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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 THOMAS W. PIGEON, an individual,
11 TWP CONSULTING, INC., a California
12 Corporation,

13 Plaintiffs,

14 v.

15 WESTERN SKYWAYS, INC., a
16 Colorado Corporation and DOES 1 to 100,
17 Defendants.

Case No.: 14-CV-1813 JLS (KSC)

**ORDER (1) DENYING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT; (2)
VACATING HEARING; (3)
DENYING PLAINTIFFS’ MOTION
FOR JUDICIAL NOTICE; AND (4)
SETTING SCHEDULE FOR
FURTHER PROCEEDINGS**

(ECF Nos. 98, 104)

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19 **DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

20 Presently before the Court is Defendant’s Second Motion for Partial Summary
21 Judgment. (“Second MSJ,” ECF No. 104-2.) Also before the Court is Plaintiffs’ Response
22 in Opposition to the Motion (“Opp’n,” ECF No. 107) and Defendant’s Reply in Support of
23 the Motion. (“Reply,” ECF No. 108.) For the reasons stated below, the Court **DENIES**
24 Defendant’s Motion.

25 **BACKGROUND**

26 The pending Motion is the second partial motion for summary judgment Defendant
27 has filed in this matter. The Court summarized the factual background of this case in its
28 previous order (*see* “Prior Order,” ECF No. 56, at 2–6) and does not repeat the background

1 here. As to the procedural background: in Defendant’s first motion for partial summary
2 judgment, Defendant argued, among other things, that Plaintiffs’ recovery should be
3 limited by the Gold Seal Warranty because the Gold Seal Warranty is a valid and
4 enforceable part of the Parties’ contract. (“First MSJ,” ECF No. 46, at 4.) The Court denied
5 Defendant’s motion, finding there is a genuine dispute of material fact as to whether the
6 Gold Seal Warranty is part of the agreement between the Parties. (“Prior Order,” ECF No.
7 56, at 12.)

8 **LEGAL STANDARD**

9 Under Federal Rule of Civil Procedure 56(a), a party may move for summary
10 judgment as to a claim or defense or part of a claim or defense. Summary judgment is
11 appropriate where the Court is satisfied that there is “no genuine dispute as to any material
12 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);
13 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those that may affect
14 the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
15 genuine dispute of material fact exists only if “the evidence is such that a reasonable jury
16 could return a verdict for the nonmoving party.” *Id.* When the Court considers the evidence
17 presented by the parties, “[t]he evidence of the non-movant is to be believed, and all
18 justifiable inferences are to be drawn in his favor.” *Id.* at 255.

19 The initial burden of establishing the absence of a genuine issue of material fact
20 falls on the moving party. *Celotex*, 477 U.S. at 323. The moving party may meet this burden
21 by identifying the “portions of ‘the pleadings, depositions, answers to interrogatories, and
22 admissions on file, together with the affidavits, if any,’” that show an absence of dispute
23 regarding a material fact. *Id.* Once the moving party satisfies this initial burden, the
24 nonmoving party must identify specific facts showing that there is a genuine dispute for
25 trial. *Id.* at 324. This requires “more than simply show[ing] that there is some metaphysical
26 doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
27 574, 586 (1986). Rather, to survive summary judgment, the nonmoving party must “by her
28 own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’

1 designate ‘specific facts’ that would allow a reasonable fact finder to return a verdict for
2 the non-moving party. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 248.

3 ANALYSIS

4 In the present Motion, Defendant argues Plaintiffs’ claims for negligence,
5 negligence per se, and product liability are barred by the economic loss rule. (Second MSJ
6 2.) The economic loss rule was adopted by the Colorado Supreme Court in 2000. *Town of*
7 *Alma v. AZCO Const., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). Under Colorado law, “a party
8 suffering only economic loss from the breach of an express or implied contractual duty
9 may not assert a tort claim for such a breach absent an independent duty of care under tort
10 law.” *Id.* There are “three factors that aid in determining whether the duty allegedly
11 breached is independent of the parties’ contract: (1) whether the relief sought in tort is the
12 same as the contractual relief; (2) whether there is a recognized common law duty of care;
13 and (3) whether the tort duty differs in any way from the contractual duty.” *BRW, Inc. v.*
14 *Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004).

