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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]**

**FEDERAL EXPRESS VEHICLE
COLLISION CASES**

THIS DOCUMENT RELATES TO:

HARLEY HOYT, an individual,

Plaintiffs,

v.

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,

Defendants.

**JUDICIAL COUNCIL
COORDINATION PROCEEDING NO.
4788**

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

**PLAINTIFF'S MOTION IN LIMINE
NO. 1 TO EXCLUDE TESTIMONY,
REFERENCE TO, OR ARGUMENT
REGARDING NTSB REPORT AND
ANY OPINIONS AND CONCLUSIONS
OF NTSB INVESTIGATORS**

**(Filed Concurrently with Declaration of
Christine Spagnoli and Exhibits 1 – 18)**

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

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

1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD HEREIN:

2 Plaintiffs respectfully move the Court for the issuance of the following Orders in *limine*:

3 1. An Order prohibiting the attorneys for all parties from offering any evidence and
4 prohibiting all attorneys and witness from making any references in the presence of jurors or
5 prospective jurors to the National Transportation Safety Board (“NTSB”) Report and any opinions
6 or conclusions of NTSB investigators, as well as the NTSB animation of the Subject Incident.

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

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

11 This Motion is made and based on the following grounds:

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

14 2. The NTSB Highway Accident Report is inadmissible pursuant to 49 USC 1154(b)
15 which states: “Reports.--No part of a report of the Board, related to an accident or an investigation
16 of an accident, may be admitted into evidence or used in a civil action for damages resulting from a
17 matter mentioned in the report.”

18 3. The Court may not take judicial notice of the contents of the NTSB Reports pursuant
19 to Evidence Code § 452 (h), as the facts are subject to dispute and are not capable of immediate and
20 accurate determination by resort to sources of reasonably indisputable accuracy.

21 4. The opinions and conclusions of NTSB investigators lack foundation, are speculative
22 and constitute inadmissible hearsay.

23 5. An animation of the collision sequence prepared by NTSB investigators lacks
24 foundation, is speculative and constitutes inadmissible hearsay.

25 6. Because the opinions and conclusions from the Report are not independently
26 admissible, they may not be relied upon by FedEx Freight’s experts in support of their opinions.
27 *See People v. Sanchez* (2016) 63 Cal. 4th 665, 684: “An expert’s opinion testimony like any other
28 hearsay evidence, “must be properly admitted through an applicable hearsay exception.” An expert

1 cannot “relate as true case-specific facts asserted in hearsay statements, unless they are
2 independently proven by competent evidence or are covered by a hearsay exception.”

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

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

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11 DATED: September 6, 2017

GREENE BROILLET & WHEELER, LLP

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13

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

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16 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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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

18 Within minutes of the crash first responders arrived including local Orland police officers
19 and rescue personnel, followed quickly by local CHP officers. Later in the evening, after dark, a
20 specialized team of CHP officers who were part of the Multidisciplinary Accident Investigation
21 Team (MAIT) arrived to conduct an investigation into the cause of the crash. The following day a
22 team of investigators from the National Transportation Safety Board (“NTSB”) arrived to conduct
23 a parallel investigation in keeping with its mission to “improve transportation safety by investigating
24 accidents and incidents and issuing safety regulations focused on safety.” *See Ex. 1 NTSB Highway*
25 *Accident Report at pg. 2, citing 49 C.F.R. 831.4.* Over a year later, On May 13, 2015, the NTSB
26 released its 77 page “Highway Accident Report” which summarized its findings and published a
27 docket containing 1869 pages of materials. Exhibit 2 is a copy of the NTSB Docket Contents which
28 includes several detailed reports of various sub-groups on a number of topics including Highway

1 Factors (*Ex. 3*); Vehicle Factors (*Ex. 4*); Human Performance Factors (*Ex. 5*); Survival Factors (*Ex.*
2 *6*); Motor Carrier Factors (*Ex. 7*) and Technical Reconstruction Factors (*Ex. 8*). These sub-group
3 reports include numerous attachments of documents obtained by the NTSB from various third party
4 sources and summaries of interviews with various witnesses.

