACATE** the District Court’s judgment and

REMAND for further proceedings consistent with this opinion.

BACKGROUND¹

I.

In October 2010, Midwest provided air traffic control services at KAIA, which had been designated as a civilian airport. Both KAIA and its air traffic control tower belonged to the Ministry of Transportation and Civil Aviation of the Islamic Republic of Afghanistan. At the time, the air traffic flying into and out of KAIA consisted of a “mix” of civilian, combat, and combat-support operations. Insurgents regularly attacked the airport.

Although the airport and control tower belonged to Afghanistan, the North Atlantic Treaty Organization (“NATO”) supervised the tower, largely for the purpose of training Afghan civilians as tower controllers. The Afghan and NATO controllers primarily trained and operated the tower during the day. Midwest personnel took over the tower’s air traffic control operations at night and were not responsible for training the Afghan civilian controllers.

The KAIA air traffic control tower was equipped with a radar presentation that was used as a visual aid for the purpose of sequencing aircraft. However, the KAIA tower lacked equipment that would alert an air traffic controller to an aircraft’s proximity to terrain, such as the mountains that surround the airport.

¹ We have construed the facts in the light most favorable to the Plaintiffs-Appellants and resolved all ambiguities and drawn all reasonable inferences in their favor. *See Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2d Cir. 2014).

Midwest operated at KAIA as an approved subcontractor for a prime contract with the U.S. military. The prime contract obligated Midwest to “provide all personnel, supervision, logistics support, and other items necessary to perform [air traffic control] services as defined in this [statement of work].” App’x 1946. The contract further required that “[a]ll work performed by the Contractor in support of this [statement of work] shall be in accordance with applicable Federal Aviation Administration (FAA) or International Civil Aviation Organization (ICAO) standards and Department of Defense (DoD) regulations as applicable.” App’x 1946.²

Midwest’s tower controllers at KAIA reported to the senior air traffic control officer and his deputy, both of whom were United States Air Force officers. For example, in September 2010, after a Midwest employee raised a staffing issue with his employer rather than with the military officers responsible for the tower’s operations, the senior air traffic control officer emailed the chief executive of Midwest stating: “Please advise all [Midwest] tower controllers on the ground here at KAIA that [although] personnel . . . issues [may be directed to a Midwest manager], ALL operational issues WILL BE DIRECTED to/through myself or [the deputy] first.” App’x 268. In response, Midwest’s chief executive confirmed that, while Midwest controllers needed to advise their

² The contract also designated “the services provided by the contractor” as an “essential contract service” and designated “contractor personnel” as “mission essential personnel.” App’x 1946. This language requires contractors “to submit [to the Department of Defense] their plans to ensure continuation” of their services in “a broad range of emergencies and crises.” Defense Federal Acquisition Regulation Supplement (DFARS); Continuation of Essential Contractor Services (DFARS Case 2009-D017), 75 Fed. Reg. 66,680, 66,681 (Oct. 29, 2010); *see* 48 C.F.R. §§ 237.7602, 252.237-7023(c).

Midwest supervisors about all issues that arose, the controllers had been instructed to direct all operational issues to the senior air traffic control officer and that there was no question that the senior officer was “in charge at the tower.” App’x 266.

Midwest personnel directed air traffic around KAIA pursuant to a hierarchy of rules and regulations. Documents or instructions issued by the senior air traffic control officer or his deputy controlled. In the absence of such guidance, the local operating procedures for KAIA applied. If the local operating procedures did not address an issue, then the standard operating procedures for KAIA applied. If the standard operating procedures were silent, then the Afghanistan Aeronautical Information Publication (“AIP”) applied. And, finally, if a procedure was not covered by the AIP, then the ICAO standards for air traffic management applied. App’x 999-1000.

The standard operating procedures provided that KAIA air traffic controllers were “responsible for providing safe, orderly and expeditious control to all aircraft operating” in KAIA-controlled airspace. App’x 1364. The AIP classified the area within 6 nautical miles surrounding KAIA and up to 9,500 feet above sea level as “Class D” airspace for which the KAIA control tower was responsible. The AIP further provided that the “[u]ltimate responsibility for aircraft and terrain avoidance rests with the pilot in command.” App’x 1458. The ICAO similarly provided that, for flights conducted in accordance with visual flight rules, “[t]he objectives of the air traffic control service . . . do not include prevention of collision with terrain.” App’x 1688.

II.

On October 12, 2010, after sunset at about 14:50 UTC or 7:20 p.m. local Afghanistan time, Transafrik International Flight 662 departed the U.S. Bagram Air Base, some thirty miles north of Kabul, Afghanistan, for KAIA, located just north of Kabul city. The plane was a Lockheed model L-100 cargo aircraft, registered to Transafrik in Uganda and leased to National Air Cargo (“NAC”), an American airline that flies chartered cargo planes. As was typical for Transafrik-NAC cargo flights, there were eight people on board, including the six plaintiffs-decedents: the pilot, Captain Henry Bulos; the co-pilot, former Philippines air force general Rene Badilla; and crew members Bernardo Castillo, Wilo Elbanbuena, Nilo Medina, and Eduardo Padura—all of whom were Transafrik employees and residents of the Philippines.

The crew had already flown on that plane several times that day; the Bagram-to-KAIA flight was the last sortie scheduled for the day, with the crew and plane—likely empty of cargo—returning to their base of operations in Kabul. However, the plane had problems with some of its avionics equipment, according to an email that another Transafrik pilot, Michael Terrell, had sent three days earlier to others at Transafrik, including Captain Bulos. Terrell described the terrain avoidance warning system as inoperable. Normally, the terrain avoidance warning system would display a topographic map and indicate the plane’s position relative to the surrounding terrain, with the map showing red when the plane was at a dangerous relative elevation. This plane’s terrain avoidance warning system did not present such a display. The plane also lacked or had an inoperable ground proximity warning system, which, when working, sounds an alarm

to alert the cockpit that the plane is in dangerous proximity to an obstacle. Terrell's email also reported that the traffic collision avoidance system, designed to help the plane avoid collisions with other aircraft, worked only sporadically. There is no evidence that Transafrik resolved any of these issues in the days following Terrell's email; it appears to have been the airline's practice to keep a plane in operation until new parts could be installed. There is also no evidence that Midwest personnel, including those working in the control tower on the evening in question, were aware of any of these issues with the plane's avionics.

Kabul, KAIA, and the Bagram Air Base are located in a mountainous region in or near the Hindu Kush mountain range. Bagram's elevation is about 4,860 feet above sea level while KAIA, to its south, is some two thousand feet higher. Kabul has been described as lying within the "bowl" of its surrounding mountains. Gregory Scott Adams Dep. at 83, App'x 519.

While the city itself may be well-lit at night, the nearby mountains "are all jet black." Michael Terrell Dep. at 105, App'x 726. As one witness described the terrain:

Most of the world, there would be lights all over the place, even on mountains generally. Not a lot, but some. The mountains around Kabul had zip, nothing. Any time you're above, maybe a thousand feet above, the valley floor was pitch black. There were no roads, no cars, no houses, no power lights, no any kind of lights up there.

Id. at 60, App'x 681. Most of this terrain was also outside of the Class D airspace that was within the "control," or responsibility, of the KAIA control tower.

A flight between Bagram and KAIA with an L-100 aircraft ordinarily takes only about 10 minutes if flown according to visual flight rules (“VFR”) or 30 minutes under instrument flight rules (“IFR”). When flying under VFR, the pilot is responsible for seeing and avoiding obstacles, such as other aircraft and terrain. The minimum ground visibility for VFR at KAIA was 5,000 meters. The VFR pilot must ensure that he or she can see obstacles outside the plane’s windows by, for example, steering clear of clouds. The KAIA standard operating procedures, ICAO standards, and AIP all stated, one way or another, that pilots operating under VFR are responsible for their aircraft’s terrain and obstacle avoidance. IFR, by contrast, requires the pilot to rely on air traffic control for obstacle avoidance. As the Kabul tower’s deputy senior air traffic control officer explained: “Under IFR . . . an aircraft is obligated to talk to air traffic control. They’re obligated to follow our directions unless an emergency situation exists. And air traffic control provides the separation services for the aircraft. And . . . that [] allows the aircraft to fly through instrument meteorological conditions,” such as clouds. Scott Stevenson Dep. at 23, App’x 565. IFR flights into Kabul take longer than VFR flights because the plane must reach an altitude and distance from the airport that allows the plane to show up clearly on radar. As do many airport air traffic controls, KAIA’s air traffic control preferred pilots to fly VFR to ease its burden of handling traffic. It was nonetheless the pilot’s choice whether to fly VFR or IFR.

Captain Bulos chose to operate Flight 662 according to VFR. Although the flight left Bagram around 7:20 p.m. local time—after sunset—Captain Bulos was permitted to use VFR. Flight 662 had to arrive in Kabul at night because Boeing 747s, which were used to transport Afghans

to Saudi Arabia for the Hajj, had been parked on Transafrik's ramp at the airport earlier that evening. A former Transafrik pilot explained that "the airport authority would not let us land until all the Hajj birds were gone and we had space." Michael Terrell Dep. at 58, App'x 679.

The parties agree that KAIA's minimum visibility of 5,000 meters was satisfied that evening, although there was some haze in the area with temporary visibility of 4,000 meters. The National Transportation Safety Board ("NTSB") indicated that the moon would have provided "limited additional light" and that "[i]t is difficult to determine how much illumination the stars provided due to the haze." National Transportation Safety Board Office of Research and Engineering Aircraft Performance Study (the "NTSB Study"), July 31, 2012, at 12, App'x 1882.

Shortly after takeoff from Bagram Air Base, Flight 662 contacted Bagram Approach Control, which controls traffic departing from and arriving at Bagram. Bagram Approach instructed Flight 662 to maintain VFR and continue on its "own navigation to Kabul." App'x 1917. Bagram Approach then informed Kabul Tower (a separate facility) that Flight 662 was headed to KAIA.

The flight continued to ascend for about five minutes, reaching its maximum altitude of 11,778 feet above mean sea level ("MSL"), which, because of the mountainous surroundings, was about seven thousand feet above ground level. The aircraft remained at this altitude for a few minutes as it flew at a near 180-degree (due south) heading, toward KAIA and Kabul.

About eight minutes into the flight, Flight 662, still flying south, began to descend; it made its first contact with Kabul Tower:³

7:28:02 P.M.	TKU662	“Tower. TKU uh 662”
7:28:05	Tower	“TKU662”

NTSB Study at 14-16, Table 1, App’x 1884. The local controller with whom Flight 662 communicated was one Darrell Smith, a Midwest employee and retired U.S. Air Force master sergeant. All of the other persons in the tower at that time were also Midwest employees.

Flight 662’s Captain Bulos then reported the aircraft’s location relative to the airfield traffic pattern and runway, and Smith cleared the flight to land on runway 29, which has a 290-degree compass bearing (i.e., the plane would land to the west-north-west).

7:28:08 P.M.	TKU662	“Roger sir, seven miles to join right downwind for two nine”
7:28:17	Tower	“TKU662 roger, report a five mile final for two nine please”
7:28:22	TKU662	“Five mile final for two nine for TKU662”
7:28:50	Tower	“TKU662 check wheels down, wind zero nine zero at four

³ The first column of the following verbatim quotations of communications among Flight 662, the KAIA tower, and other aircraft, shows the time; the second column identifies the sender; and the third column contains the contents of the communications. Quotations are from Table 1 of the NTSB Study at 14-16, App’x 1884-86.

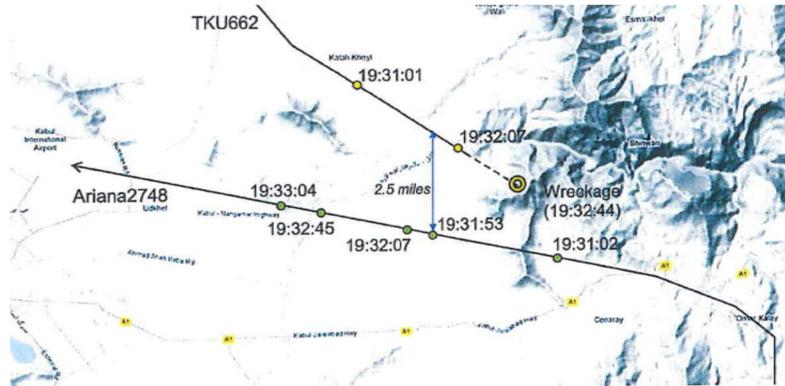
knots, cleared to land
[at] runway two nine”

NTSB Study at 14, App’x 1884. At an altitude of about ten thousand feet MSL, Flight 662 turned from its nearly 180-degree bearing to a 140-degree, or south-south-east, direction to take the plane on its “downwind leg” in which it would travel north of the runway but in the opposite direction of its intended landing on the runway, before making, in effect, a U-turn into the final approach. *See* NTSB Study at 12, Figure 10, App’x 1882 (reproduced below).

Unbeknownst to Captain Bulos, however, the tower’s radar display was not working at the time that Smith cleared Flight 662 to land. Nor was Smith able to see the plane out of the tower’s window. The radar display, although it turned on moments later, did not, and would not in any event be expected to, show Flight 662’s altitude, any minimum safe altitude for the plane, or other indications of the plane’s proximity to the terrain. Smith was also unaware of the specific altitude of the terrain surrounding Kabul.

Less than a minute after clearing Flight 662 to land, Smith was contacted by Ariana Afghan Airlines Flight 2748, a civilian IFR flight coming into Kabul from the southeast. Smith told Ariana 2748 that it is “number two to follow” Flight 662 into “runway two niner.” NTSB Study at 14, App’x 1884. However, Ariana 2748 responded

that it was on a “straight in approach . . . distance [] now one six [sixteen miles] to touchdown.” *Id.*



Now aware of the relative positions of the planes and concerned that Ariana 2748 might overtake Flight 662 because of the former’s straight path to the runway and faster speed, Smith decided to switch the order in which the planes would land. As noted, Flight 662 was headed southeast, toward a point east of the east end of the runway where it would eventually turn almost 180 degrees to land westbound.

Just after 7:30 p.m., Smith asked Captain Bulos to extend Flight 662’s downwind leg (i.e., continue flying east) and cancelled its landing clearance:

7:30:16 P.M.	Tower	“TKU662 can you extend your downwind sir?”
7:30:23	TKU662	“Uh. copy all extend on downwind TKU662”
7:30:29	Tower	“Roger. landing clearance cancelled, make a left turn,

report established on your downwind. you're number two to follow an Airbus three one zero [Ariana 2748] at about a one zero mile final for two nine"

7:30:38 TKU662 "Roger, number two for TKU662"

7:30:39 Tower "Thank [y]ou"

Id. Captain Bulos then turned Flight 662, which had continued to descend to about eight thousand feet MSL, from its 140-degree heading to a 116-degree, or east-south-east, heading. Although Smith had asked Flight 662 to extend its downwind leg, the aircraft was not at that time in the Class D airspace that was the tower's zone of control.

