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2 IN THE UNITED STATES DISTRICT COURT  
3 FOR THE EASTERN DISTRICT OF CALIFORNIA  
4

5 SHIRLEY KNIGHT, Guardian ad Litem, )  
6 for J.S., a minor, and MARLENE and )  
7 HOMER FAGAN, )

8 Plaintiffs, )

9 v. )

10 DEERE & COMPANY, )

11 Defendant. )

2:08-cv-01903-GEB-EFB

ORDER DENYING DEFENDANT'S  
MOTIONS TO EXCLUDE EVIDENCE

12 Defendant Deere & Company ("Deere") has filed two  
13 evidentiary motions seeking to exclude certain evidence at trial in  
14 this products liability case. While not labeled as such, Defendant's  
15 motions appear to be, and shall be construed as, motions in limine.  
16 Defendant first seeks an order precluding "[Plaintiffs] Homer and  
17 Marlene Fagan from introducing evidence regarding the condition of the  
18 brakes on the vehicle at issue in this action at the time of the  
19 alleged injury" due to Homer Fagan's alleged spoliation of evidence.  
20 Defendant also seeks to exclude "the testimony of Plaintiff's expert  
21 witness Russell E. Darnell on the grounds that [his opinions] . . .  
22 do[] not meet the standards of reliability required by Federal Rule of  
23 Evidence 702." Plaintiffs oppose Defendant's motions. A hearing was  
24 held on February 22, 2010. For the reasons stated below, Defendant's  
25 motions in limine are DENIED.

26 **I. BACKGROUND**

27 This case concerns a fatal accident involving a 1991 John  
28 Deere Model AMT 622 Utility Vehicle owned by Homer and Marlene Fagan

1 (the "Vehicle"). On September 3, 2006, Homer and Marlene Fagan were  
2 using the Vehicle to lead a pony from their residence in Oak Run,  
3 California, to the nearby home of Julie Stevens. (Homer Fagan Depo.  
4 43:25-44:13.) Marlene Fagan was driving the Vehicle while Homer sat  
5 on the tailgate, leading the pony. (Traffic Collision Report 10.)  
6 While in route to the Stevens' home, Marlene and Homer Fagan  
7 encountered Julie Stevens and her daughter walking along the road.  
8 (Id.) Julie Stevens climbed into the passenger seat of the Vehicle  
9 and Julie's daughter sat on the tailgate with Homer Fagan and they  
10 then resumed riding toward the Stevens' home. (Id.) While traveling  
11 downhill on Gale Lane, a private gravel road, the Vehicle's brakes  
12 failed. (Id.) When Marlene Fagan tried to make a sharp left turn,  
13 the Vehicle flipped, throwing Marlene Fagan, Julie Stevens and her  
14 daughter to the ground. (Id.) Before the Vehicle flipped, Homer  
15 Fagan jumped off the back. (Id.) Julie Stevens landed on an  
16 outcropping of rocks, causing fatal injuries. (Id.) Marlene Fagan  
17 was partially pinned under the Vehicle and Julie Stevens' daughter  
18 sustained a laceration to her left elbow. (Id.)

19 Three days after the accident, California Highway Patrol  
20 Officer Glenn Revheim inspected the Vehicle, which was parked at the  
21 Fagans' residence. (Revheim Depo. 21:7-16.) Homer Fagan was present  
22 during Officer Revheim's inspection. (Id. 25:2-5.) Officer Revheim  
23 detailed his findings in a Traffic Collision Report, stating:

24 Upon removing the bed of the [V]ehicle, the brake  
25 inspection revealed the following:

- 26 1.) **Right Side Brake:** The right inner [brake] disc  
27 was dirty and corroded, lacking evidence of  
28 proper contact by the brake shoe. Upon  
depressing the brake pedal and adding power to  
the rear axle, it was observed that the brake  
shoes failed to make contact with the disc and  
allowed the rear axle to rotate.

1           2.) **Left Side Brake:** The left side disc showed  
2 evidence of recent contact with both inner and  
3 outer brake shoe by the smooth, shiny, worn  
4 surface on both sides of the disc. There was  
5 a bent metal clip extending from the caliper,  
6 scraping the outer surface of the disc. Upon  
7 depressing the brake pedal and applying power  
8 to the rear axle, it was noted that the brake  
9 shoes would not apply enough pressure to the  
10 disc to prevent the rear axle from rotating.  
11 It appeared that the left side brake shoe was  
12 missing and the metal clip obviously had  
13 something to do with holding the brake shoe in  
14 place was now bent and scraping the surface of  
15 the disc.

