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

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

v. Case No. 3:16cv170-RV/HTC

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

ORDER

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

The plaintiff, Patricia LaCourse, is LaCourse's widow and was designated the personal representative of his estate. She brought this wrongful death action in Florida state court against the defendant, PAE Aviation Technical Services (PAE), a company that was under contract with the government to provide service and maintenance on aircraft at Tyndall, including the F-16 (hereinafter, the Mishap Aircraft).[1] PAE timely

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

removed the lawsuit to this federal court.[2]

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

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

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

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

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

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

---

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

By Order and Notice dated March 4, 2019, the parties were directed to file any and all additional evidentiary material by March 19, 2019 (doc. 121). Neither side did so.[3] I later held an oral argument on May 23, 2019. *See* Transcript of Oral Argument, dated May 23, 2019 (doc. 129) (Tr.). At the end of oral argument, I took the motion for summary judgment under advisement and stated that this order would follow.

I. Standard of Review

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

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

---

[3] Although no additional evidence was filed in response to my March 4th Order and Notice, PAE did file a "Notice of Specific Page and Line Designations of Plaintiff's Experts" to highlight specific portions of the plaintiff's earlier-filed expert testimony (doc. 125). In abundance of caution, and because of their significance to this case, I read the deposition testimonies of the plaintiff's four expert witnesses in full—all 1012 pages.

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

Unsupported statements by counsel made in briefs and at oral argument are not evidence. *See, e.g., Green v. School Bd. of Hillsborough Cty., Fla.*, 25 F.3d 974, 979 (11th Cir. 1994); *United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir. 1990); *accord United States v. Cardona*, 302 F.3d 494, 497 (5th Cir. 2002) ("arguments in brief[s] are not evidence"). It follows therefrom that attorney arguments alone cannot preclude summary judgment. *See Rich v. Dollar*, 841 F.2d 1558, 1565 & n.5 (11th Cir. 1988) (reversing denial of summary judgment for defendant where the district court relied on "assertions in the memorandum prepared by Rich's counsel rather than upon the factual showing submitted under oath by Rich"); *accord, e.g., Taylor v. Holiday Isle, LLC,* 561 F. Supp. 2d 1269, 1275 n.11 (S.D. Ala. 2008) ("Unadorned representations of counsel in a summary judgment brief are not a substitute for appropriate record evidence."); *Smith v. Housing Auth. of City of Prichard*, 2007 WL 735553, at *6 n.14 (S.D. Ala. 2007) ("These assertions [by plaintiff in opposition to summary judgment] are unaccompanied by citations to the record, and lack support therein. Of course, mere unsupported representations of counsel do not constitute evidence that may be

considered on summary judgment.") (quoting *Nieves v. University of Puerto Rico*, 7 F.3d 270, 276 n.9 (1st Cir. 1993) ("Factual assertions by counsel in motion papers, memoranda, briefs, or other such 'self-serving' documents, are generally insufficient to establish the existence of a genuine issue of material fact at summary judgment."); *Bowden ex rel. Bowden v. Wal-Mart Stores*, 124 F. Supp. 2d 1228, 1236 (M.D. Ala. 2000) ("opinions, allegations, and conclusory statements of counsel do not substitute for evidence" on summary judgment)).

Thus, a party opposing summary judgment must point to specific portions in the record where *evidence* of a genuine disputed issue of fact can be found. *See* Fed. R. Civ. P. 56(c)(1)(A) (party asserting that a fact is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials"); *accord* N.D. Fla. Loc. R. 56.1(F) (parties on summary judgment "must include pinpoint citations to the record evidence supporting each factual assertion"); *see also A.L. v. Jackson County School Bd.,* 635 F. App'x 774, 786-87 (11th Cir. 2015) ("'district court judges are not required to ferret out delectable facts buried in a massive record'" and, therefore, they are not required to "'mine'" the record looking for evidence that wasn't cited by the parties) (citations omitted).

