

Selected docket entries for case 22-1405

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

Appeal No. 22-1405

**THOMAS STALCUP,
Plaintiff-Appellant**

v.

**UNITED STATES DEPARTMENT OF DEFENSE,
Defendant-Appellee**

**APPELLANT'S CERTIFIED MOTION
FOR THIS COURT TO TAKE NOTICE OF NEW EVIDENCE**

Plaintiff/Appellant Stalcup prays that this Honorable Court take judicial notice of a new, material development from the related wrongful death case Krick, et. al. v. Raytheon Company, et. al. (1:22-CV-11032-AK). That case is now pending in the United States District Court for the District of Massachusetts. During a recent inspection of the reconstructed jetliner in Virginia by the families' experts, new evidence has emerged that US government personnel altered physical evidence in a manner that conceals the effects of external forces that caused the crash. This new evidence is relevant to arguments under consideration here.

In accordance with the principles articulated in Landy v. Federal Deposit Insurance Corp., 486 F.2d at 151 (3d Cir.1973), cert. denied, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974), this Court should take judicial notice of this development during a case now pending in the same Court that ruled on the present matter. This notice is respectfully requested for the limited purpose of bolstering

Stalcup's argument that he be provided with improperly transferred records, which relies on a showing of “suspect happenings” in the aftermath of the crash of TWA Flight 800. *See* Br. at 21, 42, and 43; and Appellant's Reply Brief at 24 – 27 (quoting from the Reply Brief at 26).

Magistrate Judge Donald Cabell describing FBI agents entering Naval facilities and removing radar tapes that could have recorded the TWA Flight 800 incident as “very stark and . . . ominous” is already a matter of record. D.176, 10/30/19 Magistrate Hearing, 2:15:07. However, that episode may now be eclipsed by newly discovered and potentially highly disturbing evidence which was not available at the time Stalcup filed his Reply Brief, suggesting that FBI personnel altered one or more fuselage components in order to conceal the effects of a missile blast. Given the potential gravity of this new revelation, this Honorable Court should consider this evidence when evaluating Stalcup's arguments and the merits of his appeal.

From the moment TWA Flight 800 crashed, Appellee DOD, in coordination with other government agencies and individuals, mishandled evidence of a widely reported detonation of a missile near TWA Flight 800, which caused the forward and rear sections of the jetliner to fall into separate debris fields. Certain lower-left fuselage parts that were directly affected by the missile fell into the earliest debris field, known as the “red zone”, and were found to exhibit evidence of inward and upward damage from that detonation. Left Fuselage 14A (“LF-24A”), in particular,

was severely curled inward and over itself by “180” degrees into the cargo bay beneath the passenger cabin. Notably, this part is now completely flat and devoid of any such inward curl. The authenticity of this physical evidence is supported by Exhibits 1 and 2.

Plaintiff/Appellant Stalcup was unaware of the alteration of LF-24A at the time he filed his Reply Brief with this Court. As such, his prior arguments that rely on a showing of “suspect happenings” (Appellant's Reply Brief at 26) involving the FBI were incomplete and partly based on circumstantial evidence, including the timing of the transfer of radar records to the FBI and the proximity of the respective missile test sites to the TWA Flight 800 incident. However, the new physical evidence is far more compelling and indicates that FBI personnel tampered with evidence in order to conceal the effects of the missile. This further supports Stalcup's contention that the FBI's withholding of radar and other evidence, at the direction of the DOD and military personnel, reflects a pattern of suspicious activity by the government in relation to this incident. As such, and based on case law cited below and in Stalcup's briefs, this Honorable Court should reverse the District Court's order allowing the DOD to continue withholding responsive radar and other records which were placed into FBI custody soon after the incident, which, like the alteration of part LF-24A, successfully concealed evidence of a missile causing the crash.

Stalcup respectfully requests that this Honorable Court take notice of the newly discovered and material evidence and fully consider it when making its ruling on this matter. Pursuant to 28 U.S. Code § 2106, he urges this Court to exercise its power to modify, vacate, set aside, or reverse the district court's prior decisions denying Stalcup's motion to compel the FBI to produce responsive radar tapes (ADD-51) and ruling that the DOD “need not further search” the FBI (ADD-39). Stalcup maintains that these prior rulings were wrong and not fair and just at the time, and they have now been rendered even more invalid by the new evidence.