16 (Traffic Collision Report 8.) Officer Revheim concluded in his  
17 report:

18           [that the] collision was caused by Party #1  
19 (Marlene Fagan) attempting to negotiate a sharp  
20 left curve in the road at an unsafe speed, due to  
21 the mechanical failure of [the Vehicle's] left side  
22 disc brake, established by statements and  
23 inspection of the [V]ehicle's disc brakes . . . .  
24 [T]he brakes had apparently been operating with no  
25 apparent problems prior to the collision. It is  
26 highly unlikely that, had the brakes not been  
27 operational to some degree, Party #1 would not have  
28 been able to drive the [V]ehicle from her residence  
to the location of the collision. Party #1's  
residence is over one mile from the scene, much of  
which is traveling downhill. Based on inspection  
of the brakes, it was evident that they were not  
maintained as they should have been. This  
conclusion was reached by visual inspection of the  
right disc, which was caked with dirt/corrosion,  
and obviously had not been in contact with the  
brake shoe for some time. Essentially, it was  
determined that the [V]ehicle had been stopping  
with only the left side disc brake for sometime.  
It was this brake that failed and resulted in the  
collision.

29 (Id. 13.)

30           Homer Fagan gave deposition testimony on June 12, 2009,  
31 that after Officer Revheim's inspection was completed, he replaced the  
32 braking mechanisms in the Vehicle, which included removing the brake  
33

1 discs and pads that were in the Vehicle at the time of the accident.  
2 (Fagan Depo. 112:15-117:17.) He placed the brake parts he removed on  
3 a shelf behind his house. (Id. 117:2-17.) However, Homer Fagan no  
4 longer has these parts and does not know what happened to them. (Id.  
5 117:18-118:1.) The last time Homer Fagan saw the brake parts was  
6 approximately six weeks after the accident. (Id. 117:22-24.) After  
7 he made these repairs, Homer Fagan continued to use the Vehicle on his  
8 property. (Id. 33:9-12.)

9 In July 2008, Homer and Marlene Fagan and Shirley Knight,  
10 the Guardian ad Litem for J.S., separately filed lawsuits against  
11 Defendant related to the accident in California Superior Court for the  
12 County of Shasta. Defendant removed both actions to this federal  
13 court, and the two cases were consolidated before the undersigned  
14 judge. Both the Fagans and J.S. allege products liability claims  
15 against Defendant. J.S. alleges the Vehicle's braking system was  
16 defective due to the position of the fluid reservoir in relation to  
17 the brake pads and braking mechanism on the rear of the Vehicle and  
18 the absence of a braking mechanism on the front of the Vehicle. Homer  
19 and Marlene Fagan similarly allege the Vehicle was "defective and  
20 unsafe in manufacture and design in that a hydraulic cylinder was  
21 located above the brake pads and braking mechanism on the passenger  
22 rear axle." Defendant disputes that the accident was caused by any  
23 defect in the Vehicles' design and contends the accident was the  
24 result of the Fagans' negligent maintenance of the Vehicle's brakes.

25 A representative of Defendant's inspected the Vehicle in  
26 April 2009, and determined that the right side brakes were not  
27 performing properly. (Fagan Depo. 109:4-110:11.) Homer Fagan then  
28 took the Vehicle to a Deere dealership for maintenance in June 2009,

1 where it was inspected by Loren Schneider. (Id. 110:16-22.)  
2 Schneider gave deposition testimony that he determined that the  
3 Vehicle's right side caliper was not working and he replaced the  
4 caliper and the right side brake pads. (Schneider Depo. 22:18-25:1.)  
5 Schneider also testified that he noticed that the Vehicle had "a  
6 hydraulic leak on [the] ram" and that he "pointed it out to [Homer]  
7 Fagan when he picked . . . up [the Vehicle]" and "told him that [the  
8 leak] could cause a problem later down the road . . . ." (Id. 27:6-  
9 20.) Schneider further testified that he thought the leak was coming  
10 from the reservoir that holds hydraulic fluid and that it was  
11 "possible" that the reservoir "could leak onto the right rear brake."  
12 (Id. 28:9-14.)