Smith then attended to the departure of another flight, Pamir Airlines Flight 305. After Pamir 305 was cleared for takeoff, Smith cleared Ariana 2748 to land. Smith then spoke to Captain Bulos for the final time:

7:31:47 P.M. Tower "TKU 662, continue downwind. I'll call your base. Traffic you're following [i.e., Ariana 2748] is abeam [you] now [i.e., directly on TKU662's right]"

7:31:53 TKU662 "We have it in sight, TKU662 extend the downwind"

NTSB Study at 15, App’x 1885 (emphasis added). “I’ll call your base” meant that Smith would tell Bulos when to turn the aircraft to its “base leg,” i.e., the plane would turn right and briefly fly perpendicular to the runway, before turning right again into its final leg for landing.⁴

Air traffic control soon lost contact with Flight 662. Smith then saw a fireball from his position in the tower.

7:32:07 P.M.	Tower	“TKU662 tower, you up?”
7:32:14	Tower	“TKU662 Tower”
...		
7:32:50	Tower	“And uh Ariana2748 do you see the smoke off to your right sir?”
7:32:58	Tower	“Ariana2748 tower”
7:33:00	Ariana2748	“Tower go ahead”
7:33:02	Tower	“Roger, did you copy the smoke off to your right . . . ?”
7:33:05	Ariana2748	“Negative”
7:33:23	Tower	“TKU662 Tower. how do you hear?”
7:33:35	Tower	“TKU662, ah Kabul tower two on Guard, how do you hear me?”

⁴ Midwest contends that the statement “I’ll call your base” did not mean that Flight 662 could only turn when Smith said so. The meaning of the statement is a factual issue, however, and we therefore accept the Plaintiffs-Appellants’ meaning for purposes of reviewing the grant of summary judgment.

7:33:46	Tower	“TKU662, Kabul Approach, how do you hear?”
7:33:52	Tower	“I mean Kabul Tower, how do you hear?”
7:34:05	Tower	“TKU662 Kabul Approach how do you hear?”
7:34:52	Tower	“TKU662 Kabul Approach how do you hear?”

Id.

Having continued flying at the 116-degree heading it took after Smith asked Bulos to extend its downwind leg, Flight 662 crashed into mountain terrain ten to twelve miles east of the airport and at an altitude of 7,874 feet MSL, killing everyone on board. The cockpit voice recorder and flight data recorder were also destroyed in the crash.

III.

On October 2, 2012, the Plaintiffs-Appellants, as administrators of the estates of Captain Bulos, co-pilot Baddilla, and crew members Castillo, Elbanbuena, Medina, and Padura, filed a complaint in New York Supreme Court, County of Erie, asserting negligence claims against Midwest, NAC, and Transafrik. The Plaintiffs-Appellants claimed that NAC and Transafrik: (1) negligently procured, provided, and dispatched an aircraft “that was not in an airworthy or safe condition” because of issues such as the inoperative terrain avoidance warning system and traffic collision avoidance system; (2) negligently “failed to require and/or provide specific training

to the flight crew . . . relative to the operating environment, unsafe conditions, and dangers to be reasonably anticipated during approaches into Kabul”; (3) negligently “failed to require and/or provide proper and adequate navigational aids”; and (4) negligently “failed to ensure proper and safe crew pairing for the intended flight.” Compl. at 8-9, App’x 139-40. The Plaintiffs-Appellants claimed that Midwest gave a negligent instruction to Flight 662, negligently failed to provide a minimum safe altitude warning to the flight, negligently “failed to provide necessary instruction to keep a safe and proper separation between . . . Flight 662 and the surrounding terrain,” and “otherwise negligently and carelessly failed to provide proper and safe instructions, warnings, and/or other air traffic control services to” Flight 662. Compl. at 11-12, App’x 142-43.

The defendants removed the case to the United States District Court for the Western District of New York, invoking diversity jurisdiction, federal enclave jurisdiction, and federal officer jurisdiction. Notice of Removal, *Baddilla v. Nat’l Air Cargo Inc.*, No. 12-cv-01066-FPG-JJM (W.D.N.Y. Nov. 12, 2012), ECF No. 5. After the Plaintiffs-Appellants moved to remand the case to state court, the District Court, upon a report and recommendation from Magistrate Judge Jeremiah J. McCarthy, determined that while it lacked diversity or federal enclave jurisdiction, it could exercise federal officer jurisdiction because Midwest personnel working in the Kabul Tower were supervised by a federal officer.

The District Court later granted Transafrik’s unopposed motion to dismiss, *see* Report & Recommendation, *id.*, (W.D.N.Y. July 1, 2015), ECF No. 92, and dismissed the claims against NAC with prejudice pursuant to a stipulation of dismissal agreed to by the Plaintiffs-Appellants

and NAC, *see* Text Order, *id.* (W.D.N.Y. Jan. 12, 2017), ECF No. 154.⁵ With Midwest as the sole remaining defendant, the case proceeded to discovery on the negligence claims and Midwest's defense that the claims are preempted under the government contractor defense, *see Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), or the FTCA's combatant-activities exception, 28 U.S.C. § 2680(j).

After the close of discovery, Midwest moved for summary judgment on the grounds that the claims are preempted and, alternatively, that it could not be held liable for the crash because a pilot flying under VFR is solely responsible for separating an aircraft from the terrain. In a Report and Recommendation issued in April 2017, Magistrate Judge McCarthy recommended that Midwest's motion be granted, agreeing with the Defendant-Appellee that the claims are preempted and that Midwest neither owed a duty of care to Flight 662 nor was a proximate cause of the crash. In January 2020, over the Plaintiffs-Appellants' objections, the District Court adopted Judge McCarthy's recommendation.

This appeal followed.

DISCUSSION

On appeal, the Plaintiffs-Appellants argue that the District Court lacked jurisdiction over their claims and that it erred in granting Midwest's motion for summary judgment. As we explain below, with respect to the jurisdictional challenge, which we review *de novo*, *see, e.g., Plumbing Indus. Bd., Plumbing Loc. Union No. 1 v. E. W. Howell Co.*, 126 F.3d 61, 65 (2d Cir. 1997), the District

⁵ It is not clear from the record whether the dismissal of the claims against NAC was pursuant to a settlement or otherwise.

Court correctly determined that this case could be removed to federal court under the federal officer removal statute. However, as to the challenge to the grant of summary judgment to Midwest, also reviewed *de novo*, construing the evidence in the light most favorable to the Plaintiffs-Appellants and drawing all reasonable inferences in their favor, *see, e.g., June v. Town of Westfield*, 370 F.3d 255, 257 (2d Cir. 2004), we conclude that the Plaintiffs-Appellants' claims are not preempted and that there remain genuine disputes of material fact regarding the Defendant-Appellee's liability for Flight 662's fatal crash.

I.

Although the Plaintiffs-Appellants contest the District Court's exercise of federal officer jurisdiction, we conclude that the District Court properly exercised jurisdiction over the Plaintiffs-Appellants' claims.

The federal officer removal statute, 28 U.S.C. § 1442(a)(1), provides for removal of cases to federal court by a defendant who (1) is a "person" who "act[ed] under [a federal] officer," (2) is being sued for an act taken "under color of [federal] office," and (3) raises "a colorable federal defense." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008) (quotation marks omitted). We construe the statute liberally and have interpreted each of these requirements broadly. *Id.* at 136. The term "person" includes corporations. *Id.* at 135. A person who assists, is supervised by, or receives delegated authority from a federal officer qualifies as one who is "acting under" the officer. *Id.* at 136-37. The causal connection implied by the "under color of . . . office" requirement is satisfied if the challenged act "occurred *while* [d]efendants were performing their official duties." *Id.* at 137-38 (emphasis in original). And "[c]ourts have imposed few limitations on

what qualifies as a colorable federal defense.” *Id.* at 138; *see id.* at 139-40 (corporation claiming government contractor defense raised colorable federal defense).

Here, Midwest satisfies all of the requirements of section 1442(a)(1). It is a “person” that assisted U.S. Air Force officers; it is being sued for allegedly negligent acts that occurred while performing its official air traffic control duties; and its claim of federal preemption based on the FTCA’s combatant activities exception qualifies as a colorable federal defense. *See Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (defendants need only raise a “colorable defense,” even if we reject that defense). The District Court therefore properly exercised jurisdiction over the present action pursuant to the federal officer removal statute.

II.

The Plaintiffs-Appellants next argue that the District Court erred in granting summary judgment in favor of Midwest on the ground that their state-law claims were preempted by the combatant activities exception of the FTCA.

A.

The FTCA waives the federal Government’s sovereign immunity from tort claims brought against the United States for harm caused by the negligence or wrongful conduct of “any employee of the Government.” 28 U.S.C. § 1346(b)(1); *see id.* § 2674. The FTCA contains several exceptions, which preserve the Government’s sovereign immunity under specified circumstances. *See id.* § 2680. Relevant here, the “discretionary function” exception bars claims “based upon the exercise or performance [of] . . . a discretionary function or duty on the part of a federal agency or an employee of the Government,” *id.* § 2680(a),

and the “combatant activities” exception contained in 28 U.S.C. § 2680(j) bars claims “arising out of the combatant activities of the military or naval forces . . . during time of war,” *id.* § 2680(j). But the FTCA explicitly excludes “any contractor with the United States” from the definition of “[f]ederal agenc[ies]” covered by the statute and limits the “[e]mployee[s]” covered by the statute to, as relevant here, “officers or employees of any federal agency.” *Id.* § 2671. The FTCA thus excludes military contractors from the scope of the Government’s retained sovereign immunity.

Despite the plain language excluding government contractors, in *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988), the Supreme Court held that the FTCA’s discretionary function exception preempted state-law claims arising from a contractor’s alleged design defect where “the state-imposed duty of care . . . [was] precisely contrary to the duty imposed by the Government.” *Id.* at 509; *see id.* at 510-13. *Boyle* involved a Marine who drowned when he was unable to escape his helicopter after it crashed into the ocean during a training exercise. *Id.* at 502. The Marine’s father brought state-law tort claims against the contractor that built the helicopter, alleging that the design of the helicopter’s emergency escape system was defective. *Id.* at 503. The escape hatch, per the Government’s specifications, opened outward instead of inward, rendering it ineffective in a submerged craft. *Id.* at 503, 509.

On review, the Court first identified an “area of uniquely federal interest” in “the procurement of equipment by the United States.” *Id.* at 507; *see also id.* at 505 n.1 (“[T]he liability of independent contractors performing work for the Federal Government . . . is an area of

uniquely federal interest.”). It next identified the potential for significant conflict between “state law which holds Government contractors liable for design defects” and the discretionary function of selecting an appropriate design for equipment for the United States Armed Forces. *Id.* at 512. Finally, to determine the appropriate “scope of displacement” of state law, the Court adopted a three-part test: “Liability for design defects in military equipment cannot be imposed, pursuant to state law,” it said, “when (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.” *Id.* These conditions “assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.” *Id.*

In short, “under *Boyle*, for the military contractor defense to apply, government officials ultimately must remain the agents of decision.” *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 630 (2d Cir. 1990) (“*Asbestos Litigation*”). That is, state-law claims against military contractors are preempted under *Boyle* only where the federal Government has mandated the action that allegedly violated state law.

B.

Midwest does not argue (nor could it) that it is covered under the FTCA or that the Plaintiffs-Appellants’ claims are preempted as a result of the limited holding in *Boyle* itself. Instead, Midwest asks us to extend the application of the federal common-law defense in *Boyle* to the FTCA’s combatant activities exception, which preserves the Government’s immunity from claims arising out of “combatant activities of the military . . . during time of war.” 28 U.S.C. § 2680(j). Midwest argues that, under the logic of

Boyle, it is protected by the combatant activities exception because the claims against it arose from its involvement in combatant activities of the U.S. military.

Such an extension would protect military contractors from state-law claims premised on conduct not mandated, authorized, or even considered by the federal Government. In the absence of clear direction from Congress or the Supreme Court, we decline Midwest's invitation.

1.

As an initial matter, we recognize that several of our sister Circuits have to varying degrees extended the application of *Boyle* to the FTCA's combatant activities exception. The process of extending *Boyle* beyond its specific facts began with a case that, like *Boyle*, involved products liability claims against manufacturers of military equipment.

In *Koochi v. United States*, 976 F.2d 1328 (9th Cir. 1992), the Ninth Circuit held that the combatant activities exception preempted tort claims against the manufacturer of an air defense system that U.S. naval personnel used to shoot down an Iranian commercial airliner. *Id.* at 1336-37. The court explained that the combatant activities exception "recognize[s] that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of *authorized military action*." *Id.* at 1337 (emphasis added). Because the authorized "direction of force against the aircraft by United States naval forces cannot give rise to tort liability [under the FTCA]," and "imposition of liability on [the] defense contractor 'w[ould] produce [the] same effect sought to be avoided by the FTCA exception,'" the Ninth Circuit held

that state-law claims against the contractor for the military's use of force were preempted. *Id.* (quoting *Boyle*, 487 U.S. at 511).

In *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), the D.C. Circuit extended *Boyle* beyond the products liability context, to lawsuits under D.C. tort law against private contractors who worked as interpreters and interrogators at Abu Ghraib prison in Iraq and allegedly participated in the atrocities committed there. The majority opinion first addressed “whether a significant conflict exists between the federal interests and D.C. tort law” by considering the purpose of the combatant activities exception. *Id.* at 7. Describing the legislative history of the exception as “singularly barren,” the majority rejected the Ninth Circuit’s more limited view of the federal interests that the exception seeks to protect. *Id.* “The policy embodied by the combatant activities exception,” the majority concluded, “is simply the elimination of tort from the battlefield.” *Id.* Whereas state and federal law imposed specific and conflicting duties that justified preemption in *Boyle*, the majority in *Saleh* held that “it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA’s policy of eliminating tort concepts from the battlefield.” *Id.* The majority then fashioned a two-part test to determine the scope of displacement: “During wartime, where a private service contractor is [1] integrated into combatant activities over which [2] the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.” *Id.* at 9.⁶ *Saleh* thus represents a substantial expansion of the *Boyle* preemption doctrine.

⁶ The *Saleh* majority also rejected the analysis of the district court in that case, which identified a federal interest in “shield[ing] military combat decisions from state law regulation” and therefore held that

By contrast, the dissent in *Saleh* thought that the “preemption question in these cases should be controlled by *Boyle*, which authorizes displacement of state law only when a federal contract imposes a directly conflicting duty on a contractor.” *Id.* at 32 (Garland, J., dissenting). The dissent observed that unlike the Government-mandated helicopter design in *Boyle*, the alleged conduct of the contractors in *Saleh* violated federal law and policy. *Id.* at 23. And, “[u]nlike the situation in *Koochi*, where sailors fired the weapon, there [was] no claim . . . that the force used against the plaintiffs was either ‘directed’ or ‘authorized’ by U.S. military personnel.” *Id.* at 24. Without “incompatible” state and federal duties, the dissent said, there was “no warrant for preemption.” *Id.* at 23.