The Facts

1. This FOIA case involves records from the July 17, 1996 crash of TWA Flight 800, a 747 that broke in half in midair (at 13,800 feet) approximately nine miles south of Long Island, NY, and fell to the sea in flames.
2. Based on the new evidence presented herein, it appears that there has been significant spoliation of a fuselage component located precisely where the jetliner broke in two.
3. The facts and circumstances of the crash, as well as suspicious government activity related to the handling of responsive records and other evidence is materially relevant to this case.
4. More than sixty eyewitnesses on nearby beaches and boats saw a missile rise from the surface and cause the crash.

5. During Appellant Stalcup's discovery period in this action, he confirmed for the first time that US aerial drones (used as missile targets in 1996) were flying near TWA Flight 800 approximately when it went down.
6. As part of a missile test overseen by DOD, one or more US interceptor missiles were then fired at these drones.
7. One of the interceptor missiles went off course and detonated below TWA Flight 800.
8. As a result, the jetliner's lower fuselage was severely deformed inward in milliseconds, bending over itself by 180 degrees (see Ex. 1) and causing parts of the lower fuselage to separate and disperse into the debris field closest to JFK Airport known as the "red zone."
9. The nose section of the plane broke away and fell further along the flight path and into another debris field known as the "yellow zone," while the rear section, with the wings, continued onward and fell into the furthest debris field known as the "green zone".
10. Left Fuselage 24A (LF-24A), a large wreckage item located in the red zone, was severely affected by the missile detonation and had an inward curl of 180 degrees, as labeled by the NTSB. Ex. 1.
11. Stalcup's certified court filing at the district level confirmed for the first time that US government missile test assets were present near TWA Flight 800 at the time of the crash.

12. After that filing, the National Transportation Safety Board (“NTSB”) announced the destruction of the TWA Flight 800 reconstruction.
13. Family members of the crash victims were subsequently informed about Navy missile targets flying near TWA Flight 800 when it crashed and about the NTSB's plan to destroy the reconstruction.
14. Some family members consulted a national law firm, and then, on the families' behalf, an attorney from that firm sent the NTSB an evidence preservation letter.
15. The firm then filed the wrongful death case Krick, et. al. v. Raytheon Company, et. al. (1:22-CV-11032-AK) against the DOD, the US Navy, Raytheon Company, and Lockheed Martin for wrongful death in the federal District Court in Boston, MA.
16. On January 26, 2023, the NTSB allowed the law firm and their consultants, including Appellant Dr. Tom Stalcup, to visually inspect the reconstructed wreckage of TWA Flight 800 at the NTSB Training Facility in Ashburn, VA.
17. The reconstruction is made up of thousands of individual parts, which investigators pieced back together like a jigsaw puzzle.
18. The lower-left section of the fuselage just forward of the wings is comprised of pieces directly affected by external forces in midair. These pieces were recovered widely dispersed from one another in the earliest debris field (the

red zone), and when pieced back together, they all indicated the same external event.

19. The part in this area most obviously affected by external forces is Left

Fuselage 24A or LF-24A. This part was curled severely inward and over itself by 180 degrees. Ex. 1.

20. Upon analyzing photos from the families' recent inspection, Stalcup

discovered that LF-24A had been flattened, and it no longer has its inward curl, severe or otherwise. Ex. 2.

21. Stalcup was previously unaware of this alteration before the inspection, and

this newly discovered physical evidence of tampering demonstrates government impropriety and strengthens Stalcup's previously briefed arguments.

22. Stalcup has exchanged letters with the NTSB General Counsel's office

concerning this alteration as it relates to this case, most recently receiving a

letter from the NTSB two days ago on May 3, 2023, in which the NTSB

restated its intention to destroy the entire reconstruction, including part LF-

24A. In its response to a letter from Stalcup specifically asking for additional

photos to determine when the part was altered, the NTSB did not provide any

additional photos or other evidence to support any explanation for how, when,

or why LF-24A was altered.