5 Throughout the course of this litigation, FXF has impermissibly attempted to rely upon and
6 utilize the opinions and conclusions of the NTSB investigators to try to shore up its positions in this
7 case. For instance, FXF relied heavily on these opinions and conclusions in its Opposition to
8 Plaintiffs’ Motions for Summary Adjudication, primarily related to the NTSB investigators’
9 opinions regarding whether Evans may have experienced a sudden medical emergency. Although
10 this Court ultimately ruled that such reliance was improper because the NTSB Report is
11 inadmissible¹, Plaintiffs’ counsel anticipates that FXF will still attempt to introduce and utilize this
12 “evidence” at trial. For example, defense counsel have repeatedly used the NTSB Accident Report
13 to question various California Highway Patrol Officers, such as Officer Horner and Sgt. Parsons,
14 even though the MAIT team drafted its own report which differs in several important respects from
15 the NTSB’s conclusions, including the MAIT Team’s ultimate conclusion that the primary collision
16 factor was Evans’ unsafe turning motion in violation of Vehicle Code § 22107.²

17 For the reasons set forth herein, the NTSB Report and the opinions of the investigators
18 contained therein are clearly inadmissible, and admission of this evidence would constitute
19 reversible error. Accordingly, Plaintiffs’ counsel respectfully requests that the instant motion to
20 exclude the NTSB Report, including all of its sub-reports as well as the NTSB collision sequence
21 animation, be granted in its entirety.

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27 ¹ Plaintiffs’ counsel objected to Defendant’s reliance on the NTSB Report as evidentiary support for their
28 Oppositions to Plaintiffs’ Motion for Summary Adjudication. The Court sustained Plaintiffs’ objections. *See Ex. 9,*
Transcript of Hearing at pg.16:12 – 25; 18:3 – 19:7.

² See, e.g., *Ex. 10, Parsons deposition at pgs. 128, 188 – 193; Ex. 11, Horner deposition at pgs. 112 - 133.*

1 **II. THE NTSB REPORT AND OPINIONS AND CONCLUSIONS OF THE NTSB**
2 **INVESTIGATORS ARE INADMISSIBLE UNDER FEDERAL LAW.**

3 At the outset, the NTSB Highway Accident Report is specifically and unequivocally
4 inadmissible pursuant to 49 USC 1154(b) which states: “Reports.--No part of a report of the Board,
5 related to an accident or an investigation of an accident, may be admitted into evidence or used in a
6 civil action for damages resulting from a matter mentioned in the report.”

7 Further, 49 CFR 835.3 severely limits the scope of what an NTSB investigator may testify
8 to. 49 CFR 835.3(a) reflects the legislative intent of other statutory provisions limiting the
9 admissibility of NTSB reports and provides as follows:

10 “Section 701(e) of the FA Act and section 304(c) of the Safety Act
11 **preclude the use or admission into evidence of Board accident**
12 **reports in any suit or action for damages arising from accidents.**
13 **These sections reflect Congress' "strong * * * desire to keep the**
14 **Board free of the entanglement of such suits."** Rep. No. 93-1192,
15 93d Cong., 2d Sess., 44 (1974), **and serve to ensure that the Board**
16 **does not exert an undue influence on litigation. The purposes of**
17 **these sections would be defeated if expert opinion testimony of**
18 **Board employees, which may be reflected in the views of the**
19 **Board expressed in its reports, were admitted in evidence or used**
20 **in litigation arising out of an accident.** The Board relies heavily
21 upon its investigators' opinions in its deliberations. Furthermore, the
22 use of Board employees as experts to give opinion testimony would
23 impose a significant administrative burden on the Board's
24 investigative staff. **Litigants must obtain their expert witnesses**
25 **from other sources.”** (emphasis added).

26 49 CFR 835.3(b) further provides that NTSB investigators “*shall decline to testify*
27 *regarding matters beyond the scope of their investigation, and they shall not give any expert or*
28 *opinion testimony.*” (emphasis added). Also, 49 CFR 835.3(c) states, “Board employees may testify
about the firsthand information they obtained during an investigation that is not reasonably
available elsewhere, including observations recorded in their own factual accident reports.
Consistent with the principles cited in § 835.1 and this section, current *Board employees are not*
authorized to testify regarding other employee's reports, or other types of Board documents,
including but not limited to safety recommendations, safety studies, safety proposals, safety
accomplishments, reports labeled studies, and analysis reports, as they contain staff analysis
and/or Board conclusions.” (emphasis added). Finally, § 835.3(e) notes further limitations: “Not