Since *Saleh*, two other circuits have applied *Boyle* to the combatant activities exception. In a case from the Third Circuit, *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458 (3d Cir. 2013), the parents of a U.S. soldier who died by electrocution while showering at his barracks in Iraq filed negligence claims against the U.S. military contractor hired to perform maintenance at the barracks. *Id.* at 463. And in *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014), a Fourth Circuit case, U.S. military personnel who served in Iraq and Afghanistan brought various state-law tort claims for injuries suffered as a result of military contractors’ waste disposal and water treatment practices, which allegedly violated military directives and the defendants’ contract with the government. *Id.* at 331-32. In both of these opinions, the

preemption was justified only where contractors were “under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers.” *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007), *rev’d in part*, *Saleh*, 580 F.3d 1.

circuits rejected the Ninth Circuit's narrow view and the D.C. Circuit's broad view of the relevant federal interest, holding instead that the purpose of the combatant activities exception "is to foreclose state regulation of the military's battlefield conduct and decisions." *Harris*, 724 F.3d at 480; see *In re KBR*, 744 F.3d at 348.

Having paved a middle ground on the federal interest at issue, the Third and Fourth Circuits nevertheless retained *Saleh*'s two-part "combatant-activities, command-authority" test for determining the scope of preemption (that is, whether the contractor is (1) integrated into combatant activities over which (2) the military retained command authority). See *Harris*, 724 F.3d at 480-81; *In re KBR*, 744 F.3d at 349-51. The Third Circuit considered that test "well-tailored to the purpose underlying § 2680(j)." *Harris*, 724 F.3d at 481. "The first prong—whether the contractor is integrated into the military's combatant activities—ensures that preemption occurs only when battlefield decisions are at issue. And the second prong—whether the contractor's actions were the result of the military's retention of command authority—properly differentiates between the need to insulate the military's battlefield decisions from state regulation and the permissible regulation of harm resulting solely from contractors' actions." *Id.* Both prongs need to be satisfied for preemption to occur.

After applying the two-part test, the Third and Fourth Circuits in *Harris* and *In re KBR* concluded that the relevant state laws were not preempted. In *Harris*, for example, the Third Circuit held that the state-law claims brought by the parents of the soldier electrocuted in the shower were not preempted even though the contractor's maintenance of electrical systems at a barracks in an ac-

tive war zone was a combatant activity and therefore satisfied the first prong of the test. The Third Circuit determined that the contractor had failed to satisfy the second prong of the test because “[t]he military did not retain command authority over [the contractor’s] installation and maintenance.” *Id.* “[T]he relevant contracts and work orders,” the court explained, “did not prescribe how [the contractor] was to perform the work required of it.” *Id.* Rather, the contracts “provided for general requirements or objectives” and gave the contractor “considerable discretion in deciding how to satisfy them.” *Id.*; *see also In re KBR*, 744 F.3d at 351 (vacating the district court’s dismissal of the injured servicemembers’ claims because “the extent to which [the contractor] was integrated into the military chain of command is unclear”).

2.

On appeal, Midwest urges a significant extension of *Boyle* and the federal common-law defense it recognized. But the Supreme Court has repeatedly “underscore[d] the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking.” *Rodriguez v. FDIC*, 140 S. Ct. 713, 718 (2020). And the Court “has never extended *Boyle* beyond the discrete conflicts that application of the discretionary function exception targets.” *Saleh*, 580 F.3d at 24 (Garland, J., dissenting).

Boyle held that state law would not be preempted where the plaintiffs sought to impose a duty on a contractor that was neither “identical to one assumed under the contract” nor “contrary to any assumed.” *Boyle*, 487 U.S. at 509. If a “contractor could comply with both its contractual obligations and the state-prescribed duty of care[,] [n]o one suggests that state law would generally be preempted.” *Id.* For example, a federal contract for the pur-

chase of air conditioners that “specif[ied] the cooling capacity but not the precise manner of construction” would not preempt a state law imposing a duty of care to include a certain safety feature. *Id.* In *Boyle*, preemption was justified because the duty the plaintiffs sought to impose was precisely contrary to that imposed by the contract. *Id.*⁷ The Court thus characterized its holding in *Boyle* as a “special circumstance” in which the “government has directed a contractor to do the very thing that is the subject of the claim.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001).⁸

⁷ *Boyle* similarly distinguished *Miree v. DeKalb County*, 433 U.S. 25 (1977), in which the Court held that federal common law did not preempt state-law claims arising from an aviation accident, on the ground that the plaintiffs in *Miree* were “not seeking to impose upon the person contracting with the Government a duty contrary to the duty imposed by the Government contract.” *Boyle*, 487 U.S. at 508.

⁸ The Supreme Court’s guidance on the related doctrine of “derivative sovereign immunity” is one more reason to avoid expanding *Boyle*. The Court’s decision in *Boyle* drew support from *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), a leading derivative sovereign immunity case. *See Boyle*, 487 U.S. at 506. The Court recently explained that the “[c]ritical” factor in *Yearsley* was “the contractor’s performance in compliance with all federal directions”; in other words, the contractor had a defense because its actions were “all authorized and directed by the Government of the United States.” *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 167 & n.7 (2016) (quoting *Yearsley*, 309 U.S. at 20); *see also* Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969, 987-92 (2021) (analyzing the relationship between *Boyle* and *Yearsley* and concluding that, under either doctrine, the key question is “did the government dictate the actions, or did the government leave them to the contractor’s discretion?”); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 197 (2d Cir. 2008) (requiring a showing that “federal agencies exercised supervision, control, and enforcement authority,” rather than “merely accept[ing], without substantive review or enforcement authority, decisions made by [the contractor]”).

Our Court has likewise declined to expand the government contractor defense beyond *Boyle*'s direct conflict rationale. We have instead limited contractor liability only where the government mandated the action that violated state law. *See Asbestos Litig.*, 897 F.2d at 630 (“[G]overnment officials ultimately must remain the agents of decision.”); *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 90 (2d Cir. 2008) (“If the government buys a product ‘off-the-shelf’ . . . the seller of that product cannot be heard to assert that it is protected from the tort-law consequences of the product’s defects . . . [because] the seller was not following the government’s discretionary procurement decisions.”). In *Asbestos Litigation*, for example, the defendant-contractor relied on *Boyle* to defend against a claim that it was liable under state law, which the contractor said “would result in the imposition of pass-through costs from the contractor upon the Government.” *Asbestos Litig.*, 897 F.2d at 631. We rejected the contractor’s reliance on *Boyle*. “Had *Boyle*’s aim been to prevent military contractors from passing any liability costs on to the Government,” we said, “it simply could have granted military contractors a blanket immunity from all state tort liability.” *Id.* The contractor in *Asbestos Litigation* also claimed that it was entitled to a defense under *Boyle* because the Government would be immune under the discretionary function exception for its “conscious decision not to warn those working in shipyards . . . of the dangers” presented by asbestos. *Id.* In response, we pointed to the “crucial distinction” between the defense recognized in *Boyle* and the Government’s immunity under the discretionary function exception. *Id.* at 632. The relevant issue in assessing the contractor’s liability, we said, is not the scope of the Government’s immunity under an FTCA exception. “Stripped to its essentials, the military contractor’s defense under *Boyle* is to claim, ‘The Government

made me do it.’” *Id.* We have thus consistently recognized that “*Boyle* hinges the military contractor defense upon the military contractor’s having followed a government-approved requirement contrary to a state tort law duty.” *Id.* at 631. And we have declined to extend *Boyle*’s atextual preemption defense beyond that core rationale.

Commentators generally agree that “courts should not create a combatant-activities defense for government contractors,” Margaret Z. Johns, *Should Blackwater and Halliburton Pay for the People They’ve Killed? Or Are Government Contractors Entitled to a Common-Law, Combatant-Activities Defense?*, 80 TENN. L. REV. 347, 351 (2013), or at least that preemption is appropriate only “in cases where the contractor was under the supervision and control of the military” and “government conduct substantially circumscribe[d] contractor discretion,” Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT’L L. 395, 461-63 (2009). *See also*, e.g., Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1073 (2016); Rodney M. Perry, Note, *Fixing the Faults: An Argument Against the Saleh v. Titan Corp. Rule for Private Military Contractor Immunity*, 42 PUB. CONT. L.J. 607, 623 (2013) (noting that under *Saleh* military contractors may be afforded broader protection from tort liability than U.S. servicemembers enjoy under the Westfall Act). Even those who favor broad protection for military contractors question the legal basis for judicial expansion of *Boyle* beyond the “special circumstances” of that case. *See, e.g.*, Major Jeffrey B. Garber, *The (Too) Long Arm of Tort Law: Expanding the Federal Tort Claims Act’s Combatant Activities Immunity Exception to Fit the New Reality of Contractors on the Battlefield*, ARMY LAW., Sept.

2016, at 20 (conceding that it is “undeniable that a straight-forward reading of the [FTCA] weighs against the application of the [combatant activities] exception to contractors” and therefore advocating for congressional expansion of contractor liability protections to address the “unsustainable status quo”); *see also* Brief of Retired Military Officers as Amici Curiae at 7-28, *Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (Nos. 09-1335, 10-1891, 10-1921) (arguing that the D.C. Circuit’s decision in *Saleh* runs counter to the law of war’s fundamental distinction between combatants and civilians, as well as U.S. military regulations and public policy).⁹

The text of the FTCA, *Boyle* itself, precedent from this Circuit, and various commentators suggest that only Congress can do what *Midwest* asks us to do. “The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary . . . but by the people through their elected representatives in Congress.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981); *see Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“[W]e start with the assumption that [state law is] not to be superseded by [federal law] unless that was the clear

⁹ These widespread concerns are amplified by the lack of a limiting principle on the preemption recognized in *Saleh*. The military contractor defense recognized in *Boyle* may have been “atextual,” but it was limited by the requirement of a “discrete conflict.” *Saleh*, 580 F.3d at 23 (Garland, J., dissenting). By contrast, the broad preemption based on the combatant activities exception that *Midwest* seeks has few apparent bounds. The FTCA also contains exceptions for “[a]ny claim arising in a foreign country,” 28 U.S.C. § 2680(k), and “[a]ny claim arising out of assault[] [or] battery,” 28 U.S.C. § 2680(h). Would these exceptions preempt all tort claims against military contractors operating abroad? “Once we depart from the limiting principle of *Boyle*, it is hard to tell where to draw the line.” *Saleh*, 580 F.3d at 23 (Garland, J., dissenting).

and manifest purpose of Congress.” (quotation marks omitted)). Even if “[i]t may well be that, all things being equal, state law ought to play very little role in creating liability for the actions of private military contractors overseas,” it is entirely unclear that “the federal courts ([as opposed to] the political branches) have the ability to say so.” Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, *supra*, at 1073; *cf. Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (“The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.”). We therefore decline to expand *Boyle* beyond its direct conflict rationale.

3.

Keeping that rationale in mind, we have no problem retaining *Boyle*’s useful “analytic process” for determining whether federal law preempts state-law claims against government contractors. *Harris*, 724 F.3d at 479; *see In re KBR*, 744 F.3d at 347 (similar). Under that process, we consider whether a “significant conflict” exists between a “uniquely federal interest” (reflected in the combatant activities exception) and the operation of state law, and then determine the appropriate scope of displacement resulting from the conflict. *Boyle*, 487 U.S. at 507-12.

We begin with the relevant federal interest. As noted, four sister Circuits have reached varying conclusions about the “uniquely federal interest” implicated by state-law tort claims arising out of a government contractor’s involvement in combatant activities. The Ninth Circuit held that the combatant activities exception “recognize[s] that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.” *Koohi*, 976 F.2d at

1337. The D.C. Circuit broadly held that “the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield.” *Saleh*, 580 F.3d at 7. And the Third and Fourth Circuits came out somewhere in the middle, holding that the purpose of the combatant activities exception “is to foreclose state regulation of the military’s battlefield conduct and decisions.” *Harris*, 724 F.3d at 480; see *In re KBR*, 744 F.3d at 348.

There is, we admit, “very little authority for us to rely on to resolve this disagreement,” *Harris*, 724 F.3d at 479, but resolve it we must. Our principal concern with the Ninth Circuit’s narrow focus on “those against whom force is directed” is that it ignores that the combatant activities exception “would prevent suits against the military for harm it causes through friendly fire.” *Id.* at 480. On the other hand, the D.C. Circuit’s blanket statement “loses sight of the fact” that the FTCA “does not provide immunity to nongovernmental actors”; thus, “to say that Congress intended to eliminate all tort law is too much.” *Id.* Ultimately, we find the analysis of the Third and Fourth Circuits more persuasive and “adopt [their] formulation of the interest at play here.” *In re KBR*, 744 F.3d at 348.

So what is the proper scope of displacement resulting from the conflict between the federal interest in foreclosing state regulation of the military’s battlefield decisionmaking and the operation of state tort law? As noted, the Third and Fourth Circuits adopted *Saleh*’s two-part test for determining the scope of preempted state claims (again, that test is whether the contractor was (1) “integrated into combatant activities,” (2) “over which the military retain[ed] command authority”). *Saleh*, 580 F.3d at 9; see *Harris*, 724 F.3d at 480-81; *In re KBR*, 744 F.3d at 349-51. But recall that the D.C. Circuit designed its test

around the FTCA’s purported “policy of eliminating tort concepts from the battlefield,” *Saleh*, 580 F.3d at 7, a broad interest indeed. So the Third and Fourth Circuits’ more narrowly defined federal interest in foreclosing state regulation of the military’s battlefield conduct and decisions will result in a correspondingly more modest displacement of state law.¹⁰ No significant conflict exists between *that* interest and state law unless the challenged action can reasonably be considered the military’s *own* conduct or decision and the operation of state law would conflict with that decision.

With that in mind, we conclude that the combatant activities exception does not displace state-law claims against contractors unless (1) the claim arises out of the contractor’s involvement in the military’s combatant activities, and (2) the military specifically authorized or directed the action giving rise to the claim. These two conditions “assure that the suit is within the area where the policy of the [combatant activities exception] would be frustrated—*i.e.*, they assure that the [contractor’s action

¹⁰ The federal Government itself criticized the *Saleh* test as “inexact, unclear, and potentially misguided.” Brief for United States as Amicus Curiae at 15, *Saleh v. Titan Corp.*, 564 U.S. 1037 (No. 09-1313). In particular, the Government has argued, the two-part *Saleh* test “misunderst[ands] the circumscribed role private contractors play in war zones” under both the law of war and U.S. military regulations; it improperly focuses on “whether the tortfeasor is himself engaging in a combatant activity,” rather than on the military’s combatant activities; and it “d[oes] not address whether application of the preemption defense it recognized would be appropriate if the contractor employees acted outside the scope of their employment or the contractor acted outside the scope of the contract,” and thus might afford more protection to private contractors than U.S. military personnel receive under the Westfall Act. *Id.* at 15-17. In any event, the narrower federal interest identified by the Third and Fourth Circuits plainly calls for a narrower displacement.

giving rise to the claim] was considered by a Government officer, and not merely by the contractor itself.” *Boyle*, 487 U.S. at 512; *see also Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007) (“[C]ommon law claims against private contractors will be preempted [by the combatant activities exception] only to the extent necessary to insulate *military* decisions from state law regulation.” (emphasis in original)). The combatant activities exception would thus “displace[] state law only when the Government, making a . . . [battlefield] decision contrary to the requirements of state law, incorporates this decision into a military contractor’s . . . obligations, thereby limiting the contractor’s ability to accommodate safety in a different fashion.” *Asbestos Litig.*, 897 F.2d at 632. This test captures both the federal interest embodied in the combatant activities exception and the requirements of *Boyle* itself. In addition, it preempts only those claims that would, if successful, impose state-law duties in conflict with the military’s battlefield decisionmaking.¹¹

The test also strikes the proper balance between protecting military decisionmaking and opening the federal courthouse doors to a plaintiff’s legitimate state-law claims. Consider *Koochi*, for example. There, the plaintiffs’ claims against the manufacturer of a U.S. Navy air defense system would be preempted under our test because the claims arose out of the contractor’s supply of a military vessel’s weapons, and the U.S. military itself fired the contractor’s missile in an “authorized military action.” *Koochi*, 976 F.2d at 1337. By contrast, under our test, the

¹¹ Under this rule, the fact that “the military retain[ed] command authority,” *Saleh*, 580 F.3d at 9, might create a question of fact as to whether the military authorized a particular action, but it would not be dispositive. *See Boyle*, 487 U.S. at 514 (noting that “whether the facts establish the conditions for the defense is a question for the jury”).

plaintiffs' claims in *Saleh*, *Harris*, and *In re KBR* would not be preempted on summary judgment because the challenged contractor actions in those cases were neither authorized nor directed by the military.¹²

C.