### 13 **III. Defendant's Motion to Exclude Evidence Due to Spoliation**

14 Defendant argues that "[t]he Fagans' failure to maintain the  
15 critical evidence of the brake pads that were on the [V]ehicle at the  
16 time of the accident" constitutes spoliation of evidence, and the  
17 Court should use its inherent authority to preclude the Fagans from  
18 "introducing evidence regarding the condition of the brakes at the  
19 time of the accident." (Mot. to Exclude Evid. Based on Spoliation  
20 2:24-26, 5:16-17.) Homer and Marlene Fagan counter that they "had no  
21 pre-litigation duty to preserve the brakes." (Opp'n to Mot. to  
22 Exclude Evid. Based on Spoliation 5:3.) Plaintiff J.S. seeks to join  
23 in the Fagans' opposition to Defendant's motion and his request to  
24 join is granted.

#### 25 **A. Legal Standard**

##### 26 **1. Applicable Law**

27 The parties dispute whether state or federal law governs the  
28 spoliation issue in this case. Defendant asserts federal law

1 controls. Plaintiff rejoins that since jurisdiction is premised upon  
2 diversity, state law determines whether there has been spoliation but  
3 federal law governs the appropriate sanction.

4 "A federal trial court has the inherent discretionary power  
5 to make appropriate evidentiary rulings in response to the destruction  
6 or spoliation of relevant evidence. Such power includes the power  
7 where appropriate to order the exclusion of certain evidence." Glover  
8 v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (citing Unigard Sec.  
9 Ins. Co. v. Lakewood Engineering & Mfg. Corp., 982 F.2d 363 (9th Cir.  
10 1992)). When a federal court exercises its inherent power to sanction  
11 a party for failure to preserve evidence, federal law controls the  
12 inquiry. See Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th  
13 Cir. 2005) (stating that "federal law governs the imposition of  
14 sanctions for failure to preserve evidence in a diversity suit); King  
15 v. Illinois, 337 F.3d 550, 556 (concluding that "federal law governs"  
16 the "issue of spoliation"); Silvestri v. Gen. Motors Corp., 271 F.3d  
17 583, 590 (4th Cir. 2001) (stating that "federal law of spoliation  
18 applies [in a diversity action] because . . . the power to sanction  
19 for spoliation derives from the inherent power of the court, not  
20 substantive law."); see also Glover, 6 F.3d at 1329-30 (assessing  
21 district court's spoliation sanction in a diversity action in light of  
22 federal spoliation standard); Erlandson v. Ford Motor Co., No. 08-CV-  
23 1137-BR, 2009 WL 3672898, at \*3-7 (D. Or. Oct. 30, 2009) (applying  
24 federal law in a diversity action to determine whether sanctions for  
25 spoliation were warranted). The cases relied upon by Plaintiffs do  
26 not suggest the contrary.

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28 ///

1 **2. Spoliation**

2 "Spoliation refers to the destruction or material alteration  
3 of evidence or to the failure to preserve property for another's use  
4 as evidence in pending or *reasonably foreseeable litigation.*"  
5 Silvestri, 271 F.3d at 590 (emphasis added). A party "engage[s] in  
6 spoliation of [evidence] as a matter of law only if they had some  
7 notice that the [evidence was] potentially relevant to . . .  
8 litigation before [it was] destroyed." United States v. Kitsap  
9 Physicians Service, 314 F.3d 995, 1001 (9th Cir. 2002). "If a party  
10 breaches its duty to preserve evidence, the opposing party may move  
11 the court to sanction the party destroying evidence." In re Napster,  
12 Inc. Copyright Litigation, 462 F. Supp. 2d 1060, 1066 (N.D. Cal. 2006)  
13 (citing Unigard, 982 F.2d at 365).

14 "The duty to preserve material evidence arises not only  
15 during litigation but extends to that period before the litigation  
16 when a party reasonably should know that the evidence may be relevant  
17 to anticipated litigation." World Courier v. Barone, No. C 06-3072  
18 TEH, 2007 WL 1119196, at \*1 (N.D. Cal. Apr. 16, 2007) (quoting  
19 Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)).  
20 "Indeed, as soon as a potential claim is identified, a litigant is  
21 under a duty to preserve evidence which it knows or reasonably should  
22 know is relevant to the action." AmeriPride Servs., Inc. v. Valley  
23 Indus. Serv., Inc., No. CIV S-00113 LKK/JFM, 2006 WL 2308442, at \*4  
24 (E.D. Cal. Aug. 9, 2006) (citing Nat'l Ass'n of Radiation Survivors v.  
25 Turnage, 115 F.R.D. 543, 556-57 (N.D. Cal. 1987)). "The future  
26 litigation must be 'probable,' which has been held to mean 'more than  
27 a possibility." Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc.,  
28

1 264 F.R.D. 517, 524 (N.D. Cal. 2009) (quoting Hynix Semiconductor Inc.  
2 v. Rambus Inc., 591 F. Supp. 2d 1038, 1061 (N.D. Cal. 2006)).

