No. 15-41172

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA, EX REL., JOSHUA HARMAN,

Plaintiff/Relator – Appellee,

v.

TRINITY INDUSTRIES, INC.; TRINITY HIGHWAY PRODUCTS, L.L.C.,

Defendants – Appellants.

On Appeal from the United States District Court for the Eastern District of Texas, Marshall Division, Case No. 2:12-CV-00089

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The Court should grant oral argument. This appeal concerns the largest judgment in the history of the False Claims Act, totaling more than $663 million in damages and civil penalties. The district court entered this judgment despite this Court's specific prior admonitions that Defendants have a "strong argument" for judgment as a matter of law on multiple grounds. Appellants submit that oral argument would be useful to the Court's consideration of the issues presented in this appeal.

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INTRODUCTION

The False Claims Act is a powerful statute. Employed properly, it can be an effective tool for protecting the United States against fraud. But in the wrong hands, it can be destructive—crippling companies that endeavor in good faith to comply with complex rules and regulations. The danger of abuse is acute, because the FCA authorizes private litigants who suffer no injury to obtain massive judgments—treble damages, civil penalties, and attorney's fees—creating a powerful incentive for litigants to expand and contort the Act.

Not surprisingly, then, courts vigorously enforce limits on the FCA to prevent its abuse. The Act is about *fraud*, not regulatory compliance—and it protects the *United States government*, not private parties. As this Court has noted, the Act "is not a general 'enforcement device' for federal statutes, regulations, and contracts." *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010). It is designed "to vindicate civic interests in avoiding fraud against public monies"—not "to serve the parochial interests of relators." *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340 (6th Cir. 2000).

That is precisely the problem with the judgment below. A business competitor, Joshua Harman, contends that Trinity misrepresented its compliance with certain Federal Highway Administration (FHWA) regulations when it sold the

ET-Plus highway guardrail system to private contractors (who were paid by State Departments of Transportation, which were sometimes reimbursed by FHWA).

But FHWA has repeatedly stated that it agrees with Trinity and disagrees with Harman. Congress enacted the FCA to protect the United States. Harman's complaint, by contrast, is with the government itself—as his own counsel admitted during closing arguments to the jury. ROA.17938:21-25 (Harman failed to "get [action] at the FHWA . . . but he can get it here").

Indeed, this is an extreme case of FCA abuse in at least four respects.

To begin with, Trinity *fully complied* with all applicable FHWA regulations. So this is not even a case of regulatory noncompliance—let alone fraud.

Moreover, FHWA evaluated Harman's allegations—and rejected them. FHWA issued an official memorandum explicitly reaffirming that the ET-Plus system was at all times "*eligible for Federal reimbursement*" and "*continues to be eligible today.*" ROA.4305-06 (DX-2) (emphasis added). That alone should have defeated liability—because any alleged false statement was wholly immaterial to the government's payment decision.

What's more, *this Court explicitly warned the district court*—in an unusual mandamus order issued on the eve of trial—that FHWA's statements were likely fatal to Harman's case. As Judges Higginbotham, Jones, and Higginson explained: "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. . . . [A] strong argument can be made that the defendant's actions were *neither material nor were any false claims based on false certifications presented to the government*." *In re Trinity Indus., Inc.*, No. 14-41067 (5th Cir. Oct. 10, 2014) (emphasis added) (ROA.8449-8450). The panel even suggested that the case might warrant the unprecedented remedy of pretrial mandamus relief on the merits. *Id.* ("this is a close case").

Yet in the face of this Court's remarkable eve-of-trial ruling, the district court did—nothing. Instead, the court barreled into trial, ignoring both the pointed admonitions of this Court and the express statements of the United States. The end result was the *largest judgment in the 150-year history of the False Claims Act*—totaling more than $663 million in damages and civil penalties, plus another $19 million in attorney's fees and costs.

If a case like this can be submitted to a jury—and result in hundreds of millions of dollars in liability—even where the government has expressly approved the expenditure of the federal funds in question, then no business is safe from liability. The judgment below cannot stand.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331. It denied Trinity's Rule 50(b) motion for judgment as a matter of law on June 9, 2015, and denied Trinity's Rule 59 motion for new trial on August 3, 2015. Appellants timely filed a notice of appeal on August 28, 2015. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Was the district court wrong to ignore the official statements of the Federal Highway Administration, the U.S. Department of Justice, and this Court, and to deny Defendants' Rule 50(b) motion for judgment as a matter of law, when Harman's case fails under every element of the False Claims Act, including materiality, falsity, scienter, and false claim?

2. Are Defendants entitled to relief from the judgment below, because the government suffered no damages as a matter of law, and because the district court calculated the civil penalties award without submitting the number of false claims to the jury?

3. Was the district court wrong to deny Defendants' motion for new trial, in a one-paragraph order that "decline[d] to address" any of the extensive newly discovered evidence provided by various federal and state government officials?

STATEMENT OF THE CASE

I. The History and Development of the ET-Plus

In a perfect world, every driver would drive sober, undistracted, and at the speed limit—and would never drive off the road. Because that world does not exist, guardrails have long performed a critical safety role, helping to prevent drivers from crashing into trees, plunging into ravines, or veering into oncoming traffic.

