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Plaintiffs' Co-Lead Counsel

(SPACE BELOW FOR FILING STAMP ONLY)

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 Hon. John Shepard Wiley, Jr., Dept. 311)

PLAINTIFF'S MOTION IN LIMINE NO. 9 TO EXCLUDE TESTIMONY, REFERENCE TO, OR ARGUMENT CONCERNING AN ALLEGED LACK OF PRIOR SIMILAR INCIDENTS; DECLARATION OF CHRISTINE D. SPAGNOLI

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

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

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

Plaintiff respectfully moves 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 statement, argument or reference in the presence of jurors or prospective jurors to any claim that allegedly there is a lack of prior similar incidents involving distracted or texting FedEx Freight drivers, or that the alleged lack of prior similar incidents establishes that Tim Evans was not distracted or texting when the Subject Incident occurred.

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 Plaintiff will be accorded a fair trial and that the trial record will not be tainted with reversible error to the prejudice of Plaintiff.

2. Evidence of an absence of other incidents is irrelevant to the issues in this action and is inadmissible in negligence actions in California.

3. The introduction of evidence concerning an alleged absence of other incidents involving distracted or texting FedEx Freight drivers in this case is inadmissible under California *Evidence Code* § 352, because Defendant cannot make the requisite foundational showing for this evidence which will thereby be unduly prejudicial and create a substantial danger of confusing the jury.

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

DATED: September 6, 2017 **GREENE BROILLET & WHEELER, LLP**

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

DATED: September 6, 2017 **KIESEL LAW LLP**

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

Evidence in this case establishes that this crash was a result of distracted driving by FedEx driver Timothy Evans, who had a routine habit of using his mobile device while driving. Plaintiff's counsel anticipate that FXF's attorneys will attempt to argue that there have been no other accidents involving distracted or texting FXF drivers. In anticipation of this argument, Plaintiff's counsel sought a PMQ deposition of a FXF representative to testify about other accidents involving distracted or texting drivers long before trial. The Defendant refused to produce a witness after multiple meet and confer attempts. Plaintiff now brings this motion because the law is clear that such an argument is not permissible where the defendant has refused to provide any foundation to support the assertion.

II. ANY ARGUMENT CONCERNING THE ALLEGED LACK OF PRIOR SIMILAR INCIDENTS INVOLVING DISTRACTED OR TEXTING DRIVERS SHOULD BE EXCLUDED AT TRIAL.

A. FXF Cannot Lay a Proper Foundation to Offer Evidence Regarding an Absence of Prior Similar Incidents.

At the outset, under *Evidence Code* 702, in order for any witness to testify about the lack of prior incidents a witness must lay the foundation that he or she has personal knowledge about the prior incidents. *Evidence Code* 702 states that: "Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter."

Evidence Code 403 requires that a party must establish preliminary facts related to witnesses' personal knowledge before the witness may testify: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding

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of the existence of the preliminary fact, when: (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony."

Here, the attorneys for FXF cannot assert that there have been "no prior similar incidents" without offering evidence to support the existence of this preliminary fact. In this case, FXF has refused to provide any evidence concerning its record keeping and knowledge of accident history (or the alleged lack of accident history) related to distracted and/or texting drivers. Furthermore, even if such evidence does exist, it must come from a witness with personal knowledge of the safety history at FXF and all of the incidents which have occurred involving FXF vehicles. There is no employee or former employee of FXF who has been produced by the defendant, despite repeated requests, who has demonstrated any such knowledge. FXF's counsel have not identified any witnesses who have the requisite knowledge or expertise through whom this testimony will be elicited, nor have they identified any documents from which such a conclusion could be drawn.