1 all material in a factual accident report may be the subject of testimony. The purpose of the factual
2 accident report, in great part, is to inform the public at large, and as a *result the factual accident*
3 *report may contain information and conclusions for which testimony is prohibited by this part.*”
4 (emphasis added).³

5 **A. The NTSB Analysis Regarding Evans’ Incapacitation Is Inadmissible**

6 In Section 2 of the Report, under the heading “Analysis”, the NTSB investigators discuss
7 various conclusions reached including their ultimate conclusion that:

8 “Ultimately, NTSB investigators were unable to determine whether the truck driver may
9 have been affected by a medically incapacitating but undiagnosed condition or a medical
10 event that prevented him from controlling the truck-tractor. Therefore, the NTSB concludes
11 that based on the truck driver’s lack of braking or other appropriate reaction prior to or during
12 the crash sequence – and witness accounts concerning the driver’s behavior or condition –
13 he was unresponsive due to an unknown cause, which prevented him from controlling his
14 vehicle and led to the crash.” *Ex. 1, NTSB Highway Accident Report at pg. 34.*

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16 Clearly this conclusion is exactly the type of “analysis” which is prohibited from admission
17 into evidence in a civil case pursuant to the federal regulations cited herein. First, there is no
18 evidence that this conclusion is based on “first hand information” obtained by an NTSB
19 investigator. In fact, not a single NTSB investigator has been deposed, much less established
20 foundation to identify any “first hand information” that they may have exclusively obtained. And
21 indeed, the evidence derived from depositions of the CHP MAIT team members reflects that the
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25 ³ 49 C.F.R. 835.1 further states as follows: “This part prescribes policies and procedures regarding the testimony
26 of employees of the National Transportation Safety Board (Board) in suits or actions for damages and criminal
27 proceedings arising out of transportation accidents when such testimony is in an official capacity and arises out of or is
28 related to accident investigation. The purpose of this part is to ensure that the time of Board employees is used only for
official purposes, to avoid embroiling the Board in controversial issues that are not related to its duties, to avoid spending
public funds for non-Board purposes, to preserve the impartiality of the Board, and to prohibit the discovery of opinion
testimony.”

(continued...)

1 NTSB employees tagged along to CHP witness interviews, which were recorded, and utilized the
2 scene survey that was carried out by the CHP MAIT team to analyze the accident sequence.⁴

3 Second, the NTSB analysis is not based on information that is “*not reasonably available*
4 *elsewhere.*” Instead, just as the federal regulations dictate, FXF has obtained its own expert
5 witnesses who have reviewed the same source materials and factual evidence that was reviewed by
6 the NTSB employees, and those litigation experts have reached their own conclusions concerning
7 that evidence, such as whether there is physical evidence at the scene which indicates whether Evans
8 took evasive action when his vehicle entered the median.⁵

9 FedEx Freight’s only purpose in attempting to tell the jury about the NTSB’s analysis
10 appears to be to shore up the conclusions its hired litigation experts reached by cloaking those
11 experts in the veil of legitimacy offered by government employees with presumably no axe to grind.
12 But, as the NTSB Report itself admonishes: “The NTSB does not assign fault or blame for an
13 accident or incident; rather, as specified by NTSB regulation, accident/incident investigations are
14 fact finding proceedings with no formal issues and no adverse parties and are not conducted for the
15 purpose of determining the rights or liabilities of any person. Assignment of fault or legal liability
16 is not relevant to the NTSB statutory mission to improve transportation safety by investigating
17 accidents and incidents and issuing safety regulations.” (*Ex. 1 at pg. 2, citing 49 C.F.R. § 831.4*).

18 **B. The Court May Not Take Judicial Notice of the NTSB Report or Any Statements**
19 **of Fact or Circumstances Contained Therein**

20 Despite the federal prohibitions and the Court’s previous ruling striking the FXF experts’
21 references to various conclusions in the NTSB reports, Plaintiffs’ counsel anticipate that FXF’s

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23 ⁴ As set forth in Plaintiffs’ MIL #2 regarding the CHP MAIT Report, the scene survey did not accurately capture
24 the location where the FedEx Vehicle departed into the median, a critical piece of evidence that calls into question both
25 the NTSB and CHP conclusions regarding the path of the vehicle and whether Evans was unresponsive after activating
the left turn signal in the #2 lane. Further, as reflected in *Ex. 8*, at page 17, the NTSB Technical Reconstruction Group
Chairman’s Report: “All roadway evidence was documented by the CHP investigators who provided the NTSB
investigators with photographs, total station data and 3D scan data of the vehicles at final rest.”