The central act giving rise to the Plaintiffs-Appellants' state-law claims in this case was Midwest air traffic controller Smith's decision to cancel Flight 662's clearance to land, divert Flight 662 out of controlled Class D air space, and to inform the pilot that he would "call [his] base" (*i.e.*, tell him when to turn) without having obtained a visual on the flight's proximity to the surrounding terrain. The record on summary judgment does not establish as a matter of law in Midwest's favor that the military authorized or directed Smith's action. It was therefore error for the District Court to hold that the Plaintiffs-Appellants' state-law claims were preempted.

In concluding that the U.S. military did not authorize or direct Smith's decision, we address two important facts.

First, Midwest's prime contract provided that "[a]ll work performed by the Contractor in support of this [Statement of Work] shall be in accordance with applicable . . . [ICAO] standards." The ICAO, in turn, provides that, for flights conducted in accordance with visual flight rules, "[t]he objectives of the air traffic control service . . . do not include prevention of collision with terrain."

¹² *Boyle* requires that we engage in this analysis. More practically, in a small segment of cases—such as in *Koohi*, where the challenged action was the military's intentional firing of a missile—the Government becomes the agent of decision, even where it did not supply reasonably precise specifications to the contractor *ex ante*. The logic of *Boyle* applies to these cases.

The Government thus required Midwest to comply with the ICAO, which did not itself require controllers to prevent collisions with terrain. Second, the U.S. Air Force officer at KAIA's control tower emphasized in an email to the chief executive of Midwest that "ALL operational issues WILL BE DIRECTED to/through [the officer] or [his deputy] first." While defending the need for Midwest controllers to advise their corporate supervisors about all issues at the KAIA tower, Midwest's chief executive acknowledged that the captain was "in charge at the tower."

There was evidence that the military retained some authority at KAIA's tower and, at a very general level, approved ICAO standards. But we see no evidence that the Government directed Smith's actions at issue here. The Government did not issue a specific instruction that compelled Smith's directions to Flight 662 (allegedly in violation of his state-law duty of care). *Cf. Boyle*, 487 U.S. at 509 (no preemption where "the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed"). Indeed, no member of the U.S. military was even present in the tower the evening of the fatal crash. Preemption arises when the Government specifically authorizes or directs the contractor action, not when the Government generally permits the contractor to undertake a range of actions.

Midwest alternatively argues that Smith's air traffic control directions "at least partially implicate[] the military's decision to not equip the KAIA air traffic control tower with resources to provide [terrain separation services]." Appellee's Br. 16. By that logic, any tort claim against a military contractor would involve an indirect

challenge to the military's decision *not to prevent* the action that gave rise to the claim. We have rejected that same reasoning in failure-to-warn cases, in which we held that contractors cannot escape liability simply because the Government failed to require them to warn consumers or workers about dangerous conditions of which the Government was aware when contracting for the product. *See Asbestos Litig.*, 897 F.2d at 631-32. We similarly conclude that the military's decision to stock the KAIA tower with certain equipment did not alone permit tower controllers to divert flights out of Class D air space without any warning or awareness of the flight's proximity to the surrounding terrain.

Again, the preemption principles underlying *Boyle* as applied to either the combatant activities exception (here) or the discretionary function exception (in *Boyle*) direct us to ask one basic question: whether “[t]he Government made [the contractor] do it.” *Asbestos Litig.*, 897 F.2d at 632. Because the answer in this case is no, we conclude that the District Court erred in granting summary judgment to Midwest on preemption grounds.¹³

¹³ The outcome would be the same under *Boyle* itself. We assume without deciding that *Boyle* applies to contracts for services as well as for goods. *See Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1334, 1345 (11th Cir. 2003) (discretionary function exception preempted claims based on defendant-contractor's allegedly negligent service and maintenance of helicopters). Preemption based on a contract for services would still demand that “government officials ultimately must remain the agents of decision.” *Asbestos Litig.*, 897 F.2d at 630; *accord Hudgens*, 328 F.3d at 1335-37 (requiring the contractor to establish that (1) the U.S. approved reasonably precise procedures; (2) the contractor's performance conformed to those procedures; and (3) the contractor warned the U.S. about the dangers associated with those procedures that were known to the contractor but not to the U.S.). Midwest does not argue that Smith's instructions to Flight 662 meet this standard.

III.

Finally, the Plaintiffs-Appellants argue that the District Court erred in granting summary judgment to Midwest on the grounds that, as a matter of law, the Defendant-Appellee neither owed a duty of reasonable care to Flight 662 nor proximately caused the October 12, 2010 crash. We conclude that summary judgment should not have been granted on either ground. The Defendant-Appellee, acting through the local air traffic controller, Smith, owed a duty of care to Flight 662, and the Plaintiffs-Appellants have produced sufficient evidence for a jury to conclude that this duty was breached and that such breach proximately caused the fatal crash.

The parties and the District Court proceeded as if New York law applies, although they cited “cases from a variety of jurisdictions but not including [the law of Afghanistan].” *Stanford v. Kuwait Airways Corp.*, 89 F.3d 117, 122 (2d Cir. 1996). Under such circumstances, it is indeed generally appropriate to apply New York law and familiar concepts of common-law tort liability to determine the rights of the parties. *Id.*; *Johnson v. Price-line.com, Inc.*, 711 F.3d 271, 275-76 & n.2 (2d Cir. 2013). Accordingly, the Plaintiffs-Appellants’ negligence claims require them to establish that (1) Midwest owed them a duty of care, (2) Midwest breached this duty, and (3) the Plaintiffs-Appellants suffered damages as a proximate result of that breach. *Di Benedetto v. Pan Am World Serv., Inc.*, 359 F.3d 627, 630 (2d Cir. 2004) (citing *Solomon by Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985)).

Beginning with the duty of care, a legal question, *id.*, neither New York state courts nor this Court has yet addressed the scope of an air traffic controller’s duty of care

to a pilot operating under VFR. Out-of-circuit cases, however, have adopted some basic principles that the parties do not meaningfully dispute: Air traffic controllers and pilots generally share a concurrent duty to ensure an aircraft's safe operation. See *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 838 (9th Cir. 1995) (per curiam). "Both the pilot and the air traffic controller owe a duty of care to passengers in an airplane. . . . Each is responsible for the safe conduct of the aircraft and the safety of its passengers." *Redhead v. United States*, 686 F.2d 178, 182 (3d Cir. 1982). While "[t]he pilot is in command of the aircraft, is directly responsible for its operation, and has final authority as to its operation," *id.*, "[t]ower personnel and air traffic controllers are often a source of vital information," the negligent provision of which may lead to crashes, *id.*

With respect to VFR flights, however, courts have held that pilots are responsible for their own terrain separation and have, accordingly, recognized a more circumscribed duty for air traffic controllers. As one court has summarized such non-Second Circuit precedent: "The case law is incontrovertible that an aircraft operating pursuant to visual flight rules must provide its own navigation and clearance from obstructions. The duty to operate the aircraft, and to navigate, is assigned to the pilot who must provide his own separation from obstructions, and other aircraft, while in VFR conditions." *In re Air Crash Near Rio Grande, Puerto Rico, on Dec. 3, 2008*, No. 11-CV-80761, 2016 WL 6916600, at *5, 2016 U.S. Dist. LEXIS 148178, *18 (S.D. Fla. Oct. 24, 2016) (quoting *Baker v. United States*, 417 F. Supp. 471, 484 (W.D. Wash. 1975)).

But however limited in scope, the controller also has responsibilities with respect to a VFR flight. As one district court observed, air traffic controllers have been held to have such a duty to issue safety warnings "beyond

those required by [applicable controlling documents and manuals”:

(1) when danger to the aircraft is immediate and extreme; (2) when the air traffic controller is able to gather more information or make more accurate observations than the pilot; (3) when the controller is better qualified than the pilot to evaluate the danger; (4) when the pilot declares an emergency or indicates distress; (5) when danger is “reasonably apparent” to the controller but not apparent, in the exercise of due care, to the pilot; and (6) when the controller has conveyed dangerously inaccurate or misleading information to the pilot.

Turner v. United States, 736 F. Supp. 2d 980, 1008 (M.D.N.C. 2010) (citations omitted).¹⁴

To limn the bounds of a controller’s duty to a VFR flight, we refer to two cases from our sister Circuits. First, in *Wojciechowicz v. United States*, 582 F.3d 57 (1st Cir. 2009), the First Circuit reviewed a case in which a small plane, flown under VFR, crashed into the El Yunque mountain in Puerto Rico, killing all aboard. *Id.* at 61. About five minutes before the crash, the pilot had spoken with an air traffic controller, who had given the pilot a go ahead for landing and provided an “approach vector to the airport.” *Id.* at 62. The controller did not, however, direct the pilot to fly any particular route or at a specific altitude

¹⁴ Courts, including this Circuit, have also recognized that a controller’s failure to report significant weather conditions may be negligent. *Ingham v. E. Air Lines, Inc.*, 373 F.2d 227, 240-41 (2d Cir. 1967); *see also Himmeler v. United States*, 474 F. Supp. 914, 930 (E.D. Pa. 1979) (“A controller has a duty to report weather changes which, under the circumstances, a pilot would consider important in deciding whether to try to land and in preparing for the conditions he would meet in landing.”).

before entering that traffic pattern around the airport. *Wojciechowicz v. United States*, 576 F. Supp. 2d 241, 248-49 (D.P.R. 2008) (“[The pilot] was free to choose his own desired routing to the traffic pattern entry point . . . , as well as any altitude at any given point.”), *aff’d*, 582 F.3d 57 (1st Cir. 2009). Before entering the pattern directed by the controller, the plane flew into clouds covering the terrain and crashed into El Yunque. *Wojciechowicz*, 582 F.3d at 63. The plaintiffs-appellants, who included the relatives of the pilot and passengers killed in the crash, faulted the controller for not directing the pilot away from the mountain or issuing a safety alert. *Id.* at 63-64. But the First Circuit, in affirming the district court’s judgment in favor of the controller following a bench trial, held that the controller had not violated a duty to separate the plane from the mountain because “[t]here [was] no serious contention that the pilot did not know where El Yunque was” and the controller “did not then know the plane’s course or altitude or whether it was approaching or turning away from the obstruction.” *Id.* at 61, 69. The controller likewise had no duty to issue a safety alert regarding unsafe proximity to the terrain; the controller had insufficient notice that the pilot “had placed himself in a dangerous position” because the pilot was operating under VFR and had made no distress calls. *Id.* at 70.

Second, in *Yates v. United States*, 497 F.2d 878 (10th Cir. 1974), the pilot of a small Cessna plane was flying under VFR into an Albuquerque, New Mexico airport. He contacted air traffic control for landing instructions. *Id.* at 880. The controller directed the pilot to follow closely behind a much larger TWA-operated Boeing 707 that would land just before his flight. *Id.* About three hundred feet from the near end of the runway, the Cessna pilot was hit by the 707’s wake turbulence—which is “invisible and

moves in a circular fashion from a vortex” and “is generated behind and below heavier aircraft”—and crashed. *Id.* at 880-81. The government—named a defendant because the FAA operated the tower—argued that it could not be held liable for the crash because “the regulations establish that each pilot is in command of and responsible for his own aircraft and has the final authority with respect to its operation, and that it is up to the pilot to exercise his own judgment as to existence of hazard and to refuse to accept instructions which he considers increase his peril.” *Id.* at 881. The Tenth Circuit rejected the argument, reasoning that a “controller’s directions and warnings” are not “merely advisory.” *Id.* at 883. “This becomes clear,” the court continued, “in light of considering that if the pilot could depart from the control of the tower at any time[,] the control of the airfield traffic would soon become a shambles.” *Id.* Further, the court concluded that the controller had an obligation to warn the Cessna pilot of potential wake turbulence because “[i]n relationship to the extent of the hazard[,] the warning would have called for very little effort.” *Id.*

Of the many important differences between *Wojciechowicz* and *Yates*, one is critical here: While the plane in the former case crashed before it had entered the traffic pattern provided by the air traffic controller, the plane in the latter case crashed from the 707’s wake turbulence, which the controller should have known about, while complying with the controller’s instruction to land behind the larger plane. At the very least, then, these cases taken together, although not binding on us, stand for the proposition that a controller has a duty not to lead a VFR flight into a danger that the controller is or should be aware of. This is consistent, too, with the above-quoted statement from *Turner*, that courts have held a controller to a duty to warn a VFR flight when he “has conveyed

dangerously inaccurate or misleading information to the pilot,” “is able to gather more information or make more accurate observations than the pilot,” or “is better qualified than the pilot to evaluate the danger.” *Turner*, 736 F. Supp. 2d at 1008.

Accordingly, we cannot agree with the District Court or the Defendant-Appellee that the common law imposes on a controller like Smith no duty of care to a VFR flight. The common-law principle that an aircraft operating pursuant to VFR must provide its own terrain separation and obstacle avoidance does not free from any potential liability an air traffic controller who guides the plane into danger that the controller knew about or ought to have known about.

Stated in general terms, we think that Midwest was obligated not to put Flight 662 in peril that a reasonable controller would—or at least should—have foreseen or anticipated. But while “the scope of the legal duty of a controller to issue a warning is easily defined in general terms,” such duty in a given case “is very fact specific and will probably require a different action in every circumstance.” *Id.* (quoting *In re Greenwood Air Crash*, 873 F. Supp. 1257, 1265 (S.D. Ind. 1995)). We agree with these other courts that have recognized that “[i]n virtually every case what a reasonable [controller] would do in the defendant’s position will necessarily need to be established through expert testimony.” *Id.* (quoting *Greenwood Air Crash*, 873 F. Supp. at 1266). Yet the District Court disregarded the Plaintiffs-Appellants’ experts’ views on the controller’s duty of care in this case. According to the District Court, expert witness Julie Harvey’s opinion that Smith assumed a duty when he redirected Flight 662 was undermined by her acknowledgement that

under VFR, pilot Bulos was responsible for terrain separation. The District Court also disregarded the opinion of the Plaintiffs-Appellants' other expert, Colin Sommer, because it thought that Sommer's view that Smith's conduct gave rise to a duty to separate the aircraft from the terrain lacked common-law support. But as explained above, the common law does not eliminate a controller's duty of reasonable care when guiding a VFR flight. Indeed, it is the proper role of these experts to opine on what a reasonable controller would have done in the Kabul tower that fateful evening.

