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Plaintiffs' Co-Lead Counsel

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES – CENTRAL CIVIL WEST**

**COORDINATION PROCEEDING
SPECIAL
TITLE [RULE 3.550]**

**JUDICIAL COUNCIL
COORDINATION PROCEEDING NO.
4788**

**FEDERAL EXPRESS VEHICLE
COLLISION CASES**

Case Number: BC552419
*Assigned for All Purposes to the Hon. John
Shepard Wiley, Jr., Dept. 311*

THIS DOCUMENT RELATES TO:

**PLAINTIFF'S MOTION IN LIMINE
NO. 2 TO EXCLUDE TESTIMONY,
REFERENCE TO, OR ARGUMENT
REGARDING CHP MAIT REPORT
AND CHP OFFICERS OPINIONS AND
CONCLUSIONS AND OTHER
INADMISSIBLE HEARSAY**

HARLEY HOYT, an individual,

Plaintiffs,

v.

**(Concurrently Filed with Declaration of
Christine Spagnoli and Exhibits 1 – 13)**

FEDERAL EXPRESS CORPORATION dba
FEDEX CORPORATION, a corporation;
FEDEX FREIGHT, 1NC. dba FEDEX
FREIGHT, a corporation; SILVERADO
STAGES, INC., a California Corporation; and
DOES 1-50, inclusive,

Date: September 26, 2017
Time: 10:00 a.m.
Dept: 311

Defendants.

Action Filed: July 22, 2014
Trial Date: October 4, 2017

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TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD HEREIN:
Plaintiffs respectfully move the Court for the issuance of the following Orders in *limine*:

1. An Order prohibiting the attorneys for all parties from offering any evidence and prohibiting all attorneys and witness from making any references in the presence of jurors or prospective jurors to certain opinions and/or conclusions of California Highway Patrol Officers and Investigators, as well excerpts from MAIT Report containing such opinions and conclusions and other inadmissible hearsay.

2. An Order requiring the attorneys for all parties to instruct all parties, and any persons who may be called as witnesses, of the Court’s exclusionary order on this Motion.

3. An Order that no attorney, party or witness shall make any reference to the filing of this Motion, whether it be granted or denied.

This Motion is made and based on the following grounds:

1. The above-described orders are necessary to ensure that plaintiffs will be accorded a fair trial and that the trial record will not be tainted with reversible error to the prejudice of plaintiffs.

2. Certain opinions and conclusions from the CHP Officers and Investigators and other information contained in the MAIT Report lack foundation, are speculative and constitute inadmissible hearsay.

3. Because opinions and conclusions and hearsay from the MAIT Report at issue are not independently admissible, they may not be relied upon by FedEx experts in support of their opinions. *See People v. Sanchez* (2016) 63 Cal. 4th 665, 684: “An expert’s opinion testimony like any other hearsay evidence, “must be properly admitted through an applicable hearsay exception.” An expert cannot “relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.”

1 4. The evidence at issue is irrelevant and its admission would be highly prejudicial,
2 would confuse the issues, and mislead the jury. This Court should therefore exercise its discretion
3 to exclude the “evidence” at issue pursuant to Evidence Code §§ 350, 352.

4 This Motion is made and based upon all pleadings and papers on file in this action, upon the
5 Memorandum of Points and Authorities attached hereto, the accompanying Declaration of Christine
6 Spagnoli, and upon such further oral and documentary evidence as may be presented at the hearing
7 of this Motion.

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DATED: September 6, 2017

GREENE BROILLET & WHEELER, LLP

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12

Christine Spagnoli, Esq.
Christian Nickerson, Esq.
Plaintiffs’ Co-Lead Counsel

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DATED: September 6, 2017

KIESEL LAW LLP

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Paul Kiesel, Esq.
Mariana Aroditis, Esq.
Counsel for Plaintiff Harley Hoyt, Plaintiffs’
Liasion Counsel and Co-Lead Counsel

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This tragic matter arises out of a deadly and violent collision between a FedEx Freight, Inc. owned tractor pulling two trailers (hereinafter the “FedEx Vehicle”) and a charter bus owned and operated by Silverado Stages, Inc. (hereinafter the “Silverado Bus”). On April 10, 2014, at approximately 5:40 p.m., Timothy Paul Evans was driving the FedEx Vehicle on Interstate 5 southbound in the #2 lane near Orland, California, while in the course and scope of his employment with FedEx Freight Inc. (hereinafter “FXF”). As Evans drove south in the #2 lane, he activated the left turn signal and then steered the vehicle to the left, into the #1 lane. After the FXF truck completed its lane change into the #1 lane, Mr. Evans then steered left into the median, through the oleanders, and then entered the northbound lanes on Interstate 5. The FedEx Vehicle first hit a Nissan Altima in the #1 lane, occupied by Bonnie and Joe Duran, and then collided with the Silverado bus. A fire erupted on impact, which engulfed the FedEx Vehicle and the Silverado Bus before the vehicles came to rest. There were 45 passengers in the bus at the time of the collision, the majority of which were high school students being transported to Humboldt State University to participate in a college introductory program. Eight of these passengers and the bus driver sustained fatal injuries. The remaining passengers sustained personal injuries and emotional distress.

Following this tragic incident, the California Highway Patrol (“CHP”) and its Multidisciplinary Accident Investigation Team (“MAIT”) conducted an investigation and produced a report, which contained certain opinions and conclusions of its officers and investigators, as well as other information including diagrams of the scene reflecting surveys of the physical evidence documented by the officers; summaries of interviews with a number of percipient witnesses, bus

1 passengers and FedEx employees as well as the Durans and Evans’ wife; reports of mechanical
2 inspections performed on various components of the tractor, and reports of testing performed on
3 exemplar vehicles. *A true and correct copy of the MAIT Report is attached as Exhibit 1.*

4 A number of CHP MAIT team officers participated in various aspects of the investigation
5 that resulted in the 540 page report which was issued over a year after the April 10, 2014 crash. The
6 MAIT Team Leader was Sergeant Nate Parson, who testified that the primary focus of the MAIT
7 investigation was to determine whether Evans violated a vehicle code section when he crossed into
8 the median, or whether the collision was a result of some factor “other than driver.” *See, Ex. 2,*
9 *Parsons deposition at pgs. 87:21 – 88:5.*

10 Other team members from the Northern Division CHP office included Officer Horwath, Sgt.
11 Dugger, Officer Horner, Officer Mitchell, Officer Bowen, and Officer Hamman. The investigation
12 included many sub-parts including (1) photographing and surveying the physical evidence at the
13 scene; (2) interviews with surviving passengers and percipient witnesses; (3) mechanical inspections
14 of the remains of the vehicles; (4) consultation with the medical examiner who conducted autopsies
15 on FedEx driver Tim Evans and the nine occupants of the bus who were killed; (5) investigation
16 into the pre-crash activities and medical condition of Timothy Evans and the bus driver; (6) testing
17 of exemplar vehicles to determine the co-efficient of friction of the road, the audibility of rumble
18 strips; rolling resistance and braking distances for the vehicles and line of sight.