3 "District courts may impose sanctions against a party that  
4 merely had notice that the destroyed evidence was potentially relevant  
5 to litigation." In re Napster, 462 F. Supp. 2d at 1066; see also  
6 Glover, 6 F.3d at 1329 (stating that "simple notice" that destroyed  
7 evidence has "potential relevance to . . . litigation" is sufficient  
8 to warrant spoliation sanction). "However, a party's degree of fault  
9 in destroying evidence is relevant to what sanction, if any, is  
10 imposed." In re Napster, 462 F. Supp. 2d at 1066-67 (citations  
11 omitted).

## 12 **B. Discussion**

13 Defendant argues the Fagans' "failure to maintain . . . the  
14 brake pads that were on the [V]ehicle at the time of the accident"  
15 constitutes spoliation since "the Fagans had sufficient notice that  
16 the brakes could be potentially relevant evidence in litigation  
17 concerning [the] accident" and the "the failure to preserve the brake  
18 components . . . prejudices [Defendant's] defense and compromises the  
19 ability of th[e] Court to reach a correct resolution of the issues."  
20 (Mot. to Exclude Evid. Based on Spoliation 5:16-6:11.) Plaintiff  
21 counters that Homer Fagan "had no notice of any litigation until after  
22 the brake parts disappeared" and therefore was under no duty to  
23 preserve this evidence. (Opp'n to Motion to Exclude Evid. Based on  
24 Spoliation 5:27-28.)

25 The parties dispute which brake pads remained on the Vehicle  
26 after the accident and which were removed and subsequently lost by  
27 Homer Fagan. Homer Fagan gave deposition testimony that after the  
28 accident "[t]he right caliper had no [brake] pads in it" and on the



1 left side, there was only one brake pad where there should have been  
2 two. (Fagan Depo. 112:15-18 and 114:3-115:7.) Homer Fagan further  
3 testified that he removed and replaced the two backing plates and sole  
4 remaining brake pad from the left side of the Vehicle and placed them  
5 on a shelf outside of his house. (Id. 117:9-17.) This deposition  
6 testimony conflicts with Officer Revheim's report and deposition  
7 testimony which suggest that after the accident, it was the left side  
8 brake pads that were missing while the right side brake pads remained  
9 intact. (Traffic Collision Report 8-9; Revheim Depo. 30:9-31:7.)

10 At the February 22, 2010 hearing, Defendant's counsel  
11 clarified that "the focus of [Defendant's] motion" is on the Fagans'  
12 alleged spoliation of the brake pads from the right side of the  
13 Vehicle. (Hearing Transcript 21:6-16.) Defendant's counsel argued it  
14 is the right side brake pads that Homer Fagan removed and replaced and  
15 are critical to Plaintiffs' claims and Defendant's defense. (Id.)  
16 Defendant's counsel addressed the conflict as follows:

17 THE COURT: - Homer Fagan says he never had those  
18 brake pads, the right side brake pads. How do you  
respond to that?

19 MR. RYAN[,] [on behalf of Defendant]: . . . The  
20 simple response is he's wrong. He's got the sides  
21 wrong. And the reason he's got the sides wrong is  
22 because both of the pads were not missing on the  
23 left. He was confused in his deposition when he  
24 said I removed and replaced a set of pads. And  
25 he's simply got the wrong side. We know that --  
26 even their own expert concedes that, because we  
27 start with the notion that, really, the same  
28 question the Court asked me at the outset, which  
was what about the right and what about the left.  
Everyone except Mr. Fagan agrees that it was the  
right side where the brake pads were missing.  
That's agreed by all witnesses, including the  
plaintiff's own expert, that those - that Mr. Fagan  
is mistaken when he talks about it was the other  
way around, he never had the brake pads from the  
right side . . . . [T]here is consistent evidence  
throughout that shows that he has to be wrong. He

1           says he has two brake pads that he removes, and  
2           that they are - mysteriously disappear after, he  
3           thinks, six weeks.

4           (Hearing Transcript 21:18-24:12.)