We also find unconvincing Midwest's argument that it owed no duty to Flight 662 because the controlling documents in place at KAIA provided that pilots held the ultimate responsibility for aircraft safety, including obstacle avoidance. Appellee's Br. 37. As we have noted, the Afghanistan AIP stated that the "[u]ltimate responsibility for aircraft and terrain avoidance rests with the pilot in command." App'x 1458. And under the ICAO standards, "[t]he objectives of the air traffic control service [for VFR flights] . . . do not include prevention of collision with terrain." App'x 1688. While these rules might be relevant to the division of responsibilities between a controller and a pilot operating under VFR, or in determining whether any duty of care was breached, we cannot agree that they foreclose the imposition of any liability where the controller leads a pilot into danger. Holding otherwise would render a controller's instructions as "merely advisory." *Yates*, 497 F.2d at 883 ("We cannot, therefore, accept the view that the controllers with the complex equipment which they employ are there merely to give advice."); see *Himmeler*, 474 F. Supp. at 928 ("Where, as here, a pilot places himself in the hands of the controller and thereafter follows the controller's suggestions or instructions, the

pilot is entitled to rely upon such information and directions and is not free or expected to disregard same.”). Under Midwest’s view, a pilot in Bulos’s position might be required to ignore a controller’s direction to preserve the safety of the aircraft, possibly putting others—including nearby traffic like Ariana 2748—in harm’s way, thus creating the very disorder that air traffic control exists to prevent. App’x 1364 (“The ATC Local Controller is responsible for providing safe, orderly and expeditious control to all aircraft operating in the Kabul [Control Zone].”); *see also Yates*, 497 F.2d at 883 (“[I]f the pilot could depart from the control of the tower at any time[,] the control of the airfield traffic would soon become a shambles.”).

Underscoring this conclusion that the controlling evidence and testimony do not extinguish Midwest’s duty of care to Flight 662, moreover, is Harvey’s report and testimony. She opined that Smith’s instructions to Bulos to “extend your downwind” and “I’ll call your base” would have been understood by the pilot to be mandatory and not advisory. *See, e.g.*, App’x 1020-24, 1085, 1141-42.

The control tower’s lack of equipment capable of indicating an airplane’s proximity to the terrain also does not nullify the controller’s duty to exercise reasonable care. What Smith knew, or should have known, when communicating with Flight 662 that evening relates not to the existence of his duty to exercise reasonable care but to whether such duty was breached—an issue best left to the trier of fact. *See, e.g., Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 118-19 (2d Cir. 2006). While the limited equipment in the tower could support a finding that Smith was unable to foresee the peril awaiting Flight 662, we think that a reasonable jury could also conclude that

Smith's ignorance of the aircraft's position and unfamiliarity with the surrounding terrain shows that he failed to exercise reasonable care in guiding Bulos outside of Class D airspace.

Indeed, sufficient other evidence has been introduced to enable a factfinder to conclude that Midwest breached its duty of reasonable care. Smith asked Captain Bulos to continue flying east and told the pilot "I'll call your base"—*i.e.*, I will tell you when to turn toward the beginning of your landing. Shortly thereafter, Flight 662 flew directly into a mountain east of the airport, outside of the Class D airspace that was the tower's zone of control, and into terrain with which Smith was unfamiliar. This all occurred in the evening, when the mountains surrounding Kabul are "jet black." From these facts alone a jury could find that Smith breached his duty of care.

To be sure, there is also evidence and testimony that cut the other way. For instance, Smith did not know about the problems with the plane's avionics equipment. He told Flight 662 to extend its downwind leg only after first asking if Bulos would be able to do so. And Bulos never indicated that he was having any difficulty carrying out his duties under VFR.

Smith also did not give Flight 662 a specific vector—Bulos appears responsible for what turned out to be the flight's final 116-degree heading. Smith also testified that, contrary to the Plaintiffs-Appellants' expert testimony, "I'll call your base" did not mean that the plane could not turn until he told it do so. We think that sorting through these facts to determine if Midwest failed to exercise reasonable care must, though, be left to a trier of fact.

The analysis is much the same with respect to proximate cause, which is ordinarily a question of fact for a

jury. *See, e.g., Benitez v. N.Y.C. Bd. of Educ.*, 73 N.Y.2d 650, 659 (1989) (“[I]ssues of proximate cause are generally fact matters to be resolved by a jury.”). Flight 662 changed course to fly eastward in the direction of the mountain after Smith asked Bulos to extend its downwind leg. And the aircraft crashed just seconds after Smith told Bulos to continue on the flight’s downwind leg and that he would “call [Flight 662’s] base.” We do not think that, in light of this evidence, the District Court could conclude as a matter of law that Midwest’s conduct did not proximately cause the fatal crash.

Midwest asserts that Bulos must have been the sole proximate cause of the crash because he was flying under VFR and thus had exclusive responsibility for avoiding the terrain. But as we explained with respect to the duty of care, we decline to sanction a view of the law that exempts an air traffic controller from possible liability where its unreasonable instruction leads a flight—even one operating under VFR—into danger foreseeable to the controller.

Midwest similarly urges that Bulos’s negligence severed any connection between Smith’s conduct and the crash. *Id.* But as the New York Court of Appeals has explained: “When a question of proximate cause involves an intervening act, ‘liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant’s negligence.’” *Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016) (emphasis omitted) (quoting *Mazella v. Beals*, 27 N.Y.3d 694, 706 (2016)). Such a determination is normally a question for a factfinder, unless “only one conclusion may be drawn from the established facts.” *Id.* (quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980)). That is not the case here. Midwest may be correct that the crash was not

a foreseeable result of Smith's instructions because Bulos affirmed that he could extend his downwind leg and did not indicate that he was having difficulty avoiding the terrain. But we think that a reasonable jury could also find to the contrary that Smith should have foreseen that guiding the plane, at night, toward "jet black" terrain that he was unfamiliar with (and that lay outside Class D airspace) would result in danger to Flight 662.

CONCLUSION

We have considered the parties' remaining arguments on appeal and conclude that they are without merit. For the foregoing reasons, we **VACATE** the judgment of the District Court and **REMAND** for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

No. 12-CV-1066-FPG

Jessica T. BADILLA, et al.,
Plaintiffs,

v.

NATIONAL AIR CARGO INC., et al.,
Defendants.

Filed: January 14, 2020

DECISION AND ORDER

GERACI, Chief Judge.

This case arises from an October 2010 airplane crash that occurred near Kabul Afghanistan International Airport. Plaintiffs are the personal representatives of six crew members killed in the crash, who brought suit against several entities alleged to be responsible. *See generally* ECF No. 95. The only remaining defendant is Midwest Air Traffic Control Service, Inc. (“Midwest”), a government contractor that provided air traffic control ser-

vices at the airport. Plaintiffs allege that Midwest employed the air traffic controller who negligently instructed the pilot and thereby caused the crash.¹ *Id.* at 12-13.

Before the Court is the Report & Recommendation (“R&R”) of United States Magistrate Judge Jeremiah J. McCarthy, in which he recommends granting Midwest’s motion for summary judgment. ECF No. 170. Plaintiffs timely filed their objections to the R&R. *See* ECF Nos. 174, 176.

When a party makes specific objections to portions of a magistrate judge’s R&R, the district court reviews those portions *de novo*. Loc. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). An objection must “specifically identify” the portions of the R&R to which the party objects, and provide a “basis for each objection” that is “supported by legal authority.” Loc. R. Civ. P. 72(b).

Judge McCarthy granted Midwest’s motion for several independently dispositive reasons. Plaintiffs object to each of those reasons. The Court need not address them in detail, however, because each of Plaintiffs’ objections is adequately addressed by Judge McCarthy’s comprehensive and well-reasoned R&R. It suffices to say that, even after *de novo* review, the Court agrees with Judge McCarthy’s rejection of Plaintiffs’ arguments.

Accordingly, the Court **ADOPTS** Judge McCarthy’s R&R (ECF No. 170) and **GRANTS** Midwest’s summary judgment motion (ECF No. 155). The claims against Midwest, and Midwest’s counterclaim for indemnification, are **DISMISSED**. Because this disposes of the only remain-

¹ For a full summary of the underlying events, the Court refers the reader to Magistrate Judge McCarthy’s thorough recitation of the facts. *See* ECF No. 170 at 431-35.

ing claims, the Clerk of Court shall enter judgment in accordance with this Order and the prior dispositive orders, *see* ECF Nos. 120, 154, and shall close this case.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

McCARTHY, United States Magistrate Judge.

This action arises from the crash of National Airlines Flight 662 (a/k/a TKU662) into a mountain near Kabul Afghanistan International Airport (“KAIA”) on October 12, 2010, while *en route* from Bagram Air Base. Before me is the motion of defendant Midwest Air Traffic Control Service, Inc. (“Midwest ATC”) for summary judgment [155], which has been referred to me for preparation of a Report and Recommendation [13].¹ Having reviewed the parties’ submissions [155, 162, 165, 166] and heard oral argument on March 21, 2017 [167], I recommend that the motion be granted.

I. BACKGROUND

Plaintiffs, the alleged personal representatives of six crew members killed in the crash, commenced this action on October 2, 2012 by filing a Summons and Complaint in State of New York Supreme Court, County of Erie [1-3], asserting state law negligence claims.² At the time of the

¹ Bracketed references are to the CM/ECF docket entries.

² The action was removed to this court based upon diversity jurisdiction, pursuant to 28 U.S.C. §§ 1332 and 1441 (Notice of Removal [1], ¶12), federal officer jurisdiction, pursuant to 28 U.S.C. § 1442(a)(1) (Supplemental Notice of Removal [5], ¶11), and federal enclave jurisdiction (*id.* ¶16). Concluding that diversity and federal enclave jurisdiction were lacking, but that further development of the

accident, Midwest ATC³³ provided certain air traffic control services at KAIA pursuant to a subcontract with Readiness Management Services, LLC (“RMS”), which had a prime contract with the United States military for those services. Midwest ATC’s Statement of Material Facts [155-2], ¶¶15, 27, 36. Under the prime contract, RMSW employees were designated “mission essential personnel”, and provided “mission critical capabilities supporting joint services military personnel, host nation military, and coalition forces, primarily in the [United States Air Forces Central Command Area of Responsibility]”. *Id.*, ¶¶29-30. Correspondingly, Midwest ATC’s subcontract was governed by a Task Order, which stated that its air traffic control services at KAIA were in support of “Operation Enduring Freedom”, and that those services were “part of an ‘essential contract service’—therefore [its] personnel are designated as mission essential personnel”. Midwest ATC’s Statement of Material Facts [155-2], ¶¶36-37; Task Order [155-31], p. 3 of 19.

record was necessary to determine whether federal officer jurisdiction existed, plaintiffs’ initial motion to remand was denied, without prejudice. *See* September 30, 2013 Report, Recommendation and Order [50], *adopted*, October 21, 2013 Order [51]. Following the completion of limited jurisdictional discovery, plaintiffs filed a supplemental motion to remand [60], which was denied. *See* October 23, 2014 Report and Recommendation [71], *adopted*, November 13, 2014 Order [72].

³ The remaining defendants have been dismissed from the action. *See* July 1, 2015 Report and Recommendation [92], *adopted*, August 20, 2015 Decision and Order [99] (granting the dismissal motion of defendants Transafrik International Ltd. and Transafrik Corporation Ltd. (collectively “Transafrik”)) and January 12, 2017 Text Order [154] (approving the Stipulation of Order of Dismissal [153-2] filed by defendants National Air Cargo, Inc., National Air Cargo Holdings, Inc., National Air Cargo Group, Inc., and National Air Cargo - Middle East FZE (collectively “NAC”)).

At the time of the accident, KAIA belonged to the Islamic Republic of Afghanistan and its air traffic control tower was supervised by NATO. Plaintiffs' Counterstatement of Material Facts [162-4], ¶102; Adams deposition transcript [155-13], p. 43. Because there were not enough NATO civilian air traffic controllers, United States Air Force air traffic controllers filled those positions prior to Midwest ATC. Adams deposition transcript [155-13], p. 28.

The main purpose of the air traffic control tower at KAIA was to train Afghans to take over responsibility for the tower. Plaintiffs' Counterstatement of Material Facts [162-4], ¶113. Therefore, there were also Afghans and NATO civilian controllers in the control tower who trained during the day. Adams deposition transcript [155-13], pp. 27-28. At night, Midwest ATC personnel took over operations, but were not responsible for any training. *Id.*, pp. 27-29. Most Midwest ATC controllers were retired United States military members. *Id.*, p. 29. Operational control and direction of the KAIA air traffic control tower came from the senior air traffic controller officer ("SATCO"), a United States Air Force officer. Midwest ATC's Statement of Material Facts [155-2], ¶66; Hazrati deposition transcript [155-10], pp. 17-20 ("Basically SATCO was the boss"); Adams deposition transcript [155-13], pp. 10-11. Under the Local Operating Procedures for KAIA, air traffic services were provided according to the Republic of Afghanistan Aeronautical Information Publication ("AIP") and all related International Civil Aviation Organization ("ICAO") annexes and documents. Midwest ATC's Statement of Material Facts [155-2], ¶43.

Air traffic at KAIA was approximately 25% civil, and the remaining 75% was combat and other operations, in-

cluding the movement of troops and their supplies. Midwest ATC's Statement of Material Facts [155-2], ¶153. Although KAIA was designated as a civilian airport (Stevenson deposition transcript [155-14], p. 65), the movement of troops and armed combat aircraft were among KAIA's prime missions. Midwest ATC's Statement of Material Facts [155-2], ¶63. It is undisputed that the safe and efficient operation of the KAIA air traffic control tower, a pivotal hub, was central to the combat mission of the United States and NATO. *Id.*, ¶¶54, 62. KAIA was the subject of insurgent attacks on monthly basis. Hazrati deposition transcript [155-10], pp. 25-27; Adams deposition transcript [155-13], p. 53.

The pilot of TKU662, Henry Beltran Bulos, a former Philippine Air Force pilot, was employed by defendant Transafrik since 2000, and had flown in and out of KAIA previously. Bulos deposition transcript [155-16], pp. 51-54; Terrell deposition transcript [155-17], pp. 22, 27, 134. The accident occurred on the last sortie of the day when TKU622 was returning to KAIA without cargo. Terrell deposition transcript [155-17], p. 134. The flight was operating under visual flight rules ("VFR") *en route* to KAIA (Midwest ATC's Statement of Material Facts [155-2], ¶14), meaning that "[i]t's the responsibility of air crew to see and avoid hazards such as terrain and other aircraft". Adams deposition transcript [155-13], p. 54; Terrell deposition transcript [155-17], p. 13.