19 The report culminates in an “Analysis and Opinion” section in which the “MAIT Team”
20 summarizes its work and expresses various conclusions concerning the cause of the collision. The
21 ultimate conclusion reached by the MAIT Team, as reflected on page 1 of the Report was that the
22 “Primary Collision Factor” was Evans’ violation of *Vehicle Code* § 22107 (unsafe turning motion).
23 As Sergeant Parsons explained, this primary collision factor was assigned because the MAIT team
24 concluded that they had no evidence to determine that Evans suffered a medical emergency and
25 therefore could not conclude that the primary collision factor was “other than driver.” *Ex. 2,*
26 *Parsons Deposition at 37:11 – 38:6; 43:4 – 9.*

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1 While this ultimate conclusion is obviously helpful to the plaintiffs, after conducting diligent
2 discovery and taking depositions of the primary investigating CHP officers including Parsons,
3 Dugger, Bowen, Howarth, Mitchell and Horner, evidence has been discovered that was not
4 considered by the MAIT Team and which exposes considerable flaws in the assumptions, opinions
5 and conclusions expressed in the MAIT Report. While this new evidence would not, in plaintiffs'
6 counsel's opinion, result in a change in the MAIT Team's ultimate conclusion that Evans did not
7 suffer a medical emergency and that his violation of the vehicle code was the primary collision
8 factor, it does mean that the the opinions and conclusions expressed in various parts of the report
9 should not be presented to the jury, not only because they are now demonstrably incorrect, but also
10 because it would result in undue consumption of time and would no doubt create substantial
11 confusion in the minds of the jurors.

12 **A. New Tire Mark Evidence Depicting The Path Of The FedEx Vehicle**

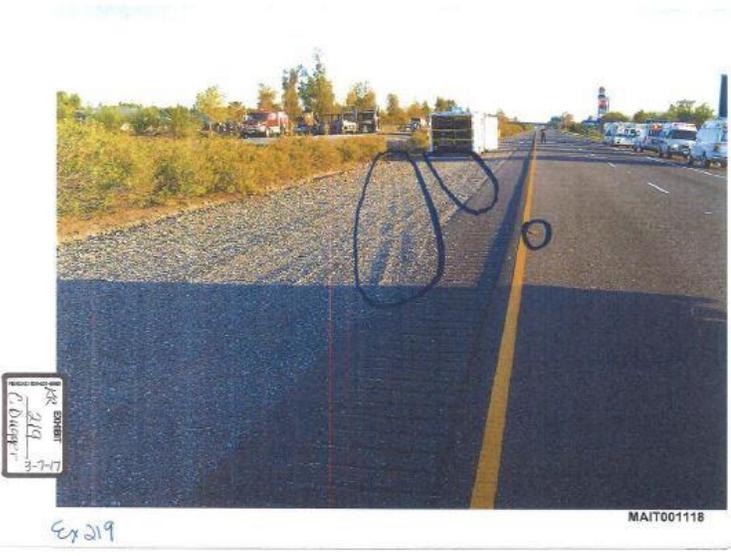
13 The new evidence that was clearly not considered by the MAIT team in reaching the
14 conclusions expressed in the report is physical evidence captured in several photographs of tire
15 marks in the southbound median which were taken soon after the crash and long before the MAIT
16 Team arrived. A photograph taken by Sgt. Doug Guy, one of the first CHP officers to arrive at the
17 scene, (and not a MAIT team member), while it was still light, clearly shows tire marks of a dual
18 wheel tractor trailer as it leaves the southbound #1 lane and enters the gravel median shoulder. *See*
19 *Ex. 3, MAIT photograph 1118.*



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Sgt. Guy testified that he arrived at the crash site within 20 minutes of the accident and immediately began walking the scene looking for physical evidence to document. He saw tire marks that entered the median from the #1 lane and took photographs of them because he believed they were associated with the path of the FedEx vehicle. He turned his photographs over to the MAIT team members, who arrived later that evening when it was dark. *Ex. 4, Guy Deposition at pgs. 9:18 – 10:10, 12:5 – 13:18; 15:15 – 16:3; 17:19 – 24.*

The primary MAIT team member who conducted the scene survey was Chris Dugger. Sgt. Dugger testified that he and his team began the survey in the dark and continued working to document the scene until the early morning daylight hours. At his deposition, which occurred on March 7, 2017, he saw Sgt. Guy’s photos for the first time. He testified that the tire marks in Guy’s photos depicted, in his opinion, where the FedEx vehicle first entered the median from the number 1 lane. He acknowledged that those tire marks were not surveyed by the MAIT Team and that his team had not observed them or been aware of them when the survey was conducted. He was

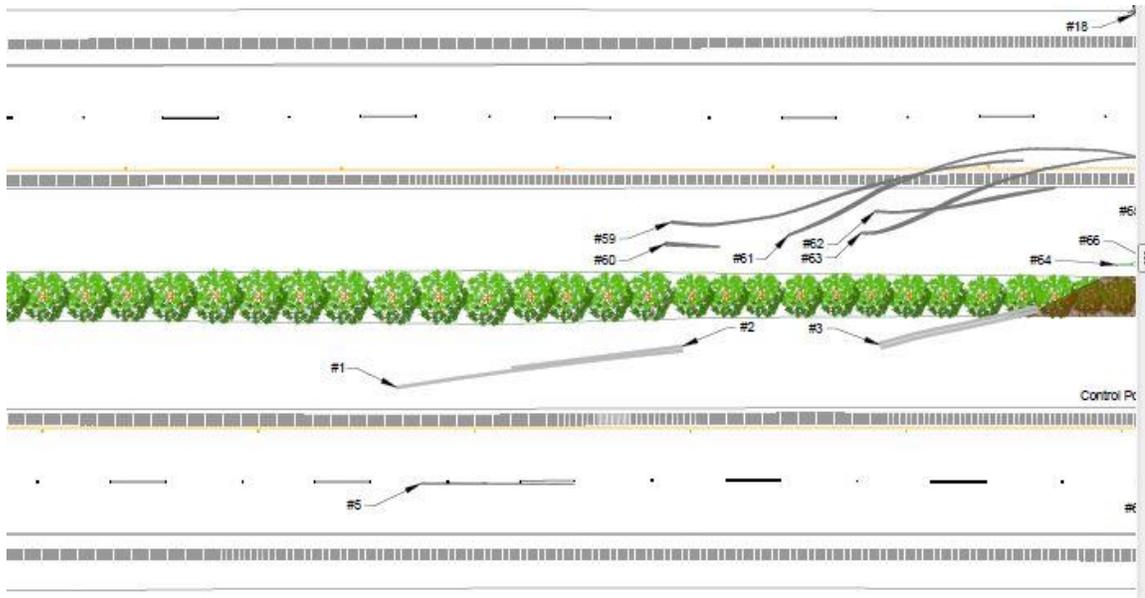


convinced that the tire marks in photo were actually where the vehicle left the road, and that they had been overlooked by the MAIT Team. *Ex. 5, Dugger Deposition at 59:12 – 60:7; 68:3 – 14; 72:12 – 73:6.* Sgt. Dugger circled the key tire marks on the photograph at his deposition:

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See *Ex. 6, Dugger Deposition Exhibit 219*.