26 ⁵ See *Ex. 12*, Fenton Declaration at ¶ 15, in which Fenton quotes an opinion from the NTSB regarding tire
27 impressions in the median, and ¶ 16 in which Fenton declares that he has reviewed photos of the tire impressions and
28 reached his own conclusions about what they depict. See also *Ex. 13*, Melinek Declaration at ¶ 10 and 11 in which Dr.
Melinek quotes passages from the NTSB Report containing the investigators various conclusions about whether Evans
took evasive action and states: “I agree with the NTSB assessment that the truck driver was “unresponsive due to an
unknown cause . . .”, and that “The NTSB is accurate in its assessment . . .”

1 counsel may nevertheless attempt to argue that the NTSB Report is somehow admissible under the
2 holding of *Bethman v. City of Ukiah*, (1989) 216 Cal.App.3d 1395. (Indeed, they attempted to do
3 so at the hearing on Plaintiff’s Motion for Summary Adjudication). However, the *Bethman* holding
4 as it relates to the admissibility of NTSB reports is limited to a footnote, and merely states the
5 obvious: “Although section 1441 (e) ***prohibits the admission into evidence of the NTSB’s opinions***
6 ***or conclusions in such report as to possible causes of an accident or negligence***, the admission of
7 factual material or a statement of the factual circumstances surrounding or leading to the accident
8 in such report is permissible.” (emphasis added). While the *Bethman* Court, in footnote 5, did
9 indicate that it was taking judicial notice of the NTSB Report in that case pursuant to *Evidence Code*
10 § 452(h), neither that section, nor any other sub-part of the statute, supports similar treatment of the
11 NTSB Report in this case.

12 *Evidence Code* § 450 is the general provision governing judicial notice, and states that:
13 “Judicial notice may not be taken of any matter unless authorized or required by law.” *Evidence*
14 *Code* § 451 sets forth matters over which a court must take “mandatory” judicial notice, while § 452
15 governs “permissive” judicial notice of various matters. Section 452(h), the section under which
16 the *Bethman* court took judicial notice of the report in that case, provides that judicial notice “***may***
17 ***be taken***” of the following matters: “Facts and propositions that are not reasonably subject to
18 dispute and are capable of immediate and accurate determination by resort to sources of reasonably
19 indisputable accuracy.”

20 The factual information in the report that the court took judicial notice of in *Bethman* had to
21 do with whether the navigation equipment in use at an airport at which the pilot was attempting to
22 land complied with FAA regulations. The pilot crashed and sued the city alleging that the airport
23 navigation equipment was inadequate. The NTSB Report was submitted as an exhibit by the City
24 in support of its demurrer, which asserted that any claim that the navigation facilities were
25 inadequate was preempted by federal law. There was no dispute that the airport facilities complied
26 with the FAA standards, a fact which was supported by the NTSB Report, and there was no objection
27 to the admission of the report for the purpose of establishing the airport’s compliance with the
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1 federal regulations. 216 Cal. App.3d at 1400. In taking judicial notice of the report, therefore, the
2 court was clearly not taking notice of facts which were “reasonably subject to dispute.”

3 Here, in contrast, the facts regarding the crash are in serious dispute, made more so by the
4 evident errors and misconceptions of the NTSB investigators as set forth in their various reports.
5 For instance, and as set forth in more detail in Plaintiffs’ Motion in Limine #2 regarding the parallel
6 CHP investigation, the government investigators did not identify or survey the key tire marks
7 evidencing where the FXF vehicle left the road. This fact has been acknowledged by one of the
8 CHP officers who conducted the survey Sgt. Dugger, and FXF’s own reconstruction expert has
9 adopted these missed tire marks in his own reconstruction. *See, Spagnoli Decl. at ¶ 15, and Ex. 15,*
10 *Dugger Deposition; Ex. 16, MAIT Photograph; and Ex. 14, Fenton deposition at 41:19 – 42:2.*