Although it was uncommon to have VFR flights after sunset, this was a designation chosen by the pilot. Midwest ATC's Statement of Material Facts [155-2], ¶155; Adams deposition transcript [155-13], p. 55; Terrell deposition transcript [155-17], pp. 14-15. Because KAIA "resides within a 'bowl' of mountains" (Midwest ATC's Memorandum of Law [165], p. 14; Terrell deposition testimony [155-

17], p. 64 (“it’s a bowl, and you sort of go up in all directions to about 14-, 15,000 feet in some cases”)), “it is difficult to fly VFR [at] nighttime”. Hazarti deposition transcript [155-10], pp. 28-29; Terrell deposition transcript [155- 17], pp. 63-64; Adams deposition transcript [155-13], p. 39 (“Flying into Kabul was not a place for amateurs”). However, it is undisputed that when a pilot made a VFR flight into KAIA, it was the responsibility of the pilot and his crew to see and avoid terrain and other aircraft. Midwest ATC’s Statement of Material Facts [155-2], ¶56.

TKU662 was equipped with a terrain avoidance warning system (“TAWS”), but the parties dispute whether it was operational. Plaintiffs’ Counterstatement of Material Facts [162-4], ¶¶24-25. After TKU662 departed from Bagram for the approximately 10-minute flight to KAIA, Bagram Approach Control instructed Mr. Bulos to “resume own navigation to Kabul” and “maintain VFR”. Plaintiffs’ Counterstatement of Material Facts [162-4], ¶¶142, 151. Darrell Smith, a retired United States Air Force master sergeant and Midwest ATC employee, occupied the local controller position in the KAIA air traffic control tower⁴ on the evening of October 12, 2010. Midwest ATC’s Statement of Material Facts [155-2], ¶¶77, 83. The AIP designated the area of responsibility for local controllers at KAIA as Class D airspace, which encompasses a radius of six nautical miles around KAIA and up to 9,500 feet above sea level. Plaintiffs’ Counterstatement of Material Facts [162-4], ¶143. Mr. Smith had a radar presentation available to him that was used as a visual aid for purposes of sequencing, but not as a control aid. Ad-

⁴ The other positions in the tower were ground control, flight data/clearance delivery and watch supervisor. Plaintiffs’ Counterstatement of Material Facts [155-2], ¶129.

ams deposition transcript [155-13], p. 31. He had no resources available to him in the air traffic control tower that would alert him to the proximity of aircraft to terrain features. Midwest ATC's Statement of Material Facts [155-2], ¶21.

Mr. Smith established radio contact with TKU662 at 14:58:05. Plaintiffs' Counterstatement of Facts [162-4], ¶154. Typically, a VFR traffic pattern would be 1,500 feet above KAIA, which itself was approximately 4,860 feet above sea level. Terrell deposition transcript [155-17], p. 62; July 31, 2012 report of the National Transportation Safety Board ("NTSB") [162-9], p. 5 of 17. According to Mr. Smith, the tower radar display was down at that time, but he did not inform TKU662 of that fact. Plaintiffs' Counterstatement of Material Facts [162-4], ¶¶195-96. He gave TKU662 clearance to land at 14:58:50. *Id.*, ¶156. At that time, a civilian airline flight (Ariana 2748) was also on approach to land at KAIA. *Id.*, ¶157; Midwest ATC's Statement of Material Facts [155-2], ¶85. While controlling both aircraft, at some point Mr. Smith was able to see their relative positions on the radar. Plaintiffs' Counterstatement of Facts [162-4], ¶160. Judging that the two aircraft were on a relatively close approach, at 15:00:17 Mr. Smith asked "TKU662. . . can you extend your downwind sir"? (*i.e.*, continue parallel to the runway in the opposite direction from the approach). Midwest ATC's Statement of Material Facts [155-2], ¶86; [169]. Mr. Bulos confirmed that he could do so, and at no time advised Mr. Smith that he anticipated any difficulty extending his downwind leg. Midwest ATC's Statement of Material Facts [155-2], ¶¶87-88.

Approximately five seconds after Mr. Bulos confirmed that he could extend his downwind, Mr. Smith cancelled the landing clearance for TKU662, and stated "make a left

turn and . . . report established on your downwind you'll be number two to follow a airbus". Plaintiffs' Counterstatement of Material Facts [162-4], ¶162; [169]. According to the NTSB report [162-9], that led TKU662 "directly into the terrain it would impact". *Id.*, p. 9 of 17. It is not evident whether Mr. Smith stated "make a left turn" when TKU662 was outside of Class D airspace or whether that instruction took TKU662 out of "Class D" airspace. Plaintiffs' Counterstatement of Material Facts [162-4], ¶¶165, 167. In any event, it is undisputed that Mr. Smith never informed Mr. Bulos that he was out of Class D airspace. *Id.*, ¶168.

At 15:01:47 Mr. Smith stated "TKU662 continue downwind I'll call your base" (*i.e.*, advise when Ariana 2748 had progressed sufficiently to permit TKU662 to land). Plaintiffs' Counterstatement of Material Facts [162-4], ¶169; Midwest ATC's Statement of Material Facts [155-2], ¶94. The parties sharply dispute whether that statement was an Air Traffic Control Instruction as defined by the AIP,⁵ which would have required any deviation from that instruction to be cleared by air traffic control absent a declared emergency. Plaintiffs' Counterstatement of Material Facts [162-4], ¶¶169, 177. During that same transmission, Mr. Smith also stated that the "traffic you're following is . . . now at your three o'clock" [169].

Mr. Smith testified that within seconds of his last communication with TKU662, which occurred at 15:01:53 (six seconds after Mr. Smith stated "I'll call your base), he saw a fireball. Smith deposition transcript [155-19], p. 59; [169]. TKU662 impacted a mountain at 7,874 feet above sea level, approximately 10 to 12 miles away from KAIA.

⁵ The AIP [155-36] defines Air Traffic Control Instructions as being "[d]irectives issued by air traffic control for the purpose of requiring a pilot to take a specific action". *Id.*, p. 29 of 211, § Gen. 2.2.

NTSB Report [162-9], p. 1; plaintiffs' Counterstatement of Material Facts [162-4], ¶148. It is undisputed that the air traffic tower radar presentation did not display the altitude of TKU662 and Mr. Smith did not assign an altitude to TKU662. Midwest ATC's Statement of Material Facts [155-2], ¶¶91, 93. However, the local controllers were expected to be aware of the minimum safe altitudes for aircraft operating in their area. Plaintiffs' Counterstatement of Material Facts [162-4], ¶139.

Midwest ATC's counsel confirmed at oral argument that it was dark at the time of the crash (approximately 7:30 p.m. local time). The NTSB's accident report [162-9] stated that it was "difficult to determine how much illumination the stars provided due to the haze, but the moon, due to its low position in the sky and waxing crescent size, would have provided limited additional light". *Id.*, p. 13 of 17. Consistent with the conditions, Mr. Smith did not visually observe TKU662 while communicating with it. Plaintiffs' Counterstatement of Material Facts [162-4], ¶200.

Plaintiffs allege that Midwest ATC was negligent by instructing TKU662 to "to execute an approach downwind . . . when it knew or should have known such instruction was unsafe and dangerous"; failing "to provide . . . a warning [that TKU662] was below the minimum safe altitude"; failing "to provide necessary instruction to keep a safe and proper separation . . . [from] the surrounding terrain"; failing "to inform [TKU662] of discrepancies between actual altitude indications available to the controllers and the reported altitude from the flight crew"; failing "to inquire, instruct or warn the crew . . . of a defective or malfunctioning transponder during the control of the flight"; and/or failing "to provide proper and safe instructions, warnings, and/or other air traffic control services to [TKU662]". Amended Complaint [95], ¶39. Midwest ATC

has counterclaimed against the estate of Mr. Bulos for indemnification. Amended Answer with Counterclaim [112], ¶¶34-43.

II. ANALYSIS

Midwest ATC raises two arguments in support of its motion: first, that plaintiffs' claims are preempted under the "combatant activities" exception to the Federal Tort Claims Act ("FTCA"); and second, that it had no duty to provide terrain separation, which is the sole duty of a pilot flying under VFR. Midwest ATC's Memorandum of Law [155-3], Points I and II.

A. Summary Judgment Standard

"The standards governing summary judgment are well-settled. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists. In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant. Summary judgment is improper if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party." *Ford v. Reynolds*, 316 F.3d 351, 354 (2d Cir. 2003).

B. Are Plaintiffs' Claims Preempted by the FTCA's Combatant Activities Exception?

The FTCA abrogates the government's sovereign immunity for state-law torts committed by its employees (*see* 28 U.S.C. § 1346(b)(1)), but carves out certain exceptions, including the combatant activities exception, which

preserves the government’s immunity for “[a]ny claim arising out of the combatant activities of the military . . . during time of war”. 28 U.S.C. § 2680(j). Since “government contractors are expressly excluded from the scope of the FTCA”, *Aiello v. Kellogg, Brown & Root Services, Inc.*, 751 F. Supp. 2d 698, 706 (S.D.N.Y. 2011), Midwest ATC instead argues that plaintiffs’ claims are preempted by federal law because imposing tort liability “would critically undermine the federal interest the combatant activities exception to the [FTCA] was intended to protect, namely the elimination of tort law from the battlefield”. Midwest ATC’s Memorandum of Law [155-3], p. 6.

In support of its preemption argument, Midwest ATC relies upon *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Midwest ATC’s Memorandum of Law [155-3], pp. 7-8. There, a Marine helicopter co-pilot drowned when he was unable to escape from the submerged aircraft because the escape hatch—designed pursuant to government specifications—opened outward, rather than inward. *Boyle*, 487 U.S. at 503. Addressing the circumstances under which “a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect”, the Court applied the doctrine of conflict preemption, which allows state law to be preempted “[in] a few areas, involving ‘uniquely federal interests’”, when “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.*, 504, 507.⁶

⁶ In addition to conflict preemption, there is “express preemption, where Congress has expressly preempted local law” and “field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room

Applying that test, the Court held that the “uniquely federal interests” implicated were “the civil liabilities arising out of the performance of federal procurement contracts” (*id.*, 506), explaining that “either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected” *Id.*, 507. It then concluded that a significant conflict existed between the federal policy, as embodied in the discretionary function exception to the FTCA,⁷ and state law because the “the state-imposed duty of care that is the asserted basis of the contractor’s liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape hatch mechanism shown by the specifications)”. *Id.*, 509. To limit the scope of displacement of state law, the Court crafted the government contractor defense, which precludes liability pursuant to state law when “(1) the United States approved reasonably precise specification; (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 of the supplier but not to the United States”. *Id.*, 512.

The Court has described *Boyle* as a “special circumstance” that applies “where the government has directed

for state law”. *New York. SMSA Limited Partnership v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010).

⁷ The discretionary function exception of the FTCA preserves immunity for “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).

a contractor to do the very thing that is the subject of the claim”. *Correctional Services. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001). *See also Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“*Boyle*, by its terms, applies only to defects in design”). However, its analysis has been extended to the combatant activities exception of the FTCA to preempt negligence claims against government contractors. It was initially applied in *Koochi v. United States*, 976 F.2d 1328 (9th Cir. 1992) to preempt claims against defense contractors for an allegedly defective missile defense system that caused a civilian aircraft to be shot under the rationale “that one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action”. *Id.*, 1337.

Application of *Boyle* was then extended beyond the product liability context in *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), where Iraqi nationals alleged that they were abused by military contractors who provided interrogation and interpretation services to the government at the Abu Ghraib military prison during the war in Iraq. Although drawing upon the *Boyle* preemption analysis, *Saleh* recognized that the area of conflict between state law and the federal interests associated with the combatant activities exception of the FTCA, which “casts an immunity net over any claim that *arises* out of combatant activities” (*id.*, p. 6 (emphasis in original)), was much broader than the conflict rising from the discretionary function exception addressed in *Boyle*:

“The nature of the conflict in this case is somewhat different from that in *Boyle*—a sharp example of discrete conflict in which satisfying both state and federal duties (*i.e.*, by designing a helicopter hatch that opens

both inward and outward) was impossible. In the context of the combatant activities exception . . . it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA’s policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare. Thus, the instant case presents us with a more general conflict preemption, to coin a term, ‘battle-field preemption’: the federal government occupies the field when it comes to warfare, and its interest in combat is always ‘precisely contrary’ to the imposition of a non-federal tort duty.” *Id.*, p. 7.⁸

In tailoring the scope of displacement of the state law “so as to coincide with the bounds of the federal interest being protected”, *Saleh* held that: “[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.” *Id.*, pp. 8-9.

Although the Second Circuit has not addressed this issue, the Third and Fourth Circuits—joining the D.C. and Ninth Circuits, as well as one district in this Circuit, have applied the reasoning of *Boyle* to the combatant activities exception of the FTCA. See *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458, 480 (3d Cir. 2013); *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 350-51 (4th Cir 2014); *Aiello*, 751 F. Supp. 2d at 707-11.

⁸ Although “battle-field preemption” is more appropriately characterized as a “type of field preemption”, it has been recognized that it “is a rational extension of *Boyle*, which itself suggested that such areas of field preemption would exist”. *Aiello*, 751 F. Supp. 2d at 710-11.

1. *Should Boyle’s Preemption Analysis Be Applied Here?*

Plaintiffs argue that the court should “decline to follow those cases that expand sovereign immunity of the Government beyond the holding of [*Boyle*]”, noting that expansion of the FTCA’s combatant activity exception to private contractors “is more properly left to Congress”. Plaintiffs’ Memorandum of Law [162], pp. 8, 12. They point to two decisions—both prior to *Saleh*—that rejected the application of the preemption analysis of *Boyle* to the combatant activities exception. In *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006), *aff’d on other grounds*, 502 F.3d 1331 (11th Cir. 2007), the court explained that it:

“find[s] no persuasive authority for the conclusion that the combatant activities exception preempts state tort law claims. The combatant activities exception to the FTCA is an explicit legislative preservation of sovereign immunity, while the government contractor defense is a judicially recognized affirmative defense, grounded in federal preemption and the discretionary function exception to the FTCA. The latter defense shields contractors only in military equipment procurement contracts and only when the government dictates design specifications. Private contractors are not entitled to sovereign immunity unless they are characterized as government employees, which Defendants are not There is no express authority for judicially intermixing the government contractor defense and the combatant activities exception; nor is there authority for bestowing a private actor with the shield of sovereign immunity. Until Congress directs otherwise, private, non-employee contractors are limited to the government contractor defense and *Boyle*’s

preemption analysis. Unless they qualify as employees or agents of the Government, private contractors may not bootstrap the Government's sovereign immunity."

See also Fisher v. Halliburton, 390 F. Supp. 2d 610, 616 (S.D. Tex. 2005) ("[p]laintiffs' claims in this case do not involve any allegation that Defendants supplied equipment, defective or otherwise, to the United States military. The Court concludes that extension of the government contractor defense beyond its current boundaries is unwarranted and the FTCA does not bar Plaintiffs' claims").