Plaintiff anticipated that FXF would attempt to make such an argument at trial and properly noticed a PMQ deposition of a FXF representative who had knowledge of other incidents. *See Declaration of Christine Spagnoli,* ¶ 3. FXF objected to the notice and refused to produce a witness. *See Declaration of Christine Spagnoli, ¶ 4*. Plaintiffs then filed a Motion to Compel, which was set to be heard on June 9, 2017. At that hearing, trial counsel for FXF represented that he had not yet formulated what he might or might not say at trial about "lack of other incidents" but attempted to assure the court and counsel that at this time he had no intentions of making such an argument. Plaintiffs' Counsel indicated that they would take the motion of calendar, but would object to any such statement at trial if the Defendant refused to make a foundational showing before trial. *See Ex. 3 Transcript of Hearing*. Since that hearing, there has not been any further discussion about the PMQ deposition. However, in an abundance of caution, Plaintiff files this Motion to prevent FXF counsel from making any such representation or argument to the jury or even attempting to now introduce evidence at trial to support such a claim. The Defendant and its attorneys have had more than ample opportunity to present a witness on this topic for examination prior to trial and deliberately refused to comply with the request.

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Establishing that something did not happen, proving negative evidence, presents the court with special problems, and is generally inadmissible. (*See 2 Wigmore, Evidence* §443-44 at 528-32 (Chadbourn rev. 1979).) It is harder to prove that an accident or injury did not happen than to prove that it did happen. The court in *Benson v. Honda Motor Co., Ltd*. (1994) 26 Cal. App. 4th 1337, 1346, relying on the decision by the Arizona Supreme Court in *Jones v. Pak-Mor Mfg. Co*. (1985) 145 Ariz. 121, 700 P.2d 819, 823 addressed this problem explaining:

> There are two possible explanations why a witness knows of no prior accident. 'The first is that there have been no prior accidents; the second is that there have been prior accidents but the witness does not know about them.' (*Jones v. Pak-Mor Mfg. Co., supra*, 700 P.2d at p. 824.) Therefore, at minimum, the proponent should proffer evidence through a witness who is familiar with product safety surveys or safety records concerning the product.

The court in *Benson* found the proponent of the negative evidence must make a preliminary foundational showing that had there been similar accidents or injuries in the past, the witness would have known about it. *Benson, supra*, 26 Cal. App 4th at 1346. In a product liability setting, the Arizona Supreme Court case cited by *Benson* described this showing as formidable, though not always insurmountable. *Jones, supra*, 700 P.2d at 825. The showing would have to include such items as: establishing a department or division to check to keep track of the safety of its products and implementing a system for ascertaining whether accidents occurred; taking a survey of its customers and the users of its products to determine if the product produced injuries; establishing a system with its insurers, distributors, or retailers whereby retail consumers are encouraged to report accidents, accidents are investigated, and data is compiled. *(Id.)* Thus, a foundational showing includes both establishing an existence of claims and/or lawsuits as well as an effort to actively seek out records of other incidents.

In *Forrest v. Beloit Corp*. (2005) 424 F.3d 344 the court held that testimony regarding an absence of prior claims should have been excluded since there was no foundation laid and the risk of unfair prejudice outweighed its probative value. The manufacturer failed to keep any records concerning whether injuries or accidents involving similar products might have occurred during the

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decades prior to the plaintiff's accident. *Id*. at 359. "The absence of any evidence concerning the safety history of these other [similar products], leaves us with no reliable way to determine the probative value." *Id.*

The court in *Benson, supra*, 26 Cal. App. 4th at 1347-48, held that the manufacturer was entitled to present evidence regarding absence of prior similar claims because a proper foundation was laid. The manufacturer offered testimony from an employee who reviewed claims of products liability in the legal department, which is collected from customer complaints, claims or lawsuits concerning personal injuries as part of its regular course of business. *Id*. at 1347. It was the practice of the manufacturer to keep a permanent, computerized system to record such complaints. *Id*. In addition, the safety records department collected information from police reports and product inspections. *Id.*

