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OPINION OF THE FIFTH CIRCUIT (SEPTEMBER 29, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
EX REL. JOSHUA HARMAN,

Plaintiff–Appellee,

v.

TRINITY INDUSTRIES INC.;
TRINITY HIGHWAY PRODUCTS LLC,

Defendants–Appellants.

No. 15-41172

Appeal from the United States District Court
for the Eastern Division of Texas

Before: JOLLY, HIGGINBOTHAM, and
GRAVES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The trial in this case offers two narratives. One of a hardworking man who, angered by failures of guardrails installed across the United States—with sometimes devastating consequences—persuaded a Texas jury of a concealed cause of those failures. The other of the inventive genius of professors at Texas A&M's Transportation Institute, who, over many years

of study and testing, developed patented systems including guardrails that, while saving countless lives, cannot protect from all collisions at all angles and all speeds by all vehicles—guardrails that have been installed throughout the United States with an approval from which the government has never wavered as it reimbursed states for the installation of a device integral to the system.

Despite a formal statement issued on the eve of trial from the government affirming that approval and a caution from this court that the case ought not proceed, seven jurors in a six-day trial in Marshall, Texas, found that the government had been defrauded. We will describe, but not decide, the substantial challenges to the jury's findings of liability and damages as an essential backdrop to the challenge we ultimately sustain, one that ends this litigation. We hold that the finding of fraud cannot stand for want of the element of materiality. Therefore, we reverse and render judgment as a matter of law for Trinity.

I.

Early highway guardrail systems helped prevent drivers from running off the road, attended by a lesser but significant risk—in a head-on collision with an automobile, the blunt ends of the guardrails could "spear" or penetrate vehicles' passenger compartments. Attempts to mitigate this risk by burying the end of the guardrail were successful, but created a different risk; guardrails ceased to spear automobiles, but proved to act as a launch ramp, rolling out-of-control vehicles, sometimes back into traffic. As part of its many years of ongoing research and testing aimed at improving

highway safety, engineers at the Texas A&M Transportation Institute ("TTI") developed a guardrail "end terminal" system known as the ET-2000, which, with modification in 1999, became the ET-Plus.[1] In a head-on collision, the ET-Plus' terminal (or extruder) head flattens and extrudes the guardrail away from the vehicle while simultaneously "gating" the vehicle by the sequential failures of the pre-drilled posts carefully laced and spaced to meet design specifications for the system, all to slow speeding vehicles to survivable stops and substantially lessen the risk posed by the rails. Trinity Highway Products, LLC, a subsidiary of Trinity Industries, Inc. ("Trinity"), manufactures the ET-Plus system under an exclusive licensing agreement with Texas A&M University—in short, TTI engineers the product and Trinity manufactures it according to TTI's design. ET-Plus systems are sold to highway contractors and installed along many highways throughout the country.

The Federal Government subsidizes many state highway improvements, reimbursing states for the installation of guardrail end terminal systems meeting its standards. At times relevant here, acceptance by the Federal Highway Administration ("FHWA") was a prerequisite to eligibility for federal reimbursement. FHWA could require testing of products, unless they "are nearly certain to be safe" or "so similar to currently accepted features that there is little doubt that they would perform acceptably." And changes to approved systems must also be submitted for approval unless an

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1 *See* Appendix A.

exercise of good engineering judgment finds they were not significant.[2]

The original ET-Plus system was successfully tested by TTI, and on January 18, 2000, FHWA accepted the ET-Plus for use on the National Highway System. At that time, the ET-Plus was designed for 27¾-inch high guardrails. By 2005, the increase of vehicles with higher centers of gravity—*e.g.*, SUVs—turned the research to taller guardrails. Trinity and TTI developed a modified ET-Plus system for use with 31-inch guardrails. TTI crash tested the new ET-Plus at the 31-inch height and prepared a report on the tests, which Trinity sent to FHWA. On September 2, 2005, FHWA approved the modified ET-Plus for the 31-inch guardrail height.

Before testing the new guardrail height, Trinity changed the guide channel width in the ET-Plus' terminal head from five inches to four inches, accompanied by necessary fabrication changes ("2005 changes"). Trinity contends that a modified version of the extruder head was included in the 31-inch guardrail system when it was crash tested in 2005. Trinity also maintains that it prepared and sent a detailed drawing of the ET-Plus head with the 2005 changes to TTI to be included in the report sent to FHWA. TTI did not include the drawing when it prepared the crash test report that Trinity later forwarded to FHWA. The body of the 2005 crash test report discussed the changes made to accommodate the 31-inch guardrail height, but not the

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[2] This will be explained.

changes in guide channel width or the related fabrication changes.[3]

Joshua Harman had been a customer of Trinity, purchasing their products and installing them in the eastern United States. Harman was also a one-time competitor of Trinity, manufacturing his own end terminal heads through SPIG and Selco, businesses he owned with his brother.[4] SPIG and Selco failed. And Trinity sued Harman, once for patent infringement related to SPIG-manufactured heads in 2011 and twice for defamation related to his campaign against the ET-Plus.[5]

Harman hoped to compete with Trinity and "with the entire industry" again in the future, admitting on

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[3] Joshua Harman argues that Trinity has provided no proof that the head units tested in 2005 included one with the 2005 changes. Trinity maintains that such a head unit was included in the 2005 testing, as A&M Professor Dr. Bligh testified to at trial. In a videotaped deposition introduced into evidence during trial, FHWA representative Nicholas Artimovich explained that, after learning of the 2005 changes, he reviewed video footage from the 2005 testing and concluded that "the tests done in 2005 used a terminal head with [the narrower] feeder channel." There is no contrary evidence.

[4] The district court excluded evidence that these heads were the source of many of Harman's problems, as unapproved SPIG heads were installed across the Commonwealth of Virginia with falsified documents to secure payment from the Virginia Department of Transportation. As a result, Virginia's State Materials Engineer removed Selco from the approved installers list. In a pretrial hearing, the district court said such evidence was "improper" and "a backdoor way to attack [Harman's] character." That ruling is not challenged on appeal.

[5] The patent suit settled. The defamation suits were each voluntarily dismissed by Trinity.

cross-examination that he intended to use the proceeds from this litigation to recapitalize his business and begin manufacturing competing end terminals. Trinity presented evidence to the jury that an investment manager prepared a prospectus to pitch to potential SPIG investors in February 2014, advertising that a "[r]ecall of Trinity's modified end terminals would mean removal and replacement of approximately one million units in the [United States], a one-billion-dollar revenue opportunity windfall for SPIG" and noting that SPIG had "[p]lans to capture 20 percent of the U.S. end terminal market in 18 to 24 months, then continue rapid growth to take market share from an exposed Trinity."

Harman testified that he set out on a cross country trip looking for accidents involving guardrails; that he acquired between six and eight ET-Plus heads; and that he found five changes that he believed were causing the accidents. The primary change was the narrowing of the guide channel from five inches to four inches. Harman also noted a shortened guide channel and feeder chute; a narrower exit gap; a change from a flush "butt weld" to a "fillet weld," diminishing the height of the extruder throat; and a steeper angle of the side plates.[6] At trial, Harman claimed that all of these changes resulted in "a complete[ly] new product." Unable to find records of FHWA approval for these changes, Harman presented his findings to FHWA in

6 *See* Appendix B.

January 2012 via an extensive PowerPoint presentation that included explanations of the 2005 changes and accident scene photographs.[7]

It is undisputed that, at that meeting, Harman discussed the change from a five-to four-inch guide channel, the shortening of the guide channel, the change in the exit gap from one and a half inches to one inch, the diminished height of the extruder chamber, and that "in [his] view, there had to be significant other changes as well." Nicholas Artimovich, an FHWA representative, took photographs and measurements of the heads Harman provided at the meeting.

FHWA then met with Trinity in February 2012 to discuss Harman's allegations. Trinity explained that, while the change in the guide channel width was inadvertently omitted from the report sent to FHWA, the May 2005 crash test was of an ET-Plus system with a modified terminal head. FHWA met twice more with Harman and his counsel. Around that same time, FHWA responded to inquiries about the ET-Plus from various state departments of transportation by confirming that the ET-Plus was eligible for reimbursement.

On March 6, 2012, Harman filed a sealed False Claims Act ("FCA") suit in the Eastern District of

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[7] The PowerPoint includes slides discussing the change from five-to four-inch feeder chute, a reduced rail height from 15.375 to 14.875 inches, a shorter, narrower feeder chute that intrudes into the extruder throat, "ledges" near the top and bottom of the extruder throat created by the feeder chute intrusion, a smaller exit gap, and pictures of what Harman argued was the resulting "throat lock."

Texas. The government reviewed the complaint and declined to intervene ten months later. The court then unsealed the complaint and discovery began. On March 13, 2014, as a July trial date loomed, Harman's counsel requested that FHWA make its employees available for deposition ("*Touhy* request"). Harman argued that Trinity still had not disclosed the fabrication changes to the ET-Plus beyond the change from a five-to four-inch guide channel.[8]

On June 17, 2014, FHWA released an official memorandum that stated that it had "validated that the ET-Plus with the 4 inch guide channels was crash tested in May 2005," that "[t]he Trinity ET-Plus with 4-inch guide channels became eligible for Federal reimbursement . . . on September 2, 2005," and that there was "an unbroken chain of eligibility for Federal-aid reimbursement [that] has existed since September 2, 2005, and the ET-Plus continues to be eligible today." On the same day, DOJ responded to Harman's *Touhy* request by emailing a copy of the memorandum with the following cover note:

> Please find attached a memorandum issued by FHWA today that addresses all of the issues raised by the parties in their respective requests for information. DOT believes that this should obviate the need for any sworn testimony from any government

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[8] In this letter, Harman also repeated his list of fabrication changes that he alleged were still undisclosed. Specifically, Harman claimed that Trinity had not disclosed "(1) the change from a 5 inch rail feeder chute to a 4 inch rail chute; (2) changes to the exit gap; (3) changes to the feeder chute assembly; (4) changes to the feeder chute assembly length; and (5) other changes to the ET-Plus."

> employees. If the parties disagree, please let me know at your earliest convenience.[9]

Trinity moved for summary judgment on the basis of the June 17, 2014 memorandum, which the district court denied from the bench.[10]

A jury trial commenced on July 14, 2014; four days into that trial the district court *sua sponte* ordered a mistrial, citing gamesmanship and inappropriate conduct by both parties. Following the mistrial, Trinity asked this court for a writ of mandamus, which this court denied while warning:

> This court is concerned that the trial court, despite numerous timely filings and motions by the defendant, has never issued a reasoned ruling rejecting the defendant's motions for judgment as a matter of law. On its face, FHWA's authoritative June 17, 2014 letter seems to compel the conclusion that FHWA, after due consideration of all the facts, found the defendant's product sufficiently compliant with federal safety standards and therefore fully eligible, in the past, present and future, for federal reimbursement claims. While we are not prepared to make the findings required to compel certification for interlocutory review by mandamus, a course that seems prudent, a strong argument can be made

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[9] For reasons not clear from the record, the district court excluded this statement from evidence, a ruling consistent with Harman's contention that the opinion of the government does not matter.

[10] Harman also moved for partial summary judgment, and his motion was likewise denied.

> that the defendant's actions were neither material nor were any false claims based on false certifications presented to the government.[11]

The case proceeded to trial for a second time the following Monday. After a six-day trial, the jury returned a verdict for Harman. The next day, facing widespread publicity of the verdict and inquiries of state Attorneys General, the government did not withdraw its approval of the ET-Plus units; rather, it sought independent testing of the units and confirmation by a separate joint task force that the units being tested were the same as those installed across the country. On November 17, 2014, Trinity renewed its motion for judgment as a matter of law under Rule 50(b).[12]

The independent testing ordered by FHWA was performed between December 10, 2014, and January 6, 2015. Awaiting the testing, Trinity suspended the sale of ET-Plus systems. A joint task force—consisting of state, federal, and foreign transportation experts—examined over one thousand existing ET-Plus installations across the country between November 2014 and January 2015 and concluded that: (1) "[t]here is no evidence to suggest that there are multiple versions [of the ET-Plus] on our nation's roadways" and (2) the units that were crash tested were "representative of the devices installed across the country."[13] FHWA

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11 *In re Trinity Indus., Inc.*, No. 14-41067 (5th Cir. Oct. 10, 2014).

12 Fed. R. Civ. P. 50(b).

13 FHWA and the American Association of State Highway and Transportation Officials (AASHTO) formed two joint task forces to investigate the ET-Plus. The second joint task force was assigned to "review[] a broad range of crash reports from multiple

announced these findings in a March 11, 2015 press release. With that confirmation, the government's approval of the units remained in place and Trinity renewed its sales.[14]

On June 9, 2015—after the results of the post-trial crash tests and dimensions studies were released—the district court denied Trinity's motion for judgment as a matter of law and entered final judgment that same day for Harman and the United States in the amount of $663,360,750—consisting of $575,000,000 in trebled damages and $138,360,750 in civil penalties for 16,771 false claims—plus an additional $19,012,865 in attorney's fees and costs. Trinity then moved for a new trial based on, among other things, the results of the post-trial crash tests and the findings of the joint task forces, which the district court denied on August 3, 2015.[15] This appeal followed.

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sources to determine if the ET-Plus has potential vulnerabilities that could compromise its ability to perform as designed." That review has not yet been completed and published.

[14] Of course, this evidence was not before the jury. But in denying Trinity's Rule 50(b) motion, the district court relied on the post-trial test in ruling that, at the time of the June 17, 2014 memorandum, FHWA did not have enough information to approve the product. We disagree—FHWA, responsive to widespread news of the verdict and the resulting unease of states with the system leading to inquiries from states Attorneys General, ordered additional testing from independent testing labs, but did not withdraw its earlier decision. The results of those tests confirmed rather than undermined the earlier decision.

[15] Trinity also claimed that a new trial was warranted on the basis of the excessive damages award, the court's failure to submit the number of false claims to the jury, the excessive fines clause, and "because the verdict is against the weight of the evidence."

II.

"A district court's resolution of a motion for new trial is reviewed for abuse of discretion, and [t]he district court abuses its discretion by denying a new trial only when there is an absolute absence of evidence to support the jury's verdict."[16] "A motion for a new trial or to amend a judgment cannot be used to raise arguments which could, and should, have been made before the judgment issued."[17] Rule 60(b)(2) allows a party to seek post-judgment relief on the basis of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."[18] "Moreover, [t]he newly discovered evidence must be in existence at the time of trial and not discovered until after trial."[19]

While our review of the district court's denial of a Rule 50(b) renewed motion for judgment as a matter of law is *de novo*, "our standard of review with respect to a jury verdict is especially deferential."[20] A party is only entitled to judgment as a matter of law on an

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16 *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 472 (5th Cir. 2015) (quoting *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 881 (5th Cir. 2013)) (internal quotation marks omitted).

17 *Garriot v. NCsoft Corp.*, 661 F.3d 243, 248 (5th Cir. 2011) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)) (internal quotation marks omitted).

18 Fed. R. Civ. P. 60(b)(2).

19 *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 158 (5th Cir. 2004) (quoting *Longden v. Sunderman*, 979 F.2d 1095, 1102-03 (5th Cir. 1992)) (internal quotation marks omitted).

20 *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016) (quoting *Evans v. Ford Motor Co.*, 484 F.3d 329, 334 (5th Cir. 2007)) (internal quotation marks omitted).

issue where no reasonable jury would have had a legally sufficient evidentiary basis to find otherwise.[21]

III.

Trinity asked the district court and now this court for a new trial on the basis of newly discovered evidence—namely, the post-trial crash tests and the dimensions report. This evidence is compelling and rebuts much of Harman's case at trial. However, we need not consider the question of post-judgment relief under Rule 60(b) here because we find that Trinity is entitled to judgment as a matter of law on the issue of materiality. Thus, we advert to the post-trial testing only in rejecting the district court's inferences from the government's decision to order the independent testing.

IV.

As we will show, the jury's findings on liability cannot stand for want of materiality. Before turning to liability, it is worth noting that Harman's failure to rebut the strong presumption against materiality also manifests in its effect on damages. The proper measure of the government's damages in an FCA action where the government received something other than what was promised is the standard formulation for contract damages: the difference between what was promised and what was received.[22] At trial, Harman's damages expert calculated damages assuming the value of the ET-Plus units with the 2005 changes

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[21] Fed. R. Civ. P. 50(a)(1).

[22] *United States v. Bornstein*, 423 U.S. 303, 316 n.13 (1976).

was limited to the scrap value of those units.[23] Using that figure, Harman's expert reached a total damages figure that was apparently adopted by the jury before statutory trebling.[24]

The problem with this figure is that nothing in the record supports the scrap valuation of the ET-

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[23] Importantly, Harman's damages expert did not testify that the value of the ET-Plus units was actually only the scrap value figure, but that he "was advised by counsel that the evidence presented in this trial will show that the units themselves have no value, but that I should provide and I was requested to provide a calculation of the scrap metal value simply to present to this Court and jury for their consideration." The expert further testified that "[t]here's no ascertainable value for a non-compliant ET-Plus unit that I could identify, so I cannot render an opinion with respect to what the actual benefit to the United States Government would be. . . . I have no expertise and—and render no opinion with respect to the actual benefit those units have to the United States Government. . . . The premise of my calculations is that the ET-Plus is not compliant with the Federal Highway Administration standards and that Trinity has certified that, in fact, during the damage period, it was compliant with the FHWA standards."

[24] Harman's damages expert testified that "the damages that range from the period March 6, 2006 through December 31, 2013, the total amount that I estimate that the U.S. Government reimbursed the states for their purchase of ET-Plus units is $218,003,273. That value will be reduced by the jury's finding of what the value of a non-compliant ET-Plus unit will be, assuming there is a finding of liability in this matter. One value that they could consider is the value of the scrap metal that I've indicated before is a value of $42,965,383. You would subtract whatever value the jury finds, but in this illustration here the scrap metal value being subtracted from the 218-million-dollar amount is a net damage to the U.S. Government of $175,037,890." The jury found that the total amount of actual damages suffered by the United States was $175,000,000.

Plus. Instead, FHWA's continued approval of reimbursement for the ET-Plus at the same amount strongly suggests that the government, the supposedly aggrieved party, considers the value of the units with the 2005 changes to be identical to the value of previous ET-Plus units. If the government received units of equivalent value, and thus has already enjoyed the benefit of its bargain, then the proper measure of actual damages should be zero. Trinity could still face civil penalty assessments "of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1980" for each individual sale,[25] of course, and Trinity also claims error in the district court's refusal to allow the jury to determine the number of false claims. Regardless, no award of damages can stand because, as we will show, the determination of liability does not. And, as we need not, we say no more of this set of damage issues.

V.

Trinity argues that Harman failed to meet his burden on each element of a claim under the FCA, which imposes liability on individuals who defraud the federal government.[26] "In determining whether liability attaches under the FCA, this court asks '(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit

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[25] 31 U.S.C. § 3729(a)(1).

[26] 31 U.S.C. § 3729 *et seq.*; *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989, 1995 (2016).

moneys due (*i.e.*, that involved a claim).'"[27] It is settled that state requests for reimbursement are claims for payment under the FCA. We address the other elements in turn.

A.

Trinity argues that Harman failed to carry his burden on proving that Trinity made "a false statement or [engaged in] a fraudulent course of conduct" that caused a false claim for payment to be presented to the United States.[28] Harman's theory is that Trinity certified that the ET-Plus system with the 2005 changes complied with the FHWA testing requirements, and that these false certifications caused states to present resultantly false claims for reimbursement to FHWA. In response, Trinity argues that the ET-Plus met the required standards at all times and thus any certification of that fact was not a false statement.

Both parties' falsity arguments turn on whether the modified ET-Plus with the 2005 changes complied with requirements set out in the National Cooperative Highway Research Program's ("NCHRP") Report 350 ("Report 350"), as adopted by FHWA. Report 350 contains protocols for testing highway features, including test parameters, test conditions, data acquisition,

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[27] *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 475 (5th Cir. 2012) (quoting *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 467 (5th Cir. 2009)).

[28] *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 365 (5th Cir. 2014) (citing *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009)); *accord* 31 U.S.C. § 3729(a)(1)(B) (liability for person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" (emphasis added)).

evaluation criteria, test documentation, implementation, and evaluation.