Plaintiffs also rely upon the dissent in *Saleh*, which similarly argued that "Congress knows full well how to make its intention to preclude private liability known", but "has not done so here". 580 F.3d at 26 (Garland, J., dissenting). The dissent further argued that courts should "hesitate to extend *Boyle* beyond the scope of the discretionary function exception and direct-conflict rationale" it employed, explaining that "[a]t the heart of *Boyle*'s analysis is the doctrine of conflict preemption. . . . [P]reemption under the discretionary function exception is in accord with that doctrine, as it requires 'a sharp example of discrete conflict in which satisfying both state and federal duties (i.e., by designing a helicopter hatch that opens both inward and outward) was impossible.' . . . By contrast, preemption under the combatant activities exception is extraordinarily broad; . . . it results not in conflict preemption but in 'field preemption.'" *Id.* 21, 23.

Faced with these conflicting authorities—none of which are controlling—I am most persuaded by the weight of authority supporting the application of *Boyle* to the combatant activities exception of the FTCA, especially post-*Saleh*. Although it is unclear whether the Supreme Court intended its analysis in *Boyle* to extend be-

yond the design defect context and the discretionary function exception of the FTCA, the preemption principles that underlie *Boyle* and *Saleh* are not new. Nor do plaintiffs persuasively argue against the application of preemption here. While they contend—like in *McMahon* and the dissent in *Saleh*—that the task of expanding the FTCA’s combatant activity exception to private contractors should be left to Congress (plaintiffs’ Memorandum of Law [162], p. 12), Midwest ATC is not seeking a grant of sovereign immunity under the FTCA, but rather is relying on the doctrine of preemption. *See Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259, 1265-66 (9th Cir. 2010) (“[a]lthough the source of the government contractor defense is the United States’ sovereign immunity . . . the government contractor defense does not confer sovereign immunity on contractors”).

Plaintiffs also argue that no conflict with an identifiable federal policy exists here because “there are no issues that potentially implicate military decision making or judgment sought to be protected and promoted in *Boyle*, or any of the other cases that address the manufacture and supply of military hardware and sophisticated weaponry”. Plaintiffs’ Memorandum of Law [162], p. 11. However, that argument ignores that broad field preemption which flows from the federal interest embodied in combatant activities exception of eliminating “‘tort from the battlefield’”, which “suggests that any non-federal substantive negligence law will cause ‘significant conflict’ with that interest.” *Aiello*, 751 F. Supp. 2d at 710.

In any event, even absent the broad field preemption of the combatant activities exception (*see Aiello*, 751 F. Supp. 2d at 710-11), plaintiffs’ claims against Midwest ATC in this case implicate military decision making and judgment. As argued by Midwest ATC, it is undisputed

that the equipment available to its controllers in the KAIA air traffic controller tower was supplied by the United States military, and that at the time of the accident there were no resources in the tower that alerted the controllers to the proximity of an aircraft to a specific terrain feature. Midwest ATC's Reply Memorandum of Law [165], pp. 7-8; Statement of Material Facts [155-2], ¶¶21, 31-32. The prime contract between RMS and the United States also stated that the work would be provided in accordance various guidelines, including the ICAO standards, which make clear that "[t]he objectives of the air traffic control service . . . do not include prevention of collision with terrain. The procedures prescribed in this document do not relieve pilots of their responsibility to ensure that any clearances issued by air traffic control units are safe in this respect." ICAO 4444 [155-39], p. 106 of 223, § 5.9, Note 3.

Therefore, the core of the plaintiffs' claim—that Midwest ATC failed to provide terrain separation services to flight TKU662—at least partially implicates the military's decision to not equip the KAIA air traffic control tower with resources to provide that service or to adopt guidelines that made terrain separation the responsibility of the controllers.

2. *Do the Activities in This Case Qualify as Combatant Activities?*

Alternatively, plaintiffs argue that even if the combatant activity exception of the FTCA could be applied to preempt negligence claims against civilian contractors, "the facts of th[is] . . . case are not the type of incidental activity that should qualify as 'combatant activity' for purposes of the FTCA and preemption of [their] claims". Plaintiffs' Memorandum of Law [162], p. 12. Courts have adopted an expansive definition of "combatant activity" as

used in the FTCA, to “include not only physical violence, but activities both necessary to and in direct connection with actual hostilities”. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948). For example, in *Aiello*, the plaintiff was injured when he fell in a latrine facility located on a “forward operating base” in Iraq. 751 F. Supp. 2d at 701. There, the court found that the plaintiff’s claim arose from a combatant activity, since the defendant, who operated and maintained the latrine facility, provided “basic life support services for active military combatants on a forward operating base” and its creation and maintenance of the latrine constituted “active logistical support of combat operations, both necessary to and in direct connection with actual combat”. *Id.*, 702, 712-13. Also relevant to the court’s determination was the fact that the base was subject to actual hostilities in the form of nearby mortar and rocket attacks. *Id.*, 713. Similarly in *Harris*, the court held that the “maintenance of electrical systems at a barracks in an active war zone qualifies as integration into the military’s combatant activities”. 724 F.3d at 481.

Plaintiffs press for a narrower test that focuses solely on the conduct undertaken at the time of the crash, arguing that “[t]he crash . . . was not caused by any activity or involvement in combatant activities; rather, it was caused by the Tower Controller’s error in providing air traffic control services to a civilian cargo plane while simultaneously providing control services to a commercial airliner. . . . [A]ll three of the controllers in the tower of a civilian airport . . . were civilian Midwest ATC employees and the only aircraft that they were providing control services for were civilian owned and operated and performing civil flights”. Plaintiffs’ Memorandum of Law [162], p. 13. However, that argument ignores the plain wording of the *Saleh* test, which focuses on the activities of the military by broadly requiring the contractor to be “integrated

into combatant activities”, rather than more narrowly requiring the contractor to be conducting combatant activities. *See Aiello*, 751 F. Supp. 2d at 715 (“[b]ecause plaintiff’s claim . . . arises from combatant activity of the military . . . [it] is preempted” (emphasis added)).⁹

Plaintiffs’ reliance on *Brokaw v. Boeing Company*, 137 F. Supp. 3d 1082 (N.D. Ill. 2015) (plaintiffs’ Memorandum of Law [162], p. 10) does not compel a different result. As in this case, *Brokaw* involved the crash of a government contractor’s plane in Afghanistan operated pursuant to a contract between the government and NAC. 137 F. Supp. 3d at 1089. The crash, which occurred while the plane departed from Bagram Air Base on re-fueling stop, was caused by the military cargo aboard breaking loose from its moorings and penetrating a bulkhead. *Id.*

Addressing whether the case was properly removed under federal officer jurisdiction, the court concluded that remand was warranted since NAC had failed to meet the third of four elements necessary to establish federal officer jurisdiction, namely whether there was a causal nexus between the federal authority and the conduct challenged. *Id.*, pp. 1096, 1099. While acknowledging that that conclusion “ended the inquiry”, it continued “[f]or the sake of completeness” to consider the final element: whether NAC had established a colorable federal defense. *Id.*, p. 1099. Among the defenses it analyzed was the combatant activities exception. In concluding that it did not provide a colorable defense, the court assumed, without deciding, that the combatant activities exception applied to private contractors, but rejected the argument that NAC was engaged in a combatant activity: “the activities

⁹ It is unnecessary for me to address the other prong of the *Saleh* test (*i.e.*, whether the military retained command authority), which is unchallenged by plaintiffs.

NAC engaged in that gave rise to this lawsuit ‘cannot logically be cataloged’ as combatant. . . . NAC’s role was simply to transport cargo. Admittedly, it was carrying military equipment and operating in a war zone, but it was not aiding the military in swinging the ‘sword of battle’; in essence, it was helping National Airlines carry the sword for the military’s later use. . . . This is not the type of incidental activity that should qualify as ‘combatant’ for purposes of the FTCA.” *Id.*, p. 1106. The court also distinguished both *Saleh* and *Aiello* “as they involved paramilitary personnel or activities that were much closer to actual hostilities”. *Id.*

While the limited facts (and analysis) presented in *Brokaw* appear to support plaintiffs’ position, it was only in *dicta* that the court analyzed the combatant activities exception. *See Paul v. Gonzales*, 444 F.3d 148, 155 (2d Cir. 2006) (treating an analysis conducted in the interest of completeness as *dicta*). In addition, while the court relied upon the lack of close proximity between NAC’s activities and actual hostilities to distinguish *Saleh* and *Aiello*, it is undisputed that KAIA was subject to insurgent attacks. *See Hazrati deposition transcript* [155-10], pp. 25-27; *Adams deposition transcript* [155-13], p. 53.

Therefore, I conclude that plaintiffs’ claims are preempted, and recommend that Midwest ATC’s motion be granted on that basis. However, recognizing that without any controlling authority from the Supreme Court or Second Circuit addressing the expansion of *Boyle*’s preemption analysis to the considerably broader combatant activities exception of the FTCA, the state of the law

remains unsettled,¹⁰ I will also analyze Midwest ATC's alternative ground for dismissal.

C. Is Midwest ATC Liable for the Accident Under Common Law?

“Under New York law, the elements of a negligence claim are: (i) a duty owed to the plaintiff by the defendant; (ii) breach of that duty; and (iii) injury substantially caused by that breach.” *Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 215 (2d Cir. 2002). Midwest ATC argues that plaintiffs' negligence claims must be dismissed, since terrain separation is the sole duty of the pilot flying under VFR, and that Mr. Bulos' failure to uphold his VFR responsibilities was the sole proximate cause the accident. Midwest ATC's Memorandum of Law [155-3], Point II.

1. *Did Midwest AT Have Any Duty to TKU662 for Terrain Separation?*

“While general negligence law applies to airline tort cases . . . the standard of due care is concurrent, resting upon both the airplane pilot and ground aviation personnel. Both are responsible for the safe conduct of the aircraft.” *Spaulding v. United States*, 455 F.2d 222, 226 (9th Cir. 1972); *Redhead v. United States*, 686 F.2d 178, 182

¹⁰ See Major Jeffrey B. Garber, *The (Too) Long Arm of Tort Law: Expanding the Federal Tort Claims Act's Combatant Activities Immunity Exception to Fit the New Reality of Contractors on the Battlefield*, Army Law, September 2016, *19 (“the state of the law remains unpredictable and unevenly applied”); *McManaway v. KBR, Inc.*, 554 Fed. Appx. 347, 353 (5th Cir. 2014) (Jones, J., dissenting) (“the scope of this exemption must be determined by the Supreme Court”).

(3d Cir. 1982) (“[b]oth the pilot and the air traffic controller owe a duty of care to passengers in an airplane”).¹¹ Although the duty of care is concurrent, “the pilot has final authority, even over air traffic controllers”. *In re: Air Crash Near Rio Grande, Puerto Rico, on Dec. 3, 2008*, 2016 WL 6916600, *4 (S.D. Fla. 2016). “Necessarily, the pilot’s knowledge of his own, his crew’s, and his aircraft’s capabilities and limitations, is of preeminent importance in this cooperative situation. None of these matters can be known by [air traffic control]”. *Turner v. United States*, 736 F. Supp. 2d 980, 1000 (M.D.N.C. 2010). Nor are air traffic controllers “to get into the cockpit and fly the plane for the pilot”, *United States Aviation Underwriters Inc. v. United States*, 682 F. Supp. 2d 761, 768 (S.D. Tex. 2010), or “presumed to have X-ray vision and extrasensory perception”. *Biles v. United States*, 848 F.2d 661, 663 (5th Cir. 1988).

Notwithstanding these limitations, controllers remain “under a duty to provide certain information and warnings to the pilot so that he has the opportunity to make a competent decision as to the operation of his aircraft”. *Richardson v. United States*, 372 F. Supp. 921, 925-26 (N.D. Cal. 1974). *See also Webb v. United States*, 840 F. Supp. 1484, 1514 (D. Utah 1994) (“[c]ontrollers have the

¹¹ Both parties evaluate plaintiffs’ negligence claims under New York law and make no argument that it conflicts with the law of any other applicable jurisdiction. Therefore, I have applied New York law. *See Clarkson Co. v. Shaheen*, 660 F.2d 506, 512 n.4 (2d Cir. 1981) (“none of the parties claimed the applicability of Canadian law or asserted that it differs from that of New York. Each seems to have assumed that New York law governs. Hence, the district court was not obligated to take judicial notice of Canadian law and correctly applied forum law”); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1112 n.3 (S.D.N.Y. 1978) (applying New York law where “the parties have not sought to prove Venezuelan law . . . or asserted that it is in conflict with the law of New York”).

responsibility to promote the safe, orderly, and expeditious flow of air traffic”); *Redhead*, 686 F.2d at 182 (controllers “are often a source of vital information” to the pilots). “[T]he key element in distinguishing the respective duties of pilot and [air traffic controllers] relates to the ability of the former to perceive a potential danger without assistance from the latter. As a result, a balancing process is involved—the vantage point of the pilot will be weighed against the Tower’s superior knowledge or awareness of the pilot’s danger.” *Richardson*, 372 F. Supp. at 926. Thus, “[e]ven if a controller issues a wrong heading or instruction, the pilot has the ‘primary duty to avoid a hazard that he himself could or should have perceived.’ ” *Airplanes of Boca, Inc. v. United States of America*, 254 F. Supp. 2d 1304, 1312 (S.D. Fla. 2003).

[9, 10] “The nature and extent of an air traffic controller’s duty of due care to pilots is a question of law.” *First of America Bank-Central v. United States*, 639 F. Supp. 446, 455 (W.D. Mich. 1986); *Palomo v. United States*, 2000 WL 33935645, *11 (S.D. Miss. 2000), *aff’d*, 45 Fed. App’x 325 (5th Cir. 2002). It is measured by the “1) applicable . . . manuals and 2) a common law duty of reasonable care”. *Wojciechowicz v. United States*, 576 F. Supp. 2d 241, 272 (D.P.R. 2008), *aff’d* 582 F.3d 57 (1st Cir. 2009).

Midwest ATC argues that “neither the international standards that defined [its] duties, nor the common law duty of reasonable care, imparted a duty on [it] to provide terrain separation services to a VFR aircraft”. Midwest ATC’s Memorandum of Law [155-3], p. 28. In contrast to a flight under instrument flight rules, where “it is presumed that pilots are unable to see either other aircraft or the ground and are guided by air traffic controllers”, it is generally recognized that a pilot flying under VFR “directs his aircraft according to what he can see, navigating

from place to place according to visual cues outside his aircraft”. *Redhead*, 686 F.2d at 180 n.1. That principle is embodied in the controlling documents. As discussed above, ICAO 4444 states that “[t]he objectives of the air traffic control service as prescribed in Annex 11 do not include prevention of collision with terrain. The procedures prescribed in this document do not relieve pilots of their responsibility to ensure that any clearances issued by air traffic control units are safe in this respect.” [155-39], p. 106 of 223, § 5.9, Note 3. Similarly, the AIP provides that “[u]ltimate responsibility for . . . terrain avoidance rests with the pilot”. [155-36], p. 87 of 211, § 3.1.5.3. Although plaintiffs point to other provisions in the controlling documents as establishing that the controllers at KAIA had a responsibility for terrain separation, their expert, Julia Harvey, acknowledged that the controlling documents do not specifically set forth that responsibility. Harvey deposition transcript [155-23], pp. 43- 44. While their other expert, Colin Sommer, testified that Section 2.2 of Annex 11 to ICAO 4444, which sets forth the general objective of air traffic control to provide advice and information useful for the safe and efficient conduct of flights, encompasses the controller’s responsibility for terrain separation (Sommer deposition transcript [155-25], p. 39), that interpretation is expressly contradicted by ICAO 4444, which states that “[t]he objectives of the air traffic control service as prescribed in Annex 11 do not include prevention of collision with terrain”. [155-39], p. 106 of 223, § 5.9, Note 3 (emphasis added).