In contrast, the court in *Forrest, supra*, 424 F.3d at 358, held that testimony regarding an absence of prior claims should have been excluded since there was no foundation laid and the risk of unfair prejudice outweighed its probative value. The manufacturer failed to keep any records concerning whether injuries or accidents involving similar products might have occurred during the decades prior to the plaintiff's accident. *Id*. at 359. "The absence of any evidence concerning the safety history of these other [similar products], leaves us with no reliable way to determine the probative value." *Id.*

Because FedEx Freight and its attorneys have refused to provide any evidence to support an assertion at trial that there have been no other incidents in which a FedEx Freight driver was involved in a crash due to distraction or cell phone use, they must be prohibited from raising any such assertion at trial.

B. <u>Evidence of the Absence of Similar Incidents is Inadmissible at Trial to Prove Lack of Negligence by Evans, and is Therefore Irrelevant</u>.

Evidence Code § 350 states that "[n]o evidence is admissible except relevant evidence." "Relevant evidence" is "[e]vidence… having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." *Evid. Code* § 210. Thus,

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the test of relevancy is whether the evidence logically tends to establish a material fact. *People v. Yu* (1983) 143 Cal.App.3d 358, 376. In *Wade v. Southwest Bank* (1962) 211 Cal.App.2d 392, the Court held that, under the rule that testimony must be confined to relevant issues, evidence of collateral facts is excluded as being incapable of affording any reasonable presumption or inference as to the principal fact or matter in the case. In *Traxler v. Thompson* (1970) 4 Cal.App.3d 378, the court determined that "[t]he only test of relevancy is logic and common sense." Here, logic and common sense can lead but to one conclusion: namely, that unfounded arguments regarding an alleged lack of prior similar incidents involving distracted or texting FedEx drivers does not tend prove or disprove any disputed fact in this case.

Case law is in accord, and holds that a claim of lack of prior incidents is not relevant and should be excluded under *Evidence Code* section 350. *Edison v. Lewis Mfg. Co*. (1959) 168 Cal.App.2d 429 ("evidence of no previous accidents is not admissible to prove due care."); *Thompson v. B.F. Goodrich Co*. (1941) 48 Cal.App.2d 723.

For example, in *Thompson v. B.F. Goodrich Co*. (1941) 48 Cal.App.2d 723, plaintiff sued for injuries sustained in a fall on defendant Goodrich's premises. The trial court's exclusion of defendant's proffered evidence regarding the absence of similar accidents was affirmed on appeal.

As the court stated:

> "Further contention is made that the trial court erred in excluding proffered evidence to the effect that many persons have passed through the entrance, and nobody had ever fallen over the platform before. Even though it has been held in some jurisdictions that such evidence is admissible, the rule has not been so adopted in California." *City of Oakland v. Pacific Gas & Electric Co.*, 47 Cal. App. 2d 444. Here it has been held that evidence of previous accidents similar in character may be admitted to charge one with the duty of anticipating a dangerous condition and of taking appropriate steps to avert the danger. (Citations.) **But it has been definitely held that evidence of the absence or previous accidents at the same place is not admissible**. *Carty v. Boeseke-Dawe Co.*, 2 Cal. App. 646*; Sheehan v. Hammond*, 2 Cal. App. 371. As said in the recent case of *City of Oakland v. Pacific Gas and Electric Co.*, supra, 47 Cal. App. 2d 448, 729, "The absence of previous accidents should not and does not have a reasonable tendency to relieve a tortfeasor from liability for the invasion of the rights of others or damage resulting therefrom. . . ." (emphasis added).

In *Murphy v. County of Lake* (1951) 106 Cal.App.2d 61, plaintiff alleged negligence of the County in maintaining a road in a dangerous and defective condition. Again, the trial court's exclusion of defendant's proffered evidence of the absence of similar accidents was affirmed:

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> "Appellant next contends that certain testimony was erroneously excluded in part and stricken in part. The testimony in question was given by a witness who stated that several months prior to the date of the accident he had driven a ten-ton grader without mishap on the shoulder of the particular portion of the road. **It is the rule that evidence of the absence of previous accidents to show that no dangerous condition existed is inadmissible**, and hence the action of the court in excluding the same was proper." *Id.* at 65 (citation omitted) (emphasis added).