The accident reconstruction experts for both the plaintiffs, and importantly, FedEx Freight, agree that the tire marks depicted in Sgt. Guy’s photo are where the FedEx tractor trailer actually departed into the median. *Ex. 9, Fenton deposition at 41:19 – 42:2*. This means that the tire marks that the MAIT team surveyed and labeled as tire marks #1 and 2 on their physical evidence scene diagram are NOT associated with the FedEx tractor and do not reflect the path of the vehicle before it crossed into the northbound lanes. This is significant because the tire marks labeled #1 and 2 on the CHP diagram are further south and at a shallower angle to the road and would lead to a different conclusion concerning the time and distance that the vehicle traveled into and through the median



before hitting the bus. See *Ex. 1, MAIT Report pg. 228, Physical Evidence Diagram (excerpt below)*:

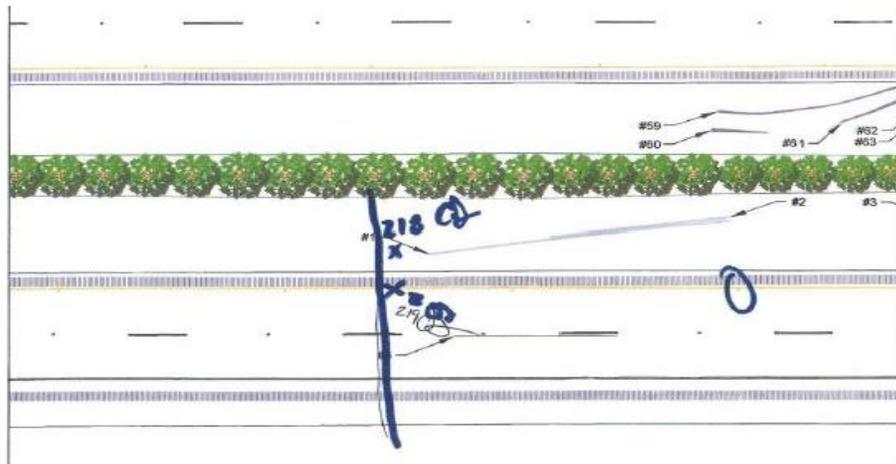
Sgt. Dugger identified the tire marks that were labeled as Tire Mark #1 and #2 in the physical evidence diagram, in a photograph he took which was marked as Deposition Exhibit 218. (See *Ex. 5, Dugger Deposition at pg. 63:11 – 64:21, 67:4 – 20; Ex. 7, Dugger Deposition Exhibit 218*.)

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Ex 218

At his deposition, Sgt. Dugger drew a circle where the tire marks shown in the Guy photograph would have begun if they had been surveyed, based on the location of the lane



reflector marker that he identified on the scene diagram:

Ex. 5, Dugger Deposition at 102:23 – 103:6; Ex. 8, Dugger Exhibit 220.

Lastly, CHP Officer Jeremy Bowen, who prepared the physical evidence diagram, testified that the tire marks depicted in Exhibit 219 were not surveyed by the MAIT Team because they

1 were not visible at the time of the survey, which occurred at night, and possibly traffic flattened
2 out the mark at the time they were measuring. He testified that, looking at the photograph, it was
3 “more likely than not” that the Volvo (FedEx vehicle) made the mark. *Ex.10, Bowen Deposition*
4 *at 47:2 – 48:11.*

5
6 **B. Testimony of Eyewitness Juan Reyes**

7 A second significant inaccurate conclusion in the MAIT Report relates to the path of the
8 FedEx tractor trailer before it left the paved travel lanes and entered into the median. The CHP
9 MAIT team concluded that the vehicle was traveling in the #2 lane when its left turn signal was
10 activated, and that Evans then allowed the vehicle to “drift” from the #2 lane into the median. (*Ex.*
11 *I, MAIT Report at pg. 16*: “As Evans drove south in the #2 lane he allowed the Volvo to drift to the
12 left into the #1 lane. For unknown reasons driver Evans allowed the Volvo to continue in a
13 southeasterly direction, into the median, through the oleanders and enter the northbound lanes.”)
14 This was based on an understanding of Mr. Reyes’ observations as explained by Sgt. Parsons: “It
15 wasn’t necessarily a lane change as much as he started to move to the left, but continued through
16 that motion, and it’s not like a lane change where he moved over and stopped in the one lane. It
17 was a continuous movement.” *Ex. 2, Parsons’ deposition at p. 99:13 – 22; 172:24 – 173:5.*

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19 Again, after deposing the eyewitness, Juan Reyes, on whom this conclusion rested, both
20 FedEx and Plaintiffs’ accident reconstruction experts agree that the vehicle did not drift from the
21 number 2 lane into the median. Instead, FedEx’s reconstruction expert, Steve Fenton, testified that
22 based on Mr. Reyes’ deposition testimony, he agrees with Plaintiffs’ expert that Evans completed a
23 lane change into the #1 lane, meaning that he steered left, then right and centered the vehicle in the
24 #1 lane, before he entered the median. *See Ex. 9, Fenton at 132:11 – 133:6.*

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26 This is a completely different scenario than the one hypothesized by the highway patrol
27 officers who clearly concluded that Evans did not steer from the time he started to leave the #2 lane
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1 until he hit the bus. *Ex. 11, Horner at pg. 33:7 – 34:13; Ex. 2, Parsons at pg. 99:13 -22.* The
2 difference in the point of entry into the median, and whether Evans was steering just prior to entering
3 the median clearly changes the analysis as to whether Evans was unresponsive and how long he had
4 to take evasive action. Instead of “drifting” from the number 2 lane across the highway until it hit
5 the bus, FedEx’s expert testified that approximately 4.3 seconds elapsed from the time the FedEx
6 truck crossed the yellow line and began to enter the median until it hit the Duran’s Nissan and
7 another .9 seconds elapsed until it hit the bus. *See Ex. 9, Fenton at 60:3 – 11.* Whether there is
8 evidence that Evans in fact did take evasive action by steering the vehicle once he was in the center
9 median is a contested issue about which both Fenton and Plaintiffs’ reconstruction expert have
10 offered opinions. But clearly neither FedEx Freight or the Plaintiffs agree with the MAIT team
11 conclusion that Evans was not steering his vehicle from the time he activated his turn signal and left
12 the #2 lane.
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15 **C. The Cell Phone Records**

16 The third piece of information that appears not to have been considered by the MAIT Team
17 in evaluating why Evans crossed into the median relates to Evans’ use of his cell phone and internet
18 data usage within 2 minutes of the crash. While the second page of the Report indicates “cell phone
19 not in use” this conclusion appears to relate solely to whether Evans was engaged in a phone call at
20 the time of the crash. There is no indication that the CHP officers ever reviewed the complete cell
21 phone records which also contain internet data usage and text message information. Sgt. Parsons
22 testified that the records which were reviewed were obtained from the NTSB but the copies of those
23 records were no longer in the possession of the CHP.¹ *Ex. 2, Parsons Deposition at 44:22 – 47:14.*
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27 ¹ The cell phone records reviewed by the NTSB were redacted to reflect only the last telephone call received by
28 Evans. See Ex. 12, redacted records.

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These three critical pieces of evidence which were not considered by the MAIT Team no doubt cast doubt on the reliability of the analysis and opinions expressed by various CHP officers in their report. The officers’ opinions are clearly expert opinions that require the necessary background, training and experience in order to be admitted at trial pursuant to Evidence Code § 801 and § 802. While the primary investigating MAIT Team members have been deposed, none of them have been designated as experts by either the Defendant or the Plaintiffs, with the exception of Sgt. Dugger, who was designated by Plaintiffs’ counsel with respect to his expert opinion that the tire marks seen in the early photograph depicts the location where Evans departed the #1 lane and entered the median. Rather than relying on the CHP officers as experts, both the defendant and the plaintiffs have instead retained multiple experts who will testify concerning accident reconstruction, including whether there is evidence that Evans steered the vehicle after entering the median, human factors issues such as perception/reaction time and distraction, and medical issues that may or may not have incapacitated Evans.

Accordingly, Plaintiffs’ counsel respectfully requests that the instant motion in limine to exclude certain opinions and/or conclusions of California Highway Patrol Officers and MAIT Team members, other than the limited expert opinion testimony of Sgt. Dugger, as well as excerpts from MAIT Report containing such opinions and conclusions and other inadmissible hearsay, be granted in its entirety.

