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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TIM NAY, *et al.*,

Plaintiffs,

Case No. C19-5425-BHS-MLP

v.

ORDER

BNSF RAILWAY COMPANY, *et al.*,

Defendants.

I. INTRODUCTION

This matter is before the Court on Defendants BNSF Railway Company (“BNSF”), National Railroad Passenger Company (d/b/a/ “Amtrak”), Timothy Burch, and Thomas Matlock’s Motion to Strike Expert Disclosures and Proposed Testimonies (“Defendants’ Motion”). (Defs.’ Mot. (dkt. # 77).) Defendants request that the Court strike the expert disclosures and proposed testimonies of Brandon Ogden and Joellen Gill because their expert opinions fail to meet the standards established by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). (*Id.* at 1.)

Plaintiffs Tim Nay, in his capacity as personal representative of the estate of Maria Gonzalez Torres (“Ms. Gonzalez Torres”), and Gregory Price, in his capacity as guardian ad

1 litem of minor I.G., oppose Defendants' Motion. (Pls.' Resp. (dkt. # 82)). Defendants filed a
2 reply. (Defs.' Reply (dkt. # 90).) Neither party requested oral argument.

3 Having considered the parties' submissions, the governing law, and the balance of the
4 record, the Court GRANTS in part and DENIES in part Defendants' Motion (dkt. # 77), as
5 further explained below.

6 II. BACKGROUND

7 Plaintiffs filed a wrongful death action arising from an Amtrak train/vehicle collision at a
8 private railroad grade crossing ("the Crossing") in Camas, Washington, that resulted in the death
9 of Ms. Gonzalez Torres on May 16, 2017.¹ (Pls.' Am. Compl. (dkt. # 31).) Due to the nature of
10 the accident, Plaintiffs secured Mr. Ogden, a railway operations consultant, and Ms. Gill, a
11 human-factors engineering consultant, to offer expert testimony regarding BNSF and Amtrak's
12 ("Railroad Defendants") train operations and rule interpretations. (Pls.' Resp. at 1.)

13 A. Brandon Ogden

14 Mr. Ogden is a railway operations consultant who has a decade of experience as a BNSF
15 certified switchman and conductor. (Ogden Decl. (dkt. # 83) at ¶¶ 2, 19, Ex. 1 (dkt. # 83-1) at
16 2-3, 29-30.) While working at BNSF, Mr. Ogden served as a Trainmaster, Director of
17 Administration, Terminal Manager, and Superintendent of Operations. (*Id.* at ¶ 19, Ex. 1 at 2-3,
18 29-30.) Mr. Ogden's previous experience includes investigating derailments, crossing accidents,
19 and personal injuries, and he has previously supervised new hire training programs for BNSF
20 employees. (*Id.* at ¶ 20, Ex. 1 at 2-3, 29-30.) In addition, Mr. Ogden has previously been retained
21 as a railroad operations expert concerning train handling, switch operation, hand brake operation,
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23 ¹ In addition to the Defendants' instant Motion, Defendants concurrently filed a motion for summary judgment. (Dkt. # 71.) Defendants' motion for summary judgment remains pending determination by this Court.

1 grade crossing collisions, train/pedestrian incidents, rail equipment movement, and evaluation of
2 railroad employee rule compliance, and has provided expert testimony in over a dozen cases. (*Id.*
3 at ¶ 22, Ex. 1 at 2-3, 29, 32-33.)

4 As to his first opinion, Mr. Ogden opines that Railroad Defendants failed to give a proper
5 audible warning at the Crossing because the train's video evidence confirms Defendant Matlock,
6 the train's engineer, did not blow the horn until about a second prior to the collision with Ms.
7 Gonzalez Torres's vehicle and because there were no active or audible warning devices at the
8 Crossing. (Ogden Decl., Ex. 1 at 7, 10.) Mr. Ogden posits that an improper visual warning was
9 provided at the Crossing due to impaired sight distances to motorists that failed to allow
10 motorists to determine the location of the Crossing, its condition, warning devices, and whether a
11 train is approaching. (*Id.* at 7-9.) Finally, Mr. Ogden opines that Railroad Defendants allowed
12 several dangerous and hazardous conditions to exist at the Crossing, making it an unreasonable
13 and unsafe place to cross. (*Id.* at 7.) On this point, Mr. Ogden notes improper design, layout, and
14 engineering of the roadway approach to the Crossing, improper placement of passive warning
15 signs, the absence of any advanced or active warning signs, and substantial vegetation visibility
16 obstructions. (*Id.* at 8-16.)

17 Next, under his second opinion, Mr. Ogden opines that BNSF's "Crossing Closure
18 Program" tasked BNSF with properly evaluating the Crossing for potential closure. (Ogden
19 Decl., Ex. 1 at 16-17; *see also id.*, Ex. 2 (dkt. # 83-2) at 3-4.) Based on factors to be considered
20 under the program, Mr. Ogden concludes Railroad Defendants failed to properly evaluate the
21 Crossing for closure. (*Id.* at 16-18.) As support for this opinion, Mr. Ogden notes that: (1) one to
22 two high-speed Amtrak passenger trains operated over the Crossing daily, with a maximum
23 authorized speed of 70 miles per hour; (2) there were four alternate private railroad crossings

1 within 2,250 feet of the Crossing, with one only 350 feet west of the Crossing, making the
2 Crossing redundant and unnecessary; (3) the ease of closing the Crossing as private crossings are
3 closed more frequently due to accidents happening at a higher rate than public crossings and the
4 lessened notice time required to close a private crossing; (4) the Crossing covered mainline track;
5 (5) the low volume of vehicle traffic at the Crossing because it served only 12 residential homes;
6 (6) the high volume of freight trains operating over the Crossing because 32-42 freight trains
7 operated over the Crossing daily with a maximum authorized speed of 60 miles per hour; (7) the
8 minimal amount of warning devices in place at the Crossing; (8) the hazardous conditions at the
9 Crossing due to its layout and design; and (9) because BNSF was aware of at least one other
10 previous train/vehicle collision at the Crossing. (*Id.* at 16-18.)