In *Reynolds v. Natural Gas Equipment* (1960) 184 Cal.App.2d 724, 737, an action against the manufacturer and seller-installer of an industrial gas burner, the court noted: "The claim of no prior explosions from this type burner is not admissible to prove due care." (citing *Edison v. Lewis Mfg. Co.* (1959) 168 Cal.App.2d 429).

In *Edison*, plaintiffs sued for wrongful death caused by a defect in a ring manufactured by defendant and incorporated into a safety belt worn by decedent, who fell to his death while working on an oil well derrick. Defendant attempted to introduce evidence of lack of other accidents, and the trial court rejected the evidence. In affirming, the Court of Appeal stated:

> "Appellant contends that, "in view of the absolutely perfect 'service experience' of the defendant up to the time that it manufactured and tested the ring in question, how can it be said that the defendant was negligent in continuing to use the same method of manufacturing and testing its "D" rings?" As heretofore pointed out, prior to the accident appellant had sold approximately 2,500 "D" rings per year over a period of 15 years without any complaint concerning the product. But there is not evidence when, if ever, appellant's product was subjected to the ultimate test of dependability, the fall of a worker wearing one, or a 'drop test'. Further, **evidence of no previous accidents is not admissible to prove due care**." *Id.* at 442 (citing *Thompson v. B.G. Goodrich Co*, 48 Cal.App.2d at 729; *Owen v. Rheem Mfg. Co.* (1947) 83 Cal.App.2d 42, 50) (emphasis added).

As noted in above authorities, evidence of the absence of similar accidents simply does not prove or disprove the defendant's negligence or lack of notice or foreseeability. Evidence of the absence of similar accidents is inadmissible at trial to prove lack of negligence, and is therefore irrelevant.

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C. Any Argument That There Have Been No Other Similar Prior Incidents has No Probative Value and is Unduly Prejudicial. The Introduction of Such Evidence Will Also Confuse the Issues and Mislead the Jury.

California Evidence Code § 352 provides that the Court may "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury." The "prejudice" factor in section 352 applies to evidence "which uniquely tends to evoke an emotional bias against [a party] as an individual and which has very little effect on the issue." *People v. Karis* (1988) 46 Ca1.3d 612, 638. Thus, "prejudice" in the context of section 352 means the evidence is "likely to inflame the passions" of the jury against the party against whom it is offered. *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008. The danger of undue prejudice exists because the evidence would be used for an improper purpose despite any limiting instruction. *Hrnjak v. Graymar, Inc*. (1971) 4 Ca1.3d 725, 732-733; *O'Gan v. King City Joint Union High School Dist*. (1970) 3 Cal.App.3d 641, 645. Since even the value of clearly relevant evidence may be outweighed by its prejudicial effect, any reference to the irrelevant but prejudicial facts set forth above compels exclusion. *Carr v. Pacific Tel. Co*. (1972) 26 Cal.App.3d 537, 545-546.

Evidence Code § 352 requires the trial judge to balance the probative value of the proffered evidence against its harmful effects, in order to decide whether to admit or exclude it. (*Kessler v. Gray* (1978) 77 Cal.App.3d 284.) As stated in *Kessler*: "That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's cause as well as reasons we cited in § 352 for exclusion." (*Id*. at 291.)