11 Among the statements in the NTSB Report that defense counsel have cherry picked in their
12 questioning of various witnesses is the statement that: “Photographs of the tire impressions through
13 the median did not depict the characteristics of tire slip indicative of emergency braking or steering.”
14 *See Ex. 1 at pg. 28, section 1.8.3 Physical Evidence.* The interpretation of the physical evidence in
15 the median is a fact that is reasonably subject to dispute. Both the defense and plaintiffs’ accident
16 reconstruction experts have offered different opinions about what the physical evidence at the scene
17 and tire impressions depict, with the defense expert opining that the evidence does not depict
18 steering, while plaintiffs’ expert opined that there was evidence of steering in the median. Of
19 particular importance in this regard is the testimony of defense expert, Stephen Fenton, who was
20 asked specifically if he knew what photographs and what tire impressions were being referred to by
21 the NTSB in this statement: “Q. You are agreeing with the conclusion without knowing what the
22 NTSB was looking at, right? A. Yes.” *See Ex. 14, Fenton Deposition at pg. 218:20 to 219:2.*

23 Certainly, there might be some facts contained in the NTSB Report, such as the date and
24 location of the crash, the makes and models of the vehicles involved, and other such easily verifiable
25 data which is not reasonably subject to dispute. However, those details are intertwined with
26 extensive expressions of opinion and conclusions by the NTSB employees that are clearly in dispute
27 and which are not the types of matters which the court is either required to or permitted to take
28 judicial notice. There are no undisputed facts contained in the NTSB Report that are not easily

1 provable from other readily available sources, making admission of any part of the NTSB Report
2 for any purpose unnecessary.

3 **III. THE NTSB OPINIONS AND CONCLUSIONS LACK FOUNDATION AND**
4 **CONSTITUTE INADMISSIBLE HEARSAY.**

5 **A. Lacks Foundation**

6 Pursuant to *Evidence Code* § 702: “the testimony of a witness concerning a particular matter
7 is inadmissible unless he has personal knowledge of the matter. Against the objection of a party,
8 such personal knowledge must be shown before the witness may testify concerning the matter.” See
9 *West v. Sundown Little League of Stockton* (2002) 96 Cal.App.4th 351, 358. Personal knowledge
10 requires two things: (1) the capacity to perceive the matter at issue through exercise of his or her
11 own senses (*California Evidence Code* § 170) and (2) the ability to recall and communicate such
12 perceptions. *People v. St. Andrew* (1980) 101 Cal.App.3d 450, 458, fn. 3.

13 The general rule regarding opinion testimony of lay witnesses is set forth in *Evidence Code*
14 § 800: “If a witness is not testifying as an expert, his testimony in the form of an opinion is limited
15 to . . . an opinion that is: “(a) rationally based on the perception of the witness; and (b) helpful to a
16 clear understanding of his testimony.” Under Section 800, lay witnesses must ordinarily testify to
17 facts only, not to their opinions and conclusions, leaving the drawing of inferences or conclusions
18 to the trier of fact. *Froomer v. Drollinger* (1962) 201 Cal. App. 2d 90; *Newton v. Los Angeles*
19 *Transit Lines* (1951) 107 Cal. App. 2d 624. Moreover, while a witness who is not testifying as an
20 expert may provide opinion testimony based on his own perception, the opinion must be necessary
21 to obtain a clear understanding of the witness’ testimony. *People v. Hurlic* (1971) 14 Cal. App. 3d
22 122, 127; *Evid. Code* § 800, (Law Revision Commission Comment).

23 A person is qualified to testify as an expert if he has special knowledge, skill, experience,
24 training, or education sufficient to qualify him as an expert on the subject to which his testimony
25 relates. (*Evid. Code*, § 720, subd. (a).) While traffic officers whose duties include investigations
26 of automobile accidents may qualify as experts and may be allowed to testify concerning their
27 opinions as to the various factors involved in such accidents, before such expert opinion testimony
28 is allowed, a specific foundational showing concerning the officer’s background, training and

1 experience must first be made. *See, e.g. Kastner v. Los Angeles Metropolitan Transit Authority*
2 (1965) 63 Cal.2d 52, 56 – 59; *Hart v. Wielt*, (1970) 4 Cal. App.3d 224, 229; *People v. Haeussler*
3 (1953) 41 Cal.2d 252.)