FHWA's reliance on Report 350 grew out of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA").[29] ISTEA required the Secretary of Transportation to "initiate a rulemaking proceeding to revise the guidelines and establish standards for installation of roadside barriers and other safety appurtenances," and thereafter issue a final rule on the matter.[30] To comply with ISTEA, FHWA undertook a formal rulemaking process which resulted in a final rule in 1993. This rule formally added NCHRP Report 350 to the regulation's "Guides and references" section.[31] That same year, FHWA produced a memorandum "[t]o further promulgate application of the guidelines in the NCHRP Report 350."

In 1997, FHWA issued a policy memorandum ("1997 Policy Memorandum") that read the 1993 rule and memorandum as a "strong indication" that, as of the following year, "FHWA would require all new installations of highway features on the National Highway System (NHS) that are covered in the NCHRP

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[29] Pub.L. 102-240, Dec. 18, 1991, 105 Stat. 1914.

[30] *Id.* at Section 1073(a), (b); 23 U.S.C. § 109 note.

[31] As the FHWA explains in its 1997 guidance: "Through a formal rulemaking process that culminated in a final rule in a notice in Volume 58, No. 135, of the Federal Register, dated July 16, 1993, the FHWA added Report 350 at paragraph 625.2(a)(13) of Title 23, Code of Federal Regulations (23 CFR). Since that time, the 'Guides and references' section of 23 CFR, Part 625, under which the NCHRP Report 350 was cited, has been removed. The NCHRP Report 350 is now cited in Section 16, Paragraph (a)(12) of the non-Regulatory Supplement to the Federal-aid Policy Guide, Subchapter G, Part 625 (NS 23 CFR 625)."

Report 350 to have been tested and found acceptable according to the guidelines in that report." Based on that understanding, FHWA stated its policy on compliance:

> Except as modified below, all new or replacement safety features on the [National Highway System] covered by the guidelines in the NCHRP Report 350 that are included in projects advertised for bids or are included in work done by force-account or by State forces on or after October 1, 1998, are to have been tested and evaluated and found acceptable in accordance with the guidelines in the NCHRP Report 350.

In other words, the 1997 Policy Memorandum required that highway safety features demonstrate "acceptable crashworthy performance" in order to gain FHWA approval of their use on the nation's highways, and Report 350 provided the measure for crashworthiness. Harman and Trinity agree that "FHWA regulations require full compliance with Report 350[.]"

When Trinity sells an ET-Plus system, the invoices often include references to bills of lading, which Trinity agrees are "sometimes—but not always—accompanied by a certificate stating that the ET-Plus is 'NCHRP Report 350 Compliant' or 'NCHRP Report 350 Tested and Approved.'" Many of these ET-Plus systems are sold to state departments of transportation, who can seek reimbursement from the federal government for systems placed on federal-aid highways.

The parties dispute the scope of disclosure required by Report 350. Harman asserts that the 1997 Policy Memorandum requires that all changes, even minor

ones, must be disclosed so that FHWA can decide if testing is necessary, pointing to language in Report 350 that "seemingly minor variations in design details can adversely affect the safety performance of a feature." Harman also emphasizes that, at trial, Trinity Highway Product's President Gregory Mitchell "admitted" that "it was required to get approval from the FHWA for the changes but that it did not do so[.]"[32] Based on this interpretation, Harman maintained at trial that the ET-Plus was not Report 350 compliant after the 2005 changes because Trinity never disclosed the changes to FHWA nor demonstrated that the modified ET-Plus had undergone adequate crash testing. Trinity, by contrast, argues that Report 350 did not require the disclosure of the 2005 changes because it only requires disclosing significant changes. Trinity further maintains that an ET-Plus system with the 2005 changes in its head was crash tested in 2005 during the 31-inch guardrail height tests and that the changes were obvious and fully disclosed to TTI, the inventor of the ET-Plus.

While Harman argues that FHWA policy requires that "any changes" be disclosed to FHWA, he does not direct us to any clear statement of such a disclosure rule. Nor can we find any. Instead, Harman directs us to the following passage in the 1997 Policy Memorandum:

> There are some features that, by their nature, are nearly certain to be safe and others that

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[32] From its context, it is not clear whether the witness referenced the requirements in place at the time of trial or nine years prior when the changes to the ET-Plus were implemented—two years before he was employed by Trinity.

> are so similar to currently accepted features that there is little doubt that they would perform acceptably. For these features, the FHWA may, on a case-by-case basis, not require qualification testing or may accept abbreviated or unique qualification procedures as the basis for their acceptance.

This passage, in isolation, could be read to require suppliers to alert FHWA to any new features or design changes, and could signify, as Harman would have it, that FHWA alone can determine whether additional testing is required. Yet another passage in Report 350 frustrates this reading:

> It is not uncommon for a designer/tester to make design changes to a feature during the course of conducting the recommended test series or after successful completion of the test series. Changes are often made to improve performance or to reduce cost of the design or both. Questions then invariably arise as to the need to repeat any or all of the recommended tests. Good engineering judgment must be used in such instances. As a general rule, a test should be repeated if there is a reasonable uncertainty regarding the effect the change will have on the test.

The plain reading of this additional language is that engineers may use their judgment to determine that additional testing is not needed for certain design changes. Under Trinity's view, because a determination of whether to test requires "good engineering judgment," "it 'cannot be false' under the FCA." Harman responds that this passage does not speak directly to disclosure requirements, and that in any

case there is no evidence that good engineering judgment was exercised.[33]

While Harman is correct that this section does not address disclosure requirements, this uncertainty does not necessarily cut against Trinity. Indeed, the regulations as written accept that engineers need not disclose changes where, in their good engineering judgment, they deem further testing unnecessary. Disagreement over the quality of that judgment is not the stuff of fraud.

Trinity also points to the following language in the 1997 Policy Memorandum to support its contention that it was not required to report every change: "should the FHWA discover subsequent to the issuance of an acceptance letter . . . the device being marketed is significantly different from the version that was crash tested, it reserves the right to modify or revoke its acceptance." As Trinity reads this language, non-significant modifications are permissible without seeking new approval;[34] the "good engineering judgment" passage would do no work if the policy required that every change be submitted to FHWA.

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[33] Harman argues that the 2005 changes were not motivated by good engineering judgment, but by profit. This profit motive argument is discussed in more detail below in connection with Harman's scienter argument. We note, however, that good engineering judgment and the desire to reduce costs—a goal which is explicitly contemplated by Report 350—are not necessarily mutually exclusive.

[34] According to Trinity, "modifications that render the product 'significantly different' would give FHWA the option to revoke its acceptance. By implication, non-significant modifications would not."

The jury was never instructed on the requirements of Report 350 regarding disclosures of changes to approved devices or further testing of modifications in approved devices. Indeed, the trial judge did not himself decide what Report 350 required until after the verdict. In denying Trinity's Rule 50(b) motion, the district court concluded that "any changes [to roadside hardware] must be reviewed by and agreed to by the FHWA." Applying that standard, the district court found that the jury had before it "substantial evidence" to support the conclusion that Trinity made false statements when it asserted the ET-Plus was Report 350 compliant.[35] Specifically, the district court relied on the "undisclosed [2005] changes" as substantial evidence that all post-2005 certifications of the ET-Plus' Report 350 compliance were false. The court also found that the 2005 changes were not an exercise of "good engineering judgment" because Trinity made the decision to modify the ET-Plus, rather than TTI. The court then indicated that it found Trinity's competing evidence unpersuasive. Finally, the court acknowledged that "[t]he jury was free to weigh such competing evidence, judge the credibility of the witnesses, and determine the veracity of the testimony presented." We cannot know from the record how the jury interpreted Report 350. And there is a powerful argument that leaving to the jury the determination of the law and the facts did not include resolution of the uncertainty inherent in the language of the policy.

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[35] Specifically, the district court found substantial evidence for the jury "to conclude that Trinity's post-2005 certifications of the ET-Plus as FHWA approved and NCHRP Report 350 compliant were false."

Despite the district court's conclusions and Harman's insistence that the 1997 Memorandum "makes it clear that disclosure is required and that the FHWA decides what tests to run," the contrary authorities cited by Trinity drain much force from Harman's claim that every change must be disclosed. There is a substantial argument that, during the relevant period, FHWA policy required disclosure of significant changes, and that significance is a matter of engineering judgment. This follows from the plain language of Report 350. While this puts the jury verdict and Harman's falsity theory at risk, we need not decide that question today.

B.

Trinity argues that even if Report 350 required disclosure of every change, Harman still failed to prove that Trinity acted with the requisite scienter. "The scienter requirement comes from § 3729(b)'s definition of the terms 'knowing' and 'knowingly.'"[36] "Though the FCA is plain that 'proof of specific intent to defraud' is not necessary, that *mens rea* requirement is not met by mere negligence or even gross negligence."[37] Rather, the relator must demonstrate that the defendant "acted with knowledge of the falsity of the statement, which is defined, at a minimum, as acting

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[36] *United States ex rel. Longhi v. United States*, 575 F.3d 458, 468 (5th Cir. 2009).

[37] *United States ex rel. Farmer v. City of Hous.*, 523 F.3d 333, 338 (5th Cir. 2008) (quoting 31 U.S.C. § 3729(a)(2); and citing *United States v. Krizek*, 111 F.3d 934, 941-42 (D.C. Cir. 1997)).

'in reckless disregard of the truth or falsity of the information.'"[38]

Trinity maintains that it could not have acted knowingly or recklessly if it was acting pursuant to a reasonable interpretation of the disclosure requirements. As we have explained, Trinity contends that the 2005 changes did not have to be disclosed to FHWA. In the alternative, Trinity maintains that the disclosure requirements were ambiguous enough that its interpretation was reasonable. Trinity then claims that a "reasonable interpretation of any ambiguity inherent in [a] regulation[] 'belies the scienter necessary to establish a claim of fraud.'"[39] Specifically, Trinity asserts that it reasonably relied on TTI's "good engineering judgment" in determining that the 2005 changes were not significant—an action consistent with its purported understanding of Report 350.[40] The trial testimony of

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[38] *United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 260 (5th Cir. 2014) (citing 31 U.S.C. § 3729(b)(1)(A)(iii)).

[39] *United States ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 832 (8th Cir. 2013). Trinity also cites *Safeco Ins. v. Burr*, 551 U.S. 47, 70 n.20 (2007), holding, in the context of the Fair Credit Reporting Act, "[w]here, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator."

[40] At trial, Trinity and TTI employees both agreed that TTI is "responsible for all design and testing of the ET-Plus sold in the United States" and that TTI "decides whether design changes should be crash-tested before sale." At trial, Trinity's President Gregory Mitchell testified that Trinity has always relied and depended on TTI for their technical expertise regarding the ET-Plus.

TTI engineers supports this claim. Texas A&M engineering professor Dr. Bligh testified that the reduction in guide channel width led to an "enhanced, improved product," and that TTI would have recommended evaluation or testing if they had any doubt about the changes' impact.[41] Dr. Bligh also testified that, based on his engineering judgment, he found no reason to "independently test" the four-inch ET-Plus head,[42]

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Q. In your mind, Dr. Bligh, as you evaluated this decision to go from five to four inches, did you have any uncertainty whatsoever that this would be anything but a positive improvement?

A. No, sir, I did not.

Q. If you had that uncertainty, Dr. Bligh, what would you have done?

A. We—we either wouldn't have recommended it or we would have recommended other types of evaluation and testing to make sure that those uncertainties were—were resolved and evaluated.

42

Q. Did you find any reason in your good engineering judgment to somehow independently test the ET-Plus extruder head with the four-inch guide channels?

A. No, sir.

Q. Was the test done on May 27, 2005 an opportunity to see that head installed on an ET-Plus system.

A. Yes, sir.

and that the May 2005 tests were sufficient.[43] Another TTI employee at the time, Dr. Buth, agreed with this assessment, stating during trial that there was no need to run additional tests on the modified ET-Plus head because the May 2005 tests left "no question in [his] mind" about what additional tests would show.[44] Trinity pointed to an email that Trinity's Vice President of International Sales, Brian Smith, sent to TTI engineers asking for "[their] thoughts on changing the 5-inch channel on the ET-Plus extruder head to a 4-inch channel" and requesting that "the sample extruder head be used in the ET 31 test that is scheduled for May 25 or 26." Trinity also provided responses from multiple TTI engineers agreeing to the change, including an email noting that engineers at TTI's Riverside campus were "in agreement . . . the head should work fine, and [they] [would] install it on the test on May 25/26."

Finally, Trinity's witnesses testified that its own business practice was to disclose changes of this type,

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43

> Q. In your judgment as an engineer who submits crash test reports to the FHWA for consideration, was it your belief that [the May 2005] crash test met the 350 criteria?
>
> A. Yes, it is.
>
> Q. And how was that demonstrated?
>
> A. The . . . data that was collected in the test was analyzed and . . . compared against the criteria that we have in Report 350.

44 Dr. Buth stated there was no need for a crash test with a pickup truck because none of the changes to the ET-Plus head would have changed the result of previous tests with pickup trucks.

and that the failure to do so here was inadvertent. In support of this argument, Trinity offered evidence that Trinity created a drawing of the modified head with the 4-inch channel that TTI received. Both Trinity and TTI maintain that the drawing was mistakenly omitted from the report sent to FHWA. Harman provided no contrary testimony.

Harman argues that there was sufficient evidence in the record for a reasonable jury to conclude that Trinity knowingly misstated compliance with FHWA regulations in marketing the ET-Plus or, at least, that its false statements were motivated by potential profits and not its understanding of the Report 350 requirements. During the trial, Harman presented evidence from which he maintains the jury could have reasonably inferred an intent to deceive purchasers and conceal the purported fraud. Specifically, Harman presented a 2004 email from then-Trinity Highway Products Vice President of Operations Steve Brown, noting a potential savings of "$2/ET" or "$50,000/year" from the five-inch to four-inch change. In the email, Brown stated "I'm feeling that we could make this change with no announcement." Jurors also heard testimony by Smith, that it was "standard procedure" to communicate with FHWA about proposed changes, and from Mitchell, that he understood the regulations to require Trinity to present proposed changes to the FHWA.[45]

45

> Q. Okay. Now, isn't it true, sir, that in order for Trinity to get approval for a modification of a product that Trinity must present the proposed change to the FHWA and then perform the tests required by the

Harman also notes Trinity's failure to mention the changes to the ET-Plus to the FHWA before the May 2005 crash tests, to disclose all of the changes to the ET-Plus beyond the change in guide channel width even after Harman disclosed those other changes in his 2012 PowerPoint presentation,[46] and to disclose the five failed flared crash tests that Harman claimed

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> FHWA and then to truthfully and accurately report the results of the test; isn't that true, sir?
>
> A. I believe that to be true, yes.
>
> Q. And you did not do that in 2005, is that not true, sir?
>
> A. Mistakenly, yes.
>
> Q. Okay. And isn't it also true that it is the FHWA and only the FHWA that makes the decision whether a test should be done and what that test should be; isn't that also correct, sir?
>
> A. That is correct.
>
> Q. In fact, the FHWA specifically requires that, doesn't it?
>
> A. Yes, it does.
>
> . . .
>
> Q. Now, it's true, sir, is it not, that the FHWA has made it very clear that if you put a product on the road and you get approval, that you must—you must disclose or certify that the product that you've—you're selling has not changed in any significant degree; isn't that correct, sir?
>
> A. It is correct.

(emphasis added).

[46] Trinity's president testified that he did not recall discussing other changes and that the "conversation was focused on the 5-to 4-inch channel."

deceived the government.[47] Harman argues that Trinity's "wrongful intent" is "evidenced by [its] own actions to conceal its fraud."

As with falsity, this question is far closer than Harman paints it. The email that serves as Harman's evidence of a profit motive also states that "we'll [sic] could get a better ET" and lists potential improvements as a result of the change. Moreover, Harman's profit motive argument is emptied of force in context, where the "profit" would be only $50,000 a year, less than one-tenth of one percent of Trinity's gross profit. Such a sum lends little force to an inference of fraudulent intent. It also ignores the fact that Trinity's entire highway products business only accounted for approximately 7-15% of Trinity's revenue between 2006 and 2010.[48] Finally, Harman's interpretation overlooks Trinity's plan to confer with TTI about the changes. In his email, Smith expressed a willingness to "consider some pendulum or sled testing, if that's what we need to convince TTI that we should roll this out." Further, Smith stated that the change could be made with no announcement "[i]f TTI agrees." There is no suggestion that these contemporaneous statements were untrue,

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[47] Harman focused on the five failed crash tests in response to the government's eve-of-trial approval letter, making them relevant to the materiality issue, as we will explain.

[48] In investor presentations filed with the SEC, Trinity allocates its revenue across five different market groups, including the Construction Products Group (CPG), which comprises highway products, concrete & aggregates, and other. Trinity reported that the CPG was responsible for 18-27% of the company's outside revenue from 2006 to 2010. Of that revenue, between 34-53% came from highway products (including highway guardrails and end terminals).

and they indicate that Trinity planned to seek TTI's engineering judgment on the changes before rolling out the modified ET-Plus head. And, more to the point, the evidence shows that Trinity did so. Indeed, there is evidence that TTI did exercise the "good engineering judgment" which Trinity sought and upon which it relied. That evidence was challenged only by counsel's sometimes misleading assertions and cross-examination.[49]

Finally, as mentioned, Trinity asserts that it transmitted a detailed drawing of the 2005 changes to TTI, which it intended to be included with other data in the crash test report submitted to FHWA. Trinity argues that TTI's omission of the drawing was inadvertent, and its transmittal to TTI cuts against Harman's claim that they intentionally hid the changes from the FHWA. Harman argues that despite this testimony, because he was unable to find a copy of the drawing, the jury was free to conclude that it did not exist.

There is a strong argument that a reasonable jury could not have found that Trinity, acting in reliance on TTI, possessed the requisite scienter in certifying compliance with Report 350, particularly in light of the Report 350's ambiguity. We need not make that decision today, for this judgment cannot stand for an even more compelling reason.

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[49] For example, Harman's counsel referred to Trinity as "TI," for which he was admonished by the court due to concerns about confusing Trinity and TTI.

C.

Trinity argues that, in light of FHWA's express rejection of Harman's claim and continued reimbursement of state purchases of the ET-Plus, Harman has failed to carry his burden on materiality. Materiality under the FCA has been a topic of increasing scrutiny since the Supreme Court's decision in *Escobar*.[50] There, Justice Thomas, writing for a unanimous court, explained that "[t]he materiality standard is demanding" and "cannot be found where noncompliance is minor or insubstantial."[51] In evaluating whether a misstatement is material, "the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive."[52] Most importantly for this case:

> [I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.[53]

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50 *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016).

51 *Id.* at 2003.

52 *Id.*

53 *Id.* at 2003-04.

Our approach to materiality, as stated in *Longhi*, is that "the FCA requires proof only that the defendant's false statements 'could have' influenced the government's pay decision or had the 'potential' to influence the government's decision, not that the false statements actually did so,"[54] the so-called "natural tendency test."[55] The Supreme Court approved this standard in *Escobar*, writing that "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property,"[56] and "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[57] Here, FHWA insists that the 2005 changes did not affect the decision to purchase the end terminals either in the past or the future. Instead, the agency's June 17, 2014 memorandum establishes that despite the modifications, the modified ET-Plus "became eligible [in 2005] and continues to be eligible]."

Our sister circuits offer guidance on the impact of the government's continued payment. On remand, the First Circuit in *Escobar* applied "the holistic approach to materiality laid out by the Supreme Court"[58] in

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54 *United States ex rel. Longhi v. United States*, 575 F.3d 458, 469 (5th Cir. 2009).

55 *Id.* at 470 (citing *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008)).

56 *Escobar*, 136 S.Ct. at 2002 (internal quotation marks omitted).

57 *Id.* (internal quotation marks omitted) (emphasis added).

58 *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 110 (1st Cir. 2016).

determining that the relator had met its burden on materiality, holding that, while a decision to pay in full despite actual knowledge that requirements were violated is very strong evidence against the materiality of those requirements, no single element is dispositive.[59] Unlike in the case we decide today, the court found no evidence that the relevant government agency had actual knowledge of any violations when it decided to pay the claims.[60] The court did not decide whether the government's actual knowledge alone disproves materiality.