11 As to his third opinion, Mr. Ogden opines that Railroad Defendants and their employees
12 violated federal regulations and their own operating rules, processes, procedures, and industry
13 standards of care in operating the Amtrak train over the Crossing. (Ogden Decl., Ex. 1 at 19-27.)
14 Mr. Ogden notes that several BNSF engineers had previously indicated speedometer defects with
15 the train between May 14, 2017, and May 16, 2017, and that due to federal regulations
16 concerning speedometers under 49 C.F.R. § 229.117, the train should not have been operated in
17 excess of 20 miles per hour until the defects had been repaired.² (*Id.* at 19-23.) Mr. Ogden
18 further notes that Defendant Matlock blew the horn only a single time for three seconds about
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20 ² Per 49 C.F.R. § 229.117:

- 21 (a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds
22 in excess of 20 miles per hour shall be equipped with a speed indicator which is -
(1) Accurate within ± 3 miles per hour of actual speed at speeds of 10 to 30 miles per
23 hour and accurate within ± 5 miles per hour at speeds above 30 miles per hour; and . . .
(b) Each speed indicator required shall be tested as soon as possible after departure by
means of speed test sections or equivalent procedures.

1 one second prior to impact with Ms. Gonzalez Torres's vehicle and that he should have instead
2 sounded the horn with two long whistles, one short whistle, and one long whistle lasting between
3 15 and 20 seconds before entering the Crossing. (*Id.* at 23.) Finally, Mr. Ogden found that
4 Railroad Defendants failed to conduct a proper root cause analysis after a previous train/vehicle
5 collision at the Crossing and that their training of their employees was deficient because Railroad
6 Defendants failed to advise their crews to recognize safety hazards present at the Crossing. (*Id.* at
7 26-28.)

8 **B. Joellen Gill**

9 Ms. Gill is a human-factors engineer consultant who has 42 years of experience in human
10 factors engineering with an emphasis in safety and risk management.³ (Gill Decl. (dkt. # 84) at
11 ¶ 4, Ex. 2 (dkt. # 84-2) at 2-3.) She has performed the roles of research associate, human factors
12 engineering associate, and senior engineer, and done theoretical work in the area of safety,
13 including warning design and effectiveness. (*Id.* at ¶ 5, Ex. 1 (dkt. # 84-1) at 4, Ex. 2 at 2-3.) Ms.
14 Gill has a Bachelor of Science in human factors engineering, a Master of Business
15 Administration Degree, and a Master of Science Degree in Environmental Engineering. (*Id.*, Ex.
16 1 at 4, Ex. 2 at 2-3.) She has been certified as a human factors professional since 2006, certified
17 as a safety professional since 2013, and is a licensed tribometrist. (*Id.*, Ex. 2 at 2-3.) Relevant to
18 the instant matter, Ms. Gill has previously consulted on railroad accident cases as a
19 human-factors engineering consultant. (*See id.*, Ex. 2 at 2; Sanders Decl. (dkt. # 85), Ex. 2 (Gill
20 Dep. (dkt. # 85-2) at 8:24-9:3).)

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23 ³ Human factors engineering combines traditional engineering disciplines with human behavioral
sciences. (Gill Decl., Ex. 1 (dkt. # 84-1) at 1.) The discipline analyzes human behavior in an attempt to
understand and protect against potential failures in safety systems. (*Id.*)

1 Per her submitted report, Ms. Gill documented several system design factors of Railroad
2 Defendants' safety or risk management program. (Gill Decl., Ex. 1 at 5.) Specifically, Ms. Gill's
3 report provides a detailed examination of the safety systems through the system design factors
4 of: (1) Hazard Analysis; (2) Plan Development; (3) Plan Implementation; (4) Plan Evaluation;
5 and (5) Documentation. (*Id.*) Each of the factors were analyzed in relation to Ms. Gonzalez
6 Torres's collision. (*Id.*)

7 Under Ms. Gill's Hazard Analysis, Ms. Gill examined *a priori* and *post hoc* issues
8 associated with the potential for train/vehicle collisions at the Crossing. (Gill Decl., Ex. 1 at 5-6.)
9 In relevant part, Ms. Gill's report noted the Crossing was hazardous because: (1) the Crossing
10 was an unguarded at-grade crossing; (2) the intermittent frequency of train use at the Crossing;
11 (3) visual obstructions that existed at the Crossing and their effect on a motorist's perception
12 reaction time; (4) issues concerning inattentive blindness; (5) train speeds at the Crossing; and
13 (6) motorist behavior at the Crossing. (*Id.* at 6-11.) Ms. Gill's *a priori* analysis concluded the
14 Crossing was "extremely dangerous for drivers." (*Id.* at 11.) Per her *post hoc* analysis, Ms. Gill
15 determined that Railroad Defendants should have known of the conditions at the Crossing before
16 Ms. Gonzalez Torres's collision and that Railroad Defendants failure to remedy the conditions
17 were "gross violations" of the basic principles of safety and risk management. (*Id.*)

18 Under Ms. Gill's Plan Development examination, Ms. Gill outlined a three-level
19 hierarchical safety process for creating a plan to control known hazards. (Gill Decl., Ex. 1 at 12.)
20 Per that structure, Ms. Gill noted three tiers to the "Safety Hierarchy": (1) "safety by design,"
21 which eliminates the hazard by system design; (2) "guarding," which provides a barrier between
22 a user and a potential hazard; and (3) "persuasion control," which uses warnings, trainings, or
23 other types of human intervention to improve overall user safety in the system. (*Id.*) On this

1 aspect, Ms. Gill concluded that Railroad Defendants’ sole reliance on “persuasion control” was
2 an underlying root cause of Ms. Gonzalez Torres’s train/vehicle collision at the Crossing. (*Id.*)
3 Specifically, Ms. Gill noted that Railroad Defendants failed to control vegetation growth at the
4 Crossing to afford an unimpeded line-of-sight, failed to train their employees to report
5 obstructive vegetation, and failed to give an audible warning at the Crossing. (*Id.* at 12-13.)

6 As to the final three factors of her evaluation, Ms. Gill determined, under the Plan
7 Implementation factor, that the Railroad Defendants failed to develop a meaningful plan for
8 mitigating life-threatening hazards present at the Crossing. (Gill Decl., Ex. 1 at 13-14.) Under the
9 Plan Evaluation step, Ms. Gill concluded that, despite being aware of the importance of routine
10 and ongoing evaluations, Railroad Defendants failed to respond to known hazards associated
11 with at-grade crossings and otherwise failed to maintain the Crossing in a safe condition. (*Id.* at
12 14.) Finally, under the Documentation step, Ms. Gill noted the record she reviewed was devoid
13 of any documentation relative to Railroad Defendants having previously undertaken any analysis
14 regarding the conditions at the Crossing. (*Id.*)

15 III. DISCUSSION

16 Federal Rule of Evidence 702 provides in relevant part:

17 A witness who is qualified as an expert by knowledge, skill, experience, training,
18 or education may testify in the form of an opinion or otherwise if: (a) the expert’s
19 scientific, technical, or other specialized knowledge will help the trier of fact to
20 understand the evidence or to determine a fact in issue; (b) the testimony is based
on sufficient facts or data; (c) the testimony is the product of reliable principles and
methods; and (d) the expert has reliably applied the principles and methods to the
facts of the case.