II. Background

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

On March 3, 2009, PAE was awarded a contract with the government to provide aircraft service and maintenance at Tyndall Air Force Base (doc. 86-1). In performing under the contract, PAE was required to follow very detailed guidelines and adhere

to specific standards, including Air Force Instructions (AFIs) and Technical Orders (TOs), all of which were prepared by, or on behalf of, the Air Force. *See* Affidavit of David Olson, dated November 15, 2018 (doc. 96-2) (Olson Aff.), at ¶¶ 7-19.

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

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

> • Also on October 31st, System A had no pressure indication in the cockpit, and the System B flight control accumulator pre-charge was low.
>
> • On November 3rd, PAE servicers performed a "confidence run" and both System A and System B failed.

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

All of the foregoing problems were addressed and corrected as they presented. *See* Maint. Rec. at 2-3, 8-11, 13-14. Thus, for example, PAE mechanics replaced the broken clamp and gauge, and they installed two new accumulators. *See id.*; *see also,*

---

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

As for the other problems that are listed above, I will assume for purposes of this order that they were all related to the hydraulic systems (because that is what plaintiff's experts have opined), but that is far from certain. Take, for example, the failure of the landing gear to retract on September 17th. Although Stutler stated in his expert report that the failure of the landing gear to retract was a hydraulic problem (doc. 108-19), he conceded at deposition under questioning by defense counsel that the landing gear failed due to a faulty solenoid, which is "an electrical piece of equipment" and "not a hydraulic valve." *See* Stutler Dep. at 240; *see also id.* at 240-41 (further conceding that the landing gear issue "related to an electrical problem"). He later tried to rehabilitate his testimony on this point during cross examination by the plaintiff's counsel when he testified that the landing gear problem was "actually electric hydraulic" because there *could* have been vibrations in the hydraulic system that were "sending a bad signal on the electrical side of the solenoid." *See id.* at 332-33, 335-36. However, as Stutler went on to admit on re-direct, he has no evidence that it happened here and he has never heard, seen, or read of it ever happening anywhere else. *See id.* at 336-38; *see also id.* at 339 ("Q: [I]n all of your experience and all of your years and your deployments and being at Homestead and all of your experience with F-16s, have [you ever] heard of that scenario happening where vibrations caused a solenoid to fail? A: Specifically, no.").

e.g., Bogaert Dep. at 58-63. After PAE installed the new accumulators, the mechanics ran a 24-hour "leak and bleed" check to ensure that they were working properly and not leaking. *See* Bogaert Dep. at 61-63. Notably, the plaintiff doesn't appear to claim that the corrective actions identified in the maintenance records had not actually been done, nor does she claim that they were done improperly. *See* Ludwig Dep. at 76-77 ("Q: Do you intend to express any opinion that the maintenance performed . . . by PAE itself was inappropriate? They put the wrong accumulator on, for example? They put the wrong piece in? They followed the wrong procedure or protocol? A: No. Q: Do you have any information from any source that the records that you have seen that indicate the maintenance that was performed are, in fact, untrue? A: No."); *accord id.* at 144-47 (testifying that there is no allegation that PAE "missed a leak, an overflow, a noise, [or] anything," and conceding that the maintenance work they did "appear[s] to have been done properly"); Kibbee Dep. at 267 ("Q: . . . [Y]ou're not coming in as an expert to testify that the maintainers improperly installed a part? A: No . . . Q: Put it in backwards . . . [or] something— A: No."). Instead, as will be discussed further *infra*, the gist of plaintiff's claim is that PAE should have treated the hydraulic issues as a chronic problem, grounded the Mishap Aircraft, and sent it for additional ("depot-level") maintenance. *See* Ewing Dep. at 61-62, 172-76 (testifying that PAE mechanics "changed a gauge here, they changed an actuator there," but the underlying problem was "something deeper" that warranted grounding and further maintenance); *see also, e.g.,* Stutler Dep. at 150-54, 281-83; Ludwig Dep. at 75-76, 145-46, 160, 176, 183.