But creating a product that reduces one safety hazard often introduces other risks—namely, the risks associated with installing a large steel rail along the side of a highway. For example, early guardrails were constructed with a blunt end, which created a risk that the end of the guardrail would "spear" the vehicle in a head-on collision. ROA.17577:13-17578:7. In a later version, the end of the guardrail was buried in the ground—which mitigated the spearing problem, but created a ramp that caused vehicles to launch into the air and roll over. *Id.*

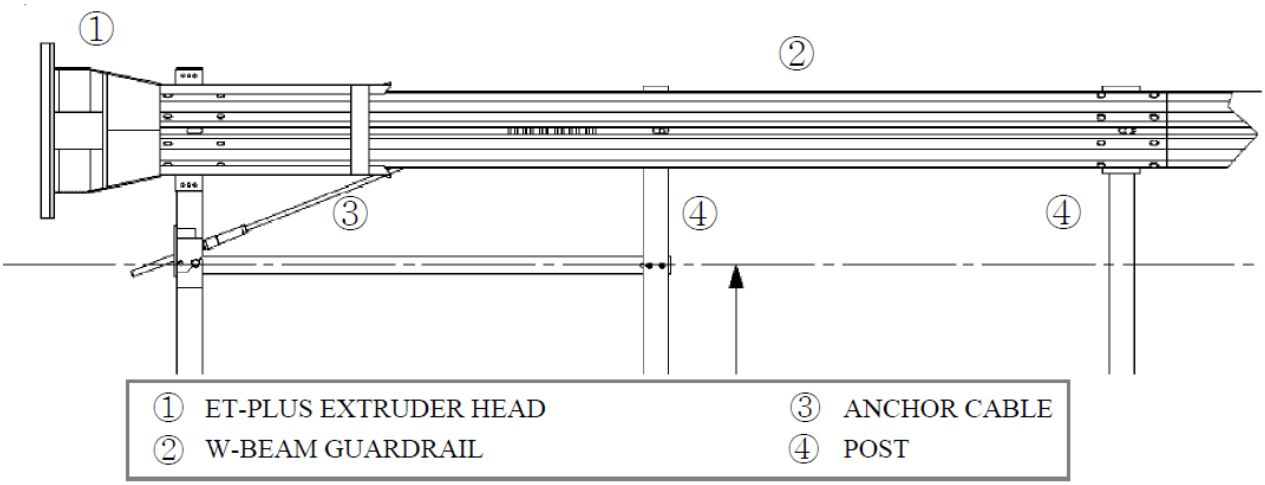
In the 1980s, research engineers at the Texas A&M Transportation Institute (TTI)—an agency of the State of Texas, and one of the premier transportation research institutes in the country—began analyzing the problem of how to end (or "terminate") a stretch of guardrail. ROA.17578:8-17 (Dr. Buth). Engineers at TTI developed a guardrail "end terminal" system known as the ET-2000—the forerunner to the ET-Plus system at issue in this case. ROA.17578:18-24. The ET-2000 was the first energy-absorbing guardrail end terminal on the market.

ROA.17016:19-17017:5 (Dr. Bligh). It was tested in accordance with national crash-testing criteria and first accepted by FHWA in 1989. ROA.396.

Research engineers at TTI continued improving the end terminal technology, eventually developing the ET-Plus guardrail end terminal system ("ET-Plus"). ROA.17579.

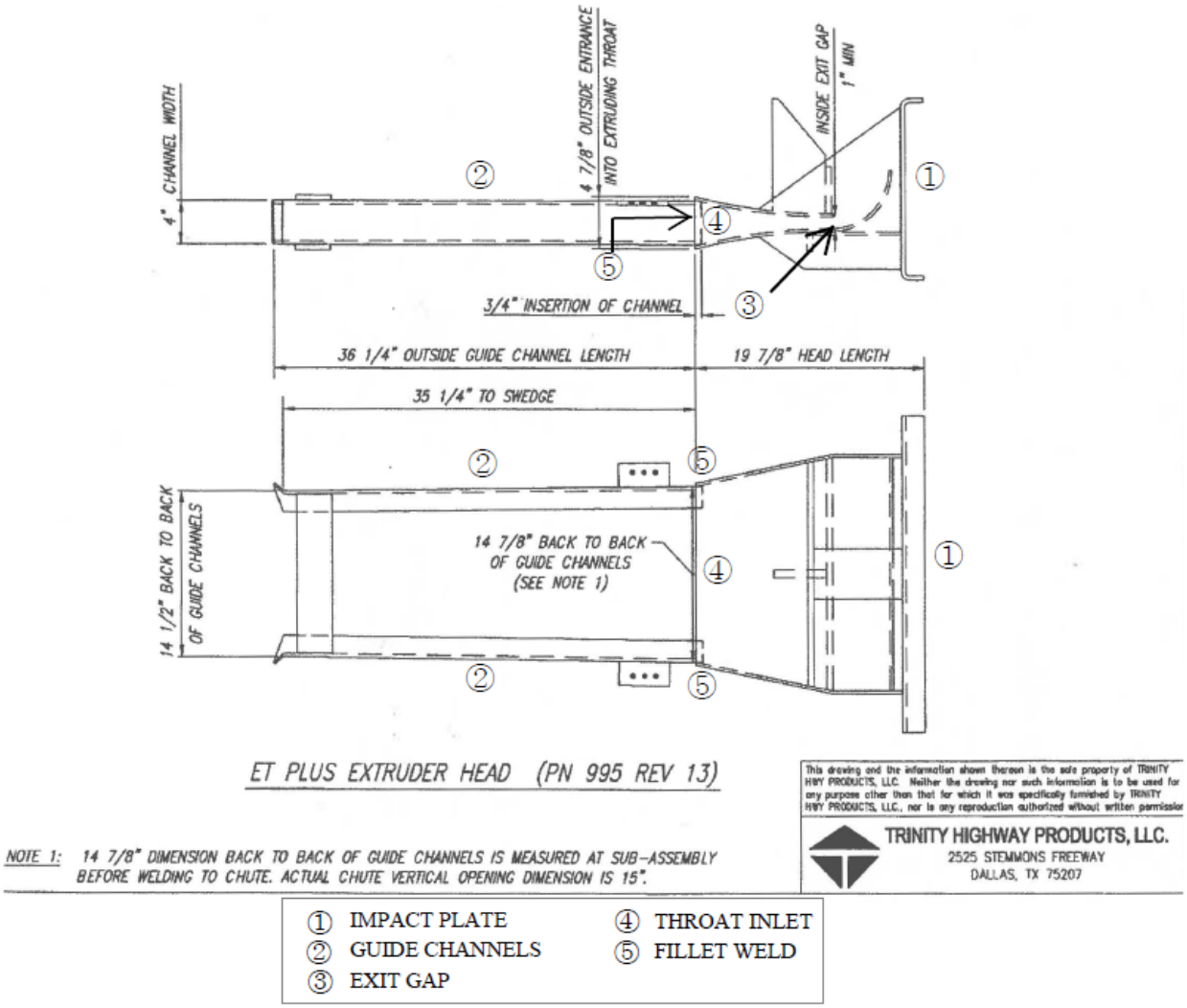
ET-Plus as installed. ROA.11685.