DISCUSSION

As noted in Landy v. Federal Deposit Insurance Corp., 486 F.2d at 151 (3d Cir.1973), an appellate court generally considers only the record and facts presented at the district court level. However, there are limited exceptions to this rule, such as when an appellate court takes judicial notice of new developments not considered by the lower court. In Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1971), the Ninth Circuit recognized this exception, which may include relevant administrative action, filings, motions, orders, and decisions. The United States Supreme Court in McQuiggin v. Perkins, 569 US 383, 132 S.Ct. 1335 (2013), has held that in appropriate circumstances, exceptions to customary procedures may be permitted, provided that “new evidence shows it is more likely than not that no reasonable juror would have convicted”. (Internal quotations omitted). Although *McQuiggin* involves missed filing deadlines, the present situation involves a more compelling circumstance - the evidence in question was not known to exist before such deadlines. This fact renders it all the more persuasive that the new evidence should be taken into account in this case.

Furthermore, as stated in *Landy*, the justification for taking judicial notice is greater when the subsequent developments were in the “very court in which the suit was instituted.” Landy Id. Here, the new evidence of tampering was discovered during an inspection by the TWA Flight 800 families' experts for their case in the Massachusetts federal district court, which is the same court that heard and ruled on

this case. The new evidence directly relates to the issues presented in this appeal, and its discovery during the related case from the same district should be considered a significant development. Therefore, it is appropriate for this Court to take judicial notice of this new evidence and consider it when ruling on the present case.

In Judicial Watch v. US Dept. of Commerce, 34 F. Supp. 2d 28, 41 (D.C. Cir. 1998), because an agency apparently “engaged in the illegal withholding of responsive documents [and] in the removal of such documents from the” agency, the D.C. Circuit Court ordered “further discovery under the rigorous supervision of a Magistrate Judge to explore the issue of unlawful destruction and removal of documents by” that agency. Likewise here, when taking notice of the new evidence, it appears that DOD, in concert with relevant nonparty agencies engaged in equally, if not more egregious illegal activity to conceal both responsive agency records and tell-tale damage to physical evidence for the single purpose of barring any scrutiny, public or otherwise, of its tragic mistake.

Considering the importance of this new evidence as it pertains to Appellants arguments now under consideration, this Court should take judicial notice of this development and fully consider it when ruling on this matter. The new evidence raises serious questions about the integrity of the government's handling of evidence, including both wreckage items and radar tapes that recorded the tragedy.

SUMMARY

Plaintiff/Appellant Stalcup requests that this Court take judicial notice of new evidence from a recent inspection during a related case in the District Court in Boston. The evidence suggests that FBI personnel altered fuselage components to conceal the effects of a missile that exploded near TWA Flight 800, which strengthens Stalcup's argument that the government has engaged in material improprieties related to the incident. Stalcup argues that this new evidence, which was not available when he filed his Reply Brief, bolsters his claims regarding the suspect activities involving the records at issue here, the handling of which Magistrate Judge Cabell called “stark” and “ominous”. Such activity is materially relevant to Stalcup's arguments, which were originally made without the benefit of the new evidence.

Plaintiff/Appellant Thomas Stalcup, under the pains and penalties of perjury, hereby certifies that this filing is true and accurate to the best of his knowledge, information, and belief.

May 5, 2023

/Thomas Stalcup/

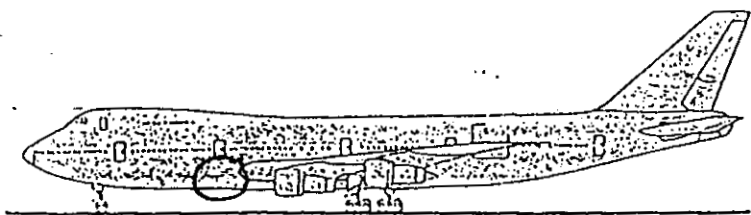
Thomas Stalcup, PhD, Pro Se
77 Pond Ave., Apt. 712C
Brookline, MA 02445
stalcupt@gmail.com

CERTIFICATE OF SERVICE

I, Thomas Stalcup, certify that this brief and its attachments should be served electronically upon opposing counsel and listed ECF users, simultaneously with this First Circuit CM/ECF filing.

May 5, 2023

/Thomas Stalcup/
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LOG # LF24TARGET # LLS 369COORD: LAT 40-38-26.LONG 72-38-34.1DEBRIS FIELD #3 (near)
Red

Ⓐ No I.D.

Ⓑ Red Tag # A252

Two belly skin panels adjacent to the belly skin panel identified as LFB.