In the context of the issue regarding absence of other similar incidents, the authority is clear and long settled. The court in *Sheehan v. Hammond* (1905) 2 Cal.App. 371, recognized that the injection into a trial of evidence of a lack of accidents had little probative value and created a great danger of confusing the jury. In affirming the exclusion of such evidence, the Court of Appeal stated:

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> If a piece of machinery is operated negligently for years, and finally someone is injured by such negligent operation, the owner cannot by way of excuse show that no prior injury had occurred. . . . **[The introduction of evidence of lack of accidents] would lead to the trial of a multitude of distinct issues, involving a profitless waste of time of the court, and tending to distract the attention of the jury from the real point in issue, without possessing the slightest force as proof of the matters involved**.
>
> (Id. at 377) (emphasis added).

As noted in *Sheehan*, evidence of the absence of other similar accidents or complaints has no probative value in negligence cases such as this one. Moreover, the admission of such evidence would impose on the Plaintiffs the virtually impossible task of disproving the truth of such statements and assertions. This is even more prejudicial to the Plaintiffs because during discovery the Plaintiffs sought a witness to testify to these very topics.

Arguments that are not supported by evidence and invite juror misconduct are clearly improper. *Smith v. Covell* (1980) 100 Cal.App.3d 947, 956-57. There can be no doubt that to argue facts not justified by the record, and to suggest that the jury could speculate, is misconduct. While a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences. *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747. *See also Cassim v. Allstate Ins.* (2004) Co. 33 Cal.4th 780, 796. Simply put, an attorney has no right to cite facts unsupported by the evidence. *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1246.

Inviting the jury to speculate invites prejudice. This collateral "evidence" may cause the jury to improperly consider whether or not FXF's liability is somehow diminished by speculation that if there were no prior similar incidents involving distracted or texting FXF drivers, then that means Tim Evans was not distracted or texting when this crash occurred, as opposed to fully taking into account the relevant evidence and considering FXF's liability in light of the relevant testimony and evidence in the case

It is prejudicial and improper for counsel for FXF to attempt to claim that Evans was not distracted or texting while driving because of an alleged absence of similar incidents. Arguing that

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a lack of accident history proves that Evans was operating the vehicle safely will undoubtedly confuse the issues and mislead the jury.

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III. CONCLUSION

For the above reasons, Plaintiff's motion should be granted in full.

DATED: September 6, 2017 **GREENE BROILLET & WHEELER, LLP**

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

DATED: September 6, 2017 **KIESEL LAW LLP**

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

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DECLARATION OF CHRISTINE D. SPAGNOLI

I, CHRISTINE D. SPAGNOLI, declare and say that:

I am an attorney at law licensed to practice before all of the courts of the State of California, and am a member of the law firm of Greene Broillet & Wheeler, LLP, attorneys of record for plaintiffs. As such, I have personal knowledge of the facts surrounding the present action and all facts herein stated. If called as a witness, I could testify competently to the following:

1. The parties met and conferred on this motion in limine but were unable to reach an agreement necessitating the filing of this motion.

2. This Motion is 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. Plaintiffs will suffer undue prejudice if evidence of or argument regarding an alleged lack of prior incidents involving distracted or texting FXF drivers is introduced to the jury. Such "evidence" lacks foundation, is irrelevant, holds little to no probative value, and creates a substantial danger of undue prejudice, of confusing the issues, and of misleading the jury.

3. On April 20, 2017, I served a Deposition Notice on Defendant FXF which included a request for a FedEx employee to testify concerning FXF's knowledge of "incidents involving collision causing death, injury or property damage was alleged to have occurred as a result of a FXF employee's use of a mobile device while operating a FXF vehicle." See **Exhibit 1**, Deposition Notice.

4. Defendant FXF objected to production of a witness or responsive records in its written response to the deposition notice served on May 10, 2017. **See Exhibit 2**, Objection. '

5. Attached as **Exhibit 3** is a true and correct copy of the Reporter's Transcript of Proceedings dated June 9, 2017.

6. After several meet and confer discussions between FXF counsel and Plaintiffs' Co-Lead counsel, FXF refused to withdraw its objections and refused to produce a responsive witness.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this ____ day of July, 2019, at Santa Monica, California.

CHRISTINE SPAGNOLI
Declarant

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