On the day of the crash, there were two issues with the Mishap Aircraft shortly before takeoff. First, the emergency power unit (EPU) took longer than expected to come on during the pre-flight check, but it eventually came on and passed the check. *See* T. Davis Dep. at 34. Next, there was an issue with the pitch override (PO) check, which requires the pilot to apply full pressure on the stick and press the PO switch to

make the stabilizers at the tail move a few inches or degrees in a nose-down direction. *See id.* at 42-44; *see also* Stutler Dep. at 133-34; Fallin Dep. at 216-17. The Mishap Aircraft failed the PO check two times before passing it on the third try. *See* Bogaert Dep. at 71-74; *see also* T. Davis Dep. at 42-53.

Despite these two issues (or "hiccups," *see* T. Davis Dep. at 42-43), the Mishap Aircraft passed all of its pre-flight checks, there was no indication of a problem with the hydraulic systems, and the plaintiff's experts agree that everything appeared to be normal (or at least they are aware of no evidence to suggest that things did not appear normal). *See, e.g.,* Ewing Dep. at 57-58, 88, 93-94; Stutler Dep. at 185-89, 201-03; Ludwig Dep. at 100-02, 144-47.[5] The PAE mechanics who conducted the pre-flight checks were all satisfied that the Mishap Aircraft was safe to fly and released it for its final flight. LaCourse then taxied the aircraft down the runway and took off to meet up with the F-4.

---

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

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

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

During the flight, the Mishap Aircraft performed a number of aerial maneuvers leading up to a "pitch back," which is an over-the-shoulder tactical maneuver where the pilot uses the pitch axis to rejoin another aircraft. *See* Ewing Dep. at 22. From all accounts, everything leading up to the pitch back appeared normal, *i.e.*, there was no gauge, light, warning, or caution indicating any problems, and there were no reports of any vibrations, shakes, or "sponginess in the controls." *See id.* at 125-26 (agreeing that "the aircraft appeared to be functioning properly on engine start, taxi out, end of runway, takeoff, initial join-up with the F-4, and flight out to the Gulf, all of the steps before this pitch back"); *see also* Kibbee Dep. at 279, 296 (agreeing that there were no "warning lights going off in the cockpit" during the flight because if there had been they would have been "picked up on the flight data or crash flight data recorder," and conceding there was "no report by the pilot or the chase plane next to him, or anyone, once the airplane took off, of any control issues, any erratic operation, any vibrations felt, anything to indicate [a problem]"). The problem occurred at the end of the pitch back maneuver. *See, e.g.,* Ludwig Dep. at 72 (testifying that the problem presented "during the termination of his pitchback . . . as he is finishing the maneuver"); Ewing Dep. at 126, 128 (testifying that everything appeared to be "okay until the last part of the flight," *i.e.*, "at the conclusion of the pitch-back").[6]

After the conclusion of the pitch back, LaCourse appeared to level off and there was "a period of no data, no inputs, no control or . . . no maneuvers." *See* Ewing Dep. at 24-25. The Mishap Aircraft then entered a "pitch-down" from about 12,000 feet.

6

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

See id. at 25-32. LaCourse apparently made no effort to eject from the aircraft or make a radio call during the descent. *See, e.g.,* Ludwig Dep. at 73, 108. At about 1,500 feet, "the aircraft went wings level and went to military power and pulled slightly degree within 6 ½ Gs," after which it hit the water. *See id.* at 72; *see also* Ewing Dep. at 32.

The AIB investigated the crash and concluded that:

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

News Release, U.S. Air Force, Release No. 020915 (September 8, 2015), available at: http://www.airforcemag.com/DRArchive/Documents/2015/September%202015/091015aib_f16.pdf.

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

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

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

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

> Their speculative opinions are: that because there was a crash there must have been air in the hydraulic system, even though the hydraulic system functioned for start up, run up, taxi out, end of runway, takeoff, join-up, initial flight maneuvers including G-turns, first attempted drone join-up, and the second attempted join-up all the way to the point of the "pitch back" maneuver, and at that point, somehow, mysteriously, air foamed in the hydraulic fluid causing both systems to fail, but only until the last moment before impact, when Decedent pulled back on the stick and the hydraulic system functioned again and moved the flight surfaces, and Decedent went to full throttle—all while Decedent made no radio call and no ejection despite at least 10,000 feet of altitude at the beginning of the event.