The ET-Plus has more than 40 component parts—including the ET-Plus extruder head, w-beam guardrail, anchor cable, and posts. ROA.17004:6-17.



ET-Plus System. ROA.19422 (DX-5) (numbering and key added).

The ET-Plus extruder head, in turn, includes an impact plate and a set of "guide channels." ROA.17017:12-17018:19.



ET-Plus Extruder Head (top and side views). ROA.11579 (numbering and key added).

In a head-on collision, the ET-Plus flattens and bends the guardrail away from the vehicle (a process called "rail extrusion"), which helps to dissipate the kinetic energy of the vehicle after impact. ROA.17009:2-13. The guide channels help to keep the ET-Plus extruder head aligned with the guardrail during a head-on

collision. ROA.17018:23-17019:10. This facilitates the extrusion of the guardrail through the head and out the exit gap. *Id.*

ET-Plus during (L) and after (R) a successful crash test. ROA.11626; ROA.11628.

The ET-Plus was successfully crash tested in accordance with National Cooperative Highway Research Program (NCHRP) Report 350, which provides recommended procedures for testing and evaluating roadside safety products. On January 18, 2000, FHWA accepted the ET-Plus for use on the National Highway System. ROA.21819.

Appellant Trinity Highway Products, LLC (THP), a subsidiary of Appellant Trinity Industries, Inc. (together, "Trinity"), manufactures the ET-Plus under an exclusive licensing agreement with The Texas A&M University System. ROA.16993:1-11. Trinity sells ET-Plus systems to various customers, including private contractors, who in turn may sell those units to State Departments of Transportation (DOTs). State DOTs may then seek federal reimbursement for ET-Plus systems installed on federal-aid highways. Trinity's invoices to its customers often contain references to bills of lading (*i.e.*, shipping documents). DX-230

(invoice); ROA.29191; ROA.29267. The bills of lading 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." ROA.21755-21759 (bill of lading); ROA.21779-21782 (same); ROA.9231 (PX-174) (certificate); ROA.9233 (PX-218) (same).

II. The 2005 Modifications to the ET-Plus

The ET-Plus approved in January 2000 was attached to a 27¾″ high guardrail previously specified by State DOTs. In 2005, manufacturers introduced a 31″ high guardrail, designed to improve performance in collisions involving vehicles with a higher center of mass. ROA.306 (DX-6). In response, Trinity and TTI made a series of changes to the ET-Plus to modify it for attachment to the 31″ high guardrail. The ET-Plus at the 31″ guardrail height was successfully crash tested in accordance with Report 350 in May 2005. TTI prepared a report summarizing the crash test results (the "2005 Report"), and Trinity submitted that report to FHWA. ROA.304-380. On September 2, 2005, FHWA approved the ET-Plus at the 31″ guardrail height. ROA.381-382 (DX-78).

Also in 2005, Trinity and TTI modified the ET-Plus by reducing the width of the guide channels from 5″ to 4″. In addition, a group of related fabrication changes was made to accommodate the 5″ to 4″ change (together with the 5″ to 4″ change, the "2005 changes"). ROA.20390-20392 (DX-47) ("fractional

adjustments had to be made in fabrication drawings to actually build the product" with 4″ guide channels). In an internal email, then-THP Vice President of Operations Steve Brown stated that making the 5″ to 4″ change would result in "a better ET," while saving "$2/ET," or "$50,000/year." ROA.7231 (PX-133); *see also* ROA.17589:6-9 (Dr. Buth) ("[B]y reducing the amount of space between the guide channels and the w-beam, . . . we would have a little bit of improvement in the way the guide channels kept the heads straighter.").

The ET-Plus with 4″ guide channels was included in one of the May 2005 crash tests. ROA.4305-4306 (DX-2). Trinity prepared and sent to TTI a detailed drawing of the ET-Plus extruder head with 4″ guide channels, but that drawing was inadvertently omitted from the 2005 Report.[1]

The 2005 Report enumerated the modifications made to the ET-Plus for attachment to the 31″ guardrail. ROA.314 (DX-6). It did not discuss the reduction of the guide channels from 5″ to 4″ and related changes.

