UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

Kristina Martinez, as Personal Representative of the Wrongful Death Estate of Christopher Carey Short, deceased; Audra Short, surviving wife of Christopher Carey Short, individually, and on behalf of A.S., surviving minor child of Christopher Carey Short,

Civil No. 1:21-cv-00570-JB-LF
Civil No. 1:21-cv-00959-JB-LF

Plaintiffs,

v.

Embraer S.A.; Embraer Aircraft Holding, Inc.; Embraer Aircraft Customer Services, LLC; Embraer Defense & Security, Inc.; and Sierra Nevada Corporation,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT REGARDING DEFENDANTS' "GOVERNMENT CONTRACTOR" AFFIRMATIVE DEFENSE

Plaintiffs Audra Short and Kristina Martinez respectfully submit this motion for summary judgment on the "government contractor" affirmative defense invoked by Defendants Sierra Nevada Corporation and Embraer S.A.[1] The defense is also known as the "*Boyle*" defense for the Supreme Court case where it was established, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 510 (1988). *Boyle* may only immunize the supplier of a defective product from liability when the United States government issued reasonably precise specifications for the feature of that product that a plaintiff claims to be defective. The defense does not apply to already developed, "off the shelf" airplanes, especially not those designed for a foreign government. Here, Embraer, S.A. created the A-29 Super Tucano airplane at the request of the Brazilian government, thirty years

[1] EDSI has waived the defense because it was not pleaded or asserted by a Rule 12 motion. (Doc. No. 41 (Case No. 570)). See *Radio Corp. of Am. v. Radio Station KYFM, Inc.*, 424 F.2d 14, (10th Cir 2003).

ago. Defendants do not—and cannot—identify a single United States government specification related to the airplane. The United States never even purchased the crash aircraft for its own use; it only considered doing so. The government contractor defense is part of federal common law, which is extremely narrow. It does not protect the discretionary decision-making of the Brazilian Air Force.

I. RULE 56.1 STATEMENT OF MATERIAL FACTS

The Crash of Aircraft 221

1. This wrongful death case arises from the June 22, 2018, crash of an Embraer A-29 Super Tucano airplane, serial number 221 ("Aircraft 221"), which killed Plaintiff Audra Short's husband, United States Navy pilot LT Christopher Short. (Ex. 1, *United States Air Force Aircraft Accident Investigation Board Report*, pp. 8, 11).

2. The crash occurred during a marketing demonstration called Light Attack Experiment II ("LAE II"). (Ex. 1, *Air Force Investigation Report*, p. 9; 2 Ex. 2, *Invitation to Participate in LAE II*).

3. During LAE II, defendants Sierra Nevada Corporation ("SNC"), Embraer, S.A., ("Embraer") and Embraer Defense & Security, Inc. ("EDSI") were jointly marketing the A-29 to the Air Force, which was considering purchasing an "off the shelf" light attack airplane. (Ex. 2, p. 1; Ex. 3, *Cooperation Agreement*).

4. During the demonstration, while at about 10,000 feet above-ground-level (AGL),[2] LT Short employed a 615 lb. GBU-12 bomb from Station 1, the outer pylon, of the aircraft's left wing at approximately 166 knots (191 MPH). (Ex. 1, pp. 8, 14, 17; Ex. 4, *Flight Manual Provided*

[2] The bomb was employed at 15,903 above mean sea level. Ground level at impact was 5,919 feet. (Ex. 1, pp. 7, 14).

to Aircrew p. 3; Ex. 5, *Deposition of Embraer 30(b)(6) Witness Pedro Esteban*, p. 37:21 to 38:16; Ex. 6, *True and Accurate Depiction of Mishap Flight*).

5. At the time that LT Short employed the GBU-12, Aircraft 221 was in the "547" weapons Configuration. (Ex. 7, *Second Deposition of SNC Principal Pilot Brian Maas*, p. 174:17-21).

6. Configuration 547 consists of a GBU-12 bomb on the outer pylon of each wing (Stations 1 and 5), rockets on the inner pylon of each wing (Stations 2 and 4), machine guns on each side, and the MX-15 sensor in the center (Station 3). (Ex. 4, p. 3; Ex. 5, p. 167:19-168:11).

7. At the time of release, Aircraft 221 was entirely within the flight envelope prescribed for Configuration 547 in SNC's Flight Manual Supplement for Aircraft 221. (Ex. 4, p. 5; Ex. 5, p. 137:5-9; Ex. 7, p. 176:11; 189:15 to 190:6).

8. Immediately after release, the asymmetric aircraft entered into a dive, spiraling in the direction of the heavier right wing, armed with the other GBU-12 bomb. (Ex. 1, p. 14-15; Ex. 6; Ex. 8, *Air Force Mishap Analysis*, p. 2-3).

9. Aircraft 221 crashed into the ground about twenty-seven seconds after the weapon release, reaching a descent rate in excess of 500 feet per second. (Ex. 1, p. 9, 13, 18; Ex. 6).

10. SNC and Embraer informed LT Short that he could safely employ a GBU-12 at 1.2 VS (i.e. 1.2 times the stall speed of the A-29), about 145 knots (167 mph), and that "[t]he aircraft does not suffer controllability or maneuverability restriction[s] on account of asymmetry of external stores within the entire flight envelope prescribed for each configuration." (Ex. 4, p. 5, 8; Ex. 9, *SNC Academics: Flight Characteristics*, p.2).

11. At the time of employment, Aircraft 221 was traveling at 166 knots, approximately 1.5 VS, according to Embraer, and was well within the envelope. (Ex. 1, p. 14; Ex. 11, p. 2).

12. After the crash, in internal emails, Embraer engineers admitted that it would "not be 100% factual" to say Aircraft 221 had full wing control authority at 1.5 VS. (Ex. 10, *30(b)(6) Deposition of Embraer, S.A. – Fabio Bonnett*, p. 44:9 to 50:19; Ex. 11, *Email referenced in prior citation*; pp. 1-2).