A month later, in a case involving an alleged fraud on the Food and Drug Administration ("FDA"), the First Circuit affirmed dismissal under Rule 12(b)(6), writing that "[t]he fact that [the Centers for Medicare and Medicaid Services] [have] not denied reimbursement for [the device] in the wake of [the relator's] allegations casts serious doubt on the materiality of the fraudulent representations that [the relator] alleges."[61] The court then turned from materiality to causation, emphasizing that the FDA did not withdraw its approval of the device in the six years following the relator's allegations and expressing its fear that allowing the FCA claims to go forward "would be to turn the FCA into a tool with which a jury of six people

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[59] *Id.*

[60] The court noted that "Relator's Second Amended Complaint only cites reimbursements paid up to 'the filing of this litigation' on July 1, 2011. It would appear that [Massachusetts' Department of Public Health] did not conclusively discover the extent of the violations until March 2012, well after the commencement of the litigation." *Id.* at 112.

[61] *D'Agnostino v. ev3, Inc.*, 845 F.3d 1, 7 (1st Cir. 2016).

could retroactively eliminate the value of FDA approval and effectively require that a product be withdrawn from the market even when the FDA itself sees no reason to do so."[62] While the court was addressing the causation element, given the conceptual juncture points of materiality and causation, its cautions remain forceful in the materiality context: "[t]he FCA exists to protect the government from paying fraudulent claims, not to second-guess agencies' judgments about whether to rescind regulatory rulings."[63]

In *Sanford-Brown*,[64] the Seventh Circuit affirmed dismissal of an FCA claim, finding a failure to establish the element of materiality where "the subsidizing agency and other federal agencies in this case 'have already examined [the for-profit higher education enterprise] multiple times over and concluded that neither administrative penalties nor termination was warranted.'"[65]

Even before *Escobar* hammered home the "rigorous" nature of materiality, the Seventh Circuit rejected an FCA claim where "[t]he government learned of [the] plaintiffs' concerns, thoroughly investigated them, and determined that they were meritless."[66] In *Mar-*

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62 *Id.*

63 *Id.*

64 *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016).

65 *Id.* (quoting *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 712 (7th Cir. 2015)).

66 *United States ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556, 563 (7th Cir. 2015).

shall, two relators brought an FCA suit against a military contractor, asserting that the company did not comply with its own specifications when manufacturing a part used in military helicopters.[67] The relators had reported their concerns to two government agents, one of whom then conducted an investigation into the manufacturing process.[68] At one point in the investigation, one of the defendant's employees made a false statement about the manufacturing process, though the investigator noted that he was not misled by the statement and "even if the government was misled . . . , it has since been made aware of [defendant's] actual practices yet continues to buy and use the [product]."[69] In the face of this evidence, the court found that "the government's actual conduct suggests that the allegedly false statements were immaterial" and affirmed the district court's finding of immateriality.[70]

In *Kelly*,[71] the Ninth Circuit addressed materiality under the FCA in connection with a government contractor's internal accounting procedures.[72] Relator Kelly, an analyst at Serco, "informed [the Department of Homeland Security] that Serco's monthly cost reports were unreliable because they tracked costs manually

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67 *Id.* at 558.

68 *Id.* at 561.

69 *Id.* at 561, 564

70 *Id.* at 563-64.

71 *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. 2017).

72 *Id.* at 328-29.

and with a single charge code in violation of the guidelines" and "that Serco was falsifying its monthly reports to make its actual costs match the expected budget for the AWS Project."[73] In affirming summary judgment for Serco, the court held that "[g]iven the demanding standard required for materiality under the FCA, the government's acceptance of Serco's reports despite their non-compliance with [the relevant guidelines], and the government's payment of Serco's public vouchers for its work . . . we conclude that no reasonable jury could return a verdict for Kelly on his implied false certification claim."[74]

In *McBride*,[75] a military morale, welfare, and recreation vendor inflated soldier headcount data and, as a result, received an outsized fee.[76] The district court granted summary judgment for the vendor, and the D.C. Circuit affirmed, in part because:

> [W]e have the benefit of hindsight and should not ignore what actually occurred: the [Defense Contract Audit Agency] investigated [the relator's] allegations and did not disallow any charged costs. In fact, [the vendor] continued to receive an award fee for exceptional performance . . . even after the Government learned of the allegations. This is "very strong evidence" that the requirements

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[73] *Id.* at 329.

[74] *Id.* at 334.

[75] *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027 (D.C. Cir. 2017).

[76] *Id.* at 1029.

> allegedly violated by the maintenance of inflated headcounts are not material.[77]

In *Petratos*,[78] the relator alleged fraud on the FDA involving off-label uses of the drug Avastin and disclosed the alleged fraud to the relevant federal agency.[79] In finding that it was not material to a payment decision, the court explained that:

> Since that time, the FDA has not merely continued its approval of Avastin for the at-risk populations that Petratos claims are adversely affected by the undisclosed data, but has added three more approved indications for the drug. Nor did the FDA initiate proceedings to enforce its adverse-event reporting rules or require Genentech to change Avastin's FDA label, as Petratos claims may occur. And in those six years, the Department of Justice has taken no action against Genentech and declined to intervene in this suit.[80]

The court noted that, "[i]n holding that [the relator] did not sufficiently plead materiality, we now join the many other federal courts that have recognized the heightened materiality standard after [*Escobar*]."[81]

The lesson we draw from these well-considered opinions is that, though not dispositive, continued

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77 *Id.* at 1034 (citing *Escobar*, 136 S. Ct. at 2003).

78 *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017).

79 *Id.*

80 *Id.* (emphasis omitted).

81 *Id.* at 492.

payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality. Notably, these cases do not fully address the gravity and clarity of the government's decision here. This system was installed throughout the United States, and the government's rejection of Harman's assertions, if in error, risked the lives on our nation's highways, not just undue expense. Where violations of the "certain requirements" described by *Escobar* involve potential for horrific loss of life and limb, the government has strong incentives to reject nonconforming products, and *Escobar*'s cautions have particular bite when deployed to decisions as here. Further, this case is not about inferring governmental approval from continued payment. Here, the government has never retracted its explicit approval, instead stating that an "unbroken chain of eligibility" has existed since 2005.

That said, there are and must be boundaries to government tolerance of a supplier's failure to abide by its rules. A recent Ninth Circuit opinion offers guidance. In *Campie*,[82] the Ninth Circuit reversed dismissal under Rule 12(b)(6) for failure to state a claim, holding that questions of materiality remained even where the FDA had continued to pay for the drug. There, the relator alleged that Gilead utilized an unapproved vendor in China for a critical component of its HIV drugs for at least two years before the FDA approved the vendor.[83] On appeal, Gilead argued that the government's continued payment for the drugs after

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[82] *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017).

[83] *Id.* at 895-96.

revelation of the alleged FDA violations demonstrated that "those violations were not material to its payment decision."[84] The court rejected that argument at the pleading stage, finding that: (1) questions remained as to whether the approval by the FDA was itself procured by fraud; (2) there existed other potential reasons for continued approval that prevent judgment for the defendant on 12(b)(6); and (3) the continued payment came after the alleged noncompliance had terminated and "the government's decision to keep paying for compliant drugs does not have the same significance as if the government continued to pay despite noncompliance."[85] The court also noted that as the parties dispute exactly what and when the government knew, calling into question its actual knowledge, the relator had "sufficiently plead[ed] materiality at this stage of the case."[86]

Trinity argues that "[w]hen the government learns of the alleged falsity, evaluates the relator's allegations, and then formally approves the product, courts have uniformly held that there is no 'material' false statement." Trinity also argues that the decision to continue approving and purchasing the product was not made by a low-level bureaucrat, but rather by FHWA itself, and thus has special force. Additionally, Trinity directs us to DOJ's evaluation of the claim, contained in its response to Harman's *Touhy* request, rejecting the request because the June 17, 2014 memorandum "addresses all of the issues raised by the parties. . . .

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84 *Id.* at 906.

85 *Id.*

86 *Id.* at 906-07.

DOT believes that this should obviate the need for any sworn testimony from any government employees." Because Harman's claims were rejected by FHWA in an official memorandum, and because FHWA continues to pay for the ET-Plus to this day, Trinity argues that Harman has failed to carry his burden in establishing that any false statement was material to the government's payment decision.

Harman counters that the post-revelation actions of the government are not determinative in an FCA action, even post-*Escobar*, and that the standard for materiality is holistic and no single element is dispositive. Harman further argues that the relevant decision makers—state departments of transportation who actually purchased the ET-Plus based on the false statements of compliance with Report 350—have either outright banned purchase or "have all but stopped buying the ET-Plus" in light of the trial verdict, which Harman argues cuts strongly in favor of a finding of materiality.

While we agree with our sister circuits that no single factor is outcome determinative, the "very strong evidence" here of FHWA's continued payment remains unrebutted. The concerns of the several states in response to the verdict do no work here. The very inquiry is question-begging—the initial reticence of some state departments of transportation to purchase the ET-Plus units arose after the verdict and its widespread publicity. Such caution is understandable. Of course, unexplained information about the verdict alone would be material to decision makers. Recall that, responsive to those concerns, the federal government itself halted sale after the verdict to await independent testing without ever retreating from its

decision to continue reimbursing the ET-Plus system. Moreover, eleven states (including states which initially suspended use of the ET-Plus after trial) filed an amicus brief in support of Trinity in this action. Additionally, Harman filed nine additional *qui tam* lawsuits under state FCAs; of the nine states involved, all but one declined to intervene in the action.

Confronted with the reality that the government was aware of all the charges of noncompliance with Report 350 when it wrote its June 2014 memorandum, Harman argued at trial that the memorandum itself was procured by fraud. Specifically, Harman relied on the fact that Trinity failed to disclose all of the changes to the ET-Plus to FHWA, both in 2005 and in subsequent conversations with FHWA, and that Trinity deceived the government by concealing five failed flared crash tests. In sum, Harman contends that the jury had evidence before it that Trinity concealed changes to the ET-Plus both in 2005 and when called to account in 2012, and that concealment—when combined with other evidence in the record of the purported failures of the ET-Plus system on the nation's highway and in flared crash tests—was sufficient to undercut FHWA's 2014 position.

While FHWA's decision to continue reimbursing ET-Plus units would be undermined if, as Harman alleges, FHWA acted unaware of the facts claimed to be fraud, undisputed evidence in the record does not bear that out. As we will explain, FHWA knew about changes to the guide channel width and attendant fabrication changes when it expressed its continued approval of the ET-Plus system. The memorandum stated FHWA's position that even though Trinity "inadvertently omitted" information about the 2005

changes, "the ET-Plus w-beam guardrail end terminal became eligible on [September 2, 2005] and continues to be eligible for Federal-aid reimbursement." In fact, Harman's own disclosures ensured that FHWA issued its June 17, 2014 memorandum with knowledge of the narrowed guide channel and related fabrication changes.

On arrival of the June 17 memorandum, failure to disclose five failed crash tests became a centerpiece of the trial, as Harman's counsel reached for any facts that the government did not know when it sent the June memorandum and responded to the *Touhy* request.[87] He injected these failed tests countless times throughout the trial, starting with a reference during voir dire. The tests came up again in opening argument, where Harman's counsel stated explicitly that FHWA's 2014 approval memorandum was "based on critically withheld information, such as those five failures." Harman's counsel then told the jury:

> [T]his fraud has gone over a period of about almost 10 years, and I've just barely touched the evidence, but I want you to know that you're the first people in the United States of America that will get to hear the whole story. The Federal Highway Administration has not heard it. No one has heard it.

Harman's counsel grilled his expert Dr. Coon, TTI's Dr. Bligh, and Harman himself—all about tests that cast no light on the ET-Plus' performance in the

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87 The district court excluded evidence of the five failed tests in the first trial, as it did the photographs of various automobile encounters with guardrails. However, the district court reversed course in the second trial.

use for which it was approved. Counsel returned to the five failed tests during closing. Once again pointing out that the jury "are the very first people in America to see those five failed tests . . . before the FHWA even heard about them." He then told jurors that Trinity ought to answer some questions, including why they did not tell FHWA about the five failed tests.[88]

But these "five failed tests" were actually of a distinct, experimental system—not the type of ET-Plus system on American roadways. Thus, this evidence does not in any way go to the government's approval of the ET-Plus for its intended use on a tangent system. There was no obligation for Trinity to disclose and no evidence that the information was hidden from FHWA.

Remarkably, Harman's argument is not that the five failed flared crash tests go to the fraud on which his claim is based—whether the ET-Plus was Report 350 compliant as Trinity certified. Rather, Harman argues that Trinity's nondisclosure of those failures was a separate fraud, and thus the government's continued approval of the modified ET-Plus was "procured by fraud." But, as Harman's expert Dr. Coon admitted at trial, the flared ET-Plus system was never commercialized or even submitted to FHWA for approval. Dr. Bligh explained that the five failed crash tests were part of an experiment as part of its ongoing research of new flared guardrail systems. Dr. Bligh explained that, because the system was flared rather than tangent —parallel—to the roadway, it posed distinct difficulties:

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88 Harman's counsel continued: "They owe you an answer for that besides just waving their arms and saying it was experimental."

> The commercial ET-Plus system is what we call a tangent terminal system. . . . [W]hen we're developing a flared system, it's a completely different geometry and configuration. And, in fact, in that particular situation, you would have the terminal significantly flaring away from the roadway. So it's quite a difference in the configuration.

The results of those tests were that TTI determined that the ET-Plus head would not correct the weaknesses of a flared configuration, and instructions were given to installers to that effect. At best, these flared tests were only determinant of the range of safety concerns treatable by the ET-Plus as modified. That it would not mitigate the hazards of a distinct system (for which no disclosure was required) is not evidence of its utility in an approved system. Tests of the experimental system had no bearing on the government's approval of the system that was in place and working. In unchallenged testimony, Dr. Bligh explained that, since the testing did not offer a solution, the project was abandoned and the flared system was never submitted to FHWA for approval; that, in his experience at TTI, results of experimentation are not presented to FHWA; and that, although FHWA was aware that Trinity and TTI were searching for solutions to weaknesses of a distinct experimental system, FHWA never requested the results of those experiments, nor did they want them. Harman's counsel conflated the experimental flared system with the tangent system actually in use on American highways, creating the

impression that the flared tests demonstrated something dangerous about the modified ET-Plus heads.[89] But returning the "five failed tests" to their context makes plain that the tests demonstrated no failure of the ET-Plus units but only showed an effort to mitigate the ongoing weaknesses of a distinct system —the flared system. Trinity and TTI did not submit a new system to FHWA for approval, they had no new system. Harman's reliance on these undisclosed failed tests as evidence of fraud was misplaced; they have no relevance here. The district was correct in excluding them in the first trial.

In sum, Harman's argument that FHWA's decision was procured by fraud because of the failure of Trinity and TTI to disclose the crash test failures of an experimental flared ET-Plus system is unavailing because:

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89 This approach was most apparent in the examination of Dr. Bligh, where Harman's counsel asked the following while talking about the failed flared tests:

> Q. How many times did you call the FHWA and say I've got these five failed tests on this prototype head, and I just wanted you to know what was happening? Did you do that?
>
> A. No, we did not. We don't submit our R&D tests to FHWA.
>
> Q. All right. Even when you've got a failure on a—on a product out in the highway and you hit it head-on just like you did in you test, you decided not to say anything about it, right?
>
> A. No, sir. That is not a product that was on the highway. That was a research and development product for a flare terminal.
>
> Q. Well, this head was on the highway, wasn't it?
>
> A. The head is one component of a system.

(1) those tests involved a different system than the tangent ET-Plus system that is at issue here; (2) FHWA does not require, and neither Trinity nor TTI have a history of disclosing, information regarding failed research and development experiments; and (3) FHWA was aware that Trinity and TTI were experimenting with a flared ET-Plus and did not request information on that project.[90]

Reliance on these alleged omissions and misrepresentations was in error. Here, the relevant inquiry is not what Trinity disclosed, but what FHWA knew at the time it issued the June 17, 2014 memorandum, no matter the source. By that point, FHWA had seen Harman's extensive PowerPoint presentation, FHWA officials had taken measurements and photographed the ET-Plus head units that Harman had presented to them, and FHWA had access to the allegations made in Harman's complaint and reiterated in the *Touhy* request. Even if Trinity deliberately withheld information from FHWA, it does not mean that the government's decision that the ET-Plus remained eligible for reimbursement was the product of ignorance—Harman's PowerPoint presentation and the allegations in his FCA suit informed FHWA of the 2005 changes. And still FHWA paid because it was not persuaded by the allegations.

As we have explained, the government's position was clear before trial. By June 2014, FHWA had

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[90] The False Claims Act does not contain an independent duty to disclose certain information. 31 U.S.C. § 3729. "There can only be liability under the False Claims Act where the defendant has an obligation to disclose omitted information." *United States ex rel. Berge v. Bd. of Trustees of Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997).

knowledge of all of Harman's allegations and still approved the ET-Plus. And, as the D.C. Circuit wrote in *McBride*, "we have the benefit of hindsight and should not ignore what actually occurred"[91]—given FHWA's unwavering position that the ET-Plus was and remains eligible for federal reimbursement, Trinity's alleged misstatements were not material to its payment decisions. The other evidence in the record, viewed most favorably to Harman, is insufficient to overcome this "very strong evidence."

This position was reaffirmed by extensive independent testing after trial that examined more than 1000 ET-Plus units across the country. After conducting crash tests of the ET-Plus with the 2005 changes, FHWA's determination that the ET-Plus is eligible for federal reimbursement has not changed to this day.[92] While this post-trial evidence was not before the jury, the district court made use of it in denying post-trial relief to Trinity. This use was, unfortunately, selective. The district court treated the requests for post-trial testing as evidence that the government had insufficient information about the ET-Plus to determine its eligibility. In doing so, the court looked past the fact that the test results concluded that (1) the ET-Plus units tested after trial passed crash tests conducted pursuant to Report 350 criteria

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91 *McBride*, 848 F.3d at 1034.

92 The district court did not rely on the "five failed tests" in its post-verdict suggestion that the government was uncertain in its approval of the purchases, to its credit, and expressed concern pretrial over the late arriving assertion, efforts consistent with his able management of this litigation.

and (2) the ET-Plus units tested post trial were representative of those in service across the country. The district court's reliance on the post-verdict tests in its denial of a new trial was flawed in a more fundamental way. The verdict sent shock waves throughout the states. The testing responded to the concern provoked by the verdict. FHWA directed one outside testing facility to test the challenged system and a second to verify that the tested system was the same as systems installed throughout the United States, a conclusion that reaffirmed the government's view, one that never changed.

Finally, none of the factors that the Ninth Circuit found warranted caution in *Campie*[93] exist here. First, the record in this case leaves no question about "what the government knew and when." Instead, the record demonstrates that FHWA continued to reimburse the ET-Plus units with full knowledge of Harman's claims about the product's purported deficiencies. Nor has Harman come forward with any evidence that FHWA's decision was procured wrongfully—through collusion between Trinity and FHWA or some other form of corruption. Nothing in the record here supports an inference that FHWA's approval was made to shield Trinity or FHWA itself from the consequences of past decisions. Nor has Trinity reformulated the ET-Plus to remove the 2005 changes. Rather, FHWA has not changed its position regarding the eligibility of the ET-Plus and still considers it eligible for reimbursement to this day, a weighty decision. Finally, it is plain that FHWA is no "captured agency." The response of the

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93 *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017).

Attorneys General of the several states and of the Justice Department itself make clear that the decision of the FHWA was made and adhered to with sensitivity to the interests of many levels of state and federal government.

VI.

Congress enacted the FCA to vindicate fraud on the federal government, not second guess decisions made by those empowered through the democratic process to shape public policy. The Act does so by aligning the interests of the government and that of the relator through a shared purse. That a relator seeks personal gain is embedded in the statute and should not, alone, cast doubt on his claims. That Harman was a one-time competitor of Trinity, with a past history of adversarial litigation, however, may raise an eyebrow. That his intended use for the proceeds from this litigation was to capitalize his failed businesses and fill the market void left by Trinity with a product sharing at least three of the "defects" he railed against at trial may give greater pause. But ultimately, the problems this case presents runs deeper.

The judgment before us falls far short of the FCA's true setting and fails to account for its congressional purpose in drawing upon private litigation to protect public coffers. The government has never been persuaded that it has been defrauded. It so advised Harman after his repeated meetings disclosing the changes in the product he says was wreaking havoc on America's highways, leaving him to file his own suit as was his statutory right. Following discovery, as he made his eve-of-trial *Touhy* request that the government produce officials to testify, the

Department of Justice declined, once again sending the message that the government did not believe itself to be a victim of any fraud, a position from which it has not to this day retreated.