Panel Ⓐ

This panel shares a fracture surface with LFB. No frames remain. 2 bays of 8-40 remain. No obvious signs of burning or soot. Panel is curled inbd as indicated.

Panel Ⓑ

Most of stringers 38 and 39 remain attached. No Frames. No obvious signs of burning or sooting.

REFER METALLURGY GROUP NOTES

REFER FIRE AND EXPLOSION GROUP NOTES FOR FIRE DAMAGE

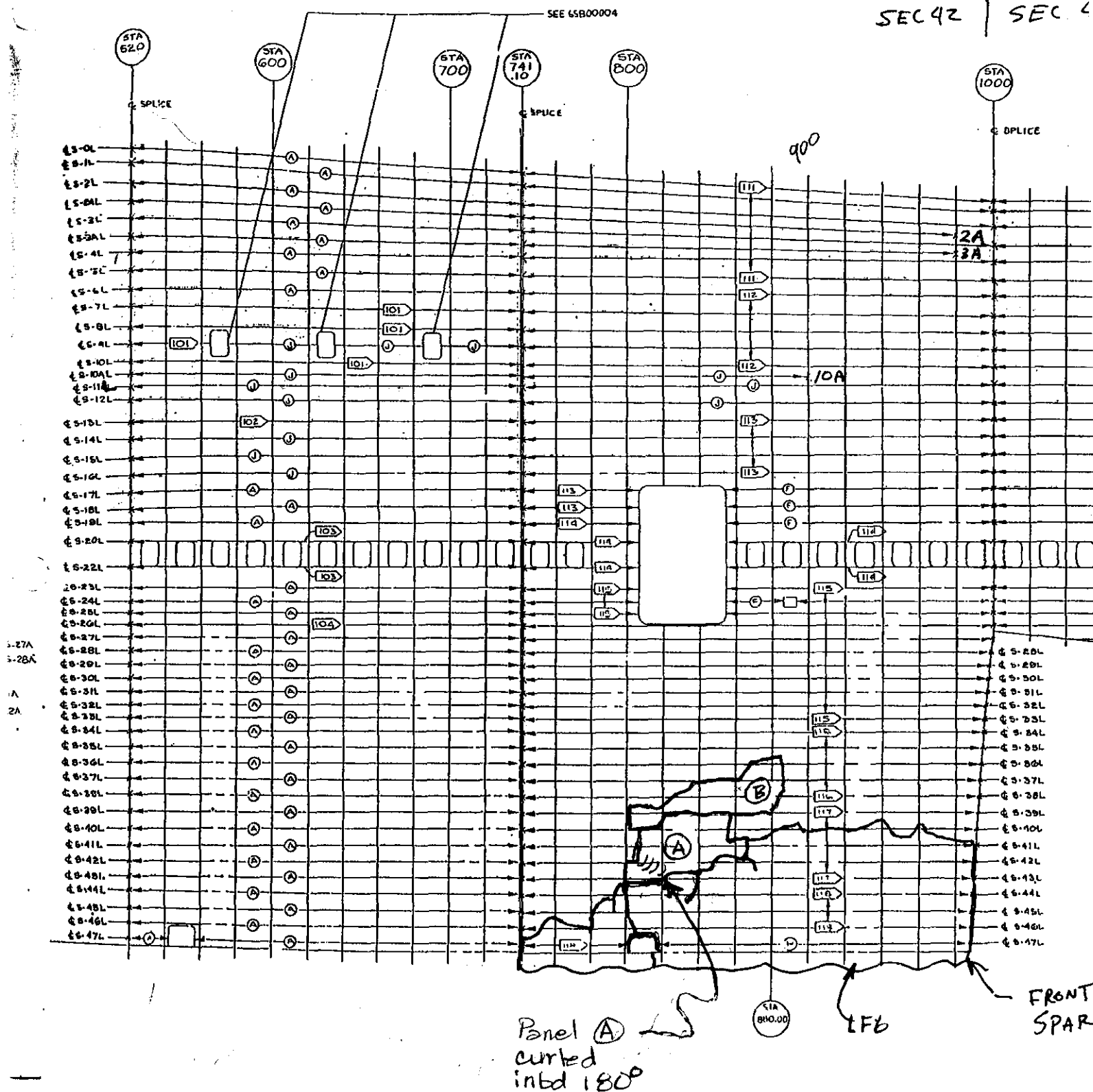
S. Chisholm
8/11/ab

Nail Scoville
TWA-10-6-96
Stephen F. Klupach JR
FBI 10-22-96
R. Brachetti
IAM 10-25-96