III. FHWA Rejects Harman's Allegations of Fraud—and Reaffirms That the ET-Plus Is, and Always Has Been, Eligible for Federal Reimbursement

In January 2012, relator Joshua Harman—one of Trinity's competitors—informed FHWA that Trinity did not disclose certain modifications to the ET-Plus

[1] Trinity has consistently maintained that the drawing was omitted unintentionally, due to administrative error. But the question of inadvertence is not at issue in this appeal.

in 2005, and alleged that the ET-Plus was performing poorly as a result of those modifications. In a 109-page PowerPoint presentation, Harman identified the 5″ to 4″ modification to the ET-Plus guide channels, along with a group of related changes, and claimed that these modifications "cause[d] the guardrail to lock up in the extruder throat during an impact." ROA.18284 (DX-8). These modifications, according to Harman, presented the same spearing risk as the original blunt-end guardrail. ROA.18291-18297 (collecting accident photos).

In response, FHWA met with Trinity and TTI representatives, who explained that the 5″ to 4″ modification was a detail inadvertently omitted from the 2005 Report, and submitted documentation showing that the ET-Plus with 4″ guide channels was crash tested in May 2005. ROA.4305-4306 (DX-2). After hearing this explanation, and independently reviewing the 2005 Report and related documents and videos, FHWA attended two additional meetings with Harman and his counsel—including a meeting where Nicholas Artimovich, a highway engineer in FHWA's Office of Safety Technologies, physically inspected and photographed an ET-Plus extruder head provided by Harman. ROA.19269:11-19; ROA.19273:20-19276:4; ROA.19277:18-19278:22.

In the following months, FHWA received numerous inquiries from State DOTs that Harman had briefed on his allegations about the ET-Plus. In each case, FHWA responded by confirming that the "ET-Plus end terminal with the 4-inch

guide channels is eligible for reimbursement under the Federal-Aid Highway Program." ROA.8230-8245 (letters to California, Illinois, Iowa, Maryland, Missouri, New Hampshire, South Carolina, Virginia, and Wisconsin).

On June 17, 2014, FHWA reaffirmed its approval of the ET-Plus in an official memorandum, which stated, "[i]n January 2012, allegations were made to FHWA that the ET-Plus had been modified by Trinity and that those modifications had not been presented to FHWA." ROA.4305 (DX-2). After summarizing FHWA's investigation, the memorandum confirmed that an "*unbroken chain of eligibility* for Federal-aid reimbursement has existed since September 2, 2005, and the ET-Plus continues to be eligible today." ROA.4306 (emphasis added).

That same day, the Department of Justice sent FHWA's memorandum to Harman's counsel in response to his request for sworn government testimony in this case. DOJ appended 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." ROA.4308 (emphasis added).

To this day, the federal government continues to reimburse State DOTs for ET-Plus systems installed on federal-aid highways.

IV. The District Court Ignores Statements of FHWA, DOJ, and This Court—and the Jury Enters Verdict against Trinity

On March 6, 2012, while FHWA's investigation was still underway, Harman filed this False Claims Act suit in the Eastern District of Texas. On May 6, 2013—

after the United States declined to intervene—Harman filed an Amended Complaint alleging that Trinity violated the FCA by making false certifications about the ET-Plus.

After FHWA issued its June 17, 2014 memorandum, Trinity re-urged its pending summary judgment motion, arguing that the federal agency that was supposedly defrauded had rejected Harman's allegations and reaffirmed its approval of the ET-Plus. ROA.4296-4308. The district court orally denied that motion in a single sentence. ROA.13894:11-12.

A jury trial commenced on July 14, 2014. Four days later, the court conducted an *ex parte* "deposition" of one of Harman's key witnesses, Dr. Dean Sicking, *see* ROA.48, and then *sua sponte* ordered a mistrial, citing "errors, gamesmanship, [and] inappropriate conduct" by both parties. ROA.15763:13-16.[2]

With a second trial approaching, Trinity filed a mandamus petition, urging this Court to grant relief based on FHWA's statements reaffirming the eligibility of the ET-Plus for federal reimbursement.

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[2] Trinity later requested the transcript of the *ex parte* proceeding, but the district court denied that request without explanation. To this day, Trinity has no knowledge of what transpired at that *ex parte* proceeding, which immediately preceded the mistrial declaration.

On Friday, October 10, 2014, three days before the second trial date, this Court issued a *per curiam* opinion that denied mandamus, but agreed that Trinity has a "strong argument" 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. . . . [A] strong argument can be made that the defendant's actions were neither material nor were any false claims based on false certifications presented to the government.

In re Trinity Indus., Inc., No. 14-41067 (5th Cir. Oct. 10, 2014) (Higginbotham, Jones, Higginson, J.J.) (ROA.8449-8450). The opinion even suggested that the case might warrant the unprecedented remedy of pretrial mandamus relief on the merits, stating that "this is a close case" and "the litigation stakes—the potential for a $1 billion adverse judgment—are unusually high." *Id*.

Trinity immediately responded to this Court's ruling by moving the district court to stay the trial, and to either certify its rulings for interlocutory review or set an expedited briefing schedule on Trinity's motion for judgment as a matter of law, so the court could issue the "reasoned ruling" contemplated by the mandamus opinion. ROA.7962-7963; *see also In re Trinity Indus.* (ROA.8449-8450) (expressing "concern[] that the trial court . . . has never issued a reasoned ruling rejecting the defendant's motions for judgment as a matter of law," and discussing possibility of interlocutory review).

But the district court did—nothing. It ignored this Court's ruling, and proceeded to trial the following Monday.