The force of this decision comes into focus as we bring to mind its stakes. The product here is of a class under constant development by dedicated engineering faculty and students at Texas A&M University in an ongoing effort to mitigate the risks on all the country's highways of leaving the road, at travel speed, into trees, creeks, and myriad other unyielding obstacles. At best these roadside barriers can only mitigate—they cannot erase the risks attending all unintended exits, nor can they assure safety at all speeds, angles, and weights. For example, even today, they are only required to be tested at collision speeds of 62 miles per hour. There have always been deadly accidents involving roadside barriers—an unfortunate reality of our automobile-centric culture.

The government has responded at every turn to Harman's challenge. In turning back his views and proofs, it balances the federal fisc, motorist safety, and other factors across the spectrum of myriad presentations to disclaim victim status. Such decision making is policy making, not the task of a seven-person jury—such a result confounds the premise of *qui tam* actions: that the government was the victim. The district court observed that to allow the government to forgive a completed fraud stands *qui tam* on its head. Respectfully, we must disagree with our able colleague who sits on the firing line. Rather, as we see it, it is the opposite.

It is charged that the accused product remains along nigh every highway in America, killing and

maiming, but the government will not remove it. We can assume that this and contrary views are debatable, but we must accept that the choice among them lies beyond the reach of seven citizens of Marshall, Texas, able though they may be. As revered as is the jury in its resolution of historical fact, its determination of materiality cannot defy the contrary decision of the government, here said to be the victim, absent some reason to doubt the government's decision as genuine. For the demands of materiality adjust tensions between singular private interests and those of government and cabin the greed that fuels it. As the interests of the government and relator diverge, this congressionally created enlistment of private enforcement is increasingly ill served. When the government, at appropriate levels, repeatedly concludes that it has not been defrauded, it is not forgiving a found fraud—rather it is concluding that there was no fraud at all.

* * *

For the above reasons, we REVERSE and RENDER judgment as a matter of law for Trinity.

JUDGMENT OF THE FIFTH CIRCUIT (SEPTEMBER 29, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
EX REL. JOSHUA HARMAN,

Plaintiff–Appellee,

v.

TRINITY INDUSTRIES INC.;
TRINITY HIGHWAY PRODUCTS LLC,

Defendants–Appellants.

No. 15-41172
D.C. Docket No. 2:12-CV-89

Appeal from the United States District Court
for the Eastern Division of Texas

Before: JOLLY, HIGGINBOTHAM, and
GRAVES, Circuit Judges.

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed and judgment is rendered as a matter of law for Trinity.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ORDER OF THE DISTRICT COURT (AUGUST 3, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES OF AMERICA
EX REL. JOSHUA HARMAN,

Relator/Plaintiff,

v.

TRINITY INDUSTRIES, INC. and
TRINITY HIGHWAY PRODUCTS, LLC,

Defendants.

Case No. 2:12-CV-00089-JRG

Before: Rodney GILSTRAP,
United States District Judge

Before the Court is the Motion for a New Trial filed by the Defendants Trinity Industries, Inc. and Trinity Highway Products, LLC (collectively, Trinity) (Dkt. No. 723). Certain of the issues raised herein, especially the constitutional challenges, are wholly new and were never raised prior to trial or during the time (nearly a year) since the verdict was returned in this case. Trinity notes in its motion that these are raised solely for appeal. As to the issues which are not newly raised in this motion, the Court has already dealt

with these issues in the Court's opinion concerning Trinity' Judgment as a Matter of Law filed under Rule 50(b). (*See* Dkt. No. 713.) The Court declines to address /readdress these issues, and instead finds that Trinity's motion should be and is hereby DENIED, so that this case may proceed to a proper appeal.

So ORDERED and SIGNED this 3rd day of August, 2015.

/s/ Rodney Gilstrap
United States District Judge

FINAL JUDGMENT OF THE DISTRICT COURT (JUNE 9, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES OF AMERICA EX REL.,
JOSHUA HARMAN,

Relator/Plaintiff,

v.

TRINITY INDUSTRIES, INC. and
TRINITY HIGHWAY PRODUCTS, LLC,

Defendants.

Case No. 2:12-CV-00089-JRG

Before: Rodney GILSTRAP,
United States District Judge

This matter comes before the Court on the Plaintiff/Relator's Post-Trial Motion to Enter Judgment Setting Damages, Penalties, and the Relator's Share of the Total Award, and Awarding Attorneys' Fees, Costs and Expenses (Dkt. No. 623). Relator's motion follows a jury trial that commenced on October 13, 2014. At the conclusion of that trial, the jury rendered a unanimous verdict, on October 20, 2014, finding that Defendants Trinity Industries, Inc. and Trinity

Highway Products, LLC (collectively, "Trinity") "knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim" in violation of the False Claims ACT ("FCA"). Dkt. No. 570. The jury further rendered a unanimous verdict, finding that the U.S. government suffered damages in the amount of $175,000,000 as the result of Trinity's violations of the FCA. *Id.*

Having considered all of the parties' arguments and the entire record in this case, the Court hereby ORDERS as follows:

- the jury's verdict of $175,000,000.00 is trebled to $525,000,000.00, pursuant to 31 U.S.C. § 3729;
- Defendants Trinity Industries, Inc. and Trinity Highway Products, LLC are hereby assessed a civil penalty of $8,250.00, for each of the 16,771 false certifications Trinity made in connection with false claims for payment, for a total penalty of $138,360,750.00; which penal sum the Court has elected to set at the midpoint of the statutory range; and,
- Final Judgment against Trinity and in favor of Relator and the U.S. government in the amount of $663,360,750.00 shall be entered herein, exclusive of attorneys' fees, expenses, and costs.

The Court also ORDERS that:

- Given that the U.S. government opted not to participate in the trial of this case and left the full burden of prosecuting this *qui tam* action to the Relator, Joshua Harman, the Relator is

hereby awarded as his commission thirty percent (30%) of the total proceeds of such $663,360,750.00, or $199,008,225.00; and,

- Relator, Joshua Harman, is hereby further awarded attorneys' fees of $16,535,035.75; expenses of $2,300,000.00; and, taxable costs of $177,830.00. Relator is designated as the prevailing party.

Consistent with the Orders stated above, pursuant to Rule 58 of the Federal Rules of Civil Procedure, and in accordance with the jury's verdict, the COURT FURTHER ORDERS AND HEREBY ENTERS FINAL JUDGMENT that the United States Government have and recover the sum of $464,352,525.00 from Defendants Trinity Industries, Inc. and Trinity Highway Products, LLC, jointly and severally; and, that the Relator, Joshua Harman, have and recover the sum of $218,021,090.75 from Defendants Trinity Industries, Inc. and Trinity Highway Products, LLC, jointly and severally.

All other pending motions are hereby DENIED. The Clerk is directed to enter this Final Judgment in the record and to close this action.

So ORDERED and SIGNED this 9th day of June, 2015.

/s/ Rodney Gilstrap
United States District Judge

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT (JUNE 9, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES OF AMERICA
EX REL. JOSHUA HARMAN,

Plaintiff,

v.

TRINITY INDUSTRIES, INC. and
TRINITY HIGHWAY PRODUCTS, LLC,

Defendants.

Case No. 2:12-CV-00089-JRG

Before: Rodney GILSTRAP,
United States District Judge

Before the Court is the Renewed Rule 50(b) Motion for Judgment as a Matter of Law filed by Trinity Industries, Inc. and Trinity Highway Products, LLC (collectively, "Trinity") (Dkt. No. 596). Having considered the motion, the related briefing in support of and in opposition to the same, the oral arguments presented by counsel, and all of the materials in the record, the Court finds that Trinity's motion should be and hereby is DENIED in all respects.

I Introduction and Procedural History

On March 6, 2012, Joshua Harman (hereinafter, "Harman") filed the complaint in this action as a *qui tam* Relator, on behalf of the United States of America, pursuant to 31 U.S.C. §§ 3729-32, otherwise known as the False Claims Act (FCA). (Dkt. No. 1). Harman alleged that Trinity violated the provisions of the FCA by knowingly and falsely certifying that Trinity's guardrail end terminals, known as the "ET-Plus" or "ET-Plus units," manufactured after 2005 had been crash tested and approved for federal reimbursement by the Federal Highway Administration (FHWA). Harman further alleged that such false certifications were necessary in order to induce the U.S. government to pay money and that the U.S. government did, in fact, pay such money when it reimbursed individual states for the costs associated with installing ET-Plus units on federally funded or subsidized highways.

A first jury trial in this action commenced on July 14, 2014. (Dkt. No. 385). However, following a series of sharp practices and other procedural irregularities, the Court was compelled to declare a mistrial. *See* (Dkt. No. 384).[1] Subsequently, the Court conducted a second, six-day jury trial which commenced on October 13, 2014. On October 20, 2014, the jury returned a unanimous verdict, finding that Trinity "knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim" in violation of the FCA. (Dkt. No. 570). The jury further found that the United States government

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[1] The circumstances leading to the Court's decision to declare a mistrial are largely irrelevant to Trinity's motion under Rule 50(b) and, as such, are not recited here.

sustained damages as a result of Trinity's violations, in the amount of $175,000,000. (*Id.*)

In the instant motion, Trinity asks the Court to set aside the jury's verdict and render Judgment as a Matter of Law (JMOL) in favor of Trinity on all of the allegations and claims asserted by Plaintiff (Dkt. No. 596). In doing so, Trinity makes two primary arguments:

(1) that Harman failed to introduce legally sufficient evidence that Trinity met the elements of an FCA claim; and

(2) that, regardless of the sufficiency of the evidence, the FHWA has determined that the ET-Plus was and is eligible for federal reimbursement and that this eligibility determination means that—as a matter of law—a claim for reimbursement for the ET-Plus cannot be "false" for purposes of the FCA.

Of these two arguments, Trinity relies most heavily on the latter. Specifically, Trinity claims that the decision in *United States v. Southland Management Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003) (*en banc*), forecloses any possibility of recovery in this case because the FHWA has, at all relevant times, accepted the ET-Plus as eligible for reimbursement by the government. For the reasons stated below, Trinity misunderstands and misapplies the holding in that case and also attempts to use facts developed after the trial—which are wholly outside the record—to collaterally attack the jury's verdict. Ultimately, this Court is persuaded that *Southland* dealt with very different facts than those at issue in this case and that

the holdings of both the majority and concurrence in *Southland* cannot support Trinity's attempt to escape the jury's verdict that it knowingly defrauded the government.

However, the facts established at trial—including the history of the ET-Plus units at issue and the efforts Trinity underwent to obtain "acceptance" for their use on federally funded highways—provide much of the context necessary for an evaluation of Trinity's eligibility arguments under *Southland*. Accordingly, the Court will first address Trinity's sufficiency-of-the-evidence contentions, in order to provide such context.

II. Legal Standard

Under Rule 50, the Court may enter JMOL when it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party on that issue." Fed. R. Civ. P. 50(a). In other words, "[Rule 50(a)] allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 447-48 (2000) (Ginsburg, J.) (quoting 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521 (2d ed. 1995)). If the Court declines to grant a motion for JMOL brought under Rule 50(a) and submits the case to the jury, a party can file a "renewed" motion for judgment as a matter of law under Rule 50(b).

When deciding such a motion under Rule 50, the Court reviews all evidence in the record and must draw all reasonable inferences in favor of the non-moving party. Importantly, the Court may not make

credibility determinations or weigh the evidence, as those are solely functions of the jury. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Accordingly, a Court may set aside a jury's verdict and grant a motion for judgment as a matter of law "only if the jury's factual findings are not supported by substantial evidence or if the legal conclusions implied from the jury's verdict cannot in law be supported by those findings." *Am. Home Assurance Co. v. United Space Alliance, LLC*, 378 F.3d 482, 486-87 (5th Cir. 2004). In other words, the jury's verdict must stand if "the state of proof is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict." *Id.* (quoting *Liberty Mut. Ins. Co. v. Falgoust*, 386 F.2d 248, 253 (5th Cir. 1967)).

III. Facts Established at Trial

In order to understand the import of the jury's verdict and the motion now before the Court, it is necessary to review the history of the ET-Plus units at issue in this case, as well as Trinity's efforts to obtain FHWA approval to use the ET-Plus on the national highway system.

A. All Roadside Hardware, Including Guardrail End Terminals, Must Be Accepted for Use by the FHWA Before Being Eligible for Reimbursement Using Federal Funds

The federal government, through the FHWA, works with state departments of transportation to develop highway construction programs. (Dkt. No. 577 at 123:7-20). As part of such programs, the federal government reimburses states for the expenses incurred by

their contractors. (*Id.*) However, roadside hardware must be crash tested[2] and accepted by the FHWA in order to qualify for such reimbursement. (Dkt. No. 577 at 145:2); (Dkt. No. 579 at 30:5-17).

The FHWA determines which tests must be run in order to obtain the approval required for reimbursement. (*Id.*); (Dkt. No. 580 at 51:9-53:22). The hardware actually installed on the highway system must "replicate the crash-tested device," and any changes to such hardware must be reviewed by and agreed to by the FHWA. (Dkt. No. 577 at 145:21-146:19).

B. Trinity Sought and Obtained Approval for Use of the "Standard" 5-Inch ET-Plus on the Highways in January 2000

It is undisputed that in 1999 Trinity sought approval from the FHWA to begin placing the ET-Plus on federal highways. *See, e.g.*, (Dkt. No. 576 at 70:23-71:3); (Dkt. No. 577 at 124:4-14). At that time, the newly developed ET-Plus was intended to replace Trinity's previously approved guardrail end terminals, called the ET-2000. (*Id.*)

Substantial evidence at trial established the ET-Plus units that Trinity submitted for approval in 1999 had specific properties and dimensions, including:

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[2] With respect to the ET-Plus units at issue in this case, the FHWA has required crash testing in accordance with the standards set out in the National Cooperative Highway Research Program (NCHRP) Report 350. (Dkt. No. 577 at 123:7-20); (Plaintiff's Exhibit ("PX") 748 / Defendants' Exhibit ("DX") 03 (NCHRP Report 350)).

- a guide channel that was five (5) inches wide and thirty-seven and one-fourth (37-1/4) inches in height;
- an exit gap of at least one and one-half (1-1/2) inches;
- a throat inlet of four (4) inches; and
- a feeder channel height of fifteen and three-eighths (15-3/8) inches.

See (Dkt. No. 576 at 80:2-11, 102:13-106:11, 132:7-11); (PX-47); (PX-51). A representative example of such a standard 5-inch ET-Plus was introduced into evidence as Plaintiff's Exhibit 948.

Further, the guide channels on such 5-inch ET-Plus units were positioned flush against the throat and secured using a "butt weld." *See, e.g.*, (Dkt. No. 575 at 86:12-22, 87:18-24); (Dkt. No. 576 at 117:13-18). The configuration of the guide channels and the weld are observable upon inspection of the 5-inch ET-Plus. (PX-948).

On January 18, 2000, following a review of crash-test reports and other materials submitted by Trinity, the FHWA issued a letter agreeing that "the ET-PLUS can be used in lieu of the original ET-2000 extruder head on any of the ET-2000 systems previously accepted for use on the National Highway system." (PX-51).

C. In 2005, Trinity Began Manufacturing and Selling a "Modified" 4-Inch ET-Plus

The evidence at trial also established that in or around 2005, Trinity modified the standard 5-inch ET-Plus, altering certain properties and dimensions. Such changes included at least:

- reducing the guide channel width from five (5) inches to four (4) inches;
- reducing the guide channel height from thirty-seven and one-fourth (37-1/4) to thirty-six and one-fourth (36-1/4) inches;
- narrowing the exit gap from at least one and one-half (1-1/2) inches to one (1) inch;
- lengthening the throat inlet from four (4) inches to four and three-eighths (4-3/8) inches; and
- reducing the feeder channel height from fifteen and three-eighths (15-3/8) inches to fourteen and seven-eighths (14-7/8) inches.

(Dkt. No. 577 at 80:2-11, 102:13-106:11, 132:7-11); (Dkt. No. 579 at 30:22-31:10, 32:2-34:25). A representative example of such a modified ET-Plus unit was introduced into evidence as Plaintiff's Exhibit 948.[3]

Further, in assembling the modified ET-Plus units, Trinity inserted the guide channels into the throat inlet and secured them using a "fillet weld" in lieu of the "butt weld" used in the standard 5-inch ET-Plus. *See, e.g.*, (Dkt. No. 576 at 81:3-82:8). The insertion of the guide channels into the throat, as well as the change to the weld, is observable upon inspection of the modified ET-Plus. (PX-948).

Given the procedural posture of this case, the Court reviews the evidence in the light most favorable to the jury's verdict. However, no inference need be made with respect to the facts recited above, as they have remained, at all times, essentially unchallenged.

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[3] Both the modified ET-Plus and the standard ET-Plus were admitted as the same exhibit number—Plaintiff's Exhibit 948.

For instance, the physical exemplars of the standard 5-inch and modified 4-inch ET-Plus units were introduced in the first trial without objection from Trinity. As Trinity's counsel stated at the pre-trial hearing conducted on July 10, 2014:

> Plaintiff's 948. Your Honor, this is—this is being dealt with by the parties. This is actually a notation for physical ET-Plus heads, and it's my understanding the parties have an agreement on that. So we don't need to address that now.

(Dkt. No. 362 at 176:7-11); *see also* (Dkt. No. 394 at 27 (Relator's list of admitted exhibits from the first trial, listing PX-948 as an exhibit admitted into evidence during the trial)).

Before the second trial, Trinity raised perfunctory questions with respect to the "chain of custody" of such physical exhibits. However, Trinity failed to squarely challenge the authenticity or admissibility the evidence. *See* (Dkt. No. 523 at 181:23-185:3); (Dkt. No. 526 at 34:24-40:18 (counsel for Trinity arguing that "we were under the impression that the [physical exhibits] were used as demonstratives" despite their pre-admission as trial exhibits and inclusion on the Relator's trial exhibit list)). Further, Trinity made no effort in its briefing to challenge any of the facts recited above. In this context, the Court treats such facts as conclusively established and will proceed to the analysis of Trinity's arguments.

IV. Analysis—Sufficiency of the Evidence[4]

In order to prevail on an FCA claim, a relator must prove: "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (*i.e.*, that involved a claim)." *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467-468 (5th Cir. 2009) (internal quotations and citation omitted). As discussed below, Harman introduced substantial evidence in support of his contentions that Trinity met each of these elements.

A. Substantial (and Frequently Un-Rebutted) Evidence Supports the Jury's Verdict That Trinity Made False Statements or Engaged in a Fraudulent Course of Conduct

In its motion, Trinity argues that the Court "mistakenly instructed the jury that it could find an FCA violation if there was a material change in the ET-Plus that was not disclosed to the FHWA." (Dkt. No. 596 at 13).[5] Trinity argues that such an instruction

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[4] In addition to the arguments addressed in this section, Trinity relies on the *Southland* decision to argue that Harman cannot have introduced evidence sufficient to support the jury's verdict. *See, e.g.*, (Dkt. No. 596 at 14 (falsity), 17 (scienter), 19 (materiality), 20 (causation)). Trinity's *Southland* arguments are addressed below and, as such, will not be repeated for every element of Harman's FCA claims.

[5] Where the Court cites to the docket and lists a page number, the Court is referring to the page of the docket entry and not to the internal pagination of the filing. In the case of the transcripts of the pre-trial and trial proceedings, this is a distinction without a difference; however, in the case of motions, attachments, and

misstates the law and that Harman must present substantial evidence of an actual lie. (*Id.* (citing *Southland*, 326 F.3d at 682 (Jones, J. concurring))). However, in its motion, Trinity provides no citation to the trial transcript for such an allegedly erroneous jury instruction—because no such jury instruction was given. Rather, the Court provided a high-level summary of Harman's contentions to the *venire* panel during jury selection, stating as follows:

> Plaintiff [Harman] alleges that the Defendants violated the False Claims Act by fraudulently enticing the United States government to pay for the ET-Plus end terminal systems that were materially different in dimension and geometry from the end terminal system that was crash-tested in 2005 and accepted for use by the Federal Highway Administration.

(Dkt. No. 574 at 24:10-15). In addition to this brief, contextual statement, the Court's preliminary instructions to the jury included the following:

> A central question in this trial will be whether the ET-Plus end terminal systems that the Defendants sold were substantially different than or essentially the same as the ones the FHWA approved in 2005.