LF24

1 SEC 42

SEC 42 | SEC 4



65B000053

Stephen F. Klupahl sr
FDD 10-22-96

2



Structures 7 - LF24 - Photo 1

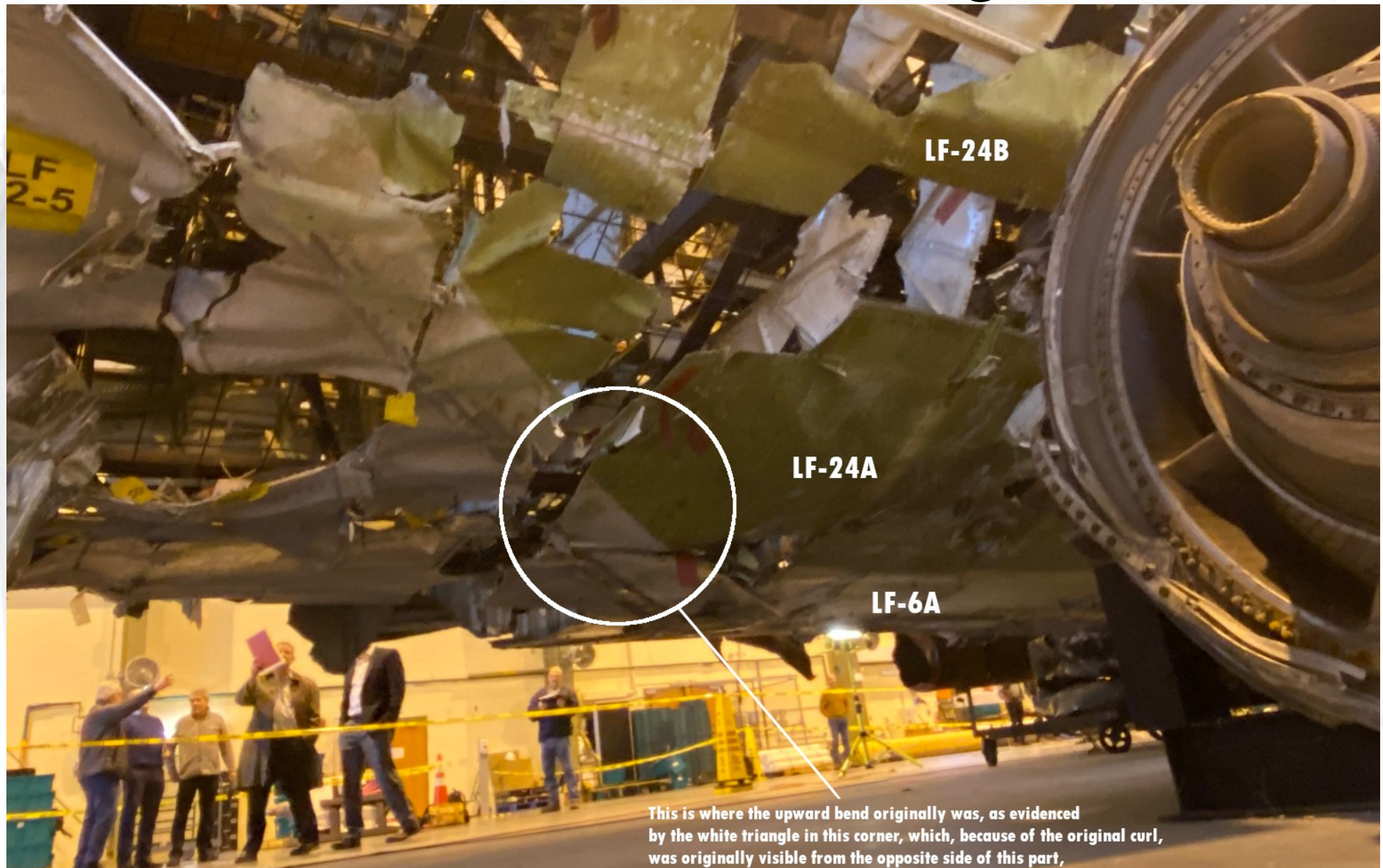


Structures 7 - LF24 - Photo 2

The Flattening of Wreckage Item LF-24A With a Preliminary* 3D Analysis.