5           The evidentiary record in this case presents a factual  
6           dispute as to whether Homer Fagan removed, replaced, and lost the  
7           right or left side brake pads. In essence, Defendant's motion  
8           requests that the court resolve the factual dispute concerning which  
9           brake pads Homer Fagan removed, and then to sanction the Fagans for  
10          their spoliation of evidence. "However, a motion in limine should not  
11          be used to resolve factual disputes or weigh evidence." Research  
12          Corp. Techs., Inc. v. Microsoft Corp., No. CV-01-658-TUC-RCJ, 2009 WL  
13          2971755, at \*1 (D. Ariz. Aug. 19, 2009). Therefore, whether Homer  
14          Fagan's conduct constitutes spoliation of evidence is not decided, and  
15          Defendant's motion is denied.

#### 16           **IV. Defendant's Motion to Exclude The Testimony of Russell Darnell**

17          Defendant also seeks an order excluding the testimony of  
18          Plaintiff's expert witness, Russell Darnell, arguing his testimony  
19          does not satisfy the requirements of Federal Rule of Evidence 702.  
20          Defendant argues Darnell is not qualified to offer expert testimony;  
21          and alternatively, Darnell's testimony is inadmissible since his  
22          opinions are based solely on speculation and conjecture or are  
23          irrelevant. Plaintiff J.S. opposes Defendant's motion and Plaintiffs  
24          Homer and Marlene Fagan seek to join in J.S.'s opposition. The  
25          Fagans' request to join in J.S.'s opposition is granted.

#### 26           **A. Federal Rule of Evidence 702**

27          "Rule 702 of the Federal Rules of Evidence allows for  
28          expert, opinion testimony by a witness qualified as an expert by

1 knowledge, skill, experience, training or education where the  
2 testimony will assist the trier of fact to understand the matters of  
3 scientific, technical, or other specialized knowledge.” United States  
4 v. Reed, 575 F.3d 900, 922 (9th Cir. 2009) (quoting Fed. R. Evid.  
5 702). The party offering the expert testimony bears the burden of  
6 demonstrating admissibility. Lust v. Merrell Dow Pharms. Inc., 89  
7 F.3d 594, 598 (9th Cir. 1996) (stating that “[i]t is the proponent of  
8 the expert who has the burden of proving admissibility”).

9 “The trial court, however, must be careful to avoid  
10 supplanting the adversary system or the role of the jury: vigorous  
11 cross-examination, presentation of contrary evidence and careful  
12 instruction on the burden of proof are the traditional and appropriate  
13 means of attacking shaky but admissible evidence.” Thompson v.  
14 Whirlpool Corp., No. C06-1804-JCC, 2008 WL 2063549, at \*3 (W.D. Wash.  
15 May 13, 2008) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S.  
16 579, 596 (1993) & Advisory Committee Notes to the 2000 Amendments to  
17 Rule 702 which state “rejection of expert testimony is the exception  
18 rather than the rule.”).

### 19 **B. Qualification**

20 Defendant argues Darnell is not sufficiently qualified to  
21 offer his opinions in this case because “he lacks academic and/or  
22 professional training . . . .” (Mot. 9:10-12.) Defendant attacks  
23 Darnell’s education and work experience as follows:

24 Although Darnell refers to himself as an  
25 ‘engineer,’ that is simply his personal  
26 assessment of his qualifications, as he is not  
27 licensed to provide services as an engineer in  
28 California, or anywhere else. Darnell’s only  
academic credential pertaining to engineering  
is not an engineering degree at all, but  
rather a degree in managing engineering  
projects. The institution from which he

1           obtained that degree, California Coast  
2           University, was not accredited to award such  
3           degrees at the time it was issued. In  
4           addition to a lack of academic and  
5           professional qualification, Darnell's work  
6           experience does not qualify him to offer his  
7           stated opinions regarding the design of the  
8           AMT 622. Darnell's report demonstrates that  
9           his primary work experience for the past  
10          twenty years has been offering expert  
11          opinions, particularly regarding accident  
12          reconstruction . . . .

13 (Mot. 9:10-12.)

14           Plaintiffs dispute Defendant's characterization of Darnell's  
15          qualifications and argue Darnell possesses the requisite knowledge,  
16          skill, expertise, training and education to offer his opinions as to  
17          the Vehicle's alleged design defects and their role in causing the  
18          accident. (Opp'n 8:25-28.)