II. THE EVIDENCE AT ISSUE

In particular, Plaintiffs’ counsel anticipates that defense counsel may impermissibly attempt to introduce the following CHP opinions and conclusions at the time of trial, which are inadmissible for the reasons set forth below:

Objection No. 1: *Page 2 MAIT Report – conclusions/opinions regarding cell phone usage and other associated factors.*

1 The CHP opinions and conclusions regarding Evans’ alleged lack of cell phone usage and
2 alleged lack of contributing/associated factors associated with the subject incident lack foundation,
3 constitute inadmissible hearsay, are irrelevant, and unduly prejudicial as set forth in further detail
4 below.

5 **Objection No. 2:** *Page 16 MAIT Report – conclusions/opinions regarding the accident:*

6 “As driver Evans drove south in the #2 lane, he allowed the Volvo to drift to the left into the
7 #1 lane. For unknown reasons, Driver Evans allowed the volvo to continue in a southeasterly
8 direction, into the median, travel over the oleanders, and enter the northbound lanes.”

9 The statement above constitutes an expert opinion which lacks foundation and which is
10 inadmissible hearsay, and unduly prejudicial as set forth in further detail below.

11 **Objection No. 3:** *Pages 45-48 MAIT Report – conclusions/opinions regarding visibility.*

12 Various CHP MAIT team officers, along with NTSB and FedEx Freight personnel
13 conducted a series of three experiments to evaluate the line-of-sight visibility of the FedEx vehicle
14 and the Bus to each other as they approached the location of the collision. This testing involved
15 installation of video cameras in both vehicles, as well as use of exemplar vehicles driven at speeds
16 approximating the pre-accident speeds of the vehicles as determined by the MAIT team. In the
17 summary section, the report details the opinions of unidentified MAIT team members concerning
18 the visibility of the vehicles to each other at various locations. None of the MAIT Team officers
19 who participated in the testing and preparation of the report have been designated as expert
20 witnesses. The opinions/conclusions expressed in the report regarding the CHP’s testing to evaluate
21 line-of-sight and visibility lack foundation, constitute inadmissible hearsay, are irrelevant, and
22 unduly prejudicial as set forth in further detail below.

23 **Objection No. 5:** *Pages 70-74 MAIT Report – Collision History at Subject Location*

24 The information contained in the MAIT report that allegedly reflects the collision history in
25 the vicinity of the crash lacks foundation, constitutes inadmissible hearsay, is irrelevant, and unduly
26 prejudicial as set forth in further detail below.

1 **Objection No. 6:** *Pages 113-115 MAIT Report – Driving Experience and Pre-Collision*
2 *Profile of Evans.*

3 This section of the report contains a summary of information which was obviously obtained
4 by the MAIT Team from third parties, including a summary of his driving experience which was
5 obtained from unidentified sources, as well as a pre-collision history which summarizes his on duty
6 and off duty activities from April 5th through April 10th and which again does not identify the sources
7 of the information. These summaries constitute inadmissible hearsay and are unduly prejudicial as
8 set forth in further detail below

9 In addition, on page 115, in the last paragraph of the pre-collision profile, the Report reflects
10 the following statement: “Approximately one-quarter mile north of the southbound State Route 32
11 exit in Orland, California, Driver Evans activated the left turn signal of the Volvo. Driver Evans
12 began to gradually merge into the #1 lane of Interstate 5 southbound. Driver Evans maintained this
13 gradual path of travel and continued toward the median.”

14 As set forth above, this MAIT Team scenario describing the path of the vehicle has been
15 demonstrated to be incorrect both because of the missed tire marks and the Reyes testimony. Evan
16 FedEx’s own accident reconstruction expert disagrees with this conclusion. The MAIT Team
17 description of the path of the vehicle as it departed the southbound lanes is clearly based on
18 inadmissible hearsay, and is irrelevant and unduly prejudicial as set forth in further detail below.

19 **Objection No. 7:** *Pages 116-119 MAIT Report – CHP Summary of Logbook Information*

20 The information contained in the MAIT report that allegedly reflects Evans’ logbook
21 information lacks foundation and is based on inadmissible hearsay.

22 **Objection No. 8:** *Page 120 MAIT Report – CHP Summary regarding Evans sobriety and*
23 *medical history.*

24 This information contained in this section of MAIT report summarizes information
25 regarding Evans that is clearly based on inadmissible hearsay from third parties, including Evans’
26 wife and various toxicology and medical reports.

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1 **Objection No. 9:** *Page 122 MAIT Report – Driving Experience of Duran (the driver of the*
2 *Nissan).*

3 The information contained in the MAIT report allegedly reflecting information regarding
4 Duran’s driving experience lacks foundation, constitutes inadmissible hearsay, is irrelevant, and
5 unduly prejudicial as set forth in further detail below.

6 **Objection No. 10:** *Page 125 – 130, MAIT Report – Involved Driver Information re Talalelei*
7 *Lealao-Taiao (driver #3).*

8 The information contained in this section of MAIT report summarizes information regarding
9 the bus driver obtained by the CHP from third parties and various records such as her phone records,
10 her driver logs and her medical history, all of which constitutes inadmissible hearsay.

11 **Objection No. 11:** *Pages 131-133; 134-138 MAIT Report – Opinions and Conclusions*
12 *regarding injury assessment of Timothy Paul Evans.*

13 This section of the Report contains a description of lab tests conducted on the decedents, as
14 well as a summary of the autopsy report on Timothy Evans conducted by Dr. Resk. The references
15 in the CHP Report to the autopsy report is inadmissible hearsay. Dr. Resk has been deposed and
16 has been designated as an expert witness by Plaintiffs. Any opinions or conclusions from his
17 autopsy should be admitted through his direct testimony.

18 **Objection No. 12:** *Pages 139 - 172 MAIT Report – Opinions and Conclusions regarding*
19 *injury assessments of deceased bus driver and passengers.*

20 This section of the Report contains a description of lab tests conducted on the decedents, as
21 well as a summary of the autopsy reports on the bus driver and nine decedents. The references in
22 the CHP Report to the autopsy reports is inadmissible hearsay. Dr. Resk who did eight of the
23 autopsies (all except Arzola) has been deposed and has been designated as an expert witness by
24 Plaintiffs. Any opinions or conclusions from his autopsies should be admitted through his direct
25 testimony.

26 **Objection No. 13:** *Pages 175 - 213 MAIT Report – Injury Assessments of Surviving Bus*
27 *Passengers.*

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1 This section of the Report contains a brief summary of the initial transportation and treatment
2 of the surviving bus passengers, a description of their injuries as reported by them in interviews with
3 the CHP, a summary of any toxicology reports if obtained, and a conclusion regarding “use of safety
4 equipment.” To the extent that the bus passengers are plaintiffs in this lawsuit, their own statements
5 to the CHP officers may be admissible, assuming the proper foundation is laid verifying the accuracy
6 of those statements, which were recorded and which are available on audiotapes. However, other
7 than in those instances where the plaintiff made a statement concerning whether or not they were
8 wearing a seatbelt, any conclusion by the CHP officers as to “use of safety equipment” is expert
9 opinion which lacks foundation and the conclusion in the report is inadmissible hearsay.

10 **Objection No. 14:** *Pages 281-282, MAIT Report – Information regarding maintenance for*
11 *the Subject FedEx Truck and Silverado Bus.*

12 This section of the Report summarizes information obtained from a review by the CHP
13 officers of records obtained from FedEx and Silverado reflecting maintenance and inspection reports
14 for the vehicles. The summary of information derived from records from third party sources
15 constitutes inadmissible hearsay.

