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5 UNITED STATES DISTRICT COURT  
6 SOUTHERN DISTRICT OF CALIFORNIA  
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8 THOMAS W. PIGEON, an individual,  
9 TWP CONSULTING, INC., a California  
10 Corporation,

11 Plaintiffs,

12 v.

13 WESTERN SKYWAYS, INC., a  
14 Colorado Corporation and DOES 1 to 100,  
15 Defendants.

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

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTIONS IN LIMINE**

(ECF No. 85)

16 Presently before the Court are Defendant's Motions in Limine ("MIL"), (ECF No.  
17 85), and Plaintiffs' Response in Opposition to Defendant's Motions in Limine ("Opp'n"),  
18 (ECF No. 86). The Court held a hearing on these Motions on April 27, 2017, and took the  
19 Motions under submission at the conclusion of the hearing. (ECF No. 87.) Having  
20 considered the Parties' arguments and the law, the Court rules as follows.

21 **LEGAL STANDARD**

22 "Although the Federal Rules of Evidence do not explicitly authorize *in limine*  
23 rulings, the practice has developed pursuant to the district court's inherent authority to  
24 manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). "A motion  
25 in limine is a procedural mechanism to limit in advance testimony or evidence in a  
26 particular area." *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009). "In the case  
27 of a jury trial, a court's ruling . . . gives counsel advance notice of the scope of certain  
28 evidence so that admissibility is settled before attempted use of the evidence before the

1 jury.” *Id.* at 1111–12. However, any ruling on a motion in limine is necessarily tentative in  
2 nature; a “district court may change its ruling at trial because testimony may bring facts to  
3 the district court’s attention that it did not anticipate at the time of its initial ruling.” *United*  
4 *States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999).

## 5 ANALYSIS

6 Defendant’s first Motion in Limine seeks to exclude “[a]ny reference or mention of  
7 the FAA’s temporary revocation of Defendant’s Repair Station Certification that was in  
8 effect from approximately June 3, 2013 to August 21, 2013.” (MIL 2.) In particular,  
9 Defendant argues that Defendant’s temporary sanction is wholly separate from Plaintiffs’  
10 allegations regarding the two “Subject Engines” because Plaintiffs purchased the Subject  
11 Engines two months *after* the temporary sanction was removed. (*Id.*)

12 Plaintiffs respond that they seek to offer evidence of the revocation solely in support  
13 of their cause of action for “Misrepresentation.” (Opp’n 4.) Specifically, pursuant to the  
14 Code of Federal Regulations, a repair station without a certificate generally may not rebuild  
15 or repair an aircraft engine, and Plaintiffs allege that Defendant concealed the revocation—  
16 which was in effect during the Parties’ initial negotiations regarding the purchase of the  
17 engine—all the way “until almost six months after the purchase was consummated.” (*Id.*  
18 at 4–5.) Plaintiffs further allege that the revocation was “for cause,” and note that they  
19 intend to introduce evidence that during the revocation period Plaintiffs had a twenty-one–  
20 minute telephone conversation with one of Defendant’s representatives during which they  
21 negotiated the terms of purchase of the two Subject Engines, but during which Defendant  
22 did not mention the emergency revocation. (*Id.* at 6–7.)

23 Given the foregoing, the Court **DENIES** Defendant’s first motion. Specifically,  
24 although Plaintiffs’ cause of action is entitled “misrepresentation,” Plaintiffs seemingly  
25 intend to attempt to prove the elements of fraud, which the Colorado courts have at times  
26 defined to include “misrepresentation.” And a cause of action for fraud under Colorado  
27 law requires a showing of the concealment of a material fact which “in equity and good  
28 conscience should have been disclosed.” (*E.g., Black v. First Fed. Sav. & Loan Ass’n of*

1 *Fargo, N.D., F.A.*, 830 P.2d 1103, 1113 (Colo. App. 1992).) Finally, the Emergency  
2 Revocation explains that the “[e]mergency action in this case is a safety measure that  
3 provides immediate protection to the public.” (Pl.’s Request for to File First Am. Compl.  
4 Ex. A, ECF No. 32, at 16.)

5 Taking the foregoing in concert, it appears that the revocation could be more relevant  
6 than prejudicial, at least as the evidence would apply to certain elements of a cause of  
7 action for fraud.