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

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

III. Discussion

A. Government Contractor Defense

The government contractor defense was first established by the Supreme Court in the seminal decision of *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Because of its significance to our case, I will discuss and quote from *Boyle* at length.

---

[7] Although I have accepted the plaintiff's theory of the crash solely for purposes of this order, her theory is highly questionable for several reasons. First, despite that F-16s have been around since the mid-70s—and over 4,500 of them have been built—the plaintiff's experts have all conceded that they have never seen (or heard of) an in-flight dual hydraulic failure due to pre-flight contamination or excess nitrogen in the hydraulic systems. *See, e.g.,* Ewing Dep. at 163; Stutler Dep. at 109-13; Ludwig Dep. at 132-33, 173; Kibbee Dep. at 161-63; *see also id.* at 241 ("Q: Do you know if Northrop or General Dynamics, or anybody who operates and maintains F-16s, have ever seen the scenario you described today here of the foaming, the ingestion, and both systems failing, and the degradation, leading to a crash? A: Never heard of that before."). Nor did the plaintiff's experts run any tests or conduct (or read) any studies or analyses to see if such a thing was even possible. *See* Ewing Dep. at 163-64; Ludwig Dep. at 167-68; Kibbee Dep. at 107, 275-76.

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

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

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

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

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

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

8

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

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

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

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

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

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

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

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

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not the United States.

Id. at 512.

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

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

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

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

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

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

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

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

B. Analysis

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

PAE responds by arguing that:

> Defendant cannot by contract with the government eliminate immunity under the government contractor defense. *Such immunity exists to prevent government contractors like Defendant from passing on the cost of risk arising from performance of uniquely governmental activities.* There are few activities more uniquely governmental than repair and maintenance of military aircraft performing military missions. *Allocation of liability between Defendant and the government in the contract has nothing to do with immunity from liability to a third party, which the government would receive if it had maintained the mishap aircraft and Defendant should receive for doing the exact same thing.*

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

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

In re Agent Orange Prod. Liability Litig., 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005). In light of the purpose of the government contractor defense (to prevent the pass-through of costs), it would make little sense to interpret the contract language as the plaintiff suggests. I believe PAE is correct that the quoted language merely allocated liability between PAE and the government, but it did not speak to liability between PAE and a third party.

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

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

Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1322 (11th Cir. 1989) (holding that third *Boyle* factor was satisfied as a matter of law where "[t]here is no evidence that General Dynamics had knowledge it withheld").

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

It is clear from reading the full testimonies of plaintiff's experts—all of whom are highly experienced and well credentialed in their respective fields—that there are numerous things they would have done differently. For example, Kibbee believes the guideline for the leak and bleed test should have been written differently. *See* Kibbee Dep. at 255-60 ("I would write it better than—I would write it a little bit differently . . . . I'd go longer . . . . I would write it that way.").[9] Stutler believes that "a common sense mechanic" should have gone above and beyond what the AFIs or TOs required. *See* Stutler Dep. at 286; *see also id.* at 276-77 (conceding that no TO precluded PAE mechanics from asking LaCourse to repeat the initially failed PO tests before takeoff,

---

9

An important point bears noting with respect to the leak and bleed test. As previously stated, Kibbee's theory of the case is that both accumulators failed (either pre-flight or during the flight) because they were leaking nitrogen when they were installed days prior. *See* Kibbee Dep. at 165-66, 288-96. He was asked by defense counsel during deposition that if the accumulators were leaking when they were installed "wouldn't you expect that to show up when they were pre-charged, and then on a leak and bleed check for 24 hours?" *Id.* at 166. Kibbee answered as follows: "No . . . . Because the way the TO is written, it doesn't say to check these things 24 hours later. It just says do it real fast, and then pressure goes back to 1600, and then you're done, *so [there is] nothing in a TO that would pick this up.*" *Id.* (emphasis added); *accord id.* at 258 (testifying that the guideline as written "would not pick up . . . this accumulator problem"). Whether the TO should (or could) have been written differently so that the mechanics would have caught the alleged nitrogen leak is, arguably, a drafting problem with the TO. But it says nothing about whether PAE *complied* with the TO, which is the only thing that matters here.