21 Fed. R. Evid. 702. Therefore, it follows that for expert testimony to be admissible under Rule
22 702, it must satisfy three requirements: (1) the expert witness must be qualified; (2) the
23 testimony must be reliable; and (3) the testimony must be relevant. *See Daubert*, 509 at 589-91.

1 The proponent of expert testimony has the burden of establishing that the admissibility
2 requirements are met by a preponderance of the evidence. *Id.* at 592 n.10; *see also Lust v.*
3 *Merrell Dow Pharms. Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

4 Before admitting expert testimony into evidence, the Court acts as a “gatekeeper” in
5 determining its admissibility under Rule 702 by ensuring the testimony is both “relevant” and
6 “reliable.” *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019) (citing
7 *Daubert*, 509 U.S. at 597). Expert testimony is relevant where “the evidence logically advance[s]
8 a material aspect of the party’s case.” *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463
9 (9th Cir. 2014) (quoting *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007)). Testimony is
10 reliable where it has “a reliable basis in the knowledge and experience of the relevant discipline.”
11 *Id.* (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999)).

12 The Supreme Court has noted that the reliability inquiry is a “flexible one,” and while the
13 Supreme Court has suggested several factors helpful in determining reliability, trial courts are
14 generally given “broad latitude in determining the appropriate form of the inquiry.”⁴ *United*
15 *States v. Wells*, 879 F.3d 900, 934 (9th Cir. 2018) (quoting *Kumho Tire*, 526 U.S. at 150); *see*
16 *also Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (finding Rule 702
17 should be applied with a “liberal thrust” favoring admission) (quoting *Daubert*, 509 U.S. at 588);
18 *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000) (Rule 702 is “construed liberally” in
19 considering admissibility of testimony based on specialized knowledge). Furthermore, the
20 reliability inquiry favors admission of testimony as “[s]haky but admissible evidence is to be

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22 ⁴ In relevant part, *Daubert* suggested several reliability factors a trial court may examine to determine the
23 reliability of expert testimony, including: (1) whether a theory or technique can be tested; (2) whether it has
been subjected to peer review and publication; (3) the known or potential error rate of the theory or
technique; (4) the existence and maintenance of standards and controls; and (5) whether the theory or
technique enjoys general acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 592-94;
see also Mukhtar v. California State Univ., Hayward, 299 F.3d 1053, 1064 (9th Cir. 2002).

1 attacked by cross examination, contrary evidence, and attention to the burden of proof, not
2 exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (citing *Daubert*, 509 U.S. at
3 596).

4 Finally, the reliability inquiry test does not seek to measure “the correctness of the
5 expert’s conclusions but the soundness of [his or her] methodology,” and therefore, when an
6 expert meets the standards established by Rule 702, “the expert may testify[,] and the fact finder
7 decides how much weight to give that testimony.” *Pyramid Techs., Inc. v. Hartford Cas. Ins.*
8 *Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (quoting *Primiano*, 598 F.3d at 564-65).

9 **A. Brandon Ogden**

10 Defendants argue Mr. Ogden’s testimony should be excluded because: (1) Mr. Ogden is
11 not qualified to offer an expert opinion; and (2) Mr. Ogden’s methodology fails to satisfy
12 standards set forth in Rule 702 or *Daubert*. (Defs.’ Mot. at 1, 4-15.) The Court will address each
13 of Defendants’ arguments regarding why Mr. Ogden’s report and testimony should be excluded
14 in turn:

15 *i. Expert Qualifications*

16 First, Defendants argue that Mr. Ogden’s education and experience lacks railroad
17 industry experience and engineering standards to allow him to give an expert opinion in this
18 case. (Defs.’ Mot. at 6-7.) Plaintiffs counter that Mr. Ogden’s proffered testimony regarding
19 Railroad Defendants’ train operations and rules interpretations is proper due to his extensive
20 experience previously working for BNSF. (Pls.’ Resp. at 3-4.)

21 On this issue, the Court must determine whether Mr. Ogden is qualified as an expert by
22 “knowledge, skill, experience, training or education.” Fed. R. Evid. 702. An expert is considered
23 qualified to testify if the expert has “sufficient specialized knowledge to assist the jurors in

1 deciding the particular issues in the case.” *Kumho Tire*, 526 U.S. at 156. Because Rule 702
2 “contemplates a *broad conception* of expert qualifications,” only a “*minimal foundation* of
3 knowledge, skill, and experience” is required. *Hangarter v. Provident Life & Accident Ins. Co.*,
4 373 F.3d 998, 1015-16 (9th Cir. 2004) (internal quotations and citation omitted, emphasis in
5 original). Consequently, a “lack of particularized expertise goes to the weight of [the] testimony,
6 not its admissibility.” *United States v. Garcia*, 7 F.3d 885, 890 (9th Cir. 1993) (citing *United*
7 *States v. Little*, 753 F.2d 1420, 1445 (9th Cir. 1984).

8 Here, the Court finds that Mr. Ogden is sufficiently qualified to testify as to Railroad
9 Defendants’ railroad operations based on his knowledge and prior experience with BNSF. As
10 previously outlined, Mr. Ogden has a decade of relevant experience with BNSF. (*See* Ogden
11 Decl., Ex. 1 at 2-3, 30.) Pertinent to the instant matter, Mr. Ogden’s experience also includes
12 investigating crossing accidents and train/vehicle collisions. (*Id.* at 2-3, 29-30.) Moreover,
13 though not dispositive, the Court further notes that Mr. Ogden has previously qualified to
14 provide expert testimony on railroad operations and rule interpretations multiple times in federal
15 courts—including this Court—based on his background and relevant experience. (*See* Ogden
16 Decl., Ex. 1 at 32-33 (citing *Rossich v. BNSF Ry. Co.*, Case No. C18-5829-RBL, Dkt. ## 101,
17 102 (W.D. Wash.)); *see also* *Smith v. BNSF Ry. Co.*, 2020 WL 2297798, at *3 (E.D. Wash. Jan.
18 30, 2020) (allowing Mr. Ogden to present evidence or testimony regarding “trains and
19 locomotive operations.”)). Therefore, the Court declines to disqualify Mr. Ogden from testifying
20 in this matter based on a lack of qualifications to render an expert opinion.