8 Defendant’s second Motion in Limine seeks to exclude “[a]ny reference or mention  
9 of evidence of any aspect of the Subject Engines’ performance or failure from any witness  
10 not providing sworn testimony at trial or by deposition.” (MIL 2–3.) The Court **GRANTS**  
11 Defendant’s second Motion, but only insofar as it does not ask the Court to preclude  
12 evidence from unavailable witnesses that fall within a relevant hearsay exception.  
13 Specifically, Plaintiffs note two witnesses—John McCullough and Igor Artemeyov—who  
14 are unavailable but whose testimony allegedly qualify, respectively, as “recorded  
15 recollection” and “present sense impression” exceptions to the general hearsay prohibition.  
16 (Opp’n 9–10.) Although the Court does not currently have sufficient facts to determine if  
17 these hearsay exceptions are validly met, the Court nonetheless notes that both of Plaintiffs’  
18 asserted exceptions seem inapplicable to the present facts. The “past recollection recorded”  
19 exception does not appear to be met given that the relevant witness—who is now dead—  
20 will be unable to affirm the truth and reliability of the recorded recollection. *See, e.g., J. C.*  
21 *Penney Co. v. N. L. R. B.*, 384 F.2d 479, 484 (10th Cir. 1967) (“To meet the accepted  
22 standards of admissibility, the trial court must also be satisfied the writing was made at a  
23 time when the events were fresh in the writer’s mind and the witness must verify the  
24 writing’s authenticity and truthfulness.”). And the “present sense impression” exception  
25 also does not appear to be met given that Plaintiffs indicate the relevant witness created his  
26 document only “within a day” after the engine failed, whereas the present sense impression  
27 exception usually requires a much tighter timeline. *See, e.g., United States v. Green*, 556  
28 F.3d 151, 155 (3d Cir. 2009) (“ ‘The idea of immediacy lies at the heart of the exception,’

1 thus, the time requirement underlying the exception ‘is strict because it is the factor that  
2 assures trustworthiness. ’ ” (citing 4 Christopher B. Mueller & Laird C. Kirkpatrick,  
3 *Federal Evidence* § 8:67, 559, 562 (3d ed. 2007))).

4 Defendant’s third Motion in Limine seeks to exclude “[a]ny reference or mention of  
5 any evidence or information regarding any other prior wrongs or alleged prior wrongful  
6 acts of Defendant or Defendant’s representatives that are not directly related to this lawsuit,  
7 specifically including, but not limited to, alleged or actual violations of FAA regulations  
8 or requirements.” (MIL 3.) The Court **GRANTS** Defendant’s third MIL. Plaintiffs argue  
9 that character evidence is admissible when a person’s character or character trait is an  
10 essential element of a charge, claim, or defense. (Opp’n 11–12.) However, Plaintiffs’ only  
11 claims are for negligence, product liability, breach of contract, and “misrepresentation,”  
12 and to admit evidence of prior negligent acts to bolster the conclusion that Defendant acted  
13 negligently in this particular instance would likely be impermissible.

14 Defendant’s fourth Motion in Limine seeks to exclude “[a]ny attempt to solicit  
15 testimony from Plaintiffs’ representatives or other witnesses who are not designated  
16 experts that would seek to place an expert definition of ‘excessive’ oil consumption as it  
17 relates to either of the Subject Engines.” (MIL 3.) The Court **DENIES** Defendant’s fourth  
18 MIL. Plaintiffs indicate that they seek to introduce testimony from Plaintiffs’ pilot and  
19 mechanic witnesses regarding “written and oral assurances provided by Defendant  
20 regarding ‘reasonable’ oil consumption, rationally based on their perceptions of those  
21 assurances.” (Opp’n 13.) The testimony will also address “actions and repairs taken by  
22 Defendant when the ‘oil consumption as recorded’ was reported to Defendant.” (*Id.*) The  
23 testimony therefore likely will only concern issues that are not based on scientific,  
24 technical, or other specialized knowledge, and non-experts may testify to such matters.

25 Defendant’s fifteenth Motion in Limine seeks to exclude “[a]ny mention, reference  
26 to, or testimony from Plaintiffs advising the jury what they think the law is, what it should  
27 be, or what Defendant must show to prevail in this case.” (MIL 6.) The Court **GRANTS**  
28 Defendant fifteenth MIL, but not insofar as the MIL would preclude Plaintiffs from

1 introducing relevant Code of Federal Regulation Sections going to alleged *negligence per*  
2 *se* on behalf of Defendant.

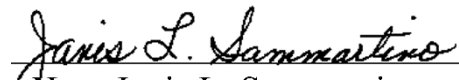
3 All of Defendant’s remaining Motions in Limine—five through fourteen and sixteen  
4 through twenty-four—seek to exclude many different types of evidence and argumentation  
5 without providing any meaningful specificity to the facts of this case. (*See* MIL 3–8.)  
6 Accordingly, the Court **DENIES** these Motions in Limine. The Court, of course, will at all  
7 times attempt to adhere to the Federal Rules of Evidence and all other binding authority.

8 **CONCLUSION**

9 Given the foregoing, the Court **GRANTS** Defendant’s second, third, and fifteenth  
10 Motions in Limine—subject to the conditions outlined above—and **DENIES** all others.

11 **IT IS SO ORDERED.**

12 Dated: May 5, 2017

13   
14 Hon. Janis L. Sammartino  
United States District Judge