but opining that sometimes mechanics should "troubleshoot a little bit further beyond what the TOs say"). And several of the experts testified about their personal opinions and about what they would have done if they had been at Tyndall that day. *See, e.g.,* Stutler Dep. at 150-52 (testifying that "if it was me, I would [have] put a red X in the orders" and grounded the aircraft based upon its maintenance history, but answering "I can't" when asked to point to where in the AFIs or TOs that was required); *id.* at 281-82 ("Personally, yes, I would have [grounded the Mishap Aircraft] . . . . [but] I'm only speaking for myself. . . . I can only speak on my behalf. Yes, I would have."); Ludwig Dep. at 76 ("If I saw repeat gripes in probably excess of three, I would not be wanting that airplane to fly. I'd be very much concerned."); *see also* Ewing Dep. at 176 (testifying "I would have put that plane down on the hangar deck of my carrier" until the "root cause" of the hydraulic problem was "fully discovered").[10]

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

---

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

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

> Assuming and setting aside the highly speculative opinions of Plaintiff's experts as to whether or not a hydraulic malfunction even occurred, which led to or caused this crash, and even if we assume that such a failure did occur in flight, there is no procedure, guideline, or U.S. Air Force regulation that would require additional in depth troubleshooting, additional "grounding" as it has been referred to by Plaintiff's experts, or additional return to "depot level" maintenance. *Plaintiff cannot cite a specific TO, guideline, or U.S. Air Force requirement that Defendant allegedly breached.*

11

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

Id. at ¶ 50 (emphasis added).

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

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

---

12 The plaintiff didn't produce any evidence of her own on this point, but she did appear to challenge the *weight* that should be afforded to PAE's evidence. For example, as noted, Captain Chiaravalle testified that the AIB made a factual determination that the Mishap Aircraft had been maintained pursuant to all relevant "Air Force TOs, AFIs, and requirements," but the plaintiff notes that Captain Chiaravalle answered "I don't know" forty six (46) times in response to *other* questions during her deposition. *See* Pl. Resp. at ¶¶ 90-92. Whether and to what extent Captain Chiaravalle was being an "evasive" and "typical" Air Force "bureaucrat" when responding to other questions, however, does not contradict her deposition testimony—or similar testimony from other individuals, including PAE employees—that PAE's maintenance conformed to all relevant Air Force guidelines and standards. *See also* Olson Aff. at ¶ 8 (testifying that PAE provided maintenance "conforming" to the government requirements).

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

> **7.1. Aircraft and Equipment Impoundment.** Aircraft or equipment is impounded when intensified management is warranted due to system or component malfunction or failure of a serious or chronic nature. . . . Impounding aircraft and equipment enables investigative efforts to systemically proceed with minimal risk relative to intentional/unintentional actions and subsequent loss of evidence.

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

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

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

Stutler testified that he had not read or reviewed "any portions" AFI 21-101, and thus it did not play "any part" in his opinions in the case. *See* Stutler Dep. at 77-78; *see also id.* at 106 (testifying that there were no TOs that he had any "particular interest in"). Ludwig answered "I'm not going to" when asked if he was planning to

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

---

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

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

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

It is also worth noting that *after* PAE filed its motion for summary judgment on the government contractor defense (in which it argued that "none of Plaintiff's experts have identified any specific TO or other regulation that Defendant failed to follow," *see* Def. Mot. at ¶ 49), the plaintiff did not submit any post-motion/post-deposition affidavits or other evidence from her experts that mentioned AFI 21-101 and/or TO 1-1-300—even though my March 4th Order and Notice explicitly granted her leave to file additional evidence.[14]

After close and careful review, I conclude that the plaintiff has not produced evidence sufficient to create a genuine disputed issue of material fact as to whether PAE's maintenance of the Mishap Aircraft conformed to the Air Force's reasonably precise standards and guidelines. The uncontradicted evidence is that it did. Therefore, PAE has met all three prongs of the *Boyle/Hudgens* test and is immune from this suit based on the government contractor defense.

14

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

IV. Conclusion

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

DONE and ORDERED this 29th day of August 2019.

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