13. After the crash, in an internal memo, SNC Principal Pilot Brian Maas admitted that the "Minimum acceptable airspeed" for a GBU-12 employment was instead 185 knots (213 MPH). (Ex. 12, p. 2)."

14. After the crash, the Air Force concluded: "The A-29 does not meet MIL-STD 1797 for lateral stick forces when loaded asymmetrically with 500-pound ordnance." (Ex. 13 p. 2).

15. During the mishap event, the rear-seat occupant, Air Force Weapons System Officer ("WSO") Major Scott Stepko, ejected from Aircraft 221 at about 2,600 feet above ground level (AGL). (Ex. 1, pp. 18).

16. LT Short attempted to eject from Aircraft 221 about 3 seconds later, at approximately 700 feet AGL, but this was an insufficient height to eject safely. (Ex. 1, 1. 8, 18;).

17. Major Stepko walked away from the crash with minor injuries; LT Short died on impact with the ground. (Ex. 1, p. 8, 18).

18. Aircraft 221's ejection seat was in SINGLE mode, which required each crewmember to pull his own ejection seat handle. (Ex. 1, p. 18-19).

19. Aircraft 221 was equipped with Martin Baker MK-BR10-LCX, which has three ejection selector settings. (Ex. 15, p. 8).

20. In SINGLE Mode, each seat must be ejected through use of that seat's individual firing handle. (*Id.*, p. 2).

21. In AFT Mode, when either crewmember pulls their ejection handle, both seats eject. If the rear seater pulls the ejection handle first, he will eject in .2 seconds, followed, .4 seconds

later, by the front seater. (*Id.).*

22. In NORMAL mode, only the pilot can initiate a dual ejection. (*Id.*).

23. When flying with a qualified WSO such as Major Stepko, LT Short always flew with the ejection seat in a different mode, the AFT mode, while in the Navy. (Ex. 14, *Deposition of Navy WSO LT Joshua "Tito" Martinez*, p. 52:22 to 53:6-15).

24. In March 2014, almost four years before the crash, Martin-Baker identified an issue with the MK-BR10-LCX seat when operated in AFT mode. (Ex. 16, *Operational Bulletin 314-001/14*, p. 3).

25. Specifically, as described in Service Information Leaflet No. 731 ("SIL 731"), Martin-Baker observed that when the rear seat initiated an ejection while in AFT mode, gas pressure needed to initiate the front seat ejection would vent, creating a risk that the front seat would not eject. (*Id.*).

26. SIL 731 informed users that "Martin-Baker is currently designing a solution to this problem and will produce a modification to the Ejection Seat which will ensure the Command System can be safely operated in the AFT mode again." (*Id.*).

27. SIL 731 also stated: "as a precaution and for an interim period to prevent interruption to operations, Martin-Baker is advising customers to operate the Command System in the **NORMAL or SINGLE Modes ONLY**." (*Id.*).

28. In response to SIL 731, on March 28, 2014, Embraer issued Operational Bulletin No. 314-011/14, circulating SIL 731. (Ex. 16, p. 1).

29. By October 2014, Martin-Baker had created a fix for the issue identified in SIL 731 and notified Embraer of that fix. (Ex. 17, *Modification Proposal Signed by Embraer, S.A.*).

30. SNC knew about the fix by at least April of 2015, three years before the crash. (Ex. 18, *SNC Engineering Change Proposal*, p. 7).

31. Aircraft 221 was manufactured after the creation of the modification and its seat had the fix already embodied on the assembly line. (Ex. 1, p. 19; Ex. 19, *Aircraft 221's Production Certificate*).

32. On the date of the crash, the ejection seats on Aircraft 221 could therefore have been safely flown in AFT mode. (Ex. 1, p. 19).

33. Prior to the crash flight, LT Short and Major Scott Stepko received ground and flight training exclusively from SNC instructors. (Ex. 20, *Deposition of SNC V.P. Tim Woods*, p. 313:6-25).

34. No Air Force instructors trained or instructed LT Short and Major Stepko in operation of the A-29. (*Id.* 313:6-7).

35. SNC Principal Pilot Brian Maas testified that, prior to the crash, he was not aware that a fix had been issued for the issue identified in SIL 731. (Ex. 7, p. 86:3-13).

36. Mr. Maas instructed LT Short and Major Stepko that SIL 731 applied to Aircraft 221. (*Id.*; Ex. 21, *SNC Egress Academics*).

37. Major Scott Stepko, the rear seat WSO in Aircraft 221, testified as follows:

Q: Were you instructed to fly in single mode by SNC?

A: Yes.

(Ex. 22, *Deposition of Major Scott Stepko*, p. 12:5-7).

38. SNC admits Mr. Maas's instruction was wrong: SNC's corporate representative, Abe Groves, testified on behalf of SNC that he was not aware of any operational bulletin restricting the use of AFT mode in Aircraft 221 on the date of the crash. (Ex. 23, *Deposition of SNC 30(b)(6) Witness Abram Groves*, 37:8-18).

39. If Aircraft 221 had been in AFT mode at the time that Major Stepko initiated his ejection, then LT Short would have been automatically ejected from the aircraft just .4 seconds

after Major Stepko, at approximately 2,300 feet AGL, and well within the survivable ejection envelope. (Ex. 1, p. 19; Ex. 24, *Expert Report of Ray Carter*, p. 4).

THE HISTORY OF THE A-29 SUPER TUCANO

40. The A-29 Super Tucano is marketed as a "light-attack" aircraft and is derived from an earlier model of Embraer aircraft, the EMB-312 Tucano. (Ex. 25, *A-29 Brochure*; Ex. 26, *Embraer description of A-29*).

41. The United States government played no role in the design or development of the A-29. (Ex. 27, *Deposition of Embraer 30(b)(6) witness Alberto Gomide*, 167:2-19).