Moreover, the district court then reversed itself on a series of evidentiary rulings. During the first trial, the court excluded photos of mangled vehicles from car accidents because those photos "are *excessively prejudicial*, and they don't provide additional probative value." ROA.14268:14-22 (emphasis added). In the second trial, however, the district court reversed course and admitted the same "excessively prejudicial" photos—without explanation. ROA.16023:17-16024:8.

At trial, Harman claimed that Trinity had falsely certified that the ET-Plus is Report 350 compliant. Harman's expert testified that he calculated the number of false claims by counting Trinity invoices, which cross-reference the bills of lading. ROA.17281:8-16. Because "the majority of the – – the bill of lading files contain the certifications" that the ET-Plus is Report 350 compliant, Harman's expert opined that Trinity had made 16,771 false claims. ROA.17280:24-17289:19.

Harman appeared to acknowledge, however, that FHWA did not agree. During his closing argument, Harman's counsel explicitly invited the jury to ignore FHWA's official approval of the ET-Plus. ROA.17938:21-25 (Harman failed to "get [action] at the FHWA . . . but he can get it here"). The jury responded by returning a $175 million verdict for Harman. ROA.8361.

V. Post-Trial Crash Tests and Dimensions Report Further Vindicate the ET-Plus

In response to the jury verdict, FHWA requested additional crash testing of the ET-Plus, but also expressly reaffirmed that the ET-Plus was eligible for federal reimbursement. ROA.9279-9280 (FHWA Letter, Oct. 21, 2014); ROA.8491 (FHWA FAQ, Nov. 12, 2014); *see also* ROA.9392-9393 (PX-1286) (FHWA Letter, Oct. 10, 2014) (summarizing recent developments).

In early 2015, FHWA confirmed the official—and successful—results of eight crash tests on the ET-Plus with 4″ guide channels. The tests were conducted at Southwest Research Institute (SwRI), and were attended by numerous State DOT representatives. ROA.11483-11485. In addition, FHWA enlisted Dr. H. Clay Gabler, an independent engineering expert, to evaluate SwRI's staffing and crash test procedures. ROA.11487-114510. Following the crash tests, FHWA, SwRI, and Dr. Gabler each separately evaluated the crash test results and determined that "*all . . . tests passed the NCHRP Report 350 criteria*." ROA.11483 (emphasis added); ROA.11823-11829.

To further evaluate certain allegations made at trial, FHWA assembled two joint Task Forces of state, federal, and foreign transportation experts. The first joint Task Force report, issued March 11, 2015 ("Dimensions Report"), evaluated field measurement data collected from more than 1,000 ET-Plus systems and concluded—contrary to Harman's allegations—that the ET-Plus systems crash

tested at SwRI were "representative of the devices installed across the country." ROA.11447-11464. The second report, issued September 11, 2015, evaluated all extruding guardrail end terminals on the market in light of the expert reports prepared for trial, as well as crash data submitted by Harman, State DOTs, and the general public. Joint AASHTO-FHWA Task Force, *Safety Analysis of Extruding W-Beam Guardrail Terminal Crashes* (Sept. 11, 2015), https://www.fhwa.dot.gov/guardrailsafety/safetyanalysis/safetyanalysis.pdf. The joint Task Force found no evidence of any "unique performance limitations" related to the ET-Plus with 4″ guide channels. *Id.* at 5-6.

VI. The District Court Denies Trinity's Rule 50(b) and Rule 59 Motions and Enters $663 Million Final Judgment

A week after the jury verdict, the district court *sua sponte* ordered the parties to mediation. ROA.8410-8411. Those talks failed.[3]

Trinity moved for judgment as a matter of law under Rule 50(b). ROA.8451. On June 9, 2015, the district court denied that motion, ruling that Trinity had violated its obligation to disclose to FHWA "any changes" made to the ET-Plus, and that FHWA's June 17, 2014 memorandum was "based on incomplete, misleading, and even false information." ROA.13289, ROA.13315.

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[3] Because the district court still had not issued a reasoned ruling, Trinity filed a second mandamus petition, which was denied. *In re Trinity Indus., Inc.*, No. 14-41297 (5th Cir. Dec. 2, 2014).

That same day, the district court entered final judgment in the amount of $663,360,750, plus $19,012,865 in attorney's fees and costs.[4] ROA.13328. The award included $525 million in treble damages, as well as civil penalties for "each of the 16,771 false certifications Trinity made." *Id.* The court determined the total number of false certifications, because it had previously refused Trinity's repeated requests to submit that inquiry to the jury. *See, e.g.*, ROA.17903:14-21.

On August 3, 2015, the district court denied Trinity's motion for a new trial. In a one-paragraph order, the court "decline[d] to address" Trinity's argument that a new trial was warranted based on newly discovered evidence—in the form of the post-trial crash test results and Dimensions Report—further confirming that the ET-Plus is fully compliant with Report 350. ROA.13544.

SUMMARY OF THE ARGUMENT

The False Claims Act imposes liability on "any person who . . . knowingly makes, uses, or causes 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). Harman bears the burden to prove *all* of those elements—scienter, false statement, materiality, and false

[4] Not surprisingly, the largest FCA judgment in history prompted two further developments: Pursuant to agency policy, FHWA issued a notice to show cause why the agency should not open a suspension or debarment proceeding based on the entry of the judgment. *See FHWA Suspension and Debarment Process*, 2000.2B (Nov. 7, 2014). Trinity responded to this request, and has not been suspended or debarred by FHWA. And the U.S. Attorney's Office for the District of Massachusetts served a federal grand jury subpoena for documents, to which Trinity has responded.

claim. Yet he meets *none* of them. Accordingly, this Court should reverse and render judgment for Trinity.