4 In this case, FXF’s counsel has not obtained any evidence about the bases of the analysis
5 and opinions and conclusions reached by NTSB employees or even the identity of the author(s).
6 At an even more basic level, defense counsel have not identified any independent “first hand factual
7 observations” made by any specific NTSB employee. Accordingly, FXF cannot lay a foundation
8 for any testimony by any NTSB employee.

9 **B. Hearsay**

10 Under *Evidence Code* § 1200(a), hearsay is defined as an out of court statement that is
11 offered to prove the truth of the matter asserted. Under § 1200(b) unless provided for under law,
12 hearsay evidence is inadmissible. *People v. Sundlee*, 70 Cal.App.3d 477, 482 (1977) (subject to
13 recognized exceptions, the hearsay rule bars out-of-court declarations of non-parties which are
14 offered to prove the truth of the matter stated.) The reason for barring hearsay statements is that
15 they lack trustworthiness in that the veracity and accuracy of the statements cannot be tested under
16 oath by the current trier of fact. The hearsay declarant’s demeanor cannot be observed and the
17 declarant is not subject to cross-examination by the adverse party. *Korsak v. Atlas Hotels Inc.* (1992)
18 2 Cal.App.4th 1516; *Buchanan v. Nye* 128 Cal.App.2d 582, 585 (1954) (the essence of the hearsay
19 rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination).

20 The NTSB Report itself is hearsay, and is further rife with multiple layers of additional
21 hearsay including summaries of witness interviews, contents of various documents obtained from
22 third parties, and opinions and conclusions of unidentified witnesses. There is no hearsay exception
23 that supports the admission of these out-of-court statements, and no non-hearsay purpose for their
24 admission.

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1 **IV. DEFENSE EXPERTS MAY NOT RELY ON THE NTSB REPORT OR OPINIONS**
2 **AND CONCLUSIONS OF THE NTSB INVESTIGATORS BECAUSE THEY ARE**
3 **INADMISSIBLE.**

4 As firmly established herein, the NTSB Report is inadmissible and the opinions and
5 conclusions of the investigators constitute hearsay, lack foundation and are based on speculation.
6 Under the recent holding of *People v. Sanchez* (2016) 63 Cal. 4th 665, experts are not permitted to
7 rely on inadmissible reports, such as the NTSB report at issue, in support of their opinions. *See*
8 *People v. Sanchez* (2016) 63 Cal. 4th 665. As the California Supreme Court explained:

9 Once we recognize that the jury must consider expert basis testimony for its truth in order to
10 evaluate the expert’s opinion, hearsay and confrontation problems cannot be avoided by
11 giving a limiting instruction that such testimony should not be considered for its truth. If an
12 expert testifies to case-specific out-of-court statements to explain the bases for his opinion,
13 those statements are necessarily considered by the jury for their truth, thus rendering them
14 hearsay. Like any other hearsay evidence, it must be properly admitted through an
15 applicable hearsay exception.” *Id. at 684.*

16 Therefore, “what an expert cannot do is relate as true case-specific facts asserted in hearsay
17 statements, unless they are independently proven by competent evidence or are covered by a hearsay
18 exception.” *Id. at 686.* An expert may properly assume the truth of facts otherwise admitted into
19 evidence in forming an opinion, but cannot assume facts for which no admissible evidence is before
20 the Court. *Id. at 676-677.* The latter scenario is the case here, as the NTSB Report as well as the
21 multiple layers of hearsay contained within it, are not admissible.