21 *ii. Vegetation and Obstructions*

22 Next, Defendants argue that Mr. Ogden’s opinions pertaining to vegetation obstructing
23 Ms. Gonzales Torres’s vision relies on deceptive and misleading photographs, pursuant to Rule

1 702(b) and Rule 403, because they fail to depict the driver's view of the railroad had Ms.
2 Gonzalez Torres stopped at the stop sign at the Crossing. (Defs.' Mot. at 7-11.) Defendants
3 additionally argue that Mr. Ogden's opinion that Defendants were required to correct visibility
4 obstructions caused by vegetation under RCW 36.86.100 is misleading under Rule 403 because
5 Southwest Viola, the road the Crossing intersects, is a private road. (*Id.* at 11.)

6 Plaintiffs argue that the photographs referenced in Mr. Ogden's report were a reliable
7 source because they accurately depict vegetation present at the Crossing. (Pls.' Resp. at 5-7.)
8 Plaintiffs further contend that Mr. Ogden's testimony referencing RCW 36.86.100 was not to
9 demonstrate that it was applicable to Southwest Viola, but to demonstrate relevant custom and
10 practices in the railroad industry with regard to vegetation and sight distances that Defendants
11 should have followed. (*Id.* at 7-8.)

12 Pursuant to Rule 702(b), the requirement that expert testimony be based on "sufficient
13 facts or data" requires the Court to engage in "an analysis of the sufficiency of underlying facts
14 or data that is quantitative rather than qualitative." *United States v. W.R. Grace*, 455 F.Supp.2d
15 1148, 1152 (D. Mont. 2006); *see also* Advisory Committee Notes to 2000 Amendments to Fed
16 R. Evid. 702. The requirement "is not intended to authorize a trial court to exclude an expert's
17 testimony on the ground that the court believes one version of the facts and not the other." *W.R.*
18 *Grace*, 455 F.Supp.2d at 1152. Pursuant to Rule 403, the Court may exclude relevant evidence if
19 its probative value is substantially outweighed by a danger of misleading the jury. Fed. R. Evid.
20 403.

21 On this point, the Court finds that Mr. Ogden's cited photographs provided adequate
22 factual support for his opinions under Rule 702(b). Based on the record, the photographs
23 referenced in Mr. Ogden's report provide a depiction of the vegetation present at the Crossing at

1 some time after the collision. (Ogden Decl., Ex. 1 at 10-12.) It is clear from Mr. Ogden’s report
2 that he also consulted the photographs that were taken by police at the scene immediately after
3 Ms. Gonzalez Torres’s collision. (*See id.* at 6.) Though the police photos of the collision were
4 not specifically referenced in his opinion, any issues as to what photographs of the Crossing were
5 more appropriate for Mr. Ogden to consult in constructing his report would go to the weight, and
6 not the admissibility, of his testimony. *See Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230-31
7 (9th Cir. 1998) (citation omitted) (“Disputes as to the strength of [an expert’s] credentials, faults
8 in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the
9 weight, not the admissibility, of [his] testimony”). Defendants are free to cross-examine Mr.
10 Ogden on any alleged deficiencies with his report at trial. *See Daubert*, 509 U.S. at 596; *see also*
11 *Bluetooth SIG, Inc. v. FCA US LLC*, 468 F.Supp.3d 1342, 1349 (W.D. Wash. 2020) (“[T]he
12 factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility,
13 and it is up to the opposing party to examine the factual basis for the opinion in
14 cross-examination.” (quoting *In re Toyota.*, 978 F.Supp.2d 1053, 1069 (C.D. Cal. 2013))).

15 However, the Court finds that Mr. Ogden’s reliance on RCW 36.86.100 as to the
16 vegetation visibility obstructions is misleading under Rule 403. In his report, Mr. Ogden referred
17 to RCW 36.86.100, in conjunction with a Federal Highway Administration’s (“FHA”)
18 “Highway-Rail Crossing Handbook,” in demonstration of “the importance of removing
19 obstructions and allowing motorists proper sight distance approaching railroad grade crossings.”
20 (*See* Ogden Decl., Ex. 1 at 10.) Yet, Mr. Ogden’s report ultimately opines that Defendants
21 violated RCW 36.86.100 in failing to contain the vegetation obstruction at the Crossing. (*See id.*
22 (“[Railroad Defendants] failed to clear visibility obstructions . . . from their own right of way to
23 allow motorists approaching the crossing adequate sight distance down the tracks in both

1 directions, *violating Washington law* and the Highway-Rail Crossing Handbook.” (emphasis
2 added).) It is not disputed by the parties that Southwest Viola was a private road. (*See* Pls’ Resp.
3 at 7.) It is also clear that RCW 36.86.100 only applies to county roads—and not private roads.⁵
4 Therefore, Mr. Ogden’s citation to RCW 36.86.100 to show that Defendants’ failure to remove
5 obstructive vegetation at the Crossing was a violation of Washington law is misleading and
6 should be stricken.

7 Consequently, the Court declines to strike Mr. Ogden’s testimony concerning vegetation
8 at the Crossing on the basis that his opinion was not supported by his cited photographs of the
9 Crossing. However, the portion of Mr. Ogden’s expert report opining that Defendants violated
10 Washington law, in reference to the applicability of RCW 36.86.100, is stricken.

11 *iii. Objective and Relevant Sources*

12 Next, Defendants make several arguments that Mr. Ogden’s expert report fails to cite to
13 objective and relevant sources under Rule 702(b) to support his opinions that: (1) Defendants
14 Burch and Matlock (“Traincrew Defendants”) failed to exercise reasonable care; (2) BNSF failed
15 to complete a root cause analysis; and (3) that Railroad Defendants failed to properly train their
16 employees.⁶ (Defs.’ Mot. at 11-15.)

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18 ⁵ RCW 36.86.100 provides in relevant part that:

19 Each railroad company shall keep its right-of-way clear of all brush and timber in the
20 vicinity of a *railroad grade crossing with a county road* for a distance of one hundred feet
21 from the crossing in such a manner as to permit a person upon the road to obtain an
unobstructed view in both directions of an approaching train or other on-track
equipment

(emphasis added).