*The 3D model of LF-24A presented herein is an approximation of the part's original shape, based on original NTSB photos. While not exact, its inward curl is closer to LF-24A's original condition than the part's current, flattened condition.

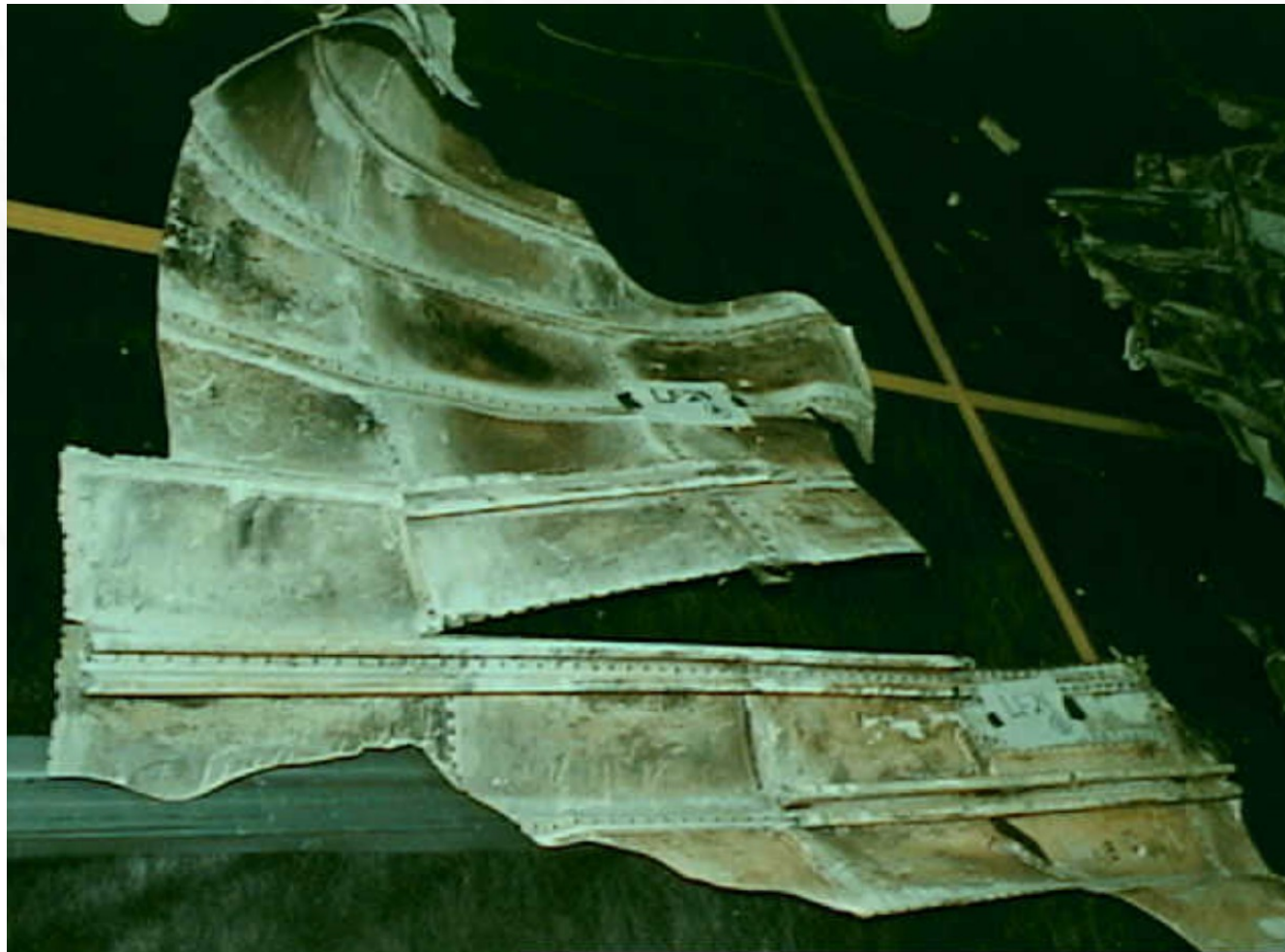