The first—and simplest—path to reversal is materiality, because FHWA has repeatedly and expressly approved the ET-Plus for federal reimbursement. Second, the statement that Harman alleges is false—that the ET-Plus is "NCHRP Report 350 Compliant"—is true as a matter of law under a proper interpretation of the regulations. Third, Trinity did not knowingly make a false statement, because a reasonable interpretation of an ambiguous regulatory regime belies scienter. Finally, compliance with Report 350 is not a condition to federal payment, and therefore cannot give rise to a false claim.

Moreover, the damages and civil penalties awards are both legally infirm. FHWA's repeated statements of approval confirm that the United States received the full benefit of its bargain, and therefore suffered no damages at all. The civil penalties award is also fatally flawed, because the district court refused to submit the number of false claims to the jury.

Finally, the district court refused to address Trinity's motion for new trial, which was based on newly discovered evidence provided by various federal and state government officials. That evidence refutes key premises of Harman's fraud theory and eviscerates his damages calculation by again confirming that the ET-Plus was and is compliant with Report 350.

STANDARD OF REVIEW

This Court reviews the denial of a Rule 50(b) motion de novo. *Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 799 F.3d 374, 377-78 (5th Cir. 2015). The standard is whether "'a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue,'" *id.*, based on "all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party." *Fairchild v. All Am. Check Cashing, Inc.*, 811 F.3d 776, 783 (5th Cir. 2016).

This Court ordinarily "reviews a denial of a Rule 59 motion for abuse of discretion." *McLendon v. Big Lots Stores, Inc.*, 749 F.3d 373, 374 (5th Cir. 2014). If, however, "the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for such deference by an appellate court disappears." *Renico v. Lett*, 559 U.S. 766, 775 (2010).

ARGUMENT

I. There Is No "Material" False Statement—Because FHWA Repeatedly and Expressly Stated That the ET-Plus Is, and Always Has Been, Eligible for Federal Reimbursement

We begin with materiality because it provides the simplest basis for reversal under the complex facts of this case.

A. Numerous FHWA Statements Have Formally Approved the ET-Plus for Federal Reimbursement, Confirming That Any Alleged False Statement Was Immaterial

Under the FCA, an actionable false statement must be "material" to a false claim. That requirement is well established as a matter of judicial interpretation, and was expressly codified in 2009. 31 U.S.C. § 3729(a)(1)(B). Both pre- and post-2009, materiality has been defined as "having a natural tendency to influence, or be capable of influencing" the government's payment decision. 31 U.S.C. § 3729(b)(4).

As this Court's mandamus opinion correctly observed, courts have repeatedly concluded that an alleged false statement is not "material" where the government learned of the alleged false statement and continued making payments for the product. *See* ROA.8450 (collecting cases). That materiality principle is well established both in this Court and in other jurisdictions. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 680 (5th Cir. 2003) (en banc) (Jones, J., specially concurring) (no materiality where agency "was aware of the basic condition of the project," but "continued making the payments"); *see also U.S. ex rel. Am. Sys. Consulting, Inc. v. ManTech Adv. Sys. Int'l*, 600 F. App'x 969, 972-78 (6th Cir. 2015) (no materiality where agency "chose to continue under its contract"); *U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 831 (7th

Cir. 2011) (no materiality where agency "neither suspended [defendant's] financing nor required that [defendant] alter the payment schedule").

This is an even easier case, for at least three reasons.

1. To begin with, the absence of materiality is particularly evident where the government learns of the alleged false statement, evaluates the relator's allegations, and then not only continues to make payments, but also *formally approves the product*.

Consider *U.S. ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556 (7th Cir. 2015). There, the relators alleged that a defense contractor falsely stated that it manufactured parts for use in military aircraft "in accord with the applicable specifications." *Id.* at 559. In response, the Department of Defense met with the relators, "decided to review [their] concerns," and ultimately "concluded that there was 'nothing either incorrect or wrong with the procedures, assembly, or testing.'" *Id.* at 561. The Seventh Circuit held that "Woodward's false statements were immaterial." *Id.* at 563. The court noted the government's response to the relators' allegations: "The government learned of plaintiffs' concerns, thoroughly investigated them, and determined that they were meritless." *Id.* It further emphasized that, "[t]o this day, the government continues to pay for and use" the product. *Id.* Because the government expressly rejected the relators' allegations

and "continue[d] to pay for and use" the product, the court concluded that there could be no FCA liability.[5]

Similarly, in *U.S. ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.*, 104 F.3d 1453 (4th Cir. 1997), the relator claimed that the university made false statements in reports related to a federal grant. The jury returned a verdict for the relator—but the Fourth Circuit reversed, holding that the alleged false statements "plainly . . . were not material" where the government had reviewed and rejected the relator's allegations while continuing to fund the grant. *Id.* at 1456, 1460, 1462 n.3. The alleged false statements were "so lacking in materiality . . . that no reasonable jury could have so found." *Id.* at 1460.