(Dkt. No. 575 at 20:11-14).

At no point did the Court instruct the jury that a material, undisclosed change to the ET-Plus was sufficient to show a false statement or fraudulent course

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other filings (*e.g.*, Trinity's motion for JMOL) the reader should refer to the page listed in the docket.

of conduct under the FCA. To the contrary, the Court's final jury instructions specifically instructed the members of the jury on all of the elements of a claim under the FCA. (Dkt. No. 584 at 34-47). In particular, the Court instructed the jury that, in order to find for Harman, the jury must first find that Trinity "made or used or caused to be made or used a false record or statement." (Dkt. No. 584 at 42:16-25). The Court clarified that "a record or statement is false if it is an assertion that is untrue when made or when used"—in other words, a lie. (*Id.* at 43:4-5 (emphasis added)). The Court further emphasized that, "[i]f the proof fails to establish any essential part of the Plaintiff's claim by a preponderance of the evidence, you should find for the Defendants as to that claim." (*Id.* at 43:1-3). After being so instructed, the jury rendered a verdict that Trinity "knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim." As discussed below, that verdict is supported by substantial evidence.

i. Trinity Failed to Disclose Any of the Modifications Made to the Standard 5-Inch ET-Plus at Any Time Before Suit Was Filed

In July of 2005—at roughly the same time as it was modifying the ET-Plus units—Trinity conducted additional crash tests of an ET-Plus set at a raised height and provided a report of such tests to the FHWA. (PX-156); (Dkt. No. 577 at 125:10-16). After receiving said report, the FHWA issued a letter dated September 2, 2005, approving a "standard" ET-Plus for use on a 31-inch guardrail system. (PX-173).

However, the additional crash tests and corresponding report were not spawned by the changes to the ET-Plus terminal head. Instead, the reason Trinity ran the crash tests was to ostensibly test the standard 5-inch ET-Plus on a new, raised 31-inch high guardrail system, which was "soon [to] be adopted as a standard [guardrail system] by several states." (PX-156). As a result, Trinity's report disclosed none of the dimensional changes to the ET-Plus described above. (PX-156); (Dkt. No. 577 at 125:25-126:15); (Dkt. No. 580 at 134:3 -136:4). Rather, every aspect of the report suggested that it was directed solely at obtaining FHWA acceptance of a "standard" ET-Plus for use with the new 31-inch guardrail systems. To-wit:

- The 2005 report is titled "NCHRP Report 350 Testing of the ET-Plus for 31-Inch-High W-Beam Guardrail." (PX-156).
- The abstract of the 2005 report states that "[s]everal modifications were made to the standard ET-PLUS to accommodate the 787 mm (31-inch) high W-beam guardrail." (*Id.* (emphasis added)).
- The description of the test article lists seven modifications to the "Standard ET-PLUS guardrail terminal," including the increase in guardrail height and various changes to the posts, W-beam, anchor, and blockout depth needed to accommodate the change in guardrail height. (*Id.* (emphasis added)).

In contrast to the precise detail with which Trinity's 2005 report describes the modifications directed to the proposed change in guardrail height, the modified dimensions of the ET-Plus head itself are

entirely omitted. Further, in forty separate places, this report identifies the test article as a "standard" ET-Plus (*i.e.*, the 5-inch ET-Plus approved in 1999). (PX-156); (Dkt. No. 581 at 199:22-200:4); (Dkt. No. 580 at 134:3-20). When confronted with these facts at trial, Trinity admitted that the 2005 report failed to expressly disclose the modifications to ET-Plus, and Trinity admitted that such modifications were not discussed in any communications with the FHWA pertaining to the report. (Dkt. No. 580 at 47:4-48:25).

Unsurprisingly, the FHWA's September 2, 2005, letter:

- expressly listed only the seven modifications covered by Trinity's 2005 test report concerning the changes to the standard ET-Plus needed to accommodate the raised guardrail system;
- expressly limited the 2005 approval to "[t]he modifications described above"—none of which included the undisclosed changes in guide channel width, guide channel height, exit gap width, throat inlet length, feeder channel height, or type of weld used;
- referred to the tested ET-Plus units as the "ET-Plus 31"; and
- excused Trinity from completing a full series of NCHRP Report 350 crash tests because "the original designs [*i.e.*, the standard 5-inch ET-Plus] for attachment to standard W-beam guardrail have proven to be crashworthy."

(PX-173).

At trial, after being confronted with these facts, Trinity admitted that it failed to disclose the modifications listed above to the FHWA at any time. *See, e.g.*, (Dkt. No. 580 at 32:12-20 (testimony of Greg Mitchell, on behalf of Trinity, admitting that "several" changes were made to the ET-Plus in 2005, none of which were reported to the FHWA)); (*Id.* at 50:7-24 (additional testimony of Greg Mitchell, further admitting that Trinity failed to disclose various changes to the ET-Plus at any time)); (Dkt. No. 581 at 214:7-12 (testimony of Dr. Eugene Buth, on behalf of Texas A&M, admitting that changes to the ET-Plus were not disclosed to the FHWA until 2012, if at all)). This testimony was then confirmed by the FHWA. (Dkt. No. 577 at 125:25-126:15 (testimony of Nick Artimovich, on behalf of the FHWA, stating that the agency first became aware of changes to the ET-Plus in 2012 when they were disclosed by Harman)). Further, Greg Mitchell, the President of Defendant Trinity Highway Products, speaking on behalf of Trinity, admitted that the description of the 2005 test article as a "standard" ET-Plus was false:

> Q. Okay. And—and when the [2005] report was finally done, the report told the FHWA that we used a standard ET-Plus, correct?
>
> A. That's correct.
>
> Q. And that was false, correct?
>
> A. It didn't consider the 5- to 4-inch change. It was a standard ET-Plus, yes.
>
> Q. It was false, correct?
>
> A. I don't know how to answer your question other than the fact than it was a standard ET-Plus.

Q. Was it true?

A. No.

Q. Okay. So it would be false?

A. Yes.

(Dkt. No. 580 at 48:12-25).[6]

Such admitted falsities are all the more striking given that the FHWA subsequently issued a letter that, on its face, limits any approval to the modifications expressly listed in the 2005 report and expressly recites the success of the "the original designs [*i.e.*, the standard 5-inch ET-Plus]" as the reason for excusing Trinity from additional testing that would otherwise be required. (PX-173).

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[6] Nevertheless, other representatives of Trinity and Texas A&M stated at trial that they intended to disclose the changes to the ET-Plus in 2005; sought to explain away the forty references to a "standard" ET-Plus as typographical errors; and insisted that the complete omission of any reference to the dimensional changes to the ET-Plus were the result of "an unfortunate mistake." *See, e.g.*, (Dkt. No. 578 at 35:3-9); (Dkt. No. 580 at 54:4-57:3). Neither Trinity nor Texas A&M could corroborate such testimony with any documents—*e.g.*, draft reports, emails, or notes. Confronted with such competing evidence, and with the benefit of the witnesses' presentation at trial, the jury was free to consider the testimony, weigh its veracity, and judge the credibility of Trinity and Texas A&M's witnesses. *Reeves*, 530 U.S. at 150-51. In light of the verdict, the Court must infer that the jury rejected Trinity's "inadvertent accident" argument and concluded that Trinity actively concealed information from the FHWA—a conclusion for which there is substantial evidence. *See, e.g.*, (PX-156); (PX-133 (Trinity email disclosing Trinity's intention to modify the ET-Plus "without announcement")).

ii. Trinity Falsely Certified That the Modified 4-Inch ET-Plus Had Been Accepted by the FHWA

Despite making modifications to the ET-Plus in or around 2005, despite the omission of any mention of such modifications to the FHWA, despite the admittedly false references to the "standard" ET-Plus in the report, and despite the limitations and "original design[]" language in the FHWA's 2005 letter, Trinity continued to certify that the newly modified 4-inch ET-Plus units it sold were both NCHRP Report 350 compliant and accepted for use and reimbursement by the FHWA, under the agency's original letter issued in 2000, as well as the 2005 letter discussed above. *See, e.g.*, (Dkt. No. 579 at 159:15-161:11); (Dkt. No. 580 at 74:7-76:10); (PX-173); (PX-174); (PX-218); (PX-608); (PX-959).

In doing so, Trinity likewise certified that the ET-Plus units it was selling beginning in 2005 were identical to the articles tested in 1999 and 2005, disclosed to the FHWA, and approved for use. For example, Mr. Greg Mitchell, speaking on behalf of the defendants, testified that Trinity was required to certify that the hardware furnished [the modified 4-inch ET-Plus sold for installation on the highways beginning in 2005] has essentially the same chemistry, mechanical properties, and geometry as that submitted for acceptance [to the FHWA]." (Dkt. No. 580 at 69:5-24).

In a second example, Plaintiff introduced letters from Trinity to the Vermont and Florida Departments of Transportation again certifying that the ET-Plus as sold was an exact match to the article tested, disclosed

to the FHWA, and approved. In the Vermont DOT letter, dated February 17, 2006, Trinity claimed that:

> The ET-2000 and the ET-Plus with HBA that are currently being furnished to the state of Vermont Agency of Transportation is identical in composition and test properties as approved by the FHWA.

(PX-959 (emphasis added)); (Dkt. No. 580 at 71:20-72:3). In the Florida DOT letter, dated September 28, 2007, Trinity claimed that:

> There have been no major design changes that would affect the acceptance status with the FHWA. The FHWA has accepted the use of each of these products for use on the national highway system as a TL-3 product when such use is requested by a highway agency.

(PX-962 (emphasis added)); (Dkt. No. 580 at 72:13-73:7). Mr. Mitchell then confirmed that Trinity provided certifications of the FHWA acceptance and NCHRP Report 350 compliance through a host of certification documents provided to the states and to the purchasers of ET-Plus units. (Dkt. No. 580 at 69:25-71:17); *see also* (Dkt. No. 579 at 139:18-142:15 (testimony of Mark Stiles admitting that Trinity must certify the ET-Plus as approved by the FHWA in order to obtain reimbursement from the government, confirming that Trinity "provides a [NCHRP Report 350] certification when it sells an ET-Plus for a federally reimbursed highway," and identifying several such confirmations sent by Trinity)).

The certifications recited above were, admittedly, false. *See* (Dkt. No. 580 at 71:18-76:10). Even if Trinity

had not admitted as much, the evidence recited above with respect to the several undisclosed changes to the ET-Plus provides the jury with substantial evidence from which to conclude that Trinity's post-2005 certifications of the ET-Plus as FHWA approved and NCHRP Report 350 compliant were false. Further, and as discussed below, Harman introduced substantial evidence that, not only did Trinity make such false certifications to its customers and state departments of transportation, it did so knowingly.

iii. Trinity's False Statements and Fraudulent Conduct Were Neither "Debatable" Nor Matters of "Good Engineering Judgment."

Trinity also argues that the jury's verdict cannot stand because the allegations regarding its statements and conduct "were subject to legitimate dispute and could not be objectively false." (Dkt. No. 596). This argument lacks merit.

As discussed above, substantial evidence supports the jury's verdict that Trinity consciously decided to: (1) modify the dimensions and properties of the ET-Plus in at least the six ways described above; (2) conceal such modifications from the FHWA; and (3) nevertheless certify to its customers and state departments of transportation that the ET-Plus units sold beginning in 2005 were "identical in composition and test properties" and had "essentially the same chemistry, mechanical properties, and geometry" as the "standard" ET-Plus tested in 1999. (PX-959); (Dkt. No. 580 at 69:5-24). However, through the President of Trinity Highway Products, Greg Mitchell, Trinity admitted at trial that such certifications were false. (Dkt. No. 580 at 48:12-25, 71:18-76:10).

Nevertheless, Trinity argues that it was not possible for the jury to have found that Trinity made any false statements because: (1) NCHRP Report 350 allows for design changes to roadside hardware; and (2) in making such "design changes," Trinity merely acted on the recommendations and "good engineering judgment" of Texas A&M. (Dkt. No. 596 at 16).

However, Harman introduced substantial evidence showing that Trinity—not Texas A&M—made the decision to modify the ET-Plus, conceal such modifications, and falsely certify that the ET-Plus units had been accepted by the FHWA. For example, Harman introduced an internal Trinity email exchange in which Trinity employees:

- discussed "pushing to change the ET to the 4" channel";
- considered the potential cost savings associated with that change;
- indicated that Trinity was "feeling we could make this change with no announcement"; and
- directed a Trinity employee to "start talking to [Texas A&M] about this."

(PX-133). Trinity's attempts to shield itself at the expense of Texas A&M are not only wholly self-serving, but also well beyond what the evidence supports.

Moreover, Harman introduced substantial evidence that the decisions outlined above were not based on "engineering judgment"—good or otherwise—from any source. Wade Malizia, the Trinity employee who claimed to have made the "prototype" ET-Plus used in

the 2005 crash tests,[7] also testified that he was not an engineer and that he received no guidance whatsoever from engineers at Trinity or Texas A&M on how to construct the "prototype" ET-Plus that was allegedly tested. (Dkt. No. 576 at 77:17-83:20). Mr. Malizia further testified that the only changes he made to the "prototype" ET-Plus involved the substitution of the 4-inch guide channel in place of the standard 5-inch channel. (*Id.* at 78:4-8). Mr. Malizia makes no mention of other changes made to the modified 4-inch ET-Plus units sold beginning in 2005 (*e.g.*, the narrowed exit gap).[8]

In the face of such substantial evidence, Trinity relies on conclusory and uncorroborated testimony from employees of Texas A&M, claiming that it was Texas A&M—not Trinity—that determined what changes to make to the ET-Plus and what changes to disclose to the FHWA. *See* (Dkt. No. 578 at 6:3-17, 57:5-58:24 (Dr. Roger Bligh)); (Dkt. No. 581 at 156:12-158:14, 181:24-182:2 (Dr. Eugene Buth)). However, those same Texas A&M employees testified that they:

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[7] Malizia also participated in the email exchange introduced as PX-133.

[8] Greg Mitchell, President of Trinity Highway Products, admitted before the jury that none of the other 2005 changes between the standard ET-Plus and the modified ET-Plus (*i.e.*, the narrowing of the exit gap from 1.5-inch to 1-inch, the change in the length, the change in the vertical height, or the change in the weld) were disclosed by Trinity to the FHWA prior to the time of trial. *See* (Dkt. No. 580 at 50:7-15 (Mitchell testifying that it was true that he did not disclose to Nick Artimovich that Trinity "had changed the length of" the ET-Plus, "changed the vertical height" or "changed the weld")).

- gave no direction to Mr. Malizia with respect to the construction of the "prototype," (Dkt. No. 578 at 7:4-6);
- transmitted no drawings to Trinity illustrating the alleged design changes made at Texas A&M, (Dkt. No. 578 at 6:18-20, 7:25-8:2); and
- took no measurements of the "prototype" and failed to otherwise document what was actually tested in 2005, (Dkt. No. 578); (Dkt. No. 581).

The same employees admitted that they never conducted a single test on the modified ET-Plus—be it a computer simulation, full-scale crash test, or anything in between—at any time before or after being made aware of Harman's allegations. *See, e.g.*, (Dkt. No. 578 at 30:22-32:18). Further, the same employees admitted to having an enormous financial stake in the continued sale of the modified ET-Plus. In fact, both Dr. Bligh and Dr. Buth acknowledged personally receiving millions of dollars directly attributable to the sales of the modified ET-Plus. *See* (Dkt. No. 577 at 164:10-168:24 (Bligh)); (Dkt. No. 581 at 172:3-10 (Buth)).

The jury was free to weigh such competing evidence, judge the credibility of the witnesses, and determine the veracity of the testimony presented. After considering such evidence, and after being instructed that they could render a verdict against Trinity only if they found that the company made or used a record or statement that it knew to be "untrue when made or when used," (Dkt. No. 584 at 42:16-43:5), the jury rendered a unanimous verdict finding that Trinity violated the FCA. The Court must infer that, in doing so, the jury rejected Trinity and Texas A&M's

statements as untrue and/or not credible. This Court is persuaded that substantial evidence supports both such determinations and the jury's verdict finding that Trinity made false statements and engaged in fraudulent conduct in violation of the FCA.

B. Substantial Evidence Supports the Jury's Verdict That Trinity Knowingly Made False and Fraudulent Statements

Trinity also argues that the Court should overturn the jury's verdict that Trinity violated the FCA because Harman introduced legally insufficient evidence to show that Trinity acted with actual knowledge that its claims were false or with reckless disregard as to the truth of such claims. (Dkt. No. 596 at 16). More specifically, Trinity argues that:

(1) "the evidence conclusively establishes that [Texas A&M's] omission of the detailed drawing [of the modified 4-inch ET-Plus, from the 2005 report] was an innocent mistake"; or, alternatively,

(2) Trinity cannot have knowingly submitted false or fraudulent statements because of its "reasonable reliance on the expert advice of the ET-Plus designers, the engineers at [Texas A&M]."

(Dkt. No. 596 at 17).

Both Trinity's "innocent mistake" and "blame-Texas A&M" arguments lack merit. As discussed above, Harman introduced ample evidence that Trinity—not Texas A&M—made the decision to modify the ET-Plus "without announcement." (PX-133). It was Trinity that decided to conceal that change from the FHWA (and

others, including its customers and state DOTs), and it was Trinity that falsely certified that the secretly modified ET-Plus had been accepted by the FHWA. *Supra* at section IV.A.; *see also, e.g.*, (PX-133); (Dkt. No. 576 at 69-140); (Dkt. No. 578); (Dkt. No. 581 at 125-233). Further, Harman introduced substantial evidence that Trinity made this decision out of a desire to reduce its costs and increase its sales. *See, e.g.*, (PX-133).

The jury was wholly free to evaluate for itself the credibility of Trinity's and Texas A&M's claims that they made an "innocent mistake," as well as Trinity's transparent effort to throw Texas A&M under the bus. Likewise, the jury was equally free to reject these claims as false in the face of the substantial, contrary evidence introduced by Harman. In light of the jury's verdict that Trinity "knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim," (Dkt. No. 570), the Court must infer that the jury concluded that Trinity attempted to deceive the FHWA, as well as its customers, state DOTs, and the public. Trinity cannot avoid liability for that deception merely because it argued at trial that the modifications to the ET-Plus were matters of "good engineering judgment." *See United States v. Aerodex, Inc.*, 469 F.2d 1003, 1005 (5th Cir. 1972) (citing *United States v. Nat'l Wholesalers*, 236 F.2d 944 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957) ("The mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of liability if it can be shown that they attempted to deceive the government agency").

C. Substantial Evidence Supports the Jury's Verdict That Trinity's False Statements Were Material

Trinity argues that Harman failed to introduce legally sufficient evidence to support the jury's verdict that Trinity's false statements were material to a demand for payment by the U.S. government. To support this argument, Trinity relies on *United States ex rel. Steury v. Cardinal Health Inc.*, 735 F.3d 202, 207 (5th Cir. 2013), which held that, in order to recover for false certifications of compliance with federal statutes, regulations, or contract provisions, the plaintiff must show that such false certifications were "prerequisites" to payment by the federal government. Trinity then argues that "Harman has no such proof" (Dkt. No. 596 at 14). This assertion is nothing short of incredible. At trial, the president of Defendant Trinity Highway Products—Greg Mitchell—testified directly to the jury that Trinity was required to certify that the products sold for use on the National Highway System had "essentially the same chemistry, mechanical properties, and geometry as that submitted for acceptance [to the FHWA]" and that it "would meet the crashworthiness requirements of the FHWA and the NCHRP Report 350." (Dkt. No. 580 at 69:5-24); (PX-173); (PX-216). Mr. Mitchell emphasized that such certification was essential for Trinity to sell the ET-Plus:

> Q. You have to certify in writing to every single state in this country that that product has been disclosed and approved by the FHWA in accordance with NCHRP 350 in order for there to be federal reimbursement for the purchase of that product; is that not correct?
>
> A. Oh, that's absolutely correct.

(Dkt. No. 580 at 137:4-9); *see also* (*id.* at 70:19-71:15). Mark Stiles, a former Vice President of Trinity Industries, confirmed that such certifications were (and remain) necessary for Trinity to obtain payment:

> Q. You understand, sir, that in order for a state to get reimbursed for the purchase of an ET-Plus that the configuration of the ET-Plus must be disclosed and approved to the FHWA. You're aware of that, aren't you?
>
> A. Yes.