22 ⁶ On reply, Defendants additionally argued that: (1) Mr. Ogden should not be allowed to give his opinion
23 as to crossing warnings and train speed because his opinions are contrary to law, would confuse the jury,
and prejudice Defendants; and (2) Mr. Ogden’s methodology is unreliable in that it failed to consider
motorist behavior at the Crossing. (Defs.’ Reply at 2-3.) However, Defendants failed to raise any Rule 403
or methodology issues pertaining to Mr. Ogden’s consideration of motorist behavior in their Motion, or

1 1. Defendant Burch

2 Defendants argue that Mr. Ogden’s opinion that Defendant Burch, the train’s assistant
3 conductor, failed to exercise reasonable care does not cite objective and relevant sources under
4 Rule 702(b) because his role as an assistant conductor limited his responsibilities. (Defs.’ Mot. at
5 11-12.) Plaintiffs argue that Mr. Ogden’s opinions regarding Defendant Burch are reliable due to
6 Defendant Burch’s deposition testimony and Mr. Ogden’s experience. (Pls.’ Resp. at 8-10.)

7 As previously noted, in his third opinion in his report, Mr. Ogden opined that Railroad
8 Defendants and their employees violated federal regulations, their own operating rules and
9 processes/procedures, and industry standards of care that are the custom and practice of the
10 industry. (Ogden Decl., Ex. 1 at 19.) At various points in his report, based on Defendant Burch’s
11 deposition testimony, Mr. Ogden found Defendant Burch was not familiar with: (1) certain
12 speedometer requirements; (2) federal regulations regarding train speed; (3) whether the horn
13 must be sounded in a specific manner for a specific duration at private crossings; and/or (4)
14 particular responsibilities regarding reporting unsafe crossings and near misses. (*See id.* at 21-22,
15 25, 27.)

16 Here, the Court finds that Mr. Ogden’s opinion as to Defendant Burch is adequately
17 supported. Though Defendant Burch did not operate as the engineer of the train in this instance,
18 throughout his deposition testimony, Defendant Burch referenced his relevant knowledge serving
19 with Railroad Defendants as to his understanding of his responsibilities, including when working
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21 _____
22 otherwise provide substantive argument on such issues. (*See* Defs.’ Mot.) Instead, these issues were raised
23 for the first time in Defendants’ reply brief. Therefore, the Court declines to address Defendants’ additional
arguments at this time. *See, e.g., Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court
need not consider arguments raised for the first time in a reply brief.”); *Koerner v. Grigas*, 328 F.3d 1039,
1048 (9th Cir. 2003).

1 as an engineer and not a conductor. (*See Sanders Decl.*, Ex. 5 (Burch Dep. at 58:1-4, 58:13-22).)
2 Mr. Ogden’s opinion’s references to Defendant Burch’s deposition testimony in his expert report
3 are based on sufficient facts to warrant admission of his opinion testimony as to Defendant
4 Burch’s alleged failures to follow federal regulations, operating rules and procedures, or industry
5 standards of care. *See Fed. R. Evid.* 702(b). The Court therefore declines to strike this portion of
6 Mr. Ogden’s opinion.

7 2. Defendant Matlock

8 Defendants next argue that Mr. Ogden additionally fails to cite to objective and relevant
9 sources under Rule 702(b) for his opinion that Defendant Matlock failed to exercise reasonable
10 care. (Dfs.’ Mot. at 12-14.) Plaintiffs argue that Mr. Ogden’s opinions regarding Defendant
11 Matlock are also reliable due to Mr. Ogden’s experience and Mr. Matlock’s deposition
12 testimony. (Pls.’ Resp. at 8-10.)

13 Mr. Ogden’s opinion first notes that Defendant Matlock indicated in comments on the
14 train’s maintenance condition reports that the train had an erratic speedometer on May 16, 2017.
15 (Ogden Decl., Ex. 1 at 19.) Mr. Ogden’s opinion then referenced 49 C.F.R. § 229.117 and
16 BNSF’s “Air Brake and Train Handling Rule 101.11” to opine that Railroad Defendants violated
17 both the regulation and policy by failing to repair the speedometer at the next repair facility, or
18 upon the train’s next daily inspection, and by failing to reduce train speed to 20 miles per hour
19 “once movement was beyond a facility where repairs could have been made or any movement
20 after the next daily inspection.” (*Id.* at 20, 22-23.) Mr. Ogden’s report additionally cites to
21 Defendant Matlock’s testimony as support that he was not aware of the requirements to test the
22 speedometer or any requirements to reduce the train’s speed. (*Id.* at 21; *see also Sanders Decl.*,
23 Ex. 4 (Matlock Dep. at 18:25-19:20, 20:11-21:2).) Based on the cited evidence and referenced

1 authority, Mr. Ogden concluded that Defendant Matlock's operation of the train at 70 miles per
2 hour was 50 miles per hour above the required speed restrictions for a train with a
3 malfunctioning speedometer. (*Id.* at 21.) Mr. Ogden further concluded that the collision could
4 have been avoided, or the severity reduced, had the train been operated at the speed required by
5 the federal regulation and the "Air Brake and Train Handling" rule. (*Id.*)

6 Mr. Ogden's report additionally opined that Defendant Matlock failed to give a
7 reasonable and timely audible warning prior to entering the Crossing. (Ogden Decl., Ex. 1 at
8 23-24.) Mr. Ogden noted that, per event recorder data and police reports, Defendant Matlock
9 sounded the train's horn one time for three seconds one second prior to impact with Ms.
10 Gonzalez's Torres's vehicle. (*Id.*) Mr. Ogden concluded Matlock should have sounded the
11 locomotive horn with two long whistles, one short whistle, and one long whistle sequence lasting
12 between 15 and 20 seconds before entering the Crossing based on his training and experience in
13 the custom and practice of the railroad industry and due to how CSX Transportation and Norfolk
14 Southern Railway operate in regard to private crossings, citing letters from those operations. (*Id.*)
15 Mr. Ogden also noted, per Mr. Matlock's deposition testimony, that he does not blow the horn
16 for private crossings without whistle boards because Railroad Defendants do not require it. (*Id.* at
17 24-25; *see also* Sanders Decl., Ex. 4 (Matlock Dep. at 31:5-21).) Finally, as part of his overall
18 conclusion that Railroad Defendants failed to properly train their employees, Mr. Ogden's report
19 cites Defendant Matlock's deposition testimony indicating that he was not trained to report
20 unsafe crossings and to only report near misses at crossings if it delays their train. (Ogden Decl.,
21 Ex. 1 at 26-27; *see also* Sanders Decl., Ex. 4 (Matlock Dep. at 42:24-43:25, 44:8-21).)