16 **Objection No. 15:** *Pages 356-446, MAIT Report – Witness Statements from Passengers and*
17 *the Durans.*

18 This section of the report contains the CHP officers’ summaries of their interviews with the
19 bus passengers and the Durans. The interviews were all recorded and the audio files have been
20 produced by the CHP. The summaries of the interviews are incomplete and in some cases inaccurate
21 or misleading. The summaries in the Report are inadmissible hearsay and unduly prejudicial as set
22 forth in further detail below. To the extent that a passenger is a plaintiff at trial, then the audio
23 recording itself may be admissible as a statement of a party.

24 **Objection No. 16:** *Pages 447-478 MAIT Report – Additional Witness Statements.*

25 This section of the report contains the CHP officers’ summaries of their interviews with third
26 party percipient witnesses. The interviews were all recorded and the audio files have been produced
27 by the CHP. The summaries of the interviews are incomplete and in some cases inaccurate or
28

1 misleading. For example, the summary of the interview of Juan Reyes left out key details which are
2 clearly inconsistent with the CHP's conclusion regarding the path of the vehicle. The summaries
3 in the Report are inadmissible hearsay as set forth in further detail below. The audio recordings
4 themselves may be independently admissible under some circumstances as exceptions to the hearsay
5 rule.

6 **Objection No. 17:** *Page 490 - 495 MAIT Report – Analysis and Opinion – Vehicle Damage*
7 *Match Points*

8 This section of the report constitutes expert opinions of unidentified CHP MAIT officers
9 concerning matching the damage to the Volvo tractor, the Nissan and the Setra bus to identify where
10 the vehicles initially came in contact with each other. Page 495 contains a photograph showing an
11 exemplar tractor and bus, but the Report itself acknowledges that it was later determined that the
12 orientation of the vehicles in the picture was not representative of the pre-collision alignment of the
13 vehicles at first contact. *Ex. 2, Parsons Deposition at pg. 200:1-10.* These are expert opinions for
14 which there is no foundation, since none of the CHP officers who were involved in this analysis
15 were identified or deposed, or designated as expert witnesses by any party.

16 **Objection No. 18:** *Page 511-512 MAIT Report – CHP conclusions/opinions regarding the*
17 *Nissan.*

18 This section of the report provides an analysis of the Nissan event data recorder and
19 statements made by the Nissan driver, Bonnie Duran. These are expert opinions for which there is
20 no foundation, since none of the CHP officers who were involved in this analysis were identified or
21 deposed, or designated as expert witnesses by any party.

22 **Objection No. 19:** *Pages 516-519 MAIT Report – CHP conclusions/opinions regarding pre-*
23 *impact collision sequence.*

24 This section of the report begins with a summary of the pre-impact collision sequence
25 starting with events that occurred on April 8th, two days before the crash up to the approximately 6
26 minutes before the collision. This summary is clearly based on information obtained by various
27
28

1 CHP officers from third party witnesses and records reviewed by the officers and therefore this
2 section of the report is inadmissible hearsay.

3 **Objection No. 20:** *Pages 520 - 523 MAIT Report – CHP conclusions/opinions regarding*
4 *pre-impact, at-impact and post-impact collision sequence.*

5 This “analysis and opinion” section again contains the now discredited hypothesis that Evans
6 did not complete his lane change into the #1 lane after activating his left turn signal. It then expounds
7 upon the conclusions from the CHP’s visibility testing, and analysis of the path of the vehicles as
8 FedEx truck first collided with the Nissan and then the bus. It includes opinions concerning the
9 motions of driver Evans and the occupants in the various vehicles resulting from the collision forces.
10 These are expert opinions which lack foundation and are inadmissible since none of the CHP officers
11 who were involved in this analysis were designated as expert witnesses by any party.

12 **Objection No. 21:** *Pages 524 - 526 MAIT Report – CHP conclusions/opinions regarding*
13 *“environmental factors.”*

14 This “analysis and opinion” section again contains an analysis of the roadway, the height of
15 the oleanders, other accidents which occurred in the same vicinity, and whether a median barrier
16 was required for this location. These are expert opinions which lack foundation and are inadmissible
17 since none of the CHP officers who were involved in this analysis were identified, deposed or
18 designated as expert witnesses by any party.

19 **Objection No. 22:** *Pages 527 - 528 MAIT Report – CHP conclusions/opinions regarding*
20 *“vehicle factors.”*

21 This “analysis and opinion” section again contains an expert analysis concerning the pre-
22 crash condition of the vehicles and whether any mechanical condition caused or contributed to the
23 collision. These are expert opinions which lack foundation and are inadmissible since none of the
24 CHP officers who were involved in this analysis were identified, deposed or designated as expert
25 witnesses by any party.

26 **Objection No. 23:** *Pages 529 - 532 MAIT Report – CHP conclusions/opinions regarding*
27 *“human factors.”*

28

1 This “analysis and opinion” section again contains an expert analysis concerning Timothy
2 Evans medical history and whether fatigue may have played a role in causing the collision. This
3 section of the analysis was, according Sgt. Parsons, largely prepared by Officer Hamman, who has
4 not been deposed or designated as an expert. *Ex. 2, Parsons Deposition at pg. 195:4 – 7.* The
5 analysis contains opinions concerning the path of the vehicle that is again based on the now
6 discredited hypothesis that Evans path toward the median began in the #2 lane, rather than, as all
7 parties now agree, after he completed his lane change into the #1 lane and centered the vehicle in
8 that lane before departing into the median leaving tire marks that were not surveyed or analyzed by
9 the CHP MAIT team. It also contains conclusions concerning whether Evans applied the brakes or
10 made any type of evasive steering maneuvers after entering the median, which again is based in part
11 on inadmissible hearsay from percipient witnesses as well as apparently expert analysis of the
12 physical evidence.

13 With respect to the “fatigue” analysis, the author of this section of the report appears to have
14 based his analysis in part on the incorrect tire marks in the median which were surveyed and the
15 incorrect summary of Mr. Reyes’ testimony. The officer also discusses the testing conducted by the
16 CHP regarding the audibility of the rumbles strips. On page 531 he also incorrectly again surmises
17 that Evans made no evasive maneuvers “as the vehicle traveled across the southbound #1 lane” and
18 through the median into the northbound lanes, even though FedEx’s own expert now agrees that
19 Evans did in fact steer the vehicle into the #1 lane and complete his lane change a few seconds
20 before he entered the median. *See Ex. 9, Fenton Deposition at 132:4 – 133:6.*

21 Lastly on page 532 of the “human factors” analysis the author discusses additional evidence
22 that might indicate if fatigue or sleepiness was a potential contributing factor much of which is based
23 on hearsay statements of others, and whether there was “physical evidence” of evasive maneuvers
24 observed at the collision scene. The ultimate conclusion reached and expressed in the last paragraph
25 of page 532 is that Evans was determined to be the direct cause of the collision because he “allowed
26 the Volvo to travel from the southbound lanes into the path of opposing northbound traffic.”
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1 The conclusions expressed in this section of the report are clearly expert opinions which
2 lack foundation and are inadmissible since none of the CHP officers who were involved in this
3 analysis were identified, deposed or designated as expert witnesses by any party.

4 **Objection No. 24:** *Video and/or testimony regarding CHP testing and results.*

5 The opinions/conclusions of the CHP contained in videos reflecting testing and results lack
6 foundation, constitute inadmissible hearsay, are irrelevant, and unduly prejudicial as set forth in
7 further detail below.

8 **Objection No. 25:** *Vehicle Dynamics Drawings - MAIT Report at pgs. 496 – 500*

9 The Vehicle Dynamics Drawings contained in the MAIT Report contain expert opinions
10 which lack foundation, constitute inadmissible hearsay, are irrelevant, and unduly prejudicial as set
11 forth in further detail below.