And in *U.S. ex rel. Smith v. Boeing Co.*, 2014 WL 5025782 (D. Kan. Oct. 8, 2014), the relators alleged that Boeing falsely certified that it manufactured aircraft parts in compliance with applicable Federal Aviation Administration (FAA) regulations. In response, FAA opened two investigations, met with the relators, and ultimately determined that "the parts were manufactured and approved in accordance with the approved data, processes, and procedures," and that "*the parts*

[5] The *Marshall* relators argued that "the government's actual conduct is irrelevant" to materiality. 812 F.3d at 563. But that "misinterpret[s] the materiality standard." *Id.* After all, "[s]tatements by the actual decision-makers may be (and often are) the best available evidence of whether alleged misrepresentations had an objective, natural tendency to affect a reasonable government decision-maker, especially if they are consistent with a rational decision-making process and a common sense reading of the record as a whole." *Am. Sys. Consulting*, 600 F. App'x at 976.

are considered approved." *Id.* at *14 (emphasis added). The court concluded that "Boeing's asserted failures were not material to the government's purchase decision," because "FAA initially certified the planes and has twice now rejected relators' claims of safety problems and regulatory non-compliance." *Id.* at *27.

The import of these cases is clear: When 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.

That is precisely what happened here. In January 2012, Harman went to FHWA with a 109-page PowerPoint presentation detailing his claims that Trinity made the 2005 changes without disclosing them to FHWA, and that the ET-Plus was performing poorly as a result. ROA.18218-18326 (DX-8). In response, FHWA met with Trinity and TTI representatives, reviewed the 2005 Report and related materials, and attended additional meetings with Harman and his counsel—including a meeting where Mr. Artimovich physically inspected and photographed an ET-Plus with 4″ guide channels. ROA.19250-19278.

After evaluating Harman's allegations, reviewing the relevant documents and crash test videos, and conducting a physical inspection, FHWA expressly reaffirmed that the ET-Plus was—at all times—approved and eligible for federal reimbursement. On June 17, 2014, FHWA issued a memorandum stating, "[i]n January 2012, allegations were made to FHWA that the ET-Plus had been

modified by Trinity and that those modifications had not been presented to FHWA." ROA.4305-4306 (DX-2). After summarizing FHWA's investigation, the memorandum confirmed that an "*unbroken chain of eligibility* for Federal-aid reimbursement has existed since September 2, 2005, and the ET-Plus continues to be eligible today." ROA.4306 (emphasis added).

Here—as in *Marshall*, *Berge*, and *Boeing*—the government evaluated and rejected the relator's allegations, and reaffirmed that the product was and is eligible for federal reimbursement. Any alleged false statement about the ET-Plus was wholly immaterial to the government's payment decision.

2. Second, it was not a low-level contract officer or investigator, but FHWA itself that reaffirmed its approval of the ET-Plus—in an official agency memorandum, issued in direct response to "inquiries from FHWA Division Offices and State DOTs" regarding the eligibility of the ET-Plus. ROA.4305. The memorandum was addressed to all FHWA Division Administrators, Directors of Field Services, and Federal Lands Division Engineers—and signed by Michael Griffith, Director of FHWA's Office of Safety Technologies. *Id*.

In other words, the June 17, 2014 memorandum represents FHWA's official position that the ET-Plus is, was, and always has been eligible for federal reimbursement. This is not a casual statement by a low-level government employee who "fail[ed] to catch an otherwise material false statement." *United*

States v. Triple Canopy, Inc., 775 F.3d 628, 639 (4th Cir. 2015). Instead, "[a]s far as this record reveals, the *federal government* is 100% satisfied with the . . . products it receives from [Trinity] and with the representations made." *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999) (emphasis added).

3. Finally, Harman's allegations have been rejected not only by FHWA, but also by the Department of Justice.

In March 2014, Harman sent a letter to FHWA requesting deposition testimony from Nicholas Artimovich and two other FHWA employees. That document, known as a "*Touhy* request," summarized Harman's fraud allegations in detail and argued that FHWA employees "possess information relevant to the disputed issues in this litigation." ROA.5037-5041 (DX-46). Trinity opposed that request as unnecessary, in light of prior FHWA statements—but noted that if Harman were allowed to depose FHWA employees, Trinity would request to do so as well.

DOJ rejected Harman's request. Indeed, on the very same day that FHWA issued its June 17, 2014 memorandum, DOJ sent that memorandum to Harman's counsel, accompanied by 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 employees." ROA.4308 (emphasis added).[6]

In other words, DOJ submitted the June 17, 2014 memorandum *in lieu of testimony* in this case. The message is unavoidable: Harman's allegations did not alter the government's determination that the ET-Plus was, and continues to be, eligible for federal reimbursement. That the district court excluded this highly relevant evidence of materiality is, at a minimum, grounds for new trial. *See U.S. ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 315-16 (1st Cir. 2010) (remanding for new trial where evidence of the government's "knowledge" and "acquiescence" was excluded). But a new trial is unnecessary, because the alleged false statements are immaterial as a matter of law.

* * *

In sum, FHWA expressly concluded that there is an "unbroken chain of eligibility" for the ET-Plus that continues to this day. That determination was made not by a low-level government investigator, but by the agency itself. And DOJ made clear that FHWA's statement "addresse[d] all of the issues" raised by Harman. ROA.4308. As this Court has already observed, these express statements "end[] the need to speculate about how else the agency 'might have acted.'"

[6] Although the district court erroneously excluded the DOJ letter at trial, it is part of the record on appeal and therefore properly before this Court. ROA.4308.

ROA.8450. Because any alleged false statement was immaterial, Trinity is entitled to judgment as a matter of law.[7]

B. Harman's Attacks on FHWA's Investigation and Statements Are Unavailing

Faced with these repeated statements of government approval, Harman and the district court claimed that the June 17, 2014 memorandum was procured by fraud. That argument is unavailing.