Consistent with the controlling documents setting forth the responsibilities of local controllers at KAIA, “[t]he case law is incontrovertible that an aircraft operating pursuant to [VFR] must provide its own navigation and clearance from obstructions. The duty to operate the aircraft, and to navigate, is assigned to the pilot who must

provide his own separation from obstructions . . . while in VFR conditions.” *In re: Air Crash Near Rio Grande, Puerto Rico*, 2016 WL 6916600, *5; *Webb*, 840 F. Supp. at 1513 (“[d]uring a VFR flight, the pilot has the responsibility to provide his own separation from obstructions”); *McDaniel v. United States*, 553 F. Supp. 910, 916 (N.D. Cal. 1982) (“[a]s a VFR pilot, Dr. McDaniel had no right, and could not reasonably expect, to rely on ‘outside input’ from the ATC to provide his separation from terrain”).

Nevertheless, the fact that “[a]voiding terrain is the VFR pilot’s continuing responsibility and that responsibility cannot be delegated in whole or in part to air traffic control . . . this does not relieve an [air traffic controller] from issuing a safety alert if he is *aware* that the aircraft is at an *altitude* which, in the controller’s judgment, places the aircraft in unsafe proximity to terrain obstructions or other aircraft”. *Wojciechowicz*, 576 F. Supp. 2d at 253 (emphasis in original). *See In re: Air Crash Near Rio Grande, Puerto Rico*, 2016 WL 6916600, *8 (“[t]he duty to issue a terrain alert arises if a controller is *aware* that an aircraft is in *unsafe* proximity to terrain” (emphasis in original)). *See also Turner v. United States*, 736 F. Supp. 2d 980, 1008 (M.D.N.C. 2010) (“[c]ourts have found that air traffic controllers have a common law duty to issue warnings beyond those required by the manuals in the following situations: (1) when danger to the aircraft is immediate and extreme . . . ; (2) when the air traffic controller is able to gather more information or make more accurate observations than the pilot . . . ; (3) when the controller is better qualified than the pilot to evaluate the danger. . . ; (5) when danger is ‘reasonably apparent’ to the controller but not apparent, in the exercise of due care, to the pilot . . . ; and (6) when the controller has conveyed dangerously inaccurate or misleading information to the pilot”).

Applying these principles, plaintiffs argue that Mr. Smith assumed a shared duty for terrain separation when he “took positive control of the TKU662 through the issuance of Air Traffic Control Instructions concerning the flight path of TKU662 and that he was then negligent in the control he exercised outside of his ‘Class D’ area of authority and in the instructions that he gave and failed to give, to TKU662 which contributed to its controlled flight into terrain”. Plaintiffs’ Memorandum of Law [162], p. 16. However, that theory is not supported by the following testimony of Ms. Harvey—plaintiffs’ own expert:

“A. . . . [M]y opinion is that he was under the . . . instruction of the controller being I will call your base, that’s a very powerful instruction that the controller is giving that pilot.

Q. But you agree with me that in the meantime, until his base was called, the VFR pilot’s duty is to maintain a separation from terrain; correct?

A. It’s his duty to maintain a separation against terrain.” Harvey deposition transcript [155-23], pp. 56-57.

...

“Q. But [Mr. Bulos] never indicated back to the tower, I’m forfeiting my responsibilities as a VFR pilot

A. No. . . . But VFR pilots can still be controlled, and they don’t have to then go, all right am I IFR now. You can still be VFR and accept a vector, accept identification, accept a height change, a level change, altitude change.

Q. And at all times it needs to be VFR, however. He has the sole and exclusive responsibility to separate himself from terrain; correct?

A. Correct.” *Id.*, pp. 116-17.

Nevertheless, plaintiffs' position does find support in the following testimony from their other expert, Mr. Sommer:

“Q. . . . An aircraft operating pursuant to [VFR] must provide its own navigation and clearance from obstructions. Do you agree with that statement . . . ?

A. I agree with it in that they should be navigating the airplane, but when they are being controlled, then they are under the direction of air traffic control. Air traffic control is giving them instruction. They can't just deviate from that instruction.

Q. There was never an instruction given to this aircraft . . . to fly according to a specific vector, or a specific compass direction, was there?

A. I would have to disagree with you with that. He was instructed to fly downwind at the heading of one one zero after making a left turn”. Sommer deposition transcript [155-25], pp. 69-70.

...

Q. It's always the pilot's responsibility to determine his spatial relationship to his terrain?

A. It is not the pilot's sole responsibility. It is also the responsibility of the controller not to direct him to fly into the side of that mountain.” *Id.*, pp. 71-72.

...

Q. . . . Do the [authorities] that are given credence in the aviation industry define VFR as principally the sole responsibility of the pilot to see and avoid terrain and other aircraft?

[A.] Final authority is the word that is used most often; not sole responsibility. It's a shared responsibility between the pilot and the controller, if he's under air traffic control." *Id.*, p. 95.

...

Q. Was there ever any information shared, at any point during this flight, that gave the tower controller reason to believe that the pilot could not maintain his separation from terrain?

[A.] The pilot never indicated that he wasn't able to do so, but he wasn't asked, either. The pilot conducted the flight in accordance with his own navigation per the instruction that he got . . . when he initially departed Bagram. Then his own navigation was taken away from him at the point where his clearance was revoked and where he was told to turn left. So there isn't any indication that he's incapable of maintaining separation from the obstacle, but he is relying on air traffic control not to steer him into one." *Id.*, p. 96.

Further explaining why Mr. Smith's conduct gave rise to a duty for terrain separation, Mr. Sommer testified that while Mr. Bulos was in class D air space, "he's at pattern altitude" and "[t]here should be no risk of any type that he's going to run into anything". *Id.*, p. 49. However, Mr. Bulos "wouldn't necessarily know that he had just left class D air space, and . . . he would surely not expect that the controller would direct him outside of the class D air space into areas that have extensive high terrain. . . . [H]e would expect that [air traffic control] knows where he is based upon the vernacular that he was using in regard to the other aircraft, in regard to what he should be able to see out his three clock. He knows . . . that the controller can see him on the scope. He doesn't know that he

just left class D air space, and he wouldn't know to turn the TAWS back on". *Id.*, p. 52. Mr. Sommer testified that if Mr. Smith did not know what the terrain was like outside of his air space, he should not have been giving instructions to operate outside of that air space without telling TKU662 to "maintain VFR", a "very common term[] that controllers use all the time because they want to make sure that pilots are . . . aware if any . . . terrain could be a danger to them" (*id.*, pp. 72-73), and that by failing to receive that direction, Mr. Bulos "was trusting that the controller was vectoring him in the appropriate manner so that he wouldn't impact terrain". *Id.*, p. 93. *See also* p. 82 ("If [air traffic control] establish that an aircraft that is under their control should maintain VFR . . . then it is up to the pilot completely. [Air traffic control] is absolving themselves of that responsibility").

Midwest ATC argues that Mr. Sommer's definition of VFR, "which expresses a joint responsibility between pilot and air traffic controller for a VFR aircraft's terrain separation, does not correlate with any document or testimony that is part of the record" and fails to meet the standard of reliability set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993). Midwest ATC's Memorandum of Law [155-3], p. 39. "[S]ummary judgment is not *per se* precluded because there are conflicting experts." *Dalberth v. Xerox Corp.*, 766 F.3d 172, 189 (2d Cir. 2014); *Colon ex rel. Molina v. BIC USA, Inc.*, 199 F. Supp. 2d 53, 71 (S.D.N.Y. 2001) ("[n]othing in *Daubert*, or any other Supreme Court or Second Circuit case, mandates that the district court hold a *Daubert* hearing before ruling on the admissibility of expert testimony, even where such ruling is dispositive of a summary judgment motion"). "The court performs the same role at the summary judgment phase as at trial; an expert's re-

port is not a talisman against summary judgment.” *Dalberth*, 766 F.3d at 189. Thus, “[a]n expert’s conclusory opinions”, including those “without factual basis . . . [are] inappropriate material for consideration on a motion for summary judgment”. *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008).

Absent from the common law duty of reasonable care or controlling documentation—the two considerations dictating whether a duty exists (*see Wojciechowicz*, 576 F. Supp. 2d at 272)—is any support for the principle that an air traffic controller assumes a duty for terrain separation of a flight operating under VFR by giving an instruction. *See In re: Air Crash Near Rio Grande, Puerto Rico*, 2016 WL 6916600, *7 (a VFR pilot “is responsible to avoid terrain To satisfy this requirement, the pilot must, at all times, fly in visual meteorological conditions . . . even if given a vector or other instructions by the controller”); *Crossman v. United States*, 378 F. Supp. 1312, 1316-17 (D. Or. 1974) (“[e]specially a VFR pilot has no right to rely on the mere notification of ‘radar contact’ as an invisible hand to guide him thereafter”). Telling, Mr. Sommer’s opinion is even contradicted by plaintiffs’ other expert.

Mr. Sommer relies heavily on Section 2.2 of Annex 11 to ICAO 4444, which sets forth the objectives of air traffic control services to provide advice and information useful for the safe and efficient conduct of flights. Sommer deposition transcript [155-25], p. 39. However, as discussed above, that opinion is expressly contradicted by ICAO 4444 which, states that “[t]he objectives of the air traffic control service as prescribed in Annex 11 *do not include prevention of collision with terrain*”. [155-39], p. 106 of 223, § 5.9, Note 3 (emphasis added).

Mr. Sommer’s opinion also lacks common law support. While it is recognized that when controlling a VFR flight

“[t]he duty to issue a terrain alert arises if a controller is *aware* that an aircraft is in *unsafe* proximity to terrain”, *In re: Air Crash Near Rio Grande, Puerto Rico*, 2016 WL 6916600, *8 (emphasis in original)), there is no evidence in the record that Mr. Smith, who lacked any terrain warning equipment and did not have a visual on the aircraft, was aware that TKU662 was in an unsafe proximity to terrain. *See id.* (finding that no duty existed where the air traffic controller’s “radar scope did not depict terrain contours or topographic features . . . or elevations” and did “not provide information about an aircraft’s altitude above terrain”). Mr. Sommer acknowledged that Mr. Bulos had the responsibility to request a different instruction if he believed that there was any danger or other issue with instruction. Sommer deposition transcript [155-25], p. 69. Since Mr. Bulos did not request an amended instruction or give any indication that he was unable to maintain his VFR responsibilities, Mr. Smith had no reason to believe that TKU662 was in unsafe proximity to terrain, or that Mr. Bulos could not maintain terrain separation. *See In re: Air Crash Near Rio Grande, Puerto Rico*, 2016 WL 6916600, *8.

Mr. Sommer’s expert report [155-24] suggests that the dark conditions gave rise to a greater reliance by Mr. Bulos on the instructions of Mr. Smith. *Id.*, p. 6 of 28. That may be so, but this did not give rise to any duty by Midwest ATC for terrain separation. Significantly, Mr. Sommer conceded that the flight was under VFR throughout (Sommer deposition transcript [155-25], p. 93)—a designation selected by Mr. Bulos. Midwest ATC’s Statement of Material Facts [155-2], ¶55. “[A]n air traffic controller is entitled to assume that if a pilot is flying under VFR the . . . conditions the pilot is experiencing are above VFR minima”. *Wojciechowicz*, 576 F. Supp. 2d at 275.

Therefore, I conclude, as a matter of law, that Midwest ATC owed no duty of care to TKU662 for terrain separation.

2. *If a Duty of Care Existed, Was Mr. Bulos the Sole Proximate Cause of the Accident?*

Midwest ATC argues that even if it had some duty for terrain separation and was negligent, plaintiffs' claims would still fail, since "it could never have been reasonably foreseen that a VFR pilot, who is legally obligated to see and avoid terrain, would fail to circumnavigate an obstacle or terrain". Midwest ATC's Memorandum of Law [155-3], pp. 40-41.

New York courts have held that "[a] plaintiff's intervening conduct . . . can break the chain of causal connection between a defendant's breach of duty and an ensuing injury to a plaintiff so as to relieve a defendant from liability for negligence. Moreover, where a party merely furnishes the occasion for an *accident but does not cause it, liability may not be imposed.*" *M.B. ex rel. Scott v. CSX Transportation, Inc.*, 130 F. Supp. 3d 654, 676 (N.D.N.Y. 2015). "New York courts have not been reluctant to grant summary judgment where the record reflected that one party's negligence was the sole proximate cause of an accident." *Gray v. Wackenhut Services, Inc.*, 446 Fed. App'x 352, 354 (2d Cir. 2011) (Summary Order).

Even if Mr. Smith was negligent in directing Mr. Bulos toward the mountain or out of Class D airspace, the fact remains that he had no reason to believe, from what was being conveyed to him by Mr. Bulos and what he was able to observe on radar, that TKU662 was in unsafe proximity to the terrain. While Mr. Sommer also criticized Mr. Smith's failure to advise Mr. Bulos to maintain VFR, he conceded that the flight was "always VFR". Sommer dep-

osition transcript [155-25], p. 93. Under those circumstances, “ [t]he controller had a right to assume that in the absence of evidence to the contrary . . . that the pilots could see the terrain themselves. ‘It is not negligence not to repeat information already given or that is already known to the pilot.’ ” *Biles*, 848 F.2d at 663 n.1 (5th Cir. 1988) (*quoting Redhead*, 686 F.2d at 183). As a pilot flying under VFR, Mr. Bulos “had a continuing duty to be aware of his location, of the elevation of the terrain over which he was flying, and of the danger posed by such terrain. He was negligent in not fulfilling these duties, and that negligence was the proximate and sole cause of this tragic plane crash”. *McDaniel*, 553 F. Supp. at 916.

III. CONCLUSION

For these reasons, I recommend that Midwest ATC’s motion for summary judgment [155] be granted. Unless otherwise ordered by Judge Arcara, any objections to this Report and Recommendation must be filed with the clerk of this court by May 2, 2017. Any requests for extension of this deadline must be made to Judge Arcara. A party who “fails to object timely. . . waives any right to further judicial review of [this] decision”. *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988); *Thomas v. Arn*, 474 U.S. 140, 155 (1985).

Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. *Paterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court’s Local Rules of Civil Procedure, written objections shall “specifically identify the portions

of the proposed findings and recommendations to which objection is made and the basis for each objection . . . supported by legal authority”, and must include “a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge”. Failure to comply with these provisions may result in the district judge’s refusal to consider the objections.