42. Embraer 30(b)(6) witness Alberto Gomide testified.

> Around 1995, [the] Brazilian Air Force ha[d] two basic needs. The first one, it's to have a combat aircraft, a light attack aircraft, to be able to do ground attack and surveillance of the Brazilian border against traffic dealers and other illegal activities. And also had the need to have an advanced trainer.
>
> And around 1995, [the] Brazilian Air Force requested Embraer and put their requirements to Embraer to develop this new aircraft that should comply with those requirements. And [it was] based on those requirements and this Brazilian Air Force need that the A-29 was developed.

(*Id.*).

43. The Brazilian Air Force began operating the A-29 in approximately 2004, fourteen years before the crash. (*Id.*, p. 172:1-6 to 172:8).

THE HISTORY OF AIRCRAFT 221

44. Aircraft 221 was never owned by the United States; rather, the aircraft was, from the time of manufacture until the time of the crash, owned exclusively by Embraer and "bailed" to SNC during the LAE. (Ex. 1, p. 1; Ex. 3).

45. Aircraft 221 "was specifically manufactured to be a demonstrator [i.e., "DEMO"] aircraft" used by Embraer for potential "customers around [the] world' and basically, to present its capabilities." (Ex. 27, 207:4-5; 208:1-5).

46. Prior to LAE II, Aircraft 221 was flown to the United States from Brazil, where it was based. (Ex. 28, *First Deposition of SNC Principal Pilot Brian Maas*, 124:22-125:13).

47. Every aircraft has an Airplane Flight Manual ("AFM") that is unique to that specific aircraft and contains mandatory instructions and guidance on how to operate the aircraft safely; AFMs are not interchangeable among aircraft. (Ex. 29, *Expert Report of Patrick Hutcheson*, p. 5, ¶ 20).

48. According to Embraer, the appropriate AFM (also known as a Pilot Operating Handbook, or "POH') for Aircraft 221 was the "DEMO" manual, TO 1A-29B(DEMO)-1. (Ex. 27, 145:2-15; Ex. 30., *DEMO Flight Manual*).

THE HISTORY OF DEFENDANTS' JOINT DISTRIBUTION OF THE A-29 SUPER TUCANO

49. SNC and Embraer began collaborating on the marketing and sale of the A-29 Super Tucano in approximately 2010, during the Afghanistan War. (Ex. 23, p. 38:11).

50. At that time, the United States was looking for light attack aircraft to sell to the Afghanistan military in a Foreign Military Sales ("FMS") transaction under 22 U.S.C. § 2751. (*Id.*, 39-40).

51. The defendants' joint marketing efforts to distribute the A-29 ultimately led to their involvement in the "Light Air Support" or "LAS" program in 2014. (*Id.*, 39:25 to 40:22).

52. Along with the LAS program, SNC and EDSI have also collaborated to provide A-29s in FMS sales to Nigeria and Lebanon. (Ex. 31, *SNC Press Release*).

LAE I

53. In March of 2017, the USAF was considering acquiring its own fleet of "off-the-shelf" light attack airplanes and published an Invitation to participate in a "Capability Assessment of Non-Developmental Light Attack Platforms." (Ex. 32, *Invitation to Participate in LAE I*).

54. The purpose of the assessment was for the USAF to conduct "market research into industry's capability, capacity, and interest in providing platforms that will be cost-effective assets (i.e., assets having low procurement, operating, and sustainment cots) in the future [USAF] force structure. Results from this Capability Assessment will be used to inform requirements and acquisition decisions as described more fully below." (*Id.*, ¶ 1).

55. As SNC Vice President Timothy Woods testified, the USAF was "looking for highly mature, already-in-production existing things." (Ex. 20, p. 53:23).

56. By "highly mature," Mr. Woods meant,

> you don't have to develop them. If you were starting from a clean sheet of paper, for example, and trying to build a new airplane, that's not going to get you to that capability very fast. So they were looking for things that had already been built and certified and produced, to some degree, to rapidly move into production to fill that capability gap.

(*Id.*, p. 54:3-12).

57. By "highly mature," Mr. Woods meant, in contrast to a "clean sheet" design aircraft, such as the F-35. (*Id.* 53:24 to 54:1).

58. Mr. Woods agreed that the A-29 "had been completely developed by the time SNC got involved with the airplane." (*Id.*, p. 56:6-9).

59. When issuing an invitation to participate in LAE I, the USAF expressly noted that it "may also decide not to initiate any acquisition programs based on the result of this market research or other information." (Ex. 32, p. 3).

60. SNC presented Aircraft 221 to the USAF for flights in LAE I and used the DEMO flight manual during that demonstration. (Ex. 33, p. 40:20-22).

LAE II

61. After LAE I, on February 15, 2018, the USAF issued an Invitation to Participate ("ITP II") in the second phase of the program; Light Attack Experiment II ("LAE II"). (Ex. 2,

Invitation to Participate in LAE II).

62. Two of the four participants of LAE I, SNC, and Textron were invited to participate and present their off-the-shelf aircraft: the A-29 and the AT-6 Wolverine, respectively. (Ex. 1, p. 9).

63. The ITP II stated that the USAF was "planning the next phase of the Light Attack Experiment . . . to gather additional data to support *a potential* acquisition program decision." (*Id.*, p. 1).

64. The ITP II stated further that its "particular focus [was] rapid fielding and rapid procurement strategies that leverage existing capabilities and emphasize *little or no development*." (*Id.*, p. 2) (emphasis added).

65. On May 12, 2018, SNC and the United States entered into an Other Transaction for Prototype Project Agreement ("OTP") addressing LAE II. (Ex. 35, *OTP*; Ex. 36, *OTP Signature Page*).

66. The OTP stated that the USAF was going "to build off of the LAE Phase I prototype project by gathering additional data to support a potential acquisition program decision." (Ex. 35, p. 7).

67. The OTP was "not a Federal procurement contract, grant, or cooperative agreement." (*Id.* p. 12).

68. The OTP contained a Statement of Work, requiring SNC to train the participating air crew in operation of the aircraft, including ground and flight instruction. (*Id.*, p. 14).