Oddly, the district court concluded that FHWA's June 17, 2014 memorandum "was based on incomplete, misleading, and even false information," because "Trinity failed to disclose any of those [2005] modifications to the FHWA at any time *prior to 2012*." ROA.13314-13316 (emphasis added). But the relevant question is not what Trinity had disclosed as of 2012, but *what FHWA knew in June 2014*. *See* ROA.4305-4306 (DX-2) (basing conclusions "upon all of the information available to the agency").

It is undisputed that FWHA was aware of the 5″ to 4″ modification—the centerpiece of Harman's PowerPoint presentation, *see* ROA.18218-18326 (DX-8)—when it issued the June 17, 2014 memorandum. But Harman claimed that other

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[7] The district court's materiality analysis does not address these concerns. ROA.13304-13305. Rather, it appears that the district court confused materiality with the conditions-of-payment requirement—even though this Court has made clear that the two requirements are distinct. *See U.S. ex rel. Steury v. Cardinal Health, Inc.* (*Steury I*), 625 F.3d 262, 269 (5th Cir. 2010).

modifications to the ET-Plus were undisclosed prior to trial. He alleged a series of related modifications: a decrease in guide channel length from 37¼″ to 36¼″; a reduction of the exit gap from 1½″ to 1″; an increase in throat inlet from 4″ to 4⅜″; a decrease in guide channel height from 15⅜″ to 14⅞″; insertion of the guide channel ¾″ into the head; and the use of a fillet weld instead of a butt weld. ROA.13290-13291. The district court seized on that list to disparage the June 17, 2014 memorandum, claiming that "other changes, such as the narrowed exit gap and extended throat inlet, remained undisclosed at least through the trial." ROA.13317.

That assertion collapses under even a cursory review of the record. FHWA was well aware of these alleged modifications by June 2014, since *Harman himself identified them*: first, in his January 2012 presentation to FHWA; and again, in his May 2013 Amended Complaint; and once again, in his March 2014 *Touhy* request. *See* ROA.18257, ROA.18263-18265 (DX-8) (guide channel length); ROA.18257-18259, ROA.18261, ROA.18263-18265 (guide channel height); ROA.18257, ROA.18262-18266 (guide channel insertion); ROA.18232, ROA.18275 (exit gap); ROA.18268, ROA.18271 (throat inlet); ROA.197-198, ROA.199-200 (Am. Compl. ¶¶ 15, 23); ROA.5039 (DX-46). In addition, Trinity expressly disclosed and discussed the fabrication changes in a February 2013 open letter that was received by FHWA. ROA.20391-20392 (DX-47) ("fractional adjustments had to be made in fabrication drawings to actually build the product" with 4″ guide

channels). Finally, FHWA conducted a physical inspection of an ET-Plus extruder head provided by Harman. ROA.19275:1-17; ROA.19278:5-12; ROA.13291 ("The change to the weld[] is observable upon inspection").

On these facts, it is abundantly clear that FHWA was fully informed of all the alleged ET-Plus modifications when it issued the June 17, 2014 memorandum. Indeed, Harman has repeatedly admitted as much. *See* ROA.16641:25-ROA.16642:8 ("[Q.] [A]ll of the information that you are complaining about here was provided to Nick Artimovich by you, was it – – not?" "A. Yes, sir."); ROA.8692 (Rule 50(b) Opp'n) ("Plaintiff did indeed attempt to alert the FHWA of the existence of changes other than the 5-to-4 inch change in the guide channel.").[8]

In the end, all that remains of Harman's allegations is a policy dispute with FHWA. Harman's counsel made this point explicit during his closing argument to the jury. ROA.17938:21-25 (Harman failed to "get [action] at the FHWA . . . but he can get it here"). But the FCA is about fraud on the United States, not policy disagreements—let alone policy disagreements in which the United States agrees with the *defendant*. Harman "may think that [FHWA's] decision was wrong, but

[8] Harman also argued that the June 17, 2014 memorandum was procured by fraud because Trinity did not submit to FHWA failed crash test results for experimental "flared" systems that used the same extruder head as the ET-Plus system. But it is undisputed that the experimental "flared" systems tested were never commercialized, sold, or installed. And no FHWA rule or regulation requires disclosure of experimental tests. Thus, even the district court did not mention the "flared" testing in concluding that the June 17, 2014 memorandum was procured by fraud.

that does not make [Trinity's] statements materially false." *U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 299 (4th Cir. 2008).

The common-sense conclusion follows: "How could such 'fraud' be material to payment if the defrauded party knows about it and remains satisfied with the work? It appears beyond doubt that [the government] was not defrauded." *U.S. ex rel. Stephenson v. Archer W. Contractors, L.L.C.*, 548 F. App'x 135, 138-39 (5th Cir. 2013).

II. There Is No False Statement—Because the ET-Plus Is, and Always Has Been, Compliant with NCHRP Report 350

The judgment below suffers a second fatal defect: The alleged false statement in this case—that the ET-Plus is "NCHRP Report 350 Compliant," ROA.9233 (PX-218)—is true under a proper interpretation of the regulations.

A. The District Court Applied an Erroneous "Any Changes" Disclosure Standard That Finds No Support in the Relevant Policies or Regulations

The district court affirmed the jury's fraud verdict on the premise that, under the applicable regulations, "*any changes* to [roadside] hardware must be reviewed by and agreed to by the FHWA." ROA.13289 (emphasis added). That premise is fatally flawed, because there was no such disclosure requirement.

To be sure, Trinity and TTI intended to include in the 2005 Report a drawing of the ET-Plus extruder head with 4″ guide channels, as a matter of internal practice. But the regulations did not require such a disclosure. As of 2005, two