LF-24A and Surrounding Parts



Pre-altered LF-24A with mating part LF-24B

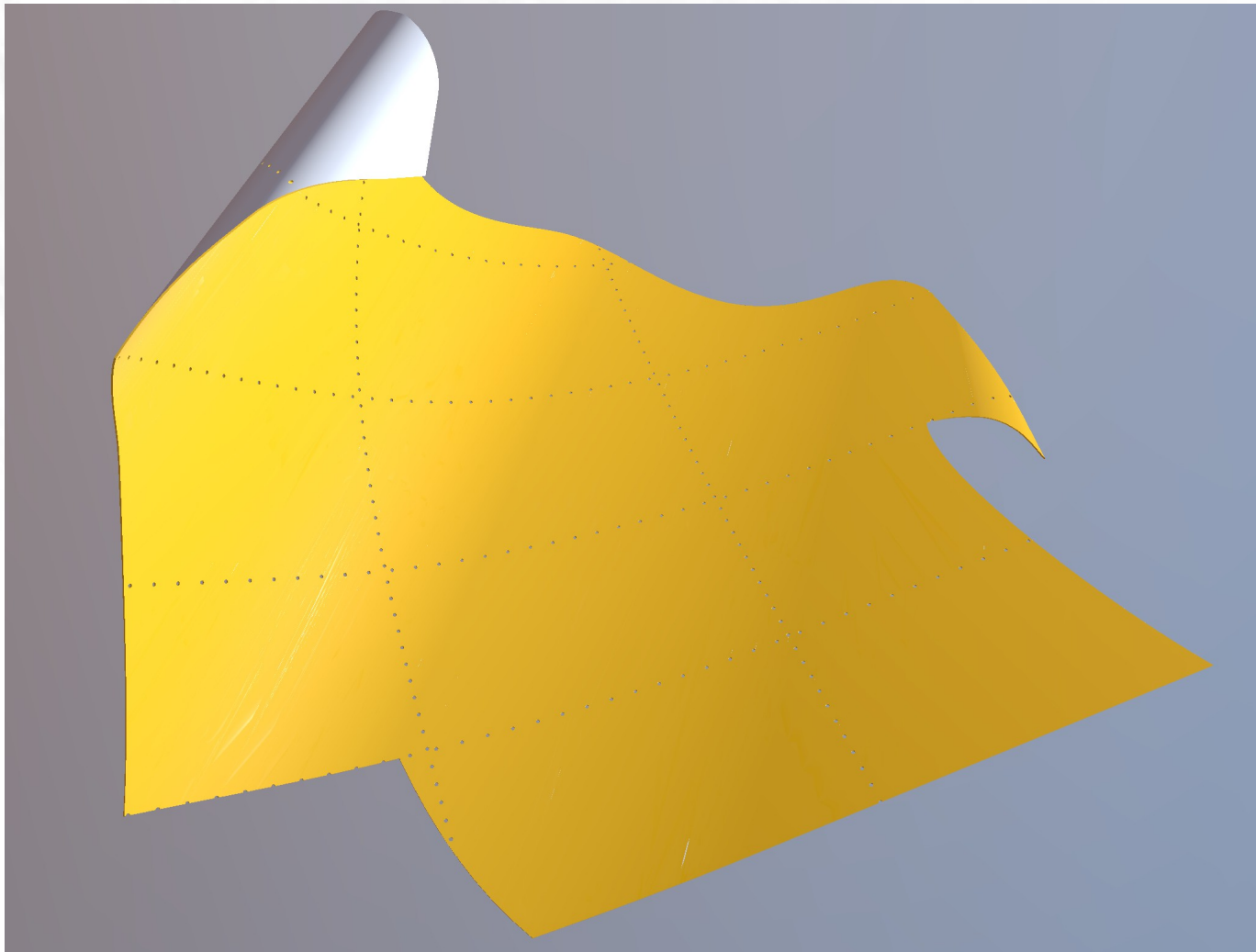
Source: NTSB Photo

Note: View of interior sides



Structures 7 - LF24 - Photo 1

LF-24A - 3D Rendered, Similar View as NTSB Photo 1