(Dkt. No. 179 at 148:12-16). The record supports the jury's conclusions that Trinity falsely certified the modified ET-Plus sold beginning in 2005 as having been accepted and approved by the FHWA. At trial, Trinity admitted that it could not sell the ET-Plus without such certifications and that they were pre-requisites to reimbursement by the federal government. Accordingly, even under Trinity's interpretation of the law, substantial evidence supports the jury's verdict. For Trinity to argue that there is no evidence that such false certifications were material, in the face of their own witnesses' testimony, makes the Court wonder about Trinity's underlying candor.

D. Trinity's Claim That Omissions Are Not Actionable Under the FCA Is Both Incorrect and Irrelevant

In addition to the arguments above, Trinity contends that Harman cannot identify a false record or statement under the FCA because Harman's case was based on Trinity's failure to disclose information to the FHWA (*e.g.*, the failed crash tests run on the ET-Plus in a flared configuration). *See* (Dkt. No. 596 at 13-14);

(Dkt. No. 615 at 11). Trinity's arguments must fail in the face of numerous Courts of Appeals decisions which have held that omissions can constitute false claims for purposes of liability under the FCA. *See United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008); *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006); *United States ex rel. Berge v. Bd. of Trs. of Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997). Further, and even though the Fifth Circuit has not addressed this issue squarely, Harman introduced substantial evidence that Trinity committed fraud by both omission and commission. *See supra* at section IV.A.; *see also, e.g.*, (PX-133); (Dkt. No. 576 at 69-140); (Dkt. No. 578); (Dkt. No. 581 at 125-233). Accordingly, Trinity's argument is not persuasive.

E. Substantial Evidence Supports the Jury's Verdict That Trinity's Knowingly False Statements Caused the Government to Pay Out Money in the Amount of $175,000,000

Damages under the FCA are calculated under the "benefit of the bargain theory," meaning that the loss suffered by the government is measured by the difference between the amount the government bargained to receive and the value of the product or services the government actually received. *See United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972) (describing measure of FCA damages as the "difference between what the government paid and what it should have paid" absent the false statement). Accordingly, "to establish damages, the government must show not only that the defendant's false claims caused the government to make payments that it would have otherwise withheld, but also that the performance the government received was worth less than what it

believed it had purchased." *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1279 (D.C. Cir. 2010); *see also United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 87 (2d Cir. 2012) ("In most FCA cases, damages are measured as they would be in a run-of-the-mine [sic] breach-of-contract case—using a 'benefit-of-the-bargain' calculation in which a determination is made of the difference between the value that the government received and the amount that it paid.").

At trial, Harman argued that Trinity issued 16,771 false claims between March 6, 2006, through the end of 2013; that during that time, the U.S. government paid $218,003,273 to reimburse states for purchases of ET-Plus units made in reliance on those false claims; and that the modified ET-Plus units—which had not been disclosed to, or approved by, the FHWA—had no ascertainable value other than as scrap metal. Accordingly, Harman argued that the appropriate measure of damages in this case was the $218,003,273 paid in reliance on Trinity's false claims or, alternatively, $175,037,890 (the money paid, offset by the scrap value of the modified ET-Plus units). To support these allegations, Harman relied on the testimony of his damages expert, William Chandler.

More specifically, Mr. Chandler testified that Trinity sells the vast majority of its ET-Plus units to contractors, who in turn bill state DOTs for the costs associated with purchasing and installing the ET-Plus on the nation's highways. (Dkt. No. 579 at 159:15-161:11). Mr. Chandler further testified that the federal government then reimburses the states for between 80% and 100% of such costs. (*Id.* at 161:17-162:6); *see*

also (*id.* at 139:12-140:4 (testimony of Mark Stiles confirming Trinity's understanding that the states bear the costs of installing roadside hardware and are reimbursed by the federal government)). Using the lower bound of that reimbursement rate (80%), Mr. Chandler calculated the $218,003,273 figure recited above. (*Id* at 158:2-20).

In the motion before the Court, Trinity attacks Mr. Chandler's analysis on two fronts: (1) Trinity argues that Chandler's testimony cannot support the jury's verdict because he failed to trace the precise amount that the federal government actually paid for modified ET-Plus units during the relevant time period; and (2) Trinity argues that Chandler's conclusion that the government received no value (or merely scrap value) from the modified ET-Plus units is based solely on an assumption.

i. Trinity Cannot Escape Liability Simply Because a Perfect Measure of Damages Is Difficult or Impossible to Determine

With respect to the first point, Trinity demands a level of proof that would be nearly impossible for any plaintiff to obtain within the realistic constraints imposed by the litigation process. This is, clearly, why Trinity argues for such onerous precision. However, the courts have consistently explained that the computation of damages need not be performed with mathematical precision but, rather, may be based upon a reasonable estimate. *See, e.g.*, *United States v. Killough*, 848 F.2d 1523, 1531 (11th Cir. 1988) (upholding damages award in an FCA case based on the aggregate price of 1,182 mobile home set-ups despite defendants' argument that each set-up involved unique

circumstances); *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997) (upholding damages award in an FCA case in which a liability determination based on the government's selection of 200 claims associated with seven patients was extrapolated to over 8,000 claims submitted by defendants); *G.M. Brod & Co. v. US. Home Corp.*, 759 F.2d 1526, 1538 (11th Cir. 1985) ("The fact that such damages are difficult to measure and by their nature are uncertain in amount does not render such damages unrecoverable . . . this is particularly true where a party breaches his contract and seeks to escape liability merely because it is impossible for the other party to state or prove a perfect measure of damages." (internal quotations omitted)); *accord Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 45 (5th Cir. 1972); *Faulk v. United States*, 198 F.2d 169, 172 (5th Cir. 1952); *see also Lee Shops, Inc. v. Schatten-Cypress Co.*, 350 F.2d 12, 18 (6th Cir. 1965) (holding the same in a breach-of-contract case).

Again, this is particularly true where the offending party "seeks to escape liability merely because it is impossible for the other party to state or prove a perfect measure of damages." *U.S. Home Corp.*, 759 F.2d at 1538 (internal quotations omitted). In this case, Trinity represented throughout discovery that it kept no records regarding the reimbursements actually paid by the federal government and could not possibly respond to discovery seeking a calculation of such reimbursements. *See, e.g.*, (Dkt. No. 665 at 46:12-18). Trinity averred such ignorance despite admitting that FHWA acceptance and federal reimbursement are necessary to generate Trinity's sales of the ET-Plus. *See, e.g.*, (Dkt. No. 179 at 148:12-16); (Dkt. No. 580 at 70:19-71:15, 137:4-9). Moreover, Trinity actively

opposed virtually every attempt by the Plaintiff to obtain discovery in this case—going so far as to violate this Court's orders compelling production. *See* (Dkt. No. 526 at 48:17-53:12 (transcript of the Court's order sanctioning Trinity for failing to comply with the Court's previous orders compelling production)). In this context, Trinity cannot escape liability simply because Harman was unable to introduce evidence tracing exact dollar amounts of reimbursements for the ET-Plus units sold as a result of Trinity's false statements.

In the absence of any data from Trinity regarding the total reimbursements for ET-Plus units, Harman (through Chandler) was required to make reasonable estimates, based on the best available data. *Krizek*, 111 F.3d at 938; *Killough*, 848 F.2d at 1532; *Faulk*, 198 F.2d at 172-173. Chander did so, using Trinity's sales data, federal highway statistics, and other government data concerning state highway expenditures and the overall reimbursement rates for federal highway products. (Dkt. No. 579 at 157:11-172:1, 173:19-176:17). Where a range of values was available to Chandler, he used the lower, more conservative figures. *See, e.g.*, (Dkt. No. 579 at 171:8-1).

ii. Chandler's Assumption That the Modified ET-Plus Would Have No Ascertainable Market Value Was Justified Under the Controlling Law and Verified by Trinity's Own Testimony

As discussed above in the context of scienter, this case is most closely analogous to the facts in *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972). In that case, the defendant contracted to sell certain

aircraft parts to the U.S. Navy, specifically 300 master rod bearings, for $90.00 each. *Id.* at 1005. However, the defendant failed to provide the bearings called for in its contract, instead substituting other bearings which were reworked so that they would appear indistinguishable from the items called for in the contract. *Id.* at 1006. The *Aerodex* defendant argued that it could not have acted with the requisite intent to "cheat" the government because the substitute products were "interchangeable" with those called for under the contract. *Id.* at 1007. The Fifth Circuit rejected this argument, instead holding that "[t]he mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of liability if it can be shown that they attempted to deceive the government agency." *Id.* at 1005 (citing *United States v. Nat'l Wholesalers*, 236 F.2d 944 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957)).

The Fifth Circuit then calculated the actual damages owed in that case (under a prior version of the FCA) for the entire cost of the bearings, holding that:

> We think that a proper application of [the FCA as codified at the time] limits the government's claim to the amount that was paid out by reason of the false claim. We treat the matter as if the claims for $27,000 for P/N 171815 bearings were false because those bearings were never delivered. The government paid $27,000 for bearings it did not receive. This amount must be doubled, and the $2,000 statutory penalty must be added for each of the three invoices.

Id. at 1011 (emphasis added).

In this case, Harman introduced substantial evidence that Trinity substituted modified ET-Plus units in place of those approved for use on the federal highway system and for reimbursement; that Trinity concealed those modifications; and that Trinity knowingly (and falsely) certified that the modified ET-Plus units were in fact identical to the original models. *See supra* at sections IV.A and IV.B. Even if the Court were to assume that the modified ET-Plus units were "interchangeable" with the originals—contrary to the substantial evidence introduced at trial and the Court's obligation to view that evidence in favor of the jury's verdict—*Aerodex* permits the jury to award damages for the full purchase price attributable to the false claims for reimbursement for ET-Plus units sold from 2005 through 2013, without any offset for any value attributable to the non-compliant ET-Plus units.

This case is also analogous to the facts of *United States v. National Wholesalers*, 236 F.2d 944 (9th Cir. 1956). In that case (which is cited in *Aerodex*), the defendant contracted to deliver certain Delco-Remy generator regulators to the U.S. Army. *Id.* at 945. However, the defendant was unable to acquire the Delco-Remy generators called for in the contract, and so it substituted other generators and attached "spurious Delco-Remy" labels to them. *Id.* at 946. After reviewing the record and the trial court's order, the Ninth Circuit held that liability attached, despite the fact that the substitute generators performed to specifications, and rendered judgment awarding damages in the amount of the purchase price for the 6,600 regulators at issue. *Id.* at 951.

Finally, Mr. Chandler's assumption—that the modified and undisclosed ET-Plus units which were installed on the national highway system had no ascertainable value—was validated by Trinity at trial. Indeed, Trinity repeatedly admitted that it could not sell the ET-Plus without a certification that the device was approved and accepted by the FHWA. *See, e.g.*, (Dkt. No. 580 at 70:19-71:15, 137:4-9); (Dkt. No. 179 at 148:12-16).

Ultimately, the jury awarded $175,000,000 in damages to the U.S. government (Dkt. No. 570). This figure is almost precisely the $175,037,890 that represents Chandler's calculations for the amount of reimbursements made in reliance on Trinity's false statements, less the scrap value of the modified ET-Plus units. Having heard testimony from Trinity that there was no viable market for ET-Plus units that were not accepted by the FHWA, the jury was free to award such damages, and the evidence before the jury supports such an award.

V. Analysis—Southland

In addition to challenging the sufficiency of the evidence introduced at trial, Trinity also contends that the Court must overturn the jury's verdict and grant JMOL in its favor because the FHWA has at all relevant times "confirmed" that the ET-Plus is eligible for federal reimbursement. According to Trinity, the FHWA's actions mean that—as a matter of law—Trinity's various certifications asserting that the ET-Plus was eligible for federal reimbursement cannot constitute "false" statements under the FCA. *See* (Dkt. No. 596 at 3-6); (Dkt. No. 61). In making this argument, Trinity relies almost exclusively on a 2003 decision by

the Fifth Circuit, *United States v. Southland Management Corp.*, 326 F.3d 669, 676 (5th Cir. 2003) (*en banc*) (hereinafter, *Southland*).

Trinity's reliance on *Southland* is misguided. As the Court explains in detail below, the facts in this case are clearly distinguishable from those at issue in *Southland*, and nothing in the *Southland* decision conflicts with the jury's verdict that Trinity knowingly violated the FCA.

A. The Fifth Circuit's *Southland* Decision Is Distinguishable.

In *Southland*, the defendants executed an agreement with the U.S. Department of Housing and Urban Development (HUD). Under the HUD agreement, as well as a separate "HAP Contract," the defendants agreed to purchase and rehabilitate an abandoned apartment complex in order to provide affordable housing to low-income families. *Southland*, 326 F.3d at 671-72. The defendants further agreed to keep the apartment building "in good repair and condition" and to "maintain the [property] . . . to provide Decent, Safe, and Sanitary housing." *Id.* In exchange, HUD guaranteed the defendants' mortgage and agreed to subsidize tenants' rent payments to the defendants. *Id.* at 672. Under the HAP Contract, the *Southland* defendants were required to submit monthly reports (known as "HAP vouchers") certifying that the apartments were in the required "Decent, Safe, and Sanitary condition." *Id.*

The property at issue in *Southland* deteriorated in the mid to late 1990s, and by 1996, the property received the lowest possible rating in HUD inspections. *Id.* at 673. By 1997, the *Southland* defendants were

unable to continue making mortgage payments on the property and surrendered the property to HUD. *Id.* The United States subsequently brought an action against the *Southland* defendants under the FCA, alleging that nineteen HAP vouchers submitted by defendants falsely certified that the property was "decent, safe, and sanitary." *Id.* at 674. The United States further argued that each such certification constituted a false claim for payment and/or a false statement under 31 U.S.C. § 3729(a). *Id.*

The United States District Court for the Southern District of Mississippi disagreed and granted summary judgment in favor of the *Southland* defendants. *Id.* at 677. On appeal, the Fifth Circuit affirmed the district court's opinion. *Id.* at 677. After granting *en banc* review, a majority of the Court noted that the contract between the *Southland* defendants and HUD expressly "spelled-out" the mechanism for controlling the abatement of payment, avoiding the need to enforce the condition of the property through the FCA. *Id.* at 675.

The Court's majority further emphasized that HUD conducted multiple management reviews and their own physical inspections of the property at issue; engaged in extensive exchanges with the defendants with respect to the deteriorating state of that property; and, nevertheless, knowingly elected to continue payments under the contract in an effort to salvage the property. *Id.* at 673-74, 677. The majority of the Court held that such "undisputed conduct and exchanges by and between the parties during this entire period demonstrates, not only that the vouchers were promptly paid, but that all parties regarded them as entitled to be paid." *Id.* at 677. In the concurring opinion, the concurring

members of the Court further emphasized that the evidence in *Southland*:

> positively demonstrates beyond reasonable question that at the time of defendants' submission of the challenged vouchers and HUD's approval of those vouchers, HUD, based on its own annual inspections of the property, knew full well of the very conditions of the property which it now claims made the property not "decent, safe, and sanitary."

Id. at 683 (emphasis added). Based on the express terms of the contract and that undisputed course of conduct between the parties, the *Southland* Court held that the defendants were entitled to the payments they received. Accordingly, the nineteen HAP vouchers submitted by the defendants could not constitute false claims under the FCA. *Id.* at 675-77.

B. The Facts of This Case Are Materially Different than Those at Issue in *Southland*

In this case, Trinity argues that the FHWA's June 17, 2014, letter[9] constitutes a formal pronouncement by the government that the ET-Plus is—and at all relevant times has been—eligible for reimbursement. Trinity then contends that this letter alone mandates that its certifications of such eligibility cannot constitute "false" claims under the FCA. (Dkt. No. 596 at 2-6). In making this argument, Trinity ignores the fact that:

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[9] Defendants' Exhibit 2 (DX-02).

i. the FHWA's June 17 letter was "based upon all of the information available to the agency," which included incomplete, misleading, and even false information provided by Trinity; and

ii. no contract or course of conduct exists between the FHWA and Trinity that might "spell-out" the mechanism for determining the validity of claims for, or payment for, ET-Plus units or indicate that the government approved the undisclosed modifications to the ET-Plus.

i. The FHWA's June 17, 2014, Letter Was Based on Incomplete, Misleading, and Even False Information.

The FHWA's June 17 letter—upon which Trinity bases virtually its entire argument—states as follows:

> The Office of Safety has received inquiries from FHWA Division Offices and State DOTs regarding the Federal-aid eligibility of the ET-Plus w-beam guardrail end terminal manufactured by Trinity Highway Products (Trinity). Our September 2, 2005 letter (FHWA No. CC-94) to Trinity is still in effect and the ET-Plus w-beam guardrail end terminal became eligible on that date and continues to be eligible for Federal-aid reimbursement.

(DX-02). The letter further states that:

> On February 14, 2012, Trinity confirmed to FHWA that the reduction in the width of the guide channels from 5 inches to 4 inches was

> a design detail inadvertently omitted from the documentation submitted to FHWA. Additionally, Trinity confirmed that the company's ET-Plus end terminal with the 4-inch wide guide channels was crash tested to the relevant crash test standards (NCHRP Report 350) at the Texas Transportation Institute (TTI) in May 2005. TTI also confirmed this information on February 14, 2012. Therefore, based upon all of the information available to the agency (including a re-examination of the documentation from ET-Plus crash tests), FHWA validated that the ET-Plus with the 4 inch guide channels was crash tested in May 2005. The FHWA confirmed this information in correspondence dated October 11, 2012 to State departments of transportation in Illinois, New Hampshire, and South Carolina, and reiterated that confirmation on January 10, 2013 in a letter to AASHTO.

(*Id.* (emphasis added)).

This letter, which issued on the eve of the first trial in this action, is the first communication from the FHWA to identify the change from a 5-inch to a 4-inch guide channel. (*Id.*) On its face, the June 17 letter merely recites Trinity's representations that an ET-Plus with a 4-inch guide channel was crash tested in 2005, and based on those representations, the government concludes that "[t]he Trinity ET-Plus with 4-inch guide channels became eligible for Federal reimbursement under FHWA letter CC-94 on September 2, 2005." (*Id.*)

As described above, that 2005 letter, which is incorporated into the June 17, 2014, letter:

- expressly listed the seven modifications covered by the change in guardrail height from Trinity's 2005 test report—none of which involved a change from the standard 5-inch ET-Plus to the modified 4-inch ET-Plus;
- expressly limited the 2005 approval to "[t]he modifications described above";
- referred to the tested ET-Plus units as the "ET-Plus 31"; and
- excused Trinity from completing a full series of NCHRP Report 350 crash tests because "the original designs [*i.e.*, the standard 5-inch ET-Plus unit] for attachment to standard W-beam guardrail have proven to be crashworthy."

(PX-173).

However, at trial Plaintiff introduced substantial and often uncontroverted evidence that Trinity made significant modifications to the ET-Plus in 2005—only one of which was the change to a 4-inch guide channel—and that Trinity failed to disclose any of those modifications to the FHWA at any time prior to 2012. *See, e.g.*, (Dkt. No. 580 at 32:12-20 (testimony of Greg Mitchell, on behalf of Trinity, admitting that "several" changes were made to the ET-Plus in 2005, none of which were reported to the FHWA)); (Dkt. No. 580 at 50:7-24 (testimony of Greg Mitchell further admitting that Trinity failed to disclose various changes to the ET-Plus at any time)); (Dkt. No. 581 at 214:7-12 (testimony of Dr. Eugene Buth, on behalf of Texas A&M, admitting that changes to the ET-Plus were not

disclosed to the FHWA until 2012, if at all)); (Dkt. No. 577 at 125:25-126:15 (testimony of Nick Artimovich, on behalf of the FHWA, stating that the agency first became aware of certain changes to the ET-Plus in 2012)).