22 Based on Defendant Matlock's deposition testimony, and the above-cited evidence in his
23 report, the Court finds that Mr. Ogden's report incorporates sufficient facts for his opinions

1 concerning Defendant Matlock under Rule 702(b). In any event, Defendants' issues as to Mr.
2 Ogden's referenced authority for his opinion are weight of the evidence concerns. *See Kennedy*,
3 161 F.3d at 1230-31. The Court therefore finds that Mr. Ogden's report provided adequate
4 support for his opinions regarding Defendant Matlock.

5 3. Root Cause

6 Defendants next argue that Mr. Ogden's opinion that a root cause analysis would have
7 prevented Ms. Gonzalez Torres's death is unsupported under Rule 702(b) because there was no
8 similar collision at the Crossing. (Defs.' Mot. at 14-15.) Plaintiffs respond that Mr. Ogden's
9 opinion that Railroad Defendants failed to complete a root cause analysis was supported by the
10 first known collision at the Crossing and by Mr. Ogden's previous experience performing root
11 cause analyses. (Pls.' Resp. at 10-11.)

12 On this issue, Mr. Ogden's report found that Railroad Defendants failed to complete a
13 root cause analysis, identify all factors that contributed to or caused the collision, and implement
14 appropriate corrective actions to prevent recurrence after the first known train/vehicle collision at
15 the Crossing. (*See* Ogden Decl., Ex. 1 at 25-26.) As a result, Mr. Ogden opined that Ms.
16 Gonzalez Torres's death may have been avoided had a root cause analysis followed after a prior
17 known collision at the Crossing. (*Id.*) Mr. Ogden's report does not provide any detail as to the
18 first train/vehicle collision at the Crossing. (*See id.*)

19 Here, based on the briefing as to this issue, it appears contested by the parties whether a
20 "similar" collision did in fact occur at the Crossing. However, in materials submitted with their
21 pending motion for summary judgment, Defendants submitted an accident report detailing that
22 there was a prior train/vehicle collision at the Crossing in 1993. (Yates Decl., Ex. M (dkt.
23 # 72-13) at 2.) Based on the report, the collision occurred due to the motorist failing to stop and

1 moving over the Crossing. (*Id.*) As a result, the Court finds Mr. Ogden's root cause opinion
2 referencing a prior collision at the Crossing is based on sufficient facts under Rule 702(b). The
3 Court declines to strike this portion of Mr. Ogden's report.

4 4. Failure to Train

5 Finally, Defendants argue that Mr. Ogden failed to cite any authority to support his
6 opinion that BNSF was responsible for training Traincrew Defendants because they were not
7 employees of BNSF under Rule 702(b). (Defs. Mot. at 14-15.) Similarly, Defendants contend
8 that Mr. Ogden's report failed to provide any authority as to how Amtrak failed to train
9 Traincrew Defendants. (*Id.*) Plaintiffs counter that Mr. Ogden's opinion that Railroad Defendants
10 failed to train their employees was not limited to Traincrew Defendants, but all of Railroad
11 Defendants' employees who ultimately failed to recognize safety hazards present at the Crossing,
12 and that Traincrew Defendants' testimony provided Mr. Ogden a requisite factual basis for his
13 opinion. (Pls.' Resp. at 11-12.)

14 On this issue, Mr. Ogden opined Railroad Defendants failed to train their employees to
15 recognize safety hazards or to take reasonable steps to reduce appreciated risks associated with
16 the Crossing. (Ogden Decl., Ex. 1 at 10, 26.) Mr. Ogden noted that Traincrew Defendants were
17 not trained to identify and report unsafe crossings and to only report near misses at crossings if it
18 would delay their train. (*Id.* at 26.) As support for his opinion, Mr. Ogden cited Traincrew
19 Defendants' testimony that they did not receive such training from Railroad Defendants. (*Id.* at
20 26-28; *see* Sanders Decl., Ex. 4 (Matlock Dep. at 27:25-27, 42:24-43:25, 44:8-21), Ex. 5 (Burch
21 Dep. at 30:25-31:2, 31:24-32:4, 45:10-46:2).)

22 Because Mr. Ogden's opinion as to Railroad Defendants' alleged failure to train
23 references Traincrew Defendants' testimony that they did not receive training in relevant areas

1 identified by Mr. Ogden in his report, the Court finds that his opinion is based on sufficient facts
2 under Rule 702(b). Furthermore, any of Defendants' contentions that Mr. Ogden's opinion on
3 this issue lacks relevant authority as to what training was owed, or which Railroad Defendant
4 was responsible for training Traincrew Defendants, go to the weight and not admissibility of his
5 testimony. Therefore, the Court declines to strike this portion of Mr. Ogden's opinion.

6 **B. Joellen Gill**

7 Next, Defendants argue Ms. Gill's testimony should be excluded because: (1) Ms. Gill is
8 not qualified to provide an expert opinion; and (2) Ms. Gill failed to consider facts and data
9 necessary to engage in her proposed methodology. (Defs.' Mot. at 1, 15-24.) As considered
10 above, the Court will address each of Defendants' arguments regarding why Ms. Gill's report
11 and testimony should be excluded in turn:

12 *i. Expert Qualifications*

13 Defendants first argue that Ms. Gill's education and experience lacks relevant research
14 and industry experience to allow her to give an expert opinion in this case. (Defs.' Mot. at
15 15-17.) Defendants argue that Ms. Gill lacks experience with the railroad industry, has no
16 advanced training or degrees in human factors, and because several courts have previously
17 excluded Ms. Gill from testifying as an expert witness. (*Id.*) Plaintiffs counter that Ms. Gill is
18 qualified to render an expert opinion due to her significant knowledge, experience, training, and
19 education in human factors and because she has previously consulted on railroad accident cases.
20 (Pls.' Resp. at 14-15.)