12 **Objection No. 26:** *Deposition Testimony of CHP Sgt. Parsons at pgs. 71:22 – 76:24;
13 136:23 – 137:3; 174:18 – 176:24; 185:21- 189:5 (attached as Exhibit 2)*

14 At his deposition, Sgt. Parsons testified concerning the evidence the team considered to
15 determine if Evans made any evasive maneuvers such as steering or braking after the tractor-trailer
16 entered the median. In the testimony, Sgt. Parsons testified that there were two sources of
17 information that his team evaluated: (1) statements of witnesses, and (2) an analysis of physical
18 evidence in the median including tire tracks and disturbed dirt. *Ex. 2, Parsons Deposition at pgs.*
19 *71:22 – 76:24.* Sgt. Parsons' opinions as expressed in his deposition are inadmissible both because
20 the statements of third parties are hearsay and second because the analysis of the physical evidence
21 is expert opinion testimony, and Sgt. Parsons has not been designated as a non-retained expert by
22 any party.

23 **Objection No. 27:** *Deposition Testimony of CHP Ofc. Horner at pgs. 33:7 – 34:13; 65:1
24 – 66:3; 68:4 – 70:12; 114:19 – 119:20; 121:2 – 121:7; 124:1 – 125:19; 128:7 – 134:22; 131:16 -
25 23; 137:25 – 138:6; 149:7 – 150:24, (attached as Exhibit 11).*

26 Officer Horner testified that while he assembled the information gathered by the other CHP
27 officers he: (1) he was not present at the scene of the crash and was not there when the scene was
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1 surveyed, (*Ex.9, Horner Deposition at 22:12 – 13; 24:5 - 7*); (2) he did not do the human factors
2 analysis (*Ex. 9, Horner Deposition at 28:1 – 17*); (3) he did not participate in the testing conducted
3 by the CHP (*Ex. 9, Horner Deposition at 66:10 - 13*) ; and (4) he did not do the analysis of whether
4 Evans may have been fatigued or asleep (*Ex.9, Horner Deposition at 70:12 – 25*). Nevertheless,
5 apparently because he was part of the MAIT Team and assisted in preparing the report, he was asked
6 expert opinion questions and in particular asked to compare the conclusions of the “MAIT Team”
7 to the NTSB’s conclusions.² Yet, Officer Horner has not been designated as a non-retained expert,
8 and there is no foundation for him to offer expert opinion testimony concerning reconstruction and
9 the path of travel of the FedEx vehicle, human factors or any analysis of whether there was physical
10 evidence at the scene of braking or steering.

11 **Objection No. 28:** *Deposition Testimony of CHP Ofc. Bowen at pg. 39:7 – 40:21 (attached*
12 *as Exhibit 10).*

13 Officer Bowen testified that in his opinion tire marks #1 and #2 on his scene diagram were
14 “more likely than not” made by the Volvo. After he was shown Deposition Exhibit 219, the
15 photograph depicting the tire marks that were not surveyed by the MAIT Team, Bowen testified
16 that in his opinion the un-surveyed tire marks were made by the Volvo. *Ex. 10, Bowen Deposition*
17 *at 47:2 – 48:11*. These are expert opinions which are inconsistent with each other. Because Bowen
18 was not designated as an expert, and since tire marks #1 and 2 have been disregarded by the retained
19 experts, Bowen’s opinions should be excluded.

20
21 **III. TRAFFIC ACCIDENT REPORTS ARE INADMISSIBLE AS A MATTER OF LAW**

22 As a matter of statutory authority, police accident reports, and any opinions and conclusions
23 contained therein, are not admissible. *See Vehicle Code Section 20013* which states: “No such
24 accident report shall be used as evidence in any trial, civil or criminal, arising out of an accident,
25 except that the department shall furnish upon demand of any person who has, or claims to have,
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27 ² The admissibility of the NTSB Report and conclusions is the subject of *Plaintiffs’ Motion in Limine #2*.
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1 made such a report or upon demand of any court, a certificate showing that a specified accident
2 report has or has not been made to the department solely to prove a compliance or failure to comply
3 with the requirement that such a report be made to the department.”

4 The function of the statute precluding the introduction into evidence at trial of a traffic
5 accident report is to protect against the danger of a jury giving more weight to such a report because
6 of its "official" character than that to which it is entitled. It is proper that the statute precludes the
7 presence of an accident report in a jury room during deliberations lest the "official" report alone
8 determine the verdict. *Sherrell v. Kelso* (1981) 116 Cal.App.3d Supp.22. *See also, Box v. California*
9 *Date Growers Assn.*, (1976) 57 Cal. App. 3d 266, 270; *Kramer v. Barnes*, (1963) 212 Cal.App.2d
10 440.

11 **IV. THE CHP OFFICERS’ OPINIONS AND CONCLUSIONS AND MAIT REPORT**
12 **EXCERPTS AT ISSUE LACK FOUNDATION AND ARE INADMISSIBLE EXPERT**
13 **AND/OR LAY OPINIONS.**

14 While it is clear that introduction of the MAIT Report into evidence is prohibited, it is
15 anticipated that defense counsel may nevertheless seek to elicit opinions from the officers who
16 prepared the report and participated in the investigation, or to introduce various excerpts from the
17 report. However, this too should be prohibited. The CHP officers’ opinions at issue here constitute
18 expert opinions, particularly with respect to the cause of the accident, the reconstruction of the path
19 of the FedEx vehicle, the analysis and interpretation of the physical evidence at the scene, and
20 whether that physical evidence demonstrates that Evans attempted to either brake or steer the
21 vehicle.

22 **A. FedEx Freight is Procedurally Barred From Eliciting Any Expert Opinion**
23 **Testimony from Any CHP Officer**

24 A person is qualified to testify as an expert if he has special knowledge, skill, experience,
25 training, or education sufficient to qualify him as an expert on the subject to which his testimony
26 relates. (*Evid. Code, § 720, subd. (a).*) While traffic officers whose duties include investigations
27 of automobile accidents may qualify as experts and may be allowed to testify concerning their
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1 opinions as to the various factors involved in such accidents, before such expert opinion testimony
2 is allowed, a specific foundational showing concerning the officer’s background, training and
3 experience must first be made. *See, e.g. Kastner v. Los Angeles Metropolitan Transit Authority*
4 (1965) 63 Cal.2d 52, 56 – 59; *Hart v. Wielt*, (1970) 4 Cal. App.3d 224, 229; *People v. Haussler*
5 (1953) 41 Cal.2d 252, 260-261.)

6 This threshold is particularly important here, where the MAIT Report is over 540 pages long,
7 was drafted by a team of 6 – 8 participants, and contains literally dozens of opinions that are
8 aggregated together without identifying the specific officer who either made the observations or
9 reached the particular conclusion. However, even if specific expert opinions could be attributed to
10 specific CHP officers, and even if the specific officer demonstrated the necessary foundation to offer
11 such opinions, FedEx Freight’s counsel has not designated any of the CHP officers as non retained
12 expert witnesses pursuant to *Code of Civil Procedure* § 2034.260. *See Spagnoli Decl. at ¶ 15 and*
13 *Ex. 13.*³

14 *Code of Civil Procedure* § 2034.300(a) compels the court, on objection of any party who has
15 made a complete and timely compliance with § 2034.260, to exclude from evidence the expert
16 opinion of any witness that is offered by any party who has unreasonably failed to list that witness
17 as an expert under § 2034.260. Since FedEx Freight submitted an expert witness designation that
18 omitted any CHP officers as non-retained experts, the Court must sustain Plaintiffs’ objections and
19 exclude any un-designated officer from offering any expert opinions.