Moreover, even if the Court accepts as true Trinity's claims that it crash tested an ET-Plus with a 4-inch guide channel in 2005 and disclosed the change from a 5-inch to a 4-inch channel sometime after 2012, this was but one of the changes made to the modified ET-Plus. *See supra* section III. Trinity admitted that other changes, such as the narrowed exit gap and extended throat inlet, remained undisclosed at least through the trial in this action. *See, e.g.*, (Dkt. No. 580 at 50:7-16 (testimony of Greg Mitchell admitting that several of the changes to the ET-Plus were not disclosed to the FHWA)).

ii. No Contract or Course of Conduct Governs the Eligibility of the ET-Plus or Trinity's Entitlement to Payments from the Federal Government

In *Southland* the Fifth Circuit determined that the contract between HUD and the defendants "spelled out [the mechanism] for controlling the abatement of the payments, and the entitlement of the Owners, when the condition of the property deteriorates." *Southland*, 326 F.3d at 675. The Fifth Circuit also held that the defendants made no "false" claims under the FCA because HUD, through its own inspections, was fully aware that the apartments were out of compliance with the relevant regulations, but had nonetheless agreed to make payments during the corrective action period. *Id.* at 677. The Court concluded that the contractual

relationship between the *Southland* defendants and HUD, as well as the "undisputed conduct and exchanges between the parties"—which included repeated inspections of the subject property by HUD—precluded FCA liability in that case. *Id.* at 677.

In the concurring opinion, which Trinity primarily relies on, the concurring members of the Fifth Circuit further emphasized that:

- HUD "knew full well of the very conditions of the property" that led to the allegedly false claims;
- this was true "at the time of defendants' submission of the [allegedly false claims]"; and
- it was "based on its own annual inspections of the property."

Id at 683 (emphasis added). The Court also noted that:

- "HUD was aware that this project was deteriorating for several years preceding its foreclosure";
- "[t]he types of problems emphasized by the government as creating substandard living conditions were not hidden defects"; and
- "HUD's policy of approving continued subsidy payments notwithstanding the project's declining condition was based not on its ignorance of the true condition but upon the imperative to provide housing for the tenants."

Id. (emphasis added). In other words, despite such contemporaneous and personal knowledge that the claims at issue in that case could be considered false, HUD nevertheless consciously decided to continue

payments under the contract that governed the agency's relationship with the defendants. *Id* at 675-77, 83.

The facts of the case at bar stand in clear contrast to those at issue in *Southland*. There is no contract between Trinity and the FHWA that might provide a vehicle for resolving Trinity's false claims in this case. Also, and unlike *Southland*, there is no indication that Trinity communicated their compliance issues to the government or sought its help in addressing them at any time before the jury rendered its verdict. *See supra* at section IV.A. To the contrary, Harman introduced substantial evidence at trial that Trinity withheld material information regarding the ET-Plus units, concealed substantial modifications to the standard ET-Plus unit that was tested and originally approved by the FHWA, and falsely certified that the ET-Plus units were compliant. *Id*.

Further, nothing in this case approaches the multiple management reviews and personal physical inspections of the property that the *Southland* Court expressly relied on in finding that the government (through HUD) knew of those defendants' otherwise false statements and, nevertheless, elected to continue payments. *Southland*, 326 F.3d at 673-74, 677. The FHWA did not participate in any investigation into the modification of the ET-Plus or the veracity of Trinity's claims that the ET-Plus was eligible for federal reimbursement until after the jury rendered its verdict. Despite Trinity's conclusory arguments regarding the FHWA's "investigation," the substantial and un-rebutted evidence introduced at trial established that none of the modifications were disclosed prior to 2012; many of the modifications were not disclosed at any time before the trial; and no testing of any kind

was done to evaluate the modifications that were made. *See, e.g.*, (Dkt. No. 580 at 32:12-20, 50:7-24 (Trinity admitting that "several" changes were made to the ET-Plus in 2005, none of which were reported to the FHWA)); (Dkt. No. 581 at 214:7-12 (Texas A&M admitting that changes to the ET-Plus were not disclosed to the FHWA until 2012, if at all)); (Dkt. No. 578 at 30:22-34:13 (Texas A&M admitting that no testing was done on the modified ET-Plus units, save the failed "flared" tests—which were not disclosed to the FHWA)).

For these and all the reasons stated herein, *Southland* does not apply, let alone control, in this case, and the FHWA's June 17, 2014, letter cannot constitute an authoritative statement with respect to the acceptance of the modified ET-Plus or its "eligibility" for federal reimbursement between 2005 and 2013.

C. Successful Fraud on a Government Agency Does Not Serve as an Absolute Defense Under the FCA

Trinity argues that any expression of acceptance by a government agency can retroactively grant absolution for such false records or statements and, consequently, deprive the courts of jurisdiction to hear a case under the FCA. (Dkt. No. 596 at 7-10). Further, Trinity argues that this is true even where, as here, there is substantial evidence that the agency's post hoc absolution is obtained through a defendant's fraud. (*Id.*); *see also* (Dkt. No. 437 at 4-5 (arguing that even admitted fraud on the government can serve as a complete defense)).

The False Claims Act expressly prohibits "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). The statute is directed, on its face, to punishing fraud against the government. 31 U.S.C. § 3729 *et seq.*; *see also United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (stating that the FCA "interdicts material misrepresentations made to qualify for government privileges or services." (internal citation and quotation marks omitted)). To hold that successful fraud on the government can bar liability would undercut the FCA completely. Such is all the more evident considering that a failed effort to defraud the government—which presumably would not elicit some expression of acceptance or approval—would offer no protection. In other words, Trinity would have this Court rule, as a matter of law, that successful fraud—but only successful fraud—inoculates the perpetrator of such fraud against liability under the FCA. This Court declines to adopt such a reading, which would effectively turn the FCA on its head.

D. Trinity's and the FHWA's Post-Trial Conduct Is Irrelevant, Outside the Record, and Incapable of Justifying a Collateral Attack on the Jury's Verdict

Trinity makes much of the fact that, following the trial in this action, the FHWA demanded that Trinity submit the modified ET-Plus to a series of crash tests. Such tests and other actions by the FHWA are irrelevant to the status of the modified ET-Plus in 2005, or at any time before such tests commenced. Such post-verdict tests are wholly outside the record

of the trial in this case and cannot be considered by this Court. Such tests, whatever their result, did not exist before the trial and were never before the jury. They cannot constitute any part of this Court's analysis under Federal Rule of Civil Procedure 50(b).

i. The Jury Made the Authoritative Determination That Trinity Made False and Fraudulent Statements in Order to Sell the Modified ET-Plus from 2005 Through 2013

It is undisputed that Trinity: (1) modified the ET-Plus in 2005; (2) failed to disclose those modifications to the FHWA; and (3) nevertheless certified that the FHWA had accepted the modified ET-Plus for use on the highways. *See supra* at section IV. It is a truism that the FHWA cannot have "accepted" changes of which it was not aware. Moreover, there was substantial evidence introduced at trial that Trinity knowingly made such modifications in order to enhance its profits; that Trinity consciously and intentionally omitted any reference to such modifications from its communications with the FHWA; and that Trinity continued to certify the modified devices, knowing those certifications to be false. *See id.* The record, as cited above, establishes a sizeable body of evidence from which a reasonable jury could (and in this case did) reach such conclusions. none of the FHWA's statements or actions taken on the eve of trial (or after trial) can retroactively impact or undermine the jury's verdict.

There is no evidence that the FHWA became aware of any modifications to the ET-Plus until Harman notified the agency of his allegations in 2012. *See* (Dkt. No. 577 at 125:25-126:15). Moreover, there is

substantial evidence that even after 2012, Trinity disputed Harman's claims with the FHWA, such that the FHWA had no clear knowledge of the true facts even after Harman published his claims to the government. A part of Trinity's response to Harman's allegations was also to manipulate and circumscribe the information provided to the FHWA, including by insisting that virtually the entire record in this case remain under seal. As discussed in the Court's Order unsealing the record in this case, neither Trinity nor Texas A&M ultimately established any compelling need for such secrecy. *See* (Dkt. No. 665 (Transcript)); (Dkt. No. 663 (written Order)).

ii. Trinity and the FHWA's Post-Trial Conduct Demonstrate the Inapplicability of *Southland* to the Facts in the Trial Record

Following the trial, the FHWA issued a series of letters concerning the ET-Plus, including a letter issued on October 21, 2014, requiring the Defendants to conduct a series of subsequent crash tests. (Dkt. No. 609-33). While such post-trial communications are not available to be used as a collateral attack on the jury's verdict, they show that the June 17, 2014, letter was anything but an "authoritative" determination by the FHWA under *Southland*. This directive for new crash tests does reveal that the FHWA did not have the same first-hand personal knowledge that HUD had in *Southland*.

Further, the FHWA's post-trial communications required Trinity to provide certain information regarding the test items and procedure. (Dkt. No. 609-56). Among the items Trinity agreed to provide was a confirmation that the modified ET-Plus units are an exact

match to the terminals tested in 2005 on a 31-inch guardrail and subject to the FHWA's September 2, 2005, letter. (*Id.*) Specifically, correspondence between Greg Mitchell, the President of Defendant Trinity Highway Products, and Tony Furst, Associate Administrator for Safety at the FHWA, contained the following exchange (Mr. Furst's request appears in standard text; Mr. Mitchell's response appears in *italicized text*):

> 2) Dimensions.
>
> a. FHWA needs confirmation that the current production unit dimensions of the ET-Plus that are proposed for testing are an exact match to the dimensions tested in 2005 and 2010. *Trinity will provide*.

(Dkt. No. 609-56).

Mr. Mitchell's assertion that "Trinity will provide" confirmation that the modified 4-inch ET-Plus units to be submitted for continuing testing "are an exact match to the dimensions tested in 2005" is directly controverted by the evidence Trinity put forward at trial. In particular, witnesses from Trinity and Texas A&M testified that no measurements were taken of the 2005 test article, no drawings were created to illustrate the dimensions of the test article, and the actual head used in the 2005 testing was destroyed. *See* (Dkt. No. 576 at 82:25-83:20); (Dkt. No. 578 at 6:3-20); (Dkt. No. 580 at 60:4-25); (Dkt. No. 582 at 136:19-137:16); (PX-141). If Trinity can now provide such concrete assurances, then the question must be asked whether they hid information which at trial they claimed did not exist.

> 6) Additional information.

> a. FHWA's letter of 10/21/14 (para. 5 of the attachment) calls for additional information by 11/11/14. In what form should FHWA expect this material to arrive by that date. Trinity will provide the requested information by that date. Given the volume of data (videos, etc.) it will be sent via mail courier. Trinity advised that the R&D crash tests on the flared version of the ET-Plus system were owned by Texas Transportation Institute and FHWA should contact Texas A&M University to acquire those test videos and results.

(Dkt. No. 609-56 at 3). Throughout the trial, Trinity and Texas A&M were represented by the same attorneys. They have been represented by the same attorneys for purposes of the ongoing post-trial proceedings. *See, e.g.*, (Dkt. No. 633 (Notice, filed January 30, 2015, indicating that counsel for Trinity "also continue to represent non-parties Texas A&M University and its member, Texas A&M Transportation Institute")). In this context, Trinity's suggestion to the FHWA that the relevant crash-test videos are not in their custody or control is difficult to accept.[10]

Further, the crash-test videos that Defendants have refused to produce directly to the FHWA were admitted as exhibits during the trial and discussed at length in open court in the presence of the public, including members of the media. (Dkt. No. 578 at 24:8-

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[10] Trinity attempted the same conduct during pre-trial proceedings before the Court, treating Texas A&M as either wholly aligned with Trinity or as a completely independent third party depending on which position was advantageous at the time. *See* (Dkt. No. 533 at 36:21-38:23).

27:22). Nevertheless, both Defendants and Texas A&M filed motions with this Court seeking to prevent public access to those same materials.[11] The Court has previously rejected Trinity's efforts to prevent public access to this information and will not repeat that analysis here. *See* (Dkt. No. 663); (Dkt. No. 665).

The Court is now concerned that Trinity may have withheld information at trial regarding the modified ET-Plus and, specifically, the 2005 tests allegedly run on such end terminals, despite extended discovery fights and multiple orders from the Court to produce all such material.

E. Trinity's Procedural Defenses Lack Merit

Trinity further argues that Plaintiff's FCA claims fail as a matter of law because (1) Plaintiff did not allege in its complaint that the June 17 letter was obtained through fraud; and (2) Plaintiff did not bring a complaint to the FHWA regarding the issuance of the June 17 letter. With respect to the first point, Trinity misunderstands the nature of Plaintiff's claims. The actionable fraud in this case is Trinity's certification that the ET-Plus that it has sold since 2005 was approved by the FHWA. *See, e.g.*, (Dkt. No. 580 at 32:12-20);

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[11] *See* (Dkt. No. 59); (Dkt. No. 598). Defendants and Texas A&M specifically attempt to maintain a seal preventing public access to documents concerning the testing of the modified ET-Plus in a flared configuration. *See, e.g.*, (Dkt. No. 597-2 (Defendant's list of "Document[s] or Excerpt[s] to Remain Sealed," featuring at least six docket entries that Defendants seek to maintain under seal expressly because they concern the "Flared ET-Plus")); (Dkt. No. 598-1 (Texas A&M's list of "Document[s] or Excerpt[s] to Remain Sealed," featuring at least eight docket entries that Texas A&M seeks to maintain under seal expressly because they concern the "Flared ET-Plus.")).

(Dkt. No. 580 at 50:7-24); (Dkt. No. 581 at 214:7). Faced with this evidence, Trinity admitted that its certifications were false and that, without those false certifications, Trinity could not have sold the ET-Plus. (Dkt. No. 579 at 139:12-140); (Dkt. No. 580 at 70:19-76:10, 137:4-9). Harman's allegations that the June 17 letter was obtained through fraud go to the weight that the jury could afford such evidence.

With respect to the second point, the FCA merely requires a *qui tam* relator, like Harman, to provide the government with a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses . . . to give [the government] the opportunity to intervene." *See United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175 (5th Cir. 2004) (internal citations omitted). Such requirements associated with bringing an FCA claim do not impart an ongoing duty to monitor the Defendants' fraudulent activities and replead every specific instance of such fraud. These purely procedural arguments are not persuasive.

VI Conclusion

From 2005 through trial, Trinity certified that the ET-Plus units it sold had been tested and approved in accordance with NCHRP Report 350 standards. As an integral part of such certifications, Trinity represented to its customers; to local, state, and federal governments; and to the driving public that the modified ET-Plus units it was selling "replicated" the standard ET-Plus units it crash tested and submitted for approval to the FHWA in 1999. After a six-day trial, the jury rendered a unanimous verdict that such certifications were false; that Trinity knew that they

were false at the time they made them; and that the knowingly false certifications were material to the government's decision to pay $175,000,000 dollars to reimburse states for modified ET-Plus units sold during the relevant time. For all of the reasons stated above, that verdict is supported by substantial evidence, and the Court finds nothing in the controlling law which compels that the verdict be set aside. Accordingly, Trinity's Renewed Rule 50(b) Motion for Judgment as a Matter of Law (Dkt. No. 596) is DENIED.

So ORDERED and SIGNED this 9th day of June, 2015.

/s/ Rodney Gilstrap
United States District Judge

ORDER OF THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING (NOVEMBER 14, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
EX REL. JOSHUA HARMAN,

Plaintiff–Appellee,

v.

TRINITY INDUSTRIES INCORPORATED;
TRINITY HIGHWAY PRODUCTS LLC,

Defendants–Appellants.

No. 15-41172

Appeal from the United States District Court
for the Eastern Division of Texas

Before: JOLLY, HIGGINBOTHAM, and
GRAVES, Circuit Judges.

PER CURIAM

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Entered for the Court:

/s/ Patrick E. Higginbotham
United States Circuit Judge

* Judge Dennis did not participate in the consideration of the rehearing en banc.

RELEVANT STATUTORY PROVISIONS

§ 3729.—FALSE CLAIMS

(a) Liability for Certain Acts.—

(1) In General.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Public Law 104–410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced Damages.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

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[1] So in original. Probably should be "101–410"

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of Civil Actions.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.—

For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or

to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from Disclosure.—

Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.—

This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§ 3730.—CIVIL ACTIONS FOR FALSE CLAIMS

(a) Responsibilities of the Attorney General.—

The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to Qui Tam Actions.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any

alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam Plaintiff.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[1]

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[1] So in original. Probably should be "General".

Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise

receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions

in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) Government Not Liable for Certain Expenses.—

The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant.—

In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from Retaliatory Actions.—

(1) In General.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any

special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) limitation on Bringing Civil Action.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

§ 3731.—FALSE CLAIMS PROCEDURE

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[1] the Government may file its own complaint or amend

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[1] So in original. Probably should be preceded by "section".

the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

§ 3732. FALSE CLAIMS JURISDICTION

(a) Actions Under Section 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of

multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims Under State Law.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) Service on State or Local Authorities.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

§ 3733.—CIVIL INVESTIGATIVE DEMANDS

(a) In General.—

(1) Issuance and Service.—Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), . . .

DEPOSITION TESTIMONY OF NICHOLAS ARTIMOVICH OF THE FHWA, ENTERED INTO JURY TRIAL, TRIAL TRANSCRIPT (OCTOBER 14, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES OF AMERICA
EX REL JOSHUA HARMAN

v.

TRINITY INDUSTRIES, INC. &
TRINITY HIGHWAY PRODUCTS, LLC

Civil Docket No. 2:12-CV-89 Marshall, Texas

Before: The Honorable Rodney GILSTRAP,
United States District Judge

[Page 136]

Q: [Attorney Wynne P. Kelly]: Now, have they told you anything about the length of the feeder channel, whether it is the same length as the 5-inch was?

A: [Nicholas Artimovich]: That was not a subject of our discussions.

Q: Have they told you anything about the height of the feeder channel, whether that is—is the same height as the 5-inch was?

A: No, sir. We did not cover that topic.

Q: Well, my—my question went specifically to whether or not they disclosed changes in the length of the feeder channel. Is the answer no?

A: The answer is no. Well, I have no recollection of that.

Q: And my second question was, did they disclose any changes in the height of the feeder channel unit?

A: No, sir.

Q: Have there been any disclosures about the height and length of the feeder channel since 2005? Do you have any information about that?

A: I have no information on that.

TRIAL TESTIMONY OF GREGG MITCHELL, PRESIDENT OF TRINITY HIGHWAY PRODUCTS (OCTOBER 16, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES OF AMERICA
EX REL JOSHUA HARMAN

v.

TRINITY INDUSTRIES, INC. & TRINITY
HIGHWAY PRODUCTS, LLC

Civil Docket No. 2:12-CV-89 Marshall, Texas

Before: The Honorable Rodney GILSTRAP,
United States District Judge

[Page 32]

Q. [Attorney George Carpinello] . . . Now, sir—it's a fact, then, sir, that Trinity's position with regard to the reusability has changed significantly since the ET-2000 was put on the record; is that not correct, sir?

A. [Gregg Mitchell] Yes.

Q. Sir, are you aware that the ET-Plus was, in fact, changed in 2005?

A. I am aware, yes.

Q. There were several changes in dimensions that were made to the ET-Plus in 2005; is that correct?

A. Yes, sir.

Q. Now, one of the changes that was made was to go to—from a 5-inch to a 4-inch channel; is that correct, sir?

A. That's correct.

[. . .]

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Q. (By Mr. Carpinello) You're aware, sir, that Trinity dramatically increased its lobbying spending, its paying through lobbyist during this period of time?

A. I'm not aware.

Q. Tell the jury what your lobbyists do, sir?

A. I'm not aware.

Q. Okay.

A. I'm not involved in that process.

Q. You spent nothing on lobbying Congress in 2005, 2006, 2007, 2008, 2009. Under 50,000 in 2010. '11, '12, '13, '14, you're spending goes up dramatically, does it not, sir?

A. It appears so, yes.

Q. Now, it's true, sir, is it not, that the FHWA has made it very clear that if you put a product on the road and you get approval, that you must—you must disclose or certify that the product that you've—you're selling has not changed in any significant degree; isn't that correct, sir?

A. It is correct.

Q. Okay.

MR. CARPINELLO: Could I have P-216, please?

Q. (By Mr. Carpinello) And this is a—this is one of the approval letters dated July 16, 2007, from the FHWA to Trinity, correct, to Mr. Smith?

A. Yes.

MR. CARPINELLO: And could I have Page 2, please? And let's move—I'm sorry, let's move on to Page 3.

Q. (By Mr. Carpinello) Please note the following standard prov—the following standard provisions that apply to the FHWA letters of acceptance.

MR. CARPINELLO: And if we could go down to the one, two, three, four, fifth bullet point.

Q. (By Mr. Carpinello) You will be expected to certify to potential users that the hardware furnished has essentially the same chemistry, mechanical properties, and geometry as that submitted for acceptance. And that will meet—that it will meet the crashworthiness requirements of the FHWA and the NCHRP Report 350. Correct, sir?