19           Plaintiffs' opposition attaches a declaration from Darnell  
20          in which he avers he "was awarded a Bachelor of Science in Engineering  
21          in 1999, a Master of Science in Engineering Management in 2000, a  
22          Ph.D. in Engineering Management in 2003, and a Doctorate in Education  
23          in 2005, all from California Coast University in Santa Ana,  
24          California." (Darnell Decl. ¶ 2.) Darnell further declares that he  
25          has been employed by various companies as a "test engineer," and in  
26          this capacity has routinely tested "vehicle brakes and braking  
27          systems." (Id. ¶ 3.) Darnell also declares that he has "offered an  
28          expert opinion in over 200 jury trials in state, federal and  
29          international courts," and has specifically "offered an expert opinion  
30          in [six other cases] . . . regarding vehicle brakes, and 27 cases  
31          involving all-terrain vehicles." (Id. ¶ 6.)

32           Rule 702 "refers only to a witness qualified as an expert by  
33          knowledge, skill, experience, training, or education. No specific

1 credentials are mentioned. Moreover, . . . an expert need not have  
2 official credentials in the relevant subject matter to meet Rule 702's  
3 requirements." United States v. Smith, 520 F.3d 1097, 1105 (9th Cir.  
4 2008) (citation omitted). "Because [Rule 702] contemplates a broad  
5 conception of expert qualifications, only a minimal foundation of  
6 knowledge, skill, and experience is required. A lack of  
7 particularized expertise goes to the weight of the testimony, not its  
8 admissibility." Allstate Ins. Co. v. Ford Motor Co., 2010 WL 1654145,  
9 at \*3 (D. Ariz. Apr. 21, 2010) (quoting Hangarter v. Provident Life &  
10 Accident Ins. Co., 373 F.3d 998, 1015-1016 (9th Cir. 2004)) (emphasis  
11 in original).

12 Plaintiffs have demonstrated that Darnell is sufficiently  
13 qualified by his knowledge, skill, education, training and experience  
14 to offer his opinions on the Vehicle's alleged design defects.  
15 Therefore, Defendant's motion to exclude Darnell's testimony for lack  
16 of qualification is denied.

#### 17 **B. Assisting the Trier of Fact**

18 Defendant also argues Darnell's opinions should be excluded  
19 because they are based on speculation and conjecture or are  
20 irrelevant. Plaintiffs rejoin that Darnell's opinions are relevant  
21 and are based on facts and data and are therefore admissible.

22 "The Federal Rules of Evidence allow expert testimony that  
23 will assist a trier of fact in understanding the evidence or in  
24 determining a fact in issue, so long as (1) the testimony is based  
25 upon sufficient facts or data, (2) the testimony is the product of  
26 reliable principles and methods, and (3) the witness has applied the  
27 principles and methods reliably to the facts of the case." Boyd v.  
28 City and County of San Francisco, 576 F.3d 938, 945 (9th Cir. 2009)

1 (quoting Fed. R. Evid. 702). "Rule 702[, ] [therefore,] embodies the  
2 twin concerns of reliability and helpfulness." Stilwell v. Smith &  
3 Nephew, Inc., 482 F.3d 1187, 1192 (9th Cir. 2007) (quotations and  
4 citations omitted). "Whether testimony is helpful within the meaning  
5 of Rule 702 is in essence a relevancy inquiry." Hemmings v. Tidyman's  
6 Inc., 285 F.3d 1174, 1184 (9th Cir. 2002). "The test for reliability,  
7 however, is not the correctness of the expert's conclusions but the  
8 soundness of his methodology. And, reliable testimony must  
9 nevertheless be helpful. A court may exclude testimony that falls  
10 short of achieving either end." Stilwell, 482 F.3d at 1192  
11 (quotations and citations omitted).

12 In his expert report, Russell opines that the Vehicle has  
13 "several design defects," including:

14 10a- No braking mechanism was provided for the  
15 single front wheel. A front brake could have and  
would have prevented this accident.

16 10b- The hydraulic reservoir for the dump bed of  
17 the AMT 622 is mounted directly above the right  
18 rear brake assembly. The reservoir was leaking  
19 hydraulic fluid directly onto the brake pads. This  
20 leakage contaminated the right rear brake pad  
21 friction surfaces which rendered them inoperable.  
22 Due to the fact that the right rear pads were  
inoperable, the left side brakes had to work much  
harder, and in the end failed at the critical  
moment so that at least one of the pads on the left  
side fell out. When the pad fell out, Mrs. Fagan  
and her passenger were left with no brakes at all  
and no back-up system . . . .