21 Here, based on the record before the Court, the Court finds that Ms. Gill is qualified to
22 render an expert opinion on human factors in this matter. As noted by Plaintiffs, Ms. Gill has
23 testified as a human factors consultant in several cases, has relevant educational background and

1 training in the field of human factors, and has previously consulted on railroad accident cases in
2 the realm of human factors. (See Gill Decl. at ¶¶ 4-5, Ex. 2 at 2-3; see also Sanders Decl., Ex. 2
3 (Gill Dep. at 8:24-9:3).) Though Defendants’ grievances about Ms. Gill’s specific experience
4 within the railroad industry and lack of study and research in her field are reasonable matters to
5 put before a factfinder, the Court is satisfied that Ms. Gill’s background provides her the
6 “minimal foundation” required to provide an expert opinion in this matter. See *Hangarter*, 373
7 F.3d at 1015-16; see also *Garcia*, 7 F.3d at 890. Therefore, the Court declines to disqualify Ms.
8 Gill from testifying in this matter based on a lack of qualifications to render an expert opinion.

9 *ii. Objective and Relevant Sources*

10 Next, Defendants argue Ms. Gill’s expert report fails to cite to objective and relevant
11 sources to support the entirety of her opinion. (Defs.’ Mot. at 17.) Specifically, Defendants
12 contend that Ms. Gill: (1) failed to cite authority or sources that there was vegetation obscuring
13 Ms. Gonzales Torres’s vision; (2) ignored federal regulations governing railroad crossings; (3)
14 improperly relied on a United States Department of Transportation (“USDOT”) FHA advisory
15 publication, RCW 36.86.100, and the “Highway-Rail Crossing Handbook” as they do not apply
16 to private crossings; (4) improperly relied on BNSF materials that have not been produced; (5)
17 ignored that Ms. Gonzales Torres was required to stop at the stop sign posted at the Crossing; (6)
18 provides irrelevant information regarding other motorist behavior at the Crossing; and (7) fails to
19 cite authority or source that Defendant Matlock’s view of Ms. Gonzalez Torres was obstructed.
20 (Defs.’ Mot. at 17-24.)

21 *1. Vegetation and Obstructions*

22 Defendants argue that Ms. Gill’s opinion on this aspect must be stricken under Rule
23 702(b) because she failed to consider photographs and site measurements taken by police in

1 forming her opinion and because she has never been to the Crossing. (Defs.' Mot. at 17-18.)
2 Defendants note that Ms. Gill's report instead makes use of Google Maps for her measurements
3 and conclusions. (*Id.*) Plaintiffs counter that Ms. Gill considered all photographs and site
4 distance measurements taken by police in forming her opinion. (Pls.' Resp. at 18-20.)

5 On this issue, per her report, Ms. Gill listed the police photos as material reviewed
6 specific to the facts of this case and she testified in her deposition that she reviewed and relied
7 upon the photographs taken by police in forming her opinions. (*See* Gill Decl., Ex. 1 at 2;
8 Sanders Decl., Ex. 2 (Gill Dep. at 23:20-24-1).) In considering the sight distance measurements,
9 Ms. Gill testified she reviewed the measurements, but found they were not relevant to her
10 analysis because they did not include the approach to the Crossing. (*See* Yates Decl. (dkt. # 72),
11 Ex. S (Gill Dep. at 60:9-11).) Though Ms. Gill's opinion as to whether Ms. Gonzales Torres's
12 view was obstructed was largely supported by data collected from Google Maps, the Court finds
13 that Defendants' arguments on this issue largely go to the weight of her testimony and that she
14 has otherwise provided sufficient facts and data for her opinion under Rule 702(b). The Court
15 therefore declines to strike this portion of Ms. Gill's opinion on this basis.

16 2. Federal Regulations

17 Defendants next contend that Ms. Gill's opinion must be stricken because she ignored
18 that matters relating to controls at the Crossing, audible warnings, and visual obstructions are
19 preempted by federal regulations. (Defs.' Mot. at 18-19.) Plaintiffs contend that their claims are
20 not preempted by federal law, as argued in their response to Defendants' pending motion for
21 summary judgment. (Pls.' Resp. at 20; *see also* dkt. # 86 at 11-22.)

22 Here, the Court finds that Ms. Gill's references in her report to the conditions of the
23 Crossing in engaging in her human factors analysis are adequately supported by sufficient facts.

1 (*See Gill Decl.*, Ex. 1 at 6-7.) Moreover, striking Ms. Gill’s opinion on the basis that Plaintiffs’
2 claims are preempted would be premature at this juncture as this Court’s determination on the
3 issue of preemption remains pending. Consequently, the Court declines to strike this portion of
4 Ms. Gill’s opinion on this basis at this time.

5 3. Authoritative Sources

6 Defendants argue that Ms. Gill’s opinion reliance on RCW 36.86.100, the “Highway-Rail
7 Crossing Handbook,” and a USDOT FHA advisory publication, “Driver Behavior at
8 Rail-Highway Crossings” is misleading under Rule 403, and not based on reliable authority or
9 sufficient facts under Rule 702(b), because her cited sources do not apply to private crossings.
10 (Defs.’ Mot. at 19-20.) Plaintiffs argue that Ms. Gill’s reliance on the USDOT FHA Report,
11 RCW 36.86.100, and the “Highway-Rail Crossing Handbook” are permissible because they are
12 relevant and reliable sources as to what the standards are for railroad safety at crossings. (Pls.’
13 Resp. at 20-21.)

14 Here, Ms. Gill cited to RCW 36.86.100, the “Highway-Rail Crossing Handbook,” and the
15 USDOT FHA advisory publication in her report to demonstrate baseline expectancies motorists
16 have as they approach a railroad crossing, and to engage in issues with visual obstructions for
17 motorists, as part of her hazard analysis inquiry. (*See Gill Decl.*, Ex. 1 at 7-9.) Unlike Mr.
18 Ogden’s report, Ms. Gill’s report did not specifically opine that Defendants violated Washington
19 law or RCW 36.86.100. The parties also do not dispute that Southwest Viola was a private road,
20 nor that RCW 36.86.100 and the FHA advisory publication do not apply to private railroad
21 crossings. (*See Defs.’ Mot.* at 20; *Pls.’ Resp.* at. 7, 20-21.) Therefore, the Court finds that Ms.
22 Gill’s opinion utilizing these sources relies on sufficient facts and data under Rule 702(b) as to
23 outlining general railroad safety standards and that the sources are not otherwise misleading

1 under Rule 403. Furthermore, Defendants’ raised concerns pertaining to the authority of these
2 materials generally go to the weight of Ms. Gill’s testimony and are better addressed at trial on
3 cross-examination. The Court declines to strike this portion of Ms. Gill’s opinion.