A. Yes, sir.

Q. And you did certify—you did certify through all your certification compliance documents that that was, in fact, the case, that from 2005 to today, that it's the same chemistry, mechanical properties, and geometry as that submitted for acceptance; is that correct, sir?

A. Yes, sir.

MR. CARPINELLO: Could I have P-173, please?

Q. (By Mr. Carpinello) This is another acceptance from September 2nd, 2005. This is just a few months after you did—you made the changes, correct, sir? You made the changes in July of 2005, didn't you?

A. Yes.

Q. Okay. So this is just a few months after the changes.

[. . .]

Q. (By Mr. Carpinello) Now, you're aware, sir, that in order to -- for Trinity to -- to sell its products to contractors who would place those contracts on federally reimbursed or subsidized highways that you must provide a certificate, correct, sir?

A. Yes. We do certify that the product we provide them is 350-certified. Yes.

Q. And you were here when I showed those to Mr. Stiles, correct?

A. Yes, sir.

Q. And those are the certificates that Trinity provides, correct?

A. Yes.

Q. Okay. And it's also true that a number of states have what are called qualified products list; is that correct?

A. Yes, sir.

Q. And in order to get on a qualified products list, you have to certify that what you're selling them has been approved by the FHWA, correct?

A. That's correct.

Q. And that it hasn't been changed, correct?

A. Yes.

[. . .]

Q. (By Mr. Carpinello) This is a letter that Trinity sent to the state of Vermont on February 17, 2006, and it says:

> The ET-2000 and the ET-Plus with HBA that are currently being furnished to the state of Vermont Agency of Transportation is identical in composition and test properties as approved by the FHWA and the Vermont Agency of Transportation.

Do you see that, sir?

A. I do.

Q. That was false, correct?

A. In our minds, when this letter was published, it was not false.

Q. But it is false, correct? Not what was in your mind, sir. It is false, correct? Because it wasn't identical.

A. No, it was not identical.

Q. So it is false. Is it false, sir?

A. Yes.

Q. Okay.

[. . .]

Q. No, sir. This is your letter. This is your letter that says there have been no major design changes

that would affect the acceptance status. The FHWA has accepted use of each of these products, but it hadn't accepted it, because you hadn't told them; isn't that true?

A. We had not told them about all the changes at that time. That's correct.

Q. Okay. So it was false, wasn't it?

A. I don't call it false. In our minds at that time, it was correct.

Q. I'm not asking what was in your mind, sir. I'm asking if it's false now as you sit here. You tell the jury whether that was true or false, please.

A. It's not accurate.

Q. It's false. Isn't it false?

A. It's not correct.

[. . .]

Q. (By Mr. Carpinello) This is another letter to the state of Florida, and, again, we see the same representation. There have been no major design changes that would affect the acceptance status with the FHWA.

And that's not correct, right, sir, that the FHWA has accepted it?

A. I'm sorry. Can you ask your question again?

Q. The—the letter is not correct, right? The FHWA had not accepted this, correct?

A. Yes, the letter is not correct.

Q. Okay. How many states before Mr. Harman told the FHWA how many states did you tell about the changes that you made to the ET-Plus?

A. We had told no states about the modifications --

[. . .]

[Page 137]

Q. You have to certify in writing to every single state in this country that that product has been disclosed and approved by the FHWA in accordance with NCHRP 350 in order for there to be federal reimbursement for the purchase of that product; is that not correct?

A. Oh, that's absolutely correct.

[. . .]

TRINITY HIGHWAY SAFETY PRODUCTS INC. EXPRESS CERTIFICATION LETTER TO STATE OF VERMONT (SEPTEMBER 28, 2007)

TRINITY HIGHWAY SAFETY PRODUCTS, INC.

February 17, 2006

Mr. Craig Graham
Research and Development Supervisor
State of Vermont, Agency of Transportation
National Life Building, Drawer 33
Montpelier, VT 05633-5001

Dear Mr, Graham:

The ET-2000 and ET-Plus with HBA that are currently being furnished to the State of Vermont Agency of Transportation is identical in composition and test properties as approved by the Federal Highway Administration and the Vermont Agency of Transportation.

Sincerely,
/s/ Gwendolyn P. Samuels
Marketing Representative

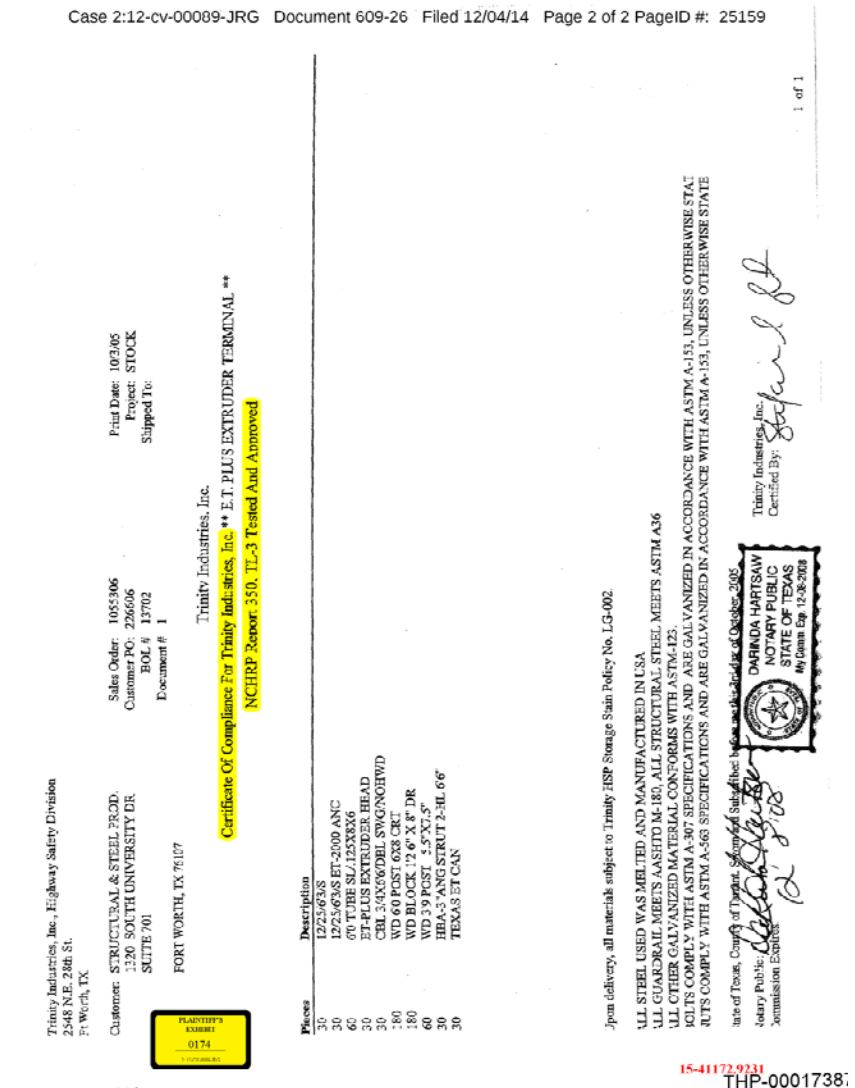
Personally appeared before me this 17th day of February 2006 who being duly sworn on oath, says that she is Marketing Representative, of Trinity Industries, Inc., and that she hereby acknowledges the execution of the-foregoing instrument for and behalf of the corporation and at this special instance and request.

/s/ Angela A. Koleszar

Notary Public
State of Ohio
My Commission Expires
on June 22, 2010

1170 North State Street • Girard. Ohio 44420 •
(330) 645.4373 • FAX (330) 645-3718

CERTIFICATE OF COMPLIANCE FOR TRINITY INDUSTRIES, INC.—NCHRP REPORT 350, TL-3 TESTED AND APPROVED, IMAGE AND TRANSCRIPTION (OCTOBER 3, 2005)



Trinity Industries, Inc., Highway Safety Division
2548 N.E. 28th St.
Ft Worth, TX

Customer: STRUCTURAL & STEEL PROD.
1220 SOUTH UNIVERSITY DR.
SUITE 701
FORT WORTH, TX 76107

Sales Order: 1055306
Customer PO: 256606
BOL # 13702
Document # 1

Print Date: 10/3/05
Project: STOCK
Shipped To:

Trinity Industries, Inc.

Certificate Of Compliance For Trinity Industries, Inc. ** E.T. PLUS EXTRUDER TERMINAL **

NCHRP Report 350, TL-3 Tested And Approved

Pieces	Description
30	12/25/63/S
30	12/25/63/S ET-2000 ANC
60	070 TUBE SL/12SX8X6
30	ET-PLUS EXTRUDER HEAD
30	CBL 3/4X56'/DEL SWG/NOHWD
180	WD 6'0 POST 6X8 CRT
180	WD BLOCK 12'6" X 8" DR
60	WD 3'9 POST 5.5"X7.5"
30	HBA-3 "ANG STRUT 2-HL 6'6"
30	TEXAS ET CAN

Upon delivery, all materials subject to Trinity ISP Storage Stain Policy No. LG-002.

ALL STEEL USED WAS MELTED AND MANUFACTURED IN USA
ALL GUARDRAIL MEETS AASHTO M-180, ALL STRUCTURAL STEEL MEETS ASTM A36
ALL OTHER GALVANIZED MATERIAL CONFORMS WITH ASTM-123.
BOLTS COMPLY WITH ASTM A-307 SPECIFICATIONS AND ARE GALVANIZED IN ACCORDANCE WITH ASTM A-153, UNLESS OTHERWISE STAT
NUTS COMPLY WITH ASTM A-563 SPECIFICATIONS AND ARE GALVANIZED IN ACCORDANCE WITH ASTM A-153, UNLESS OTHERWISE STATE

State of Texas, County of Tarrant, Sworn and Subscribed before me on this 3rd day of October, 2005

Notary Public: [signature]
Commission Expires: 12/28/08

DARINDA HARTSAW
NOTARY PUBLIC
STATE OF TEXAS
My Comm Exp 12-28-2008

Trinity Industries, Inc.
Certified By: [signature]

1 of 1

PLAINTIFF'S EXHIBIT 0174

15-41172.9231

CONFIDENTIAL

THP-0001738

Trinity Industries, Inc.,
Highway Safety Division
2548 N.E. 28th St.
Ft Worth, TX

Customer:

Structural & Steel Prod.
1320 South University Dr
Suite 701
Fort Worth, TX 76107

Sales Order:	1055306
Customer PO:	226606
BOL #	13702
Document#	1
Print Date:	10/3/05
Project:	STOCK
Shipped To:	

TRINITY INDUSTRIES, INC.
CERTIFICATE OF COMPLIANCE FOR
TRINITY INDUSTRIES, INC.
E.T. PLUS EXTRUDER TERMINAL
NCHRP REPORT 350, TL-3 TESTED AND APPROVED

Pieces	Description
30	12/25/63/S
30	12/25/63/S ET-2000 ANC
60	6'0 TUBE SL/.125X8X6
30	ET-PLUS EXTRUDER HEAD
30	CBL 3/4X6'6/DBL SWG/NOHWD
180	WD 60 POST 6X8 CRT
180	WD BLOCK 1'2 6" X 8" DR
60	WD 3'9 POST 5.5"X7.5"
30	HBA-3"ANG STRUT 2-HL 6'6"
30	TEXAS ET CAN

Upon delivery, all materials subject to Trinity HSP Storage Stain Policy No. LG-002.

ALL STEEL USED WAS MELTED AND MANUFACTURED IN USA

ALL GUARDRAIL MEETS AASHTO M-180, ALL STRUCTURAL STEEL MEETS ASTM A36

ALL OTHER GALVANIZED MATERIAL CONFORMS WITH ASTM-123.

BOLTS COMPLY WITH ASTM A-307 SPECIFICATIONS AND ARE GALVANIZED IN ACCORDANCE WITH ASTM A-153, UNLESS OTHERWISE STATED.

NUTS COMPLY WITH ASTM A-563 SPECIFICATIONS AND ARE GALVANIZED IN ACCORDANCE WITH ASTM A-153, UNLESS OTHERWISE STATED.

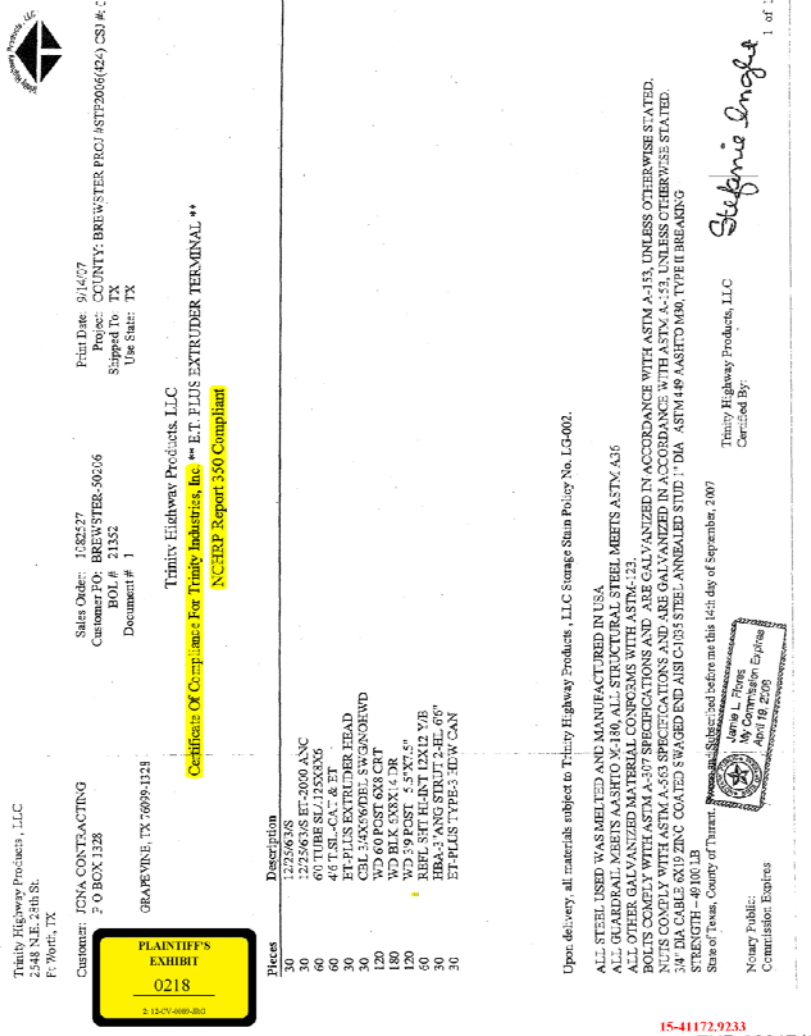
State of Texas, Court of Tarrant. Sworn and Subscribed before me this 3rd day of October 2005.

Notary Public:

/s/ Darinda Hartsaw
State of Texas
Commission Expires:
12-8-08

Trinity Industries—Inc.
Certified by:
/s/ Stefanie Inglet

CERTIFICATE OF COMPLIANCE FOR TRINITY INDUSTRIES, INC.—NCHRP REPORT 350 COMPLIANT, IMAGE AND TRANSCRIPTION (SEPTEMBER 14, 2007)



Trinity Highway Products , LLC
2548 N.E. 28th St.
Ft Worth, TX

Customer: JCNA CONTRACTING
P O BOX 1328
GRAPEVINE, TX 76099-1328

Sales Order: 1082527
Customer PO: BREWSTER-50206
BOL # 21352
Document # 1

Print Date: 9/14/07
Project: COUNTY: BREWSTER PROJ #STP2006(42-) CSJ #: 0
Shipped To TX
Use State: TX

Trinity Highway Products, LLC

Certificate Of Compliance For Trinity Industries, Inc ** E.T. PLUS EXTRUDER TERMINAL **

NCHRP Report 350 Compliant

PLAINTIFF'S EXHIBIT 0218
2:12-CV-0089-JRG

Pieces	Description
30	12/25/63/S
30	12/25/63/S ET-2000 ANC
60	60 TUBE SLT 12SX8X6
60	4'6 T SL-CAT & ET
30	ET PLUS EXTRUDER HEAD
30	CSL 3.4X6'6WDEL 5WGRNOEWD
120	WD 6'0 POST 6X8 CRT
180	WD BLK 6X8X14 DR
120	WD 5'9 POST 5.5"X7.5"
60	RBFL SHT HI-INT 12X12 YB
30	HBA-3 'ANG STRUT 2-BL 66"
30	ET-PLUS TYPE-3 4DW CAN

Upon delivery all materials subject to Trinity Highway Products , LLC Storage Stain Policy No. LG-002.

ALL STEEL USED WAS MELTED AND MANUFACTURED IN USA.
ALL GUARDRAIL MEETS AASHTO M-180, ALL STRUCTURAL STEEL MEETS ASTM A36
ALL OTHER GALVANIZED MATERIAL CONFORMS WITH ASTM-123.
BOLTS COMPLY WITH ASTM A-307 SPECIFICATIONS AND ARE GALVANIZED IN ACCORDANCE WITH ASTM A-153, UNLESS OTHERWISE STATED.
NUTS COMPLY WITH ASTM A-563 SPECIFICATIONS AND ARE GALVANIZED IN ACCORDANCE WITH ASTM A-153, UNLESS OTHERWISE STATED.
3/4" DIA CABLE 6X19 ZINC COATED SWAGED END AISI C-1035 STEEL ANNEALED STUD 1" DIA ASTM 449 AASHTO M30, TYPE II BREAKING
STRENGTH – 49100 LB

State of Texas, County of Tarrant. Sworn and Subscribed before me this 14th day of September, 2007

Notary Public:
Commission Expires

Jamie L. Flores
My Commission Expires
April 19, 2009

Trinity Highway Products, LLC
Certified By:

Stephanie Lingle

1 of 1

CONFIDENTIAL

15-41172.9233

THP-00017429

Trinity Industries, Inc.,
Highway Safety Division
2548 N.E. 28th St.
Ft Worth, TX

Customer:

Jona Contracting
P.O. Box 1328
Grapevine, TX 76099-1328

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BOL #	21352
Project:	COUNTY: BREWSTER PROJ #STP 2006 (424) CSJ #
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TRINITY INDUSTRIES, INC.
CERTIFICATE OF COMPLIANCE FOR
TRINITY INDUSTRIES, INC.
E.T. PLUS EXTRUDER TERMINAL
NCHRP REPORT 350

Pieces	Description
30	12/25/6'3/S
30	12/25/6'3/S ET-2000 ANC
60	6'0 TUBE SL/.125X8X6
60	4'6 T.SL.-CAT & ET
30	ET-PLUS EXTRUDER HEAD
30	CBL 3/4X6'6/DBL SWG/NOHWD
120	WD 6'0 POST 6X8 CRT
180	WD BLK 6X8X14 DR.
120	WD 3'9 POST 5.5"X7.5"
60	REFL SHT HI-INT 12X12 Y/B
30	HBA-3 "ANG STRUT 2-HL. 6'6"
30	ET-PLUS TYPE-3 HDW CAN

Upon delivery, all materials subject to Trinity HSP Storage Stain Policy No. LG-002.

ALL STEEL USED WAS MELTED AND MANUFACTURED IN USA

ALL GUARDRAIL MEETS AASHTO M-180, ALL STRUCTURAL STEEL MEETS ASTM A36

ALL OTHER GALVANIZED MATERIAL CONFORMS WITH ASTM-123.

BOLTS COMPLY WITH ASTM A-307 SPECIFICATIONS AND ARE GALVANIZED IN ACCORDANCE WITH ASTM A-153, UNLESS OTHERWISE STATED.

NUTS COMPLY WITH ASTM A-563 SPECIFICATIONS AND ARE GALVANIZED IN ACCORDANCE WITH ASTM A-153, UNLESS OTHERWISE STATED.

3/4" DIA CABLE 6X19 ZINC COATED SWAGED END AISI C-1035 STEEL ANNEALED STUD 1" DIA ASTM 449 AASHTO M30, TYPE II BREAKING STRENGTH —49100 LB

State of Texas, Court of Tarrant. Sworn and Subscribed before me this 14th day of September, 2007.

Notary Public:

/s/ Jamie L. Flores
My Commission Expires:
April 19, 2008

Trinity Industries—Inc.
Certified by: /s/ Stefanie Inglet