23 (Darnell Expert Report 2-3.) Darnell further opines in the  
24 "conclusion" section of his report:

25 16- At the time of the manufacture of Mr. Fagan's  
26 AMT 622 in 1991, the off road industry had  
27 progressed to an industry norm of two wheels at the  
28 front end of ATV's and small utility vehicles such  
as the AMT. It has been conclusively demonstrated  
that an ATV or similar vehicle is substantially  
more stable with two wheels in the front steering

1 position than with a single wheel in the front  
2 steering position.  
3 17- The additional manufacturing cost of supplying  
4 a front brake system on the AMT 622 would have been  
5 minimal.

6 (Id. 3.)

7 **1. Darnell's Opinion that Hydraulic Fluid Caused the Right  
8 Brake to Fail**

9 Defendant argues Darnell's opinion that a hydraulic fluid  
10 leak caused the right brake to fail is mere conjecture and should be  
11 excluded. Specifically, Defendant argues:

12 There are only two witnesses who have testified  
13 from personal observation regarding the condition  
14 of the right rear brake after the accident:  
15 California Highway Patrol Officer Glenn Revheim and  
16 plaintiff Homer Fagan. Their testimony regarding  
17 the brakes conflicts, but neither is consistent  
18 with Darnell's opinion that the right brake failed  
19 to slow the [V]ehicle because its pads were covered  
20 with hydraulic fluid. Darnell's opinion as to the  
21 condition of the right brake at the time of the  
22 accident is unreliable conjecture - inconsistent  
23 with the evidence that the brake failed because it  
24 was not properly maintained - and should be  
25 excluded . . . . [Further,] Darnell's certainty  
26 that the brake pads were saturated at the time of  
27 the accident from hydraulic fluid is based upon  
28 what he claims he saw on a replacement set of pads  
when he inspected the [V]ehicle in November 2007,  
and the statements of the John Deere dealership  
mechanic who inspected the [V]ehicle in June 2009.  
Even if Darnell saw leaking hydraulic fluid on the  
brake pads in November 2007, it would not establish  
that there was fluid on them more than a year  
earlier when the accident occurred.

(Mot. to Exclude Expert Testimony 12:14-20, 13:13-17.)

Plaintiffs respond "Darnell reviewed [Officer] Revheim's  
report and deposition testimony, and photographs taken August 24,  
2007, and believes the photographs taken after the accident clearly  
show the subject vehicle's right brake pads and the area around them  
were wet with hydraulic fluid. Darnell concluded the only source of

1 hydraulic fluid would come from a leak in the hydraulic fluid  
2 reservoir due to the deterioration of the oils seals." (Opp'n to Mot.  
3 to Exclude Expert 10:15-20.) Further, Darnell declares:

4 In preparing the opinions [he] intend[s] to offer  
5 in this case, in addition to applying the  
6 engineering principles and methodology gained from  
7 [his] education and work experience, [he]  
8 thoroughly reviewed and considered the police  
9 report, No. 2006090009, generated by investigating  
10 California Highway Patrol Officer Glenn Revheim,  
11 the deposition testimony of Peter Haag, Michael  
12 Bedis, Homer Fagan, and Marlene Fagan.  
13 Additionally, [he] reviewed Chapters 2, 3, and 10  
14 of the Clymer Manual, the Operator's Manual for the  
15 European model of the Deere Gator Vehicle, Deere  
16 Technical Manuals TM1527 and TM1363, various Deere  
17 Safety Recall Notices, various Fact and  
18 Specification Sheets pertaining to the Deere Gator  
19 Series Utility Vehicles, Technical, Parts, and  
20 Operator's Manuals for the Deere AMT 622 and Gator  
21 Series Vehicles, as well as the photos taken by the  
22 California Highway Patrol of the accident scene.  
23 [He] [has] also thoroughly reviewed and considered  
24 the deposition transcripts of Officer Glenn Revheim  
25 and John Deere certified mechanic Loren Schneider,  
26 especially those portions addressing the condition  
27 of the right and left rear disk brakes on the  
28 vehicle at issue in this case three days after the  
accident, and the condition of the right brake pad  
and right brake caliper and hydraulic fluid  
reservoir leak noted by Loren Schneider in June  
2009.

19 (Darnell Decl. ¶ 7.)