22 Accordingly, because the NTSB Report is not independently admissible, it may not be relied
23 upon by FedEx’s experts in support of their opinions. With respect to experts Fenton and Melinek,
24 both attempted to quote from various pages of the NTSB reports in support of the opinions they
25 expressed in declarations submitted in opposition to Plaintiffs’ Motion for Summary Adjudication
26 of the 15th Affirmative Defense. *See Ex. 12, Fenton Declaration at ¶ 15, Ex. 13, Melinek*
27 *Declaration at ¶ 10 and 11.* In sustaining Plaintiffs’ Counsel’s objections to these experts’ reliance
28 on and reference to specific NTSB conclusions, the Court stated: “The guts of *Sanchez* is the expert

1 can't say here's what the hearsay from the NTSB is. I agree with it. And by reciting it, I somehow
2 make it admissible. He can't do that. The proponent of the evidence has got to establish it through
3 some other proper non-hearsay or hearsay exception means, and then Sanchez says let's return to
4 hypotheticals." *See Ex. 9, Transcript of Hearing at pg. 6, lns. 22 – 28.*

5 Attempts by other FXF experts to rely upon and refer to the NTSB reports have continued,
6 even after the Court's ruling in January, and even though FXF has done nothing to lay the foundation
7 for admissibility of any portion of the NTSB Reports for a non-hearsay purpose or to establish an
8 exception to the hearsay rule. Examples of testimony of other FXF experts referring to and relating
9 the contents of the NTSB Report are set forth in the accompanying Declaration of Christine Spagnoli
10 at ¶ 14, 16,17 and Exhibits 14, 16, 18.

11 **V. THE NTSB REPORT IS IRRELEVANT**

12 *Evidence Code* § 350 states that "[n]o evidence is admissible except relevant evidence."
13 "Relevant evidence" is "[e]vidence... having any tendency in reason to prove or disprove any
14 disputed fact that is of consequence to the determination of the action." *Evid. Code* § 210. Thus,
15 the test of relevancy is whether the evidence logically tends to establish a material fact. *People v.*
16 *Yu* (1983) 143 Cal.App.3d 358, 376. Evidence of unrelated acts is irrelevant. *Morocco v. Ford*
17 *Motor Co.* (1970) 7 Cal.App.3d 84, 91. In *Wade v. Southwest Bank* (1962) 211 Cal.App.2d 392, the
18 Court held that, under the rule that testimony must be confined to relevant issues, evidence of
19 collateral facts is excluded as being incapable of affording any reasonable presumption or inference
20 as to the principal fact or matter in the case. In *Traxler v. Thompson* (1970) 4 Cal.App.3d 378, the
21 court determined that "[t]he only test of relevancy is logic and common sense."

22 Here, logic and common sense can lead but to one conclusion: namely, unfounded,
23 speculative opinions and conclusions and hearsay from unidentified NTSB investigators does not
24 tend prove or disprove any disputed fact in this case. Plaintiffs' counsel have no ability to interrogate
25 the NTSB investigators regarding their opinions and conclusions, as such testimony is not permitted
26 under the federal laws set forth above. *See* 49 CFR 835.3 and 49 USC 1154(b). The purpose of
27 the NTSB investigation was not to find fault or assign blame, but rather to explore whether safety
28 regulations should be re-evaluated or adopted to improve highway safety. That is a fundamentally

1 different purpose than a jury’s role in this litigation, which is, in fact, to determine fault and assign
2 blame. This case should be determined by the testimony and evidence produced at trial according
3 to the rules of examination and cross-examination, and not by untested conclusions and opinions of
4 unidentified NTSB investigators who will not be permitted to meaningfully testify at trial.

5 **VI. THE NTSB REPORT AND OPINIONS AND CONCLUSIONS CONTAINED**
6 **THEREIN ARE HIGHLY PREJUDICIAL, WILL CONFUSE THE ISSUES, AND**
7 **MISLEAD THE JURY AND CREATE AN UNDUE CONSUMPTION OF TIME.**

8 Even if there was some remote, trivial relevancy for such evidence (which there is not) the
9 danger of undue prejudice plainly outweighs its admission. *Evidence Code* § 352 provides: “The
10 court in its discretion may exclude evidence if its probative value is substantially outweighed by the
11 probability that its admission will (a) create an undue consumption of time or (b) create substantial
12 danger of undue prejudice, of confusing the issues, or of misleading the jury.”

13 Therefore, § 352 requires the trial judge to balance the probative value of the proffered
14 evidence against its harmful effects, in order to decide whether to admit it. See *Kessler v. Gray*
15 (1978) 77 Cal.App.3d 284. The Supreme Court defines the “prejudice” referred to in Evidence Code
16 §352 as applying to “evidence which uniquely tends to evoke an emotional bias against. . . an
17 individual and which has very little effect on the issues.” *People v. Karis* (1988) 46 Cal.3d 612, 638.
18 “In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to
19 inflame the emotions of the jury, motivating them to use the information, not to logically evaluate
20 the point upon which is relevant, but to reward or punish one side because of the jurors’ emotional
21 reaction.” *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.