15 Defendant does not dispute it had a common law duty of care to Plaintiffs but argues
16 this duty of care is the “precise duty encompassed in the Gold Seal Warranty or implied
17 warranties between Plaintiffs and Defendant.” (Reply 5.) Defendant argues because the
18 duties are the same under either the express warranty or the implied warranties of
19 merchantability and fitness for a particular purpose, the economic loss rule bars Plaintiffs’
20 tort claims. Plaintiffs argue, “whether [these] implied warranties were integrated into the
21 contract turns on whether the Gold Seal Warranty, which purports to waive[] or exclude
22 all implied warranties, is part of the contract. . . . [and] this issue is one for the jury to
23 decide.” (Opp’n 3.) The Court agrees with Plaintiffs.

24 As to the Gold Seal Warranty: The Court finds the issue of whether the economic
25 loss doctrine bars Plaintiffs’ claims due to the duty in the Gold Seal Warranty requires the
26 determination of the issue the Court has previously found to be for the jury: whether the
27 Gold Seal Warranty is part of the Parties’ agreement. The Court cannot determine how the
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1 Gold Seal Warranty applies to the economic loss doctrine if it has not yet been determined
2 if the Gold Seal Warranty is even part of the Parties' agreement.

3 As to the implied warranties: The warranties of merchantability and fitness for a
4 particular purpose are implied in every contract for the sale of goods unless expressly
5 excluded. *See* COLO. REV. STAT. ANN. §§ 4-2-314, 4-2-315, 4-2-316. “[T]o exclude or
6 modify the implied warranty of merchantability or any part of it, the language must mention
7 merchantability and in case of a writing must be conspicuous, and to exclude or modify
8 any implied warranty of fitness the exclusion must be by a writing and conspicuous.”
9 COLO. REV. STAT. ANN. § 4-2-316.

10 The Gold Seal Warranty contains waivers of the very implied warranties on which
11 Defendant, in part, bases its Motion. (*See* ECF No. 46-5, at 13 (“ALL IMPLIED
12 WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED
13 WARRANTIES OF FITNESS AND MERCHANTABILITY FOR A PARTICULAR
14 PURPOSE ARE HEREBY DISCLAIMED TO THE EXTENT LOCAL LAWS ALLOW
15 DISCLAIMERS.”). Before the Court can determine whether or not the implied warranties
16 bar Plaintiffs' claims under the economic loss rule, it would need to be determined whether
17 or not these implied warranties have been effectively waived under Colorado law.¹ And
18 before this could even be determined, the jury would need to determine whether the Gold
19 Seal Warranty is part of the Parties' agreement in the first place.

20 CONCLUSION

21 Thus, the Court determines Defendant's Second Motion for Summary Judgment is
22 not ripe for determination and **DENIES** Defendant's Motion.

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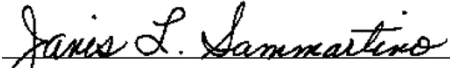
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26 ¹ In its Motion, Defendant does not ask the Court to determine whether these warranties have been
27 effectively waived and only vaguely touches on the issue of whether the warranties are included at all.
28 (*See* Second MSJ 3 (“To the extent that the contract included the implied warranties of merchantability
and fitness for a particular purpose”). But Defendant's Motion, by requesting the Court hold that the
implied warranties bar Plaintiffs' claims, seems to assume the implied warranties were not waived.

- 1 3. The pre-trial conference scheduled for November 29, 2017 at 9:30 a.m. remains on
2 calendar.
3 4. On or before December 20, 2017, each party must file its trial brief with the Court.
4 5. The jury trial scheduled for January 8, 9, 10, 11, 16, 17, 18, and 22, 2018 remains
5 on calendar.

6 **IT IS SO ORDERED.**

7 Dated: October 5, 2017


8 Hon. Janis L. Sammartino
9 United States District Judge

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