69. Neither Embraer nor EDSI contracted with the United States in relation to LAE II. (Ex. 36).

70. Neither the ITP II nor the OTP required that Aircraft 221 be flown in SINGLE mode. (Exs. 35, 35).

71. Neither the ITP II nor the OTP required that Aircraft 221 be capable of employing a GBU-12 at 166 knots. (*Id.*).

AIRCRAFT 221'S DEFECTIVE EMPLOYMENT ENVELOPE

72. Aircraft 221's Flight Manual Supplement was written by Jeff Marten, a SNC employee, checked by Brian Maas, a SNC employee, and approved by Adam Marcum, a SNC employee. (Ex. 4, p .2; Ex. 37, *Deposition of SNC Engineer Adam Marcum*, p. 141-142).

73. The 547 weapons employment envelope, which was called "TEMP 1" during LAE I, was cleared with two engineering point papers written solely by Embraer. (Ex. 38, *Point Paper for LAE II*; Ex. 39*, Point Paper for LAE I*; Ex. 5, 169:24 to 171:22).

74. Embraer never conducted flight-testing where it employed a GBU-12 at 1.2 VS from Station 1 of the A-29. (Ex. 29 p. 9, ¶¶ 36-39; Ex. 40, *Deposition of Embraer Expert Thomas Horne*, p. 29:9-20).

75. Failing to employ a GBU-12 from Station 1 at 1.2 VS was a violation of industry standards because "flight testing is normally considered mandatory to demonstrate at a minimum, envelope extremes." (Ex. 29, p. 9, ¶ 37; Ex. 41, p. 2).

DEMO v. LAS MANUAL

76. SNC was responsible for providing the aircraft for demonstration in LAE II. (Ex. 2, p. 3).

77. Rather than use the DEMO AFM that normally applied to 221, as it had during LAE I, SNC used the "LAS" AFM, used by instructors at Moody Air Force Base for use in training Afghani A-29 pilots for the LAS foreign sales program. (Ex. 33, 41:12-14; Ex. 4).

78. For purposes of LAE-II, SNC never conducted a comparison of the DEMO and LAS manuals and never realized before the crash that the two manuals had conflicting guidance on the ejection selector setting. (Ex. 23, 26:13 to 27:6; 29:21 to 30:5).

79. The LAS Manual provides: "The aircraft is flown in SINGLE mode, the REAR seat has an additional .2s delay for all three selection modes." (Ex. 4, p. 7).

80. The DEMO Manual does not contain any restrictions regarding the ejection selector setting. (Ex. 30, p. 2).

81. The Textron AT6 Wolverine, the other platform flown in LAE II, was flown in AFT mode (i.e. "DUAL") during LAE II on Aircraft 221. (Ex. 42, *LAE II Standards*, Ex. 24, p. 2-3).

THE MILITARY FLIGHT RELEASE PROCESS

82. The process of approving either public or civil aircraft to fly is called "airworthiness." (Ex. 44, *SNC Safety Review Board Minutes*).

83. When Aircraft 221 was flown to Holloman Air Force Base, it operated as a civil aircraft, and flew under a FAA special flight authorization. (*Id.*, p. 3; Ex. 45, *SNC Powerpoint*).

84. Carrying ordnance was outside the purview of Aircraft 221's Special Flight Authorization. (*See, e.g.*, Ex. 47, *SFRA from 2018*).

85. Therefore, to legally fly, Aircraft 221 needed airworthiness approval from the United States Air Force through a Military Flight Release ("MFR"). (Ex. 47, *AWB 340*, ¶ 7.7).

86. To obtain this legal authority, SNC had to assess whether the A-29 complied with identified criteria in an airworthiness publication called Military Handbook 516. (Ex. 48, *Deposition of SNC Certification Lead Kenneth Spatz*, p. 57:1 to 58:20).

87. Military Handbook 516 repeatedly states (sixteen times): "The following criteria, standards and methods of compliance apply to all air systems and represent the minimum requirements necessary to establish, verify, and maintain an airworthy design." (Ex. 49, *Military Handbook 516C*).

88. SNC certification lead Kenneth Spatz worked with Embraer engineers for the airworthiness

process. (Ex. 48, p. 236:20 to 237:23).

89. If SNC deemed the aircraft non-compliant with the identified portions of Military Handbook 516, it had to identify its opinion about those risks in a compliance report to the Air Force. (*Id.*, 61:14 to 62:8-12; Ex. 50, *Excerpts of 516C Compliance Report Completed by SNC*).

90. For the MFR, SNC was required to "[v]erify that all stores configurations for the air vehicle are documented in the flight manuals," which included verifying the safe release envelopes. (Ex. 29, ¶ 42(c); Ex. 50, p. 1, ¶ 17.2.7).

91. SNC was also required to "[v]erify that the stores operations do not adversely affect any safety aspect of the flight control of the air vehicle." (Ex. 29., ¶ 42(a); Ex. 50, p. 1 ¶ 17.2.6).

92. SNC was also required to "[v]erify that technical manuals, technical orders and publications are accurate and complete for all tasks that may have flight safety effects." (Ex. 29, ¶ 61(a); Ex. 50, p. 2 ¶ 9.4.5.).

93. SNC was also required to "verify that all relevant documentation is not in conflict with systems descriptions and procedures (normal and emergency) and actual system performance; that emergency procedures are clear; and that corrective actions do not create other hazardous situations." (Ex. 29, ¶ 61; Ex. 50, p. 2 ¶ 9.4.2).

94. In the course of obtaining the MFR, SNC represented compliance with the above-cited sections and never informed the Air Force that it believed the minimum airspeed for configuration 547 was too low. (Ex. 29, ¶ 71; Ex. 50).

95. In the course of obtaining the MFR, SNC never informed the Air Force that there was contradictory language between the DEMO and LAS manuals concerning the use of the ejection selector setting. (Ex. 29, ¶ 71; Ex. 50).

96. In the course of obtaining the MFR, SNC never informed the Air Force its instructors Aircraft 221 could be safely flown in AFT mode. (Ex. 29, ¶ 71; Ex. 50).

97. None of the documents associated with the issued MFR indicate that SNC advised the Air Force that Aircraft 221 could be safely flown in AFT mode and should not employ a GBU-12 at less than 185 knots. (Ex. 56, *MFR*, Ex. 57, *Serious Risk Acceptance Memorandum* Ex. 58, *Medium Risk Acceptance Memorandum and Airworthiness Board Briefing with Identified Risks*; Ex. 59, *List of Applicable Publications*, Ex. 60, *Flight Manual Supplement Rev. C. Change 1; Ex. 61, Experiment Plan Addendum*).

TRAINING OF THE FLIGHT CREW

98. Prior to LAE II, the Air Force provided SNC with a Light Attack Experiment II "Training Syllabus." (Ex. 51, *LAE II Training Syllabus*).

99. The syllabus was not unique to the A-29 but applied to all platforms participating in LAE II. (*Id.* p. 2).

100. The syllabus did not reference ejection selector settings. (*Id.*).

101. The syllabus stated: "Egress and ejection seat training will be provided to appropriate aircrew as required by each contractor for their respective aircraft." (*Id.*, p. 3).

102. The syllabus stated: "Each contractor provides their own training materials and training equipment." (*Id.*, p. 3).

103. The syllabus did not reference weapons employment envelopes, asymmetric flight or advise on post- release maneuvers. (*Id.*).

POST-CRASH LIGHT ATTACK DECISION

104. After the crash, the Air Force cancelled LAE II and ultimately abandoned a light attack program completely. (Exs. 54-55).

II. ARGUMENT

To assert the *Boyle* defense, Defendants must identify a military "specification" issued by the United States relating to the specific aspect of the A-29 that Plaintiffs assert is defective. They

cannot do so. The A-29 is an "off the shelf" platform. The United States never specified any aspect of the aircraft. Embraer designed the A-29 at the request of the Brazilian Air Force. In fact, the United States never even procured the A-29 for its own use before the crash: it had only facilitated foreign sales of the platform to countries like Afghanistan. And the United States never even entered into a contract with Embraer and EDSI at all. No case permitting the *Boyle* defense has such a remote connection to military procurement. Summary judgment should be granted on the defense.

A. The Summary Judgment Standard

Under Rule 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "The movant bears the initial burden of 'show[ing] that there is an absence of evidence to support the nonmoving party's case.'" *Herrera v. Santa Fe Pub. Schs.*, 956 F. Supp. 2d 1191, 1221 (D.N.M. 2013) (Browning, J.) (quoting *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991)).

The party opposing a motion for summary judgment must "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). Fed. R. Civ. P. 56(c)(1) provides: "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 purposes of the motion only), admissions, interrogatory answers, or other materials." It is not enough for the opposing party to a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." A*nderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (citations omitted). "'In responding to a motion for summary

judgment, a party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial.'" *Lopez v. Am. Baler Co.*, 2014 WL 1285448, at *11 (D.N.M. Mar. 27, 2014) (Browning, J.) (quoting *Colony Nat'l Ins. Co. v. Omer*, 2008 WL 2309005, at *1 (D. Kan. June 2, 2008) (internal quotations omitted)).

"To deny a motion for summary judgment, genuine factual issues must exist that 'can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Lopez,* 2014 WL 1285448, at *11 (Browning, J.) (quoting *Anderson*, 477 U.S. at 250). "A mere 'scintilla' of evidence will not avoid summary judgment." *Id.* (citing *Vitkus v. Beatrice Co.*, 11 F. 3d 1535, 1539 (10th Cir.1993)). "Rather, there must be sufficient evidence on which the factfinder could reasonably find for the nonmoving party." *Id.* (citing *Anderson*, 477 U.S. at 251). Finally, "there is no evidence for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable ... or is not significantly probative, ... summary judgment may be granted." *Anderson,* 477 U.S. 242, 249 (1986) (citations omitted).

B. The Government Contractor Defense is a Limited Affirmative Defense.

The government contractor defense is a very narrow affirmative defense under federal common law, which was announced by the Supreme Court in *Boyle*. 487 U.S. at 504; *see also Snell v. Bell Helicopters*, 107 F.3d 744, 746 (9th Cir. 1997) ("The military contractor defense is an affirmative defense; Bell has the burden of establishing it."). The defense only applies only when there is a "significant conflict" between a government design specification and a state products liability standard. *See id.* at 508 ("[C]onflict there must be."). Under *Boyle*, a contractor may avoid liability only if a jury finds that a defective product complies with conflicting federal specifications used to design the product. *Boyle*, 487 U.S. at 500.

The defense is known as "[t]he Government made me do it" defense. *See Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 435–36 (5th Cir. 2000); *In re Joint Eastern and Southern Dist. N.Y. Absestos Litigation*, 897 F.2d 626, 632 (2d Cir. 1990). Its purpose is to protect federal discretion in the design of privately manufactured equipment made at the request of the United States government, which sometimes involves a "trade-off between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511. The premise of the defense (entirely absent here) is that the United States, in a contract, required the defendant to design the product in a way that conflicts with state law standards. *See, e.g.*, *id.* at 509 ("[T]he state-imposed duty of care that is the asserted basis of the contractor's liability is precisely contrary to the duty imposed by the Government contract.").

In *Boyle*, a United States Marine survived a helicopter crash on the Atlantic Ocean but drowned because the aircraft's escape hatch could not open against the pressure of the ocean water. *Id.* at 502. The pilot's father argued that the escape hatch was defectively designed under state law because it opened outwards, not inwards. *Id.* The defendants asserted that the United States specified the escape-hatch design and deference to that specification immunized the contractor from conflicting state law standards. *Id.* at 503.

No statute permitted this immunity, so the Court questioned whether it had authority to create the defense in the first place. *Id.* The Court concluded that it did because "civil liabilities arising out of the performance of federal procurement contracts" present "uniquely federal" interests, that may, in narrow circumstances, justify federal common law preemption of state tort law. *Id.* at 504-05; *but see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law."). The Court reasoned that, absent the defense, contractor liability for design decisions made by the government could result in judicial "second-guessing" of military judgments. *Id.* at 511 (internal quotation marks omitted).

The Court, however, also held that where the government buys items "off-the-shelf," the defense simply does not apply. That is because there is no federal discretion to protect:

> If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

Id. at 509 (emphasis added). Later in the opinion, the Court emphasized that items "purchased from stock" are not protected by the defense. *Id.* at 510. In such instances, the manufacturer creates the defective design independently of any government requirements and, therefore, liability for that defect does not interfere with government requirements. *Id.*

To obtain *Boyle* immunity, the defendant must establish to a jury that: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.* at 512. Requiring compliance with reasonably precise specifications "assure[s] that the design feature in question was considered by a Government officer, and not merely by the contractor itself." *Id.* And ensuring that the defendant told the government about the product's known dangers removes an incentive to "withhold knowledge of risks" that the defense would otherwise create. *Id.* at 512-13 ("We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.").

C. The Military Never Issued or Approved any Specifications for the A-29.

To present the *Boyle* defense to a jury, the defendant must identify "reasonably precise specifications" addressing the alleged defects. Defendants fail to do so. No doubt recognizing that it cannot identify reasonably precise specifications, SNC takes a shotgun approach, contending

that virtually every written document associated with LAE II is a "specification" under *Boyle*. (Ex. 52, ¶ 7). But, in fact, none of them are. *See infra*, p. 20-25. Embraer uses the opposite strategy: it refuses to identify any specifications. (Ex. 53, ¶ 11).

A military specification is a "document prepared specifically to support acquisition that clearly and accurately describes the technical requirements for a purchased material." 41. C.F.R. § 101-29.201. *See, e.g.*, *Getz v. Boeing Co.*, 654 F.3d 852, 861 (9th Cir. 2011) ("Specification AV–E–8593D also required Honeywell to submit a proposed 'complete engine specification' for governmental approval."). *Determan v. Boeing Company*, 294 F.Supp.3d 1005, 1010 (D. Hi. 2018) ("[E]very specification in Detail Specification 572–1 that was incorporated into the FSD Contract was approved by [the Navy]."). Without dispute, no military specifications were ever issued by the United States for the design of the A-29.

If the defective design is not contained in a formal military specification, a defendant invoking *Boyle* must identify a "'continuous back and forth' as to the design feature in question during which the government manifests its substantive review and approval of a reasonably specific design for the allegedly defective feature." *In re 3M Combat Arms Earplug Products Liability Litigation*, 474 F. Supp. 3d 1231, 1251 (N.D. Fl. 2020) (citing *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1320-21 (11th Cir. 1989).) But even these cases require an underlying development contract. The "common thread woven" through these cases, "aside from the existence of a government contract for the design or development of something, of course—is receipt and substantive review of detailed design descriptions, drawings and/or blueprints by government officials." *Id.* at 1256. The absence of both a procurement contract and "substantive review and approval" of the design features in question "dooms the government contractor defense." *Id.*

The government's desire to purchase an existing product with certain features does not transform those features into specifications. In *3M*, for example, the plaintiffs alleged that an

earplug purchased by the Army from the defendants was defective because its stem was too short. *Id.* at 1242. The defendants shortened the stem in order to market the device to the Army, which had conditioned a potential purchase on that modification. *Id.* at 1239. The court disagreed that this condition was a "specification" under *Boyle*. The court reasoned that the manufacturer's "actions changing the length of the [earplug's] stem were not compelled by the terms of any government contract." *Id.* at 1249. Absent a contract for procurement, the "uniquely federal interest" identified in *Boyle* (the risk that liability costs of a specified design would be borne by the government) was simply not present. *Id.*

Plaintiffs' case is even further removed from *Boyle* than *3M* was. In *3M*, the United States actually bought the defective earplugs before they injured the plaintiff. Here, in contrast, Defendants cannot identify a government purchase. There is none: LT Short was killed in the course of the government's *contemplation* of a procurement of the A-29, an aircraft that SNC concedes was "completely developed by the time SNC got involved with the airplane." (SOF, ¶ 58). The United States military never bought the A-29 prior to the crash for its own use. It only considered doing so, and declined. (SOF, ¶ 103). The absence of any procurement is fatal to Defendants' assertion of the defense. *See Boyle*, 487 U.S. at 507 ("That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes *a **necessary**, not a sufficient, condition* for the displacement of state law." (emphasis added)).

Here, as in *3M*, there are no government specifications for the defendants to rely on. There is not even a procurement in the first place. Both are required to properly invoke the government contractor defense. As it relates to Embraer and EDSI, there is not even a government contract for

the court to assess. (SOF, ¶ 69).[3] Absent these basic elements, there cannot be a "significant conflict" between federal discretion and state law justifying the exceedingly narrow *Boyle* defense. 487 U.S. at 509.

D. The Documents Relied on by Defendants are not "Reasonably Precise Specifications."

Considering the documents Defendants identify as "specifications" only makes it clearer that *Boyle* does not apply to this case.

The OTP and the ITP

In interrogatory responses, SNC identifies the sole contract relating to LAE II, the Other Transaction for Prototype Agreement ("OTP") as providing specifications to support its government contractor defense. (Ex. 52, ¶ 7). This is a contract, but it does not contain any specifications for the A-29. (Ex. 35). To the contrary, it states that the purpose of LAE II is merely to "gather[] additional data to support a potential acquisition program decision." (Ex. 35, p. 7). There is no mention of ejection seat selector settings or weapons stores at all. (Ex. 35). *See Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 799 (5th Cir. 1993) ("*Boyle* makes clear that the requirements of 'reasonably precise specifications' and conformity with them refer to the particular feature of the product claimed to be defective."); *see also Lofgren v. Polaris Indus. Inc.*, No. 3:16-CV-02811, 2021 WL 2580047, at *5 (M.D. Tenn. June 23, 2021) ("[T]he courts look at the particular design feature to review whether the government had been involved in a continuous give and take with respect to that feature.")

Nor are there specifications in the Invitation to Participate ("ITP II") in LAE II, also relied on by SNC. (Ex. 52, ¶ 7). The ITP II contains only "threshold requirements" that the Air Force

[3] In a Request for Admission, Plaintiff asked Embraer to admit it is not party to any agreement with the United States related to LAE II. Embraer's complete response: "EMB objects to this request as impermissibly vague, as the term "party" can mean multiple things, both factual and legal, depending on the context in which the term is used." (Ex. 53, RFA No.1).

intended to evaluate as part of LAE II. (Ex. 2, p. 4). Construing these as design specifications puts the cart before the horse: the very point of LAE II was for the Air Force "to determine if light attack platforms meet the threshold requirements identified in Annex 1" in the first instance. (*Id.*, p. 1). These cannot be specifications.

Even assuming they are, the ITP II is not "reasonably precise" as a matter of law. *See also Snell,* 107 F.3d at 748 ("When only minimal or very general requirements are set for the contractor by the United States the [military contractor defense] is inapplicable."). The ITP II contains just two sentences on ejections seats: "The aircraft must have dual tandem zero airspeed and zero altitude ejection capability, accommodating pilots 64 inches - 77 inches tall and sitting heights of 34 inches – 40 inches. Ejection seat must allow use of standard US harness I survival kit I life preserver units (LPU) I protective gear." (Ex. 2, p. 5).

Similarly, the ITP II simply identifies desired weapons configurations, called "Standardized Conventional Loads" but provides explicitly that "[t]hese loadouts are not definitive and may be modified based on unique aircraft considerations." (*Id.*, p. 11). Again, the document is forward-looking, anticipating a *potential* future acquisition: the purpose of the demonstration was for the Air Force to determine if an existing product met its threshold requirements regarding weapons stores. (*See Id.*, p. 6, ("At initial delivery, the aircraft must be capable of carrying and delivering the weapons associated with the standard conventional loads . . . . ")). Ultimately, the A-29 was not to the Air Force's liking. After the crash, the Air Force issued a report stating, "[t]he A-29 does not meet MIL-STD 17978 for lateral stick forces when loaded asymmetrically with 500-pound ordnance" and abandoned its potential light attack acquisition program. (SOF, ¶ 14).

Critically, nowhere does the ITP II define the minimum employment speed of a GBU-12 bomb. (Ex. 2). And the United States had absolutely no participation in the review, design or development of the 547 Configuration's envelope, which is the "design feature" at issue in this

case. Rather, those limitations were created exclusively using Embraer point papers and engineering documents. (SOF, ¶ 73). To invoke the *Boyle* defense, a defendant must show evidence that the government specified the "design feature" in question. *Harduvel*, 878 F.2d at 1320-21. The ITP II does not do so.

The MFR Does Not Contain "Reasonably Precise Specifications"

Next, SNC asserts that the Military Flight Release and associated documents granting Aircraft 221 legal authority to operate during LAE II qualify as "reasonably precise specifications" under *Boyle*. (Ex. 52, ¶ 7). If such were the case, every aircraft operated by the United States military would be protected by the government contractor defense. That is because "[a]ll aircraft and air systems owned, leased, operated, used, designed, or modified by DoD must have completed an AW [airworthiness] assessment in accordance with Military Department policy." (Ex. 62, DOD 5030.61). All military aircraft must complete this assessment to obtain a legal authorization, such as a MFR, to fly. (*Id.*). As the Court in *Boyle* made clear, just because an aircraft is operated by the military does not mean a manufacturer can invoke the defense. *See Boyle*, 487 U.S. at 509 (noting that military helicopters purchased from stock are not covered by *Boyle*).

Furthermore, the criteria met to obtain a MFR are not specifications, they are minimum airworthiness standards. *Snell*, 107 F.3d at 748 ("When only minimal or very general requirements are set for the contractor by the United States the [military contractor defense] is inapplicable."). A MFR is the least comprehensive airworthiness certification available from the Air Force. *See* Ex. 34, Bulletin AWB-1009. MFRs are, by definition, extremely limited in time and scope. *See id.* p. 4 (noting MFRs are applicable "for a defined period of time."). The MFR that Aircraft 221 operated under, for example, expired on August 7 or 175 flight hours, whichever occurred first. (Ex. 56). A document that permits an airplane to fly for only 175 hours cannot possibly constitute design approval under *Boyle*.

To obtain a MFR, an aircraft must meet identified criteria contained in Military Handbook 516, Airworthiness Certification Criteria. (Ex 48, 57:14-19). That Handbook repeatedly states: "The following criteria, standards and methods of compliance apply to all air systems and represent the minimum requirements necessary to establish, verify, and maintain an airworthy design." (Ex. 49, p. 2). Such "minimum" standards, applicable to virtually *every* military aircraft, are by definition, not "reasonably precise." Nor are they "specifications" and plaintiffs are unaware of any defendant ever asserting otherwise. After all, the handbook explicitly states: "This handbook is for guidance only and cannot be cited as a requirement." *Id*. Finally, nothing in the handbook conflicts with Plaintiffs' theories of liability anyway. *See infra* p. 26-27 (discussing omissions made by SNC in airworthiness process); *see Boyle*, 487 U.S. at 504 ("[C]onflict there must be.").

MIL-HDBK-1797B

SNC also contends that another Military Handbook, 1797B, "Flying Qualities of Piloted Aircraft" contains military specifications that SNC complied with. (Ex. 52 to SOF, ¶ 7). But this assertion contradicts post-crash statements of SNC principal pilot, Brian Maas, who insisted that "MIL-STD-1797B has not been cited in any iteration of the Rapid Fielding Specification." (Ex. 12, p. 2). And, again, as the Air Force determined after the crash, "[t]he A-29 does not meet MIL-STD 1797B for lateral stick forces when loaded asymmetrically with 500-pound ordnance." (SOF, ¶ 14). Thus, even if 1797B can be deemed a specification, the A-29 did not comply with it.

Squadron Standards

SNC next cites two Air Force documents containing "squadron standards," contending these are "reasonably precise specifications" under *Boyle*. (Ex. 52, ¶ 7). The standards are from LAE II and the 81st Flight Squadron at Moody Air Force Base, where SNC instructed A-29 pilots as part of a separate program involving sales of the aircraft to Afghanistan. (Exs. 42-43). The cited standards are generalized guidelines concerning operation of squadron aircraft that are, by their

express terms, not mandatory. (*See* Ex. 42, p.1 ("Nothing in these standards alleviates the pilot's responsibility to know and adhere to all procedures and restrictions found in applicable T.O.'s, regulations, and publications.")). Moreover, the fact that SNC relies on standards from two different squadrons fatally undermines any argument that either is mandatory.

The standards do not contain any reference to a weapons release envelope, in any event. Indeed, there is no discussion of a weapons release at all. (Exs. 42-43). And while the LAE II standards recommend that the ejection selector in the A-29 be set to NORMAL, that instruction was only added in response to SNC's incorrect instruction that the AFT setting may not be used. (Ex. 24, ¶ 22). This is clear from the recommendation for the AT6 Wolverine, contained in the same standards. (Ex. 42, p. 2). The standards state that DUAL (the equivalent of AFT mode in the AT6) should be used. (*Id.* at 2). Finally, and fatally, SNC did not comply with the very standard it relies on. It instructed LT Short to fly the A-29 in SINGLE, which directly refutes its contention that the documents are mandatory specifications under *Boyle* that SNC was forced to comply with.

LAE II Syllabus

Finally, SNC contends the standard Air Force syllabus provided to participants in LAE II is a *Boyle* specification. (Ex. 52, ¶ 7). But the syllabus is not a design specification. And it is not reasonably precise. The syllabus contains general instructional topics that were used for *both* the A-29 and AT6. (Ex. 51, p 1). In addition, the syllabus required that each contractor "provide[s] their own training materials and training equipment." (*Id.* at p. 3). As a result, the syllabus makes no reference to ejection selector settings, weapons employment envelopes, or asymmetric flight. (*Id.*). The general outline contained in the LAE II syllabus is not a specification and it cannot immunize SNC for providing incorrect instruction to LT Short.

There Are No A-29 "Reasonably Precise Specifications"

The remaining "specifications" identified by SNC are so broad that they are meaningless.

"[A]ircraft 221's technical publications," "engineering reports," and "point papers" were all written by the defendants. Vague references to unidentified "LAE II mission summary sheets," "gradebooks" and "grade sheets" are also unavailing. (Ex. 52, ¶ 7). These consist primarily of descriptions of LAE II flights, most of which were conducted by SNC personnel, which was the only entity to instruct the LAE II flight crews. (SOF, ¶ 34). Such "speculation" will not protect a defendant from summary judgment. *Lopez*, 2014 WL 1285448, at *11 (internal quotation marks omitted). SNC's limitless approach to *Boyle*, asserting that essentially every written document associated with LAE II is a specification, only undermines its defense.

E. The A-29 Did Not Even Conform with General Standards.

Even assuming that the identified documents are specifications, the A-29 did not conform to them, and defendants failed to warn the Air Force about defects in the design of the aircraft known to defendants but not the United States.

In order to obtain the military flight release for Aircraft 221, SNC worked in collaboration with Embraer to identify any areas of non-compliance with MIL-HDBK-516. (SOF, ¶ 89). For example, SNC had to assess the A-29 aircraft flight manual's safe release envelope. (SOF, ¶ 90). SNC recommended compliance with this standard, even though: (1) its principal pilot concedes 185 knots, well above the minimum speed in the aircraft's flight envelope, is the "minimum acceptable" airspeed for a GBU-12 employment; and (2) Embraer does not believe 1.5 VS is an appropriate minimum employment speed, even though the stated minimum employment speed in the A-29 manual provided by SNC was 1.2 VS. (SOF, ¶¶ 12-13). This is shown from the Air Force's risk acceptance memorandum, which does not identify either of these analyzed risks. (Ex. 58).

In addition, as it relates to the ejection seats, SNC had to assess compliance with the minimum criteria contained in section 9.4.2, which mandated that SNC "verify that all relevant

documents [are] not in conflict with systems descriptions and procedures . . . .[and] that all procedures are clear." (SOF, ¶ 93). Similarly, SNC was to "[v]erify that technical manuals, technical orders and publications [were] accurate and complete for all tasks that may have flight safety effects." (SOF, ¶ 92). In recommending compliance with these provisions, SNC never told the Air Force that AFT mode would be restricted or that Aircraft 221 could be flown safely in AFT. (SOF, ¶¶ 94-96). This too is shown from the Air Force's risk acceptance memorandum, which does not contain reference to such risks. (Ex. 58). Assuming SNC's vaguely identified specifications are deemed legally sufficient, summary judgment is appropriate because the defendants did not adequately warn the government about the dangers of the A-29 that are the focus of plaintiffs' claims.

F. *Boyle Does not Apply to Negligence Claims.*

Lastly, regardless of the Court's ruling on the foregoing, *Boyle* does not apply to Plaintiffs' negligence claims. *See In re 3M*, 474 F. Supp. 3d at 1260 ("Defendants concede that the defense applies only to design defect and failure-to-warn claims."). The government contractor defense does not protect contractors who breach duties of care to military service members. *See, e.g.*, *Asbestos Litigation*, 897 F.2d at 632 ("Boyle displaces state law only when the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion."). Even if the defense does apply to negligence claims, there is no conflict of duties. The defendants were required to disclose inaccurate information about the operation of Aircraft 221. They failed to do so.

III. CONCLUSION

Plaintiffs motion for summary judgment should be granted. Plaintiffs request an order precluding the defendants from asserting the government contractor defense at trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on March 15, 2024, a copy of the attached motion was served on the following counsel via e-mail.

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