24 ³ In fact, the only CHP officer who has been designated as an expert is Sgt. Dugger, who plaintiffs’ counsel
25 designated as an expert to testify concerning the tire marks that he identified in the photographs taken by Sgt. Guy as
26 the location where the FedEx vehicle departed the #1 lane into the median. Sgt. Dugger assisted in conducting the scene
27 survey the night of the crash, but left the MAIT Team shortly thereafter and did not participate in drafting the Report or
28 analyzing the physical evidence. *Ex. 5, Dugger Deposition at 50:11-17; 103:12-16; 118:1-13*. His expert testimony is
expected to be limited to the identification of the tire marks that depict the departure of the FedEx vehicle into the
median from the south bound #1 lane.

1 **B. Lay Opinions of the CHP Officers Must be Limited to Their Personal Observations**

2 Since FedEx is precluded from attempting to elicit expert opinion testimony from any
3 specific CHP officer, Plaintiffs’ counsel anticipates that defense counsel will attempt to argue that
4 they should be allowed to offer their opinions as lay witness. This too should be prohibited.

5 The general rule regarding opinion testimony of lay witnesses is set forth in *Evidence Code*
6 § 800: “If a witness is not testifying as an expert, his testimony in the form of an opinion is limited
7 to . . . an opinion that is: “(a) rationally based on the perception of the witness; and (b) helpful to a
8 clear understanding of his testimony.” Under *Section* 800, lay witnesses must ordinarily testify to
9 facts only, not to their opinions and conclusions, leaving the drawing of inferences or conclusions
10 to the trier of fact. *Froomer v. Drollinger* (1962) 201 Cal. App. 2d 90; *Newton v. Los Angeles*
11 *Transit Lines* (1951) 107 Cal. App. 2d 624. Moreover, while a witness who is not testifying as an
12 expert may provide opinion testimony based on his own perception, the opinion must be necessary
13 to obtain a clear understanding of the witness’ testimony. *People v. Hurlic* (1971) 14 Cal. App. 3d
14 122, 127; Evid. Code § 800, (Law Revision Commission Comment).

15 In this case, the CHP officers arrived at the scene after the crash. They did not observe any
16 of the events leading up to the tragic collision. Among other things, the officers took photographs
17 of the physical evidence including the roadway and vehicles, and did a scene survey to document
18 the location of physical evidence that was observed at the scene. However, while the law
19 enforcement personnel should be allowed to testify concerning their documentation of the physical
20 evidence, they should not be allowed to offer expert opinions interpreting that evidence, since that
21 requires expertise that goes beyond the limitations of lay witness opinion testimony permitted under
22 *Evidence Code* § 800.

23 For instance, while the officers may testify that they took photographs and measured
24 physical evidence at the scene such as tire marks in the median, the interpretation of those tire marks
25 and whether they depict evidence of steering or braking is an expert, not a lay opinion.

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1 **V. THE MAIT REPORT IS INADMISSIBLE HEARSAY FOR WHICH THERE IS NO**
2 **EXCEPTION**

3 Under *Evidence Code* § 1200(a), hearsay is defined as an out of court statement that is
4 offered to prove the truth of the matter asserted. Under *Section* 1200(b) unless provided for under
5 law, hearsay evidence is inadmissible. *People v. Sundlee*, 70 Cal.App.3d 477, 482 (1977) (subject
6 to recognized exceptions, the hearsay rule bars out-of-court declarations of non-parties which are
7 offered to prove the truth of the matter stated.) The reason for barring hearsay statements is that
8 they lack trustworthiness in that the veracity and accuracy of the statements cannot be tested under
9 oath by the current trier of fact. The hearsay declarant's demeanor cannot be observed and the
10 declarant is not subject to cross-examination by the adverse party. *Korsak v. Atlas Hotels Inc.* (1992)
11 2 Cal.App.4th 1516; *Buchanan v. Nye* 128 Cal.App.2d 582, 585 (1954) (the essence of the hearsay
12 rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination).

13 The aforementioned excerpts from the MAIT Report are out-of-court statements, opinions
14 and conclusions, many of which are made by unidentified witnesses/authors. Plainly, statements
15 contained within the Report not relating to direct officer or investigator measurements or firsthand
16 observations are not admissible as they are hearsay under *Evidence Code* § 1200. Despite this,
17 Plaintiffs' counsel anticipates that FedEx's counsel will attempt to impermissibly offer the out of
18 court statements, opinions and conclusions from the MAIT report for the truth of the matter asserted
19 therein. Indeed, there is no hearsay exception or other relevant reason that supports the admission
20 of these out-of-court statements. The statements at issue lack the necessary reliability and
21 trustworthiness that would permit their admissibility in court under any exception to the hearsay
22 rule.

23 While *Evidence Code* § 1271 creates exceptions to the hearsay rule for business records,
24 a police investigation report qualifies as a business record only insofar as it reflects the reporting of
25 officer's firsthand observations. *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal. 2nd 114, 126.)
26 However, to the extent that a police report contains witness statements or a police officer's opinions
27 and conclusions, it is not admissible under the business records exception because it is not based
28

1 on the recording officer's firsthand observations. *People v. Hamilton* (1963) 60 Cal. 2nd 105, 131
2 (overruled on other grounds). The evidence therefore constitutes inadmissible hearsay for which
3 there is no exception.

4 **VI. DEFENDANTS' EXPERTS MAY NOT RELY ON OR RECITE STATEMENTS,**
5 **OPINIONS OR CONCLUSIONS FROM THE MAIT REPORT**

6 In *People v. Sanchez* (2016) 63 Cal. 4th 665, the California Supreme Court recently held
7 that expert witnesses are not permitted to rely on inadmissible hearsay in support of their opinions.

8 Under *Sanchez*, an expert cannot “relate as true case-specific facts asserted in hearsay
9 statements, unless they are independently proven by competent evidence or are covered by a hearsay
10 exception.” *Id.* at 686. As the California Supreme Court explained: “An expert’s opinion testimony
11 like any other hearsay evidence, “must be properly admitted through an applicable hearsay
12 exception.” *Id.* Experts are generally not permitted to supply case-specific facts about which they
13 have no personal knowledge. *Id.* at 676. An expert may not introduce case-specific facts as part of
14 his or her opinion, when those facts are based on hearsay, and the parties have not admitted other
15 independent evidence of those case-specific facts. *Id.* at 682. An expert may properly assume the
16 truth of facts otherwise admitted into evidence in forming an opinion, but cannot assume facts for
17 which no admissible evidence is before the Court. *Id.* at 676-677. The latter scenario is the case
18 here, as the aforementioned evidence from the MAIT report is not admissible.

19 Here, nearly every expert retained by FedEx Freight that has been deposed including its
20 accident reconstruction expert Fenton; its pathologist expert Melinek; its sleep expert Moore-Ede;
21 and its fire expert Colwell, have testified not only that they read and considered the MAIT Report,
22 but that they are relying upon various portions of it in support of their opinions. Therefore this
23 Motion is not an idle exercise. The Court can and should expect that these experts will attempt to
24 cherry-pick certain sentences from the massive report or the deposition testimony of the CHP
25 officers, which is also hearsay, to parrot to the jury in their trial testimony.

26 Accordingly, because the evidence at issue is not independently admissible, it may not be
27 relied upon by FedEx’s experts in support of their opinions.