20 Defendant cites the Ninth Circuit's exclusion of expert  
21 testimony in Guidroz-Brault v. Missouri Pac. R.R. Co., 254 F.3d 825,  
22 830-31 (9th Cir. 2001) as support for its argument that Darnell's  
23 opinion should be excluded. In Guidroz-Brault, the Ninth Circuit  
24 upheld the trial court's exclusion of expert opinions that were based  
25 upon factual assumptions which had "no support in the physical facts  
26 as described by the reports and other evidence in the record." Id. at  
27 831. However, Plaintiffs proffer evidence that Darnell has factual  
28 support for his opinion. Therefore, Defendant's arguments do not



1 "furnish an adequate basis for excluding [this] opinion." Primiano v.  
2 Cook, --- F.3d ----, 2010 WL 166030, at \*6 (9th Cir. Apr. 27, 2010).  
3 Accordingly, Defendant's motion to exclude this opinion is denied.

4 **2. Darnell's Opinion that the Inclusion of a Front Brake Would Have**  
5 **Prevented the Accident**

6 Defendant also argues Darnell's opinion that a front brake  
7 would have prevented the accident should be excluded since he "did not  
8 test whether a vehicle designed with such a front brake would have  
9 been able to stop the vehicle if that front brake had been subject to  
10 the same lack of maintenance as the existing rear brakes." (Mot. to  
11 Exclude Expert 15:5-13.) Plaintiffs argue "Darnell's conclusions are  
12 based upon test runs Darnell himself conducted at the site of the  
13 accident in August 2009 after a local mechanic was directed to install  
14 a front drum brake on the [Vehicle] . . . ." (Opp'n to Mot. to  
15 Exclude Expert 12:28-13:2.)

16 Darnell describes his "field test" of the Vehicle in his  
17 declaration as follows:

18 My intent was to reconstruct the circumstances of  
19 the accident as nearly as possible by duplicating  
20 the load the accident [V]ehicle had at the time of  
21 the accident and to duplicate the speed of the  
22 [V]ehicle along the route to the accident. I  
23 placed cones at 62 feet, 170 feet, 313 feet, 356  
24 feet apart along the accident route, beginning at  
25 the accident site and working my way backward. I  
26 noted the accident [V]ehicle picked up speed  
27 approximately 50-60 feet into the route, gradually  
28 attaining approximately 30 mph. Utilizing the  
modified front braking mechanism installed on the  
[V]ehicle for the purposes of the test, I noted  
the brake was able to sufficiently slow and stop  
the [V]ehicle as it approached the last left hand  
turn in the path leading to the accident site.  
The front brake demonstrated itself to be an  
effective secondary braking system that could  
operate as a "fail safe" braking system in the  
event the [V]ehicle's primary braking system  
failed, as it did on the date of the accident.

1 (Darnell Decl. ¶ 9.)

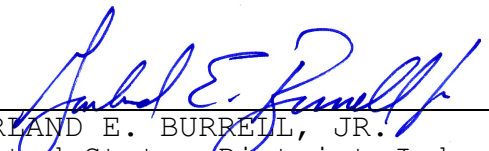
2 Since the condition of the brakes at the time of the  
3 accident is disputed, Defendant's motion to exclude this opinion on  
4 this ground is denied.

5 **3. Darnell's Opinion that the Vehicle was Defective Because it**  
6 **Lacked a Second Front Wheel**

7 Defendant lastly argues that Darnell's opinion that the lack  
8 of a second front wheel constitutes a design defect "should be  
9 excluded as not relevant to the determination of the ultimate issue of  
10 whether a defective design caused the fatality and injuries at issue"  
11 since this opinion conflicts with his deposition testimony, where  
12 Darnell states the accident would likely still have occurred even with  
13 a second front wheel. (Mot. to Exclude Expert 16:5-21.) Plaintiffs  
14 respond this opinion is relevant and admissible since Darnell may  
15 offer his opinion on "the interplay between the subject vehicle's  
16 compromised stability absent a second front wheel and the vehicle's  
17 failed braking system . . . ." (Opp'n to Mot. to Exclude Expert  
18 14:27-15:2.)

19 Defendant's argument challenges Darnell's credibility rather  
20 than the relevance of his opinion. Therefore, this portion of  
21 Defendant's motion is denied.

22 Dated: May 11, 2010

23   
24 \_\_\_\_\_  
25 GARLAND E. BURRELL, JR.  
26 United States District Judge  
27  
28