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

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1 Inviting the jury to speculate invites prejudice. This collateral “evidence” may cause the
2 jury to improperly consider whether or not FedEx’s liability is somehow diminished by speculation
3 as to why and how the NTSB came to its conclusions and opinions, as opposed to fully taking into
4 account the relevant evidence and considering FedEx’s liability in light of testimony and evidence
5 that has been obtained in this litigation.

6 If evidence related to the NTSB investigation is admitted, it would also require a significant
7 undue consumption of time because plaintiffs’ counsel would then have to explain to the jury what
8 the purpose of the NTSB is, and why the NTSB conclusions and opinions are unfounded and
9 incorrect. Moreover, Plaintiff’s counsel would be hampered by the inability to interrogate the NTSB
10 investigators as to the bases and foundation for their opinions and conclusions.

11 Last, and perhaps most importantly, the evidence carries a great risk of misleading the jury
12 into improperly drawing an inference that FedEx did nothing wrong in this case. Further the
13 unfounded, unsupported, and inadmissible opinions of the NTSB are likely to gain an unfair cloak
14 of veracity by virtue of the NTSB investigator’s positions as government officials. The jury would
15 undoubtedly give undue credibility to these opinions and conclusions just because the NTSB is a
16 government entity, which would cause severe and unnecessary prejudice to plaintiffs. *See, e.g.,*
17 *Sherrell v. Kelso* (1981) 116 Cal.App.3d Supp.22, 31, holding that *Evid. Code* § 352 precluded
18 admission of a police report explaining: “Not only is the report an “official” document per se, but
19 it even looks “official.” And therein lies the danger.”

20 Evidence related to the NTSB Report and opinions of the government investigators is the
21 exact type of “evidence” that Evidence Code §§ 350 and 352 are designed to preclude. There is no
22 reason why the jury would benefit from the unfounded collateral opinions and conclusions of the
23 NTSB. The admission of this irrelevant “evidence” would undoubtedly necessitate undue
24 consumption of this Court’s valuable time. Furthermore, such evidence creates a substantial danger
25 of undue prejudice, of confusing the issues, and of misleading the jury. As such, the evidence must
26 be excluded under Evidence Code §§ 350 & 352.

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1 **VII. IN THE EVENT CERTAIN FACTS FROM THE NTSB REPORT ARE ADMITTED,**
2 **THE JURY WOULD NOT BENEFIT FROM THE NTSB OPINIONS AND**
3 **CONCLUSIONS.**

4 If, prior to trial, FedEx Freight identifies any specific independently obtained percipient
5 observation or factual evidence identified by a specific NTSB employee that is admissible either
6 through testimony of that specific witness or through judicial notice, the admission of those facts
7 would not render the NTSB Report or the opinions and conclusions contained therein admissible
8 under *Evidence Code* §356 and the doctrine of completeness.

9 Such an argument would be a blatant misapplication of the Evidence Code and the
10 completeness doctrine. Case law is in accord. For example, in an action against an automobile
11 manufacturer arising from injuries allegedly due to the defective design of the back of an
12 automobile's front seat, the trial court properly refused to allow the admission of an entire report
13 regarding crash tests from which a party used one photograph in its case. *Benson v. Honda Motor*
14 *Co.* (1994) 26 Cal App 4th 1337. Evidence Code § 356 makes admissible only such parts of a
15 writing as are relevant to the part thereof previously given in evidence. Accordingly, just because
16 certain facts may be admitted, the door is not opened to admit the entire NTSB Report, or the
17 opinions/conclusions of NTSB investigators. Further, the issues of admissibility, hearsay,
18 foundation, relevancy, probative value, and prejudicial effect discussed above are among the mix of
19 concerns that the trial court must consider in its discretion in determining whether to admit evidence
20 under the doctrine of completeness. As explained above, it is obvious that NTSB analysis,
21 conclusions and opinions are not admissible for any purpose.

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26 **VIII. CONCLUSION**

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

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