28

1 **VII. THE EVIDENCE AT ISSUE IS IRRELEVANT**

2 *Evidence Code* § 350 states that “[n]o evidence is admissible except relevant evidence.”
3 “Relevant evidence” is “[e]vidence... having any tendency in reason to prove or disprove any
4 disputed fact that is of consequence to the determination of the action.” *Evid. Code* § 210. Thus,
5 the test of relevancy is whether the evidence logically tends to establish a material fact. *People v.*
6 *Yu* (1983) 143 Cal.App.3d 358, 376. Evidence of unrelated acts is irrelevant. *Morocco v. Ford*
7 *Motor Co.* (1970) 7 Cal.App.3d 84, 91. In *Wade v. Southwest Bank* (1962) 211 Cal.App.2d 392, the
8 Court held that, under the rule that testimony must be confined to relevant issues. In *Traxler v.*
9 *Thompson* (1970) 4 Cal.App.3d 378, the court determined that “[t]he only test of relevancy is logic
10 and common sense.”

11 Here, logic and common sense can lead but to one conclusion: namely, unfounded,
12 speculative opinions and conclusions and hearsay from CHP officers and investigators does not tend
13 to prove or disprove any disputed fact in this case. Further, important evidence and facts gathered
14 in this civil litigation was not available to CHP officers and investigators when they reached their
15 opinions and conclusions and were not as fleshed out as they are now. Thus, there is absolutely no
16 relevance to the CHP conclusions and opinions in this case.

17 **VIII. THE OPINIONS AND CONCLUSIONS OF THE CHP OFFICERS ARE HIGHLY**
18 **PREJUDICIAL, WILL NECESSITATE AN UNDUE CONSUMPTION OF TIME,**
19 **CONFUSE THE ISSUES, AND MISLEAD THE JURY.**

20 Even if there was some remote relevancy for such evidence (which there is not) the danger
21 of undue prejudice plainly outweighs its admission. *Evidence Code* § 352 provides: “The court in
22 its discretion may exclude evidence if its probative value is substantially outweighed by the
23 probability that its admission will (a) necessitate an undue consumption of time or (b) create
24 substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” Therefore,
25 *Section 352* requires the trial judge to balance the probative value of the proffered evidence against
26 its harmful effects, in order to decide whether to admit it. *See Kessler v. Gray* (1978) 77 Cal.App.3d
27 284. The Supreme Court defines the “prejudice” referred to in *Evidence Code* §352 as applying to
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1 “evidence which uniquely tends to evoke an emotional bias against. . . an individual and which has
2 very little effect on the issues.” *People v. Karis* (1988) 46 Cal.3d 612, 638. “In other words,
3 evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the
4 emotions of the jury, motivating them to use the information, not to logically evaluate the point upon
5 which is relevant, but to reward or punish one side because of the jurors’ emotional reaction.” *Vorse*
6 *v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.

7 Even if there may be some relevance, when the probative value of the issue is slight, and the
8 danger of prejudice through confusion is great, the balancing process favors exclusion of such
9 evidence. *See Kessler, supra*, 77 Cal.App.3d at 291. (“That balancing process requires consideration
10 of the relationship between the evidence and the relevant inferences to be drawn from it, whether
11 the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to
12 the proponent’s cause as well as reasons we cited in *section 352* for exclusion.”)

13 Inviting the jury to speculate invites prejudice. This collateral “evidence” may cause the
14 jury to improperly consider whether or not FedEx’s liability is somehow diminished by speculation
15 as to why and how the CHP/MAIT came to its conclusions and opinions, as opposed to fully taking
16 into account the relevant evidence and considering FedEx’s liability in light of testimony and
17 evidence that has been obtained since the CHP’s investigation.

18 If the evidence at issue is admitted, it would require a significant undue consumption of time
19 because plaintiff’s counsel would then have to explain to the jury what the role of the CHP/MAIT
20 is in a situation like this, why the MAIT/CHP conclusions and opinions are unfounded, and why the
21 MAIT/CHP conclusions and opinions are incorrect. Essentially, the jury would be left to speculate
22 about hearsay from the report, and the potential for juror confusion would be significant.
23 Additionally, the evidence carries a great risk of causing the jurors to speculate as to why the
24 CHP/MAIT came to such opinions and conclusions; and they may be misled into improperly
25 drawing an inference that FedEx did nothing wrong in this case. It would be entirely improper for
26 the jury to reach such a conclusion by speculating about a CHP/MAIT investigation.

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1 Last, and perhaps most importantly, the unfounded, unsupported, and inadmissible opinions
2 of the CHP/MAIT are likely to gain an unfair cloak of veracity by virtue of the CHP/MAIT
3 investigator’s positions as government officials. The jury would undoubtedly give undue credibility
4 to these opinions and conclusions just because the CHP/MAIT is a government entity, which would
5 cause severe and unnecessary prejudice to plaintiff. Explaining why courts exclude these reports,
6 the court in *Sherrell v. Kelso*, stated that “Accident reports are printed on forms with a standard
7 heading, insignia, and title designating their “official” character. Not only is the report an “official”
8 document per se, but it even looks “official.” And therein lies the danger.” *Sherrell v. Kelso* (1981)
9 116 Cal.App.3d Supp.22, 31.

10 This is the exact type of “evidence” that *Evidence Code* §§ 350 & 352 are designed to
11 preclude. There is no reason why the jury would benefit from the unfounded collateral opinions and
12 conclusions of the CHP/MAIT officers and investigators. The admission of this irrelevant
13 “evidence” would undoubtedly necessitate undue consumption of this Court’s valuable time.
14 Furthermore, such evidence holds little to no probative value, and creates a substantial danger of
15 undue prejudice, of confusing the issues, and of misleading the jury. As such, the evidence must be
16 excluded under Evidence Code §§ 350 & 352.

17
18 **IX. IN THE EVENT CERTAIN FACTS FROM THE MAIT INVESTIGATION ARE**
19 **ADMITTED, THE CHP/MAIT OPINIONS AND CONCLUSIONS ARE STILL NOT**
20 **ADMISSIBLE.**

21 Plaintiffs’ counsel anticipates that certain facts contained in the MAIT report may be
22 admitted into evidence by witnesses with personal knowledge of those facts at trial (for example,
23 date of the accident, time of the accident, where the deceased individuals were located after the
24 crash, photographs from the accident scene, etc.), and that FedEx’s counsel will attempt to argue
25 that the admission of those facts renders the CHP/MAIT opinions and conclusions admissible under
26 *Evidence Code* §356 and the doctrine of completeness. Such an argument would be a blatant
27 misapplication of the *Evidence Code* and the completeness doctrine. Case law is in accord.
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1 For example, in an action against an automobile manufacturer arising from injuries allegedly
2 due to the defective design of the back of an automobile's front seat, the trial court properly refused
3 to allow the admission of an entire report regarding crash tests from which a party used one
4 photograph in its case. *Benson v. Honda Motor Co.* (1994) 26 Cal App 4th 1337. Evidence Code §
5 356 makes admissible only such parts of a writing as are relevant to the part thereof previously given
6 in evidence.

7 Accordingly, just because certain facts related to the subject accident are admitted, the door
8 is not opened to admit the entire MAIT Report, or the opinions/conclusions of the CHP contained
9 therein. Further, the issues of admissibility, hearsay, foundation, relevancy, probative value, and
10 prejudicial effect discussed above are among the mix of concerns that the trial court must consider
11 in its discretion in determining whether to admit evidence under the doctrine of completeness. As
12 explained above, it is obvious that CHP/MAIT conclusions and opinions are not admissible for any
13 purpose.

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18 **X. CONCLUSION**

19 For the above reasons, Plaintiff's motion should be granted in full.
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DATED: September 6, 2017

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