4 4. BNSF Materials

5 Defendants argue that in support of her opinion Ms. Gill cites to documents purporting to
6 demonstrate that BNSF recognizes a requirement to control vegetation with Bates stamped
7 documents.⁷ (Defs.’ Mot. at 20-21; *see* Gill Decl., Ex. 1 at 8.) Defendants note that they have not
8 produced the materials described in her report and that their source and validity are unknown.
9 (*Id.*) Plaintiffs do not contest Defendants’ assertion. (*See* Pls.’ Resp.)

10 Because the BNSF documents relied upon did not originate from Railroad Defendants,
11 and based on Plaintiffs’ lack of opposition, the portion of Ms. Gill’s opinion finding that BNSF
12 recognized a requirement to control vegetation referencing cited Bates stamped BNSF materials
13 is stricken.

14 5. Stop Sign

15 Defendants argue that Ms. Gill’s opinion fails to recognize that Ms. Gonzales Torres was
16 legally required to stop at the posted stop sign at the Crossing and yield to the oncoming train.
17 (Defs.’ Mot. at 21-23.) On this point, Defendants argue that exclusion is appropriate because the
18 evidence demonstrates Ms. Gonzalez Torres never came to a complete stop before colliding with
19 the train. (*Id.* at 22-23.) Plaintiffs counter that Ms. Gill did not consider any statutory
20 requirements pertaining to the stop sign because she undertook a human factors analysis on the
21 issues in this case. (Pls.’ Resp. at 21-22.)

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⁷ Ms. Gill’s report notes that BNSF “recognizes their requirement to control vegetation,” with a specific
citation to a Bates stamped document “BNSF 0003538-0003555.” (Gill Decl., Ex. 1 at 8.)

1 As to this issue, Ms. Gill’s report acknowledges that Ms. Gonzalez Torres failed to come
2 to a complete stop at the Crossing and analyzed whether her behavior was consistent with the
3 vast majority of drivers at this stop sign from a human factors perspective in determining the
4 safety of the Crossing. (Gill Decl., Ex. 1 at 7, 11; *see also* Yates Decl., Ex. S (Gill Dep. at
5 55:16-22, 59:7-10).) Ms. Gill’s opinion was based on sufficient facts and data under Rule 702(b)
6 as she considered the relevant facts concerning Ms. Gonzalez Torres’s motorist behavior from
7 the collision to engage in her methodology. (*See* Gill Decl., Ex. 1 at 7.) The Court therefore
8 declines to strike this portion of Ms. Gill’s opinion.

9 6. Observational Study

10 On this point, Defendants argue that Ms. Gill’s reliance on an observational study should
11 be stricken under Rule 702 because how other motorists behaved at the Crossing did not excuse
12 Ms. Gonzales Torres’s failure to stop at the stop sign at the Crossing. (Defs.’ Mot. at 23-24.)
13 Defendants cite to *Dixon v. CSX Transp., Inc.*, 990 F.2d 1440 (4th Cir. 1993), to support their
14 argument. (*Id.*) Plaintiffs argue that *Dixon* is distinguishable from the facts in this case and that
15 Ms. Gill’s reliance on the observational study is permissible because, from Ms. Gill’s human
16 factors perspective, Ms. Gonzalez Torres’s behavior was consistent with the majority of
17 motorists traveling over the Crossing. (Pls.’ Resp. at 22.)

18 In *Dixon*, the plaintiff’s human factors expert conducted an observational study of
19 motorists at a railroad crossing and was allowed to testify. *Dixon*, 990 F.2d at 1452. The expert
20 testified to the jury that 96 percent of motorists approaching the crossing did not stop and that 64
21 percent failed to look to their left. *Id.* In closing arguments, plaintiff’s counsel argued that
22 because the plaintiff had looked to his left before entering the crossing, and because plaintiff’s
23 expert’s study demonstrated 64 percent of drivers did not look left, the plaintiff had “[driven]

1 better than everybody else out there.” *Id.* The Fourth Circuit found the district court erred in
2 admitting the survey testimony because the survey results failed to consider any legal duties
3 imposed by state law on motorists approaching grade crossings, the study was irrelevant as to
4 whether plaintiff had fulfilled their burden to act as a reasonably prudent person, and because it
5 suggested plaintiff could not be considered contributorily negligent. *Id.* at 1452-53.

6 In this case, the observational study at issue was examined as part of Ms. Gill’s human
7 factors analysis and found that 85 percent of motorists do not stop before traversing the
8 Crossing.⁸ (Gill Decl., Ex. 1 at 11.) Per her report, Ms. Gill interpreted this data from a human
9 factors perspective to opine that Ms. Gonzalez Torres’s motorist behavior of not coming to a
10 complete stop at the stop sign was consistent with the majority of motorists traveling over the
11 Crossing, making the Crossing dangerous. (*Id.*) Unlike in *Dixon*, Ms. Gill did not specifically
12 opine that Ms. Gonzalez Torres drove better than other drivers at the Crossing or that she was not
13 contributorily negligent in causing the collision, but rather that the conditions present at the
14 Crossing made it dangerous to motorists based on human behavior.

15 The Court finds that Ms. Gill’s opinion’s incorporation of the observational study was
16 based on sufficient facts and data, relevant to the issues to be decided by the trier of fact
17 regarding the safety of the Crossing in this case, and reliable based on Ms. Gill’s human factors
18 experience under Rule 702. Furthermore, the Court fails to discern an issue as to the reliability of
19 Ms. Gill’s principles and methods in engaging in her human factors methodology based on her
20 citation to the observational study as part of her opinion. *See* Fed. R. Evid. 702(c)-(d). As such,
21 the Court declines to strike this portion of Ms. Gill’s report.

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⁸ The observational study relied upon by Ms. Gill was not conducted by Ms. Gill but by Sam Wade, a private investigator. (Pls.’ Resp. at 22.)

1 Gill's expert testimony is permitted, save for the portion of her opinion referencing unproduced
2 BNSF materials.

3 The Clerk is directed to send copies of this Order to the parties and to the Honorable
4 Benjamin H. Settle.

5 Dated this 16th day of November, 2021.

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7 MICHELLE L. PETERSON
8 United States Magistrate Judge
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