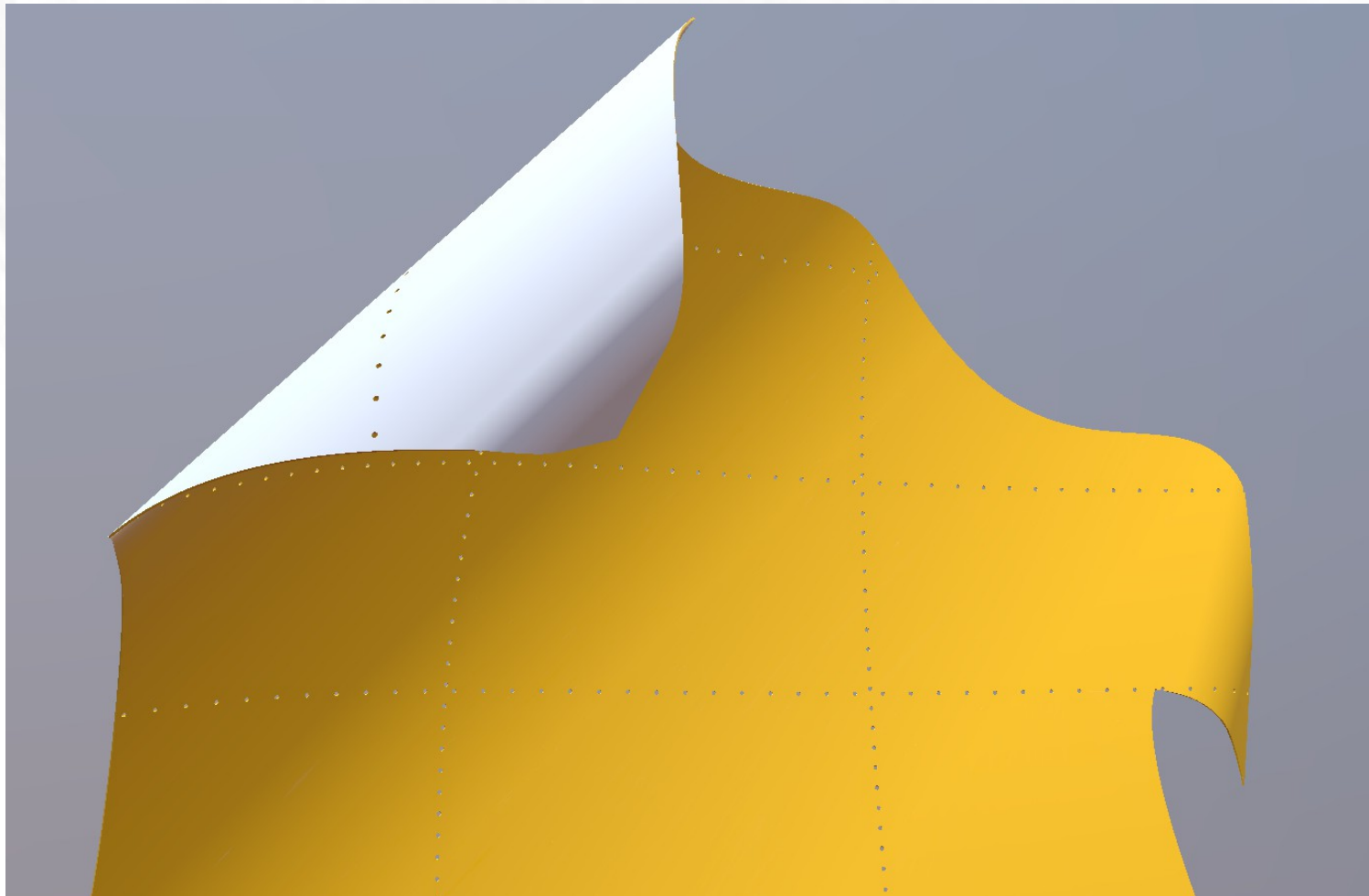
Pre-altered LF-24A

Source: NTSB Photo



Structures 7 - LF24 - Photo 2

LF-24A – Same 3D Rendering, Similar View as NTSB Photo 2



LF-24A Edited Away and Replaced by Same 3D Model



LF-24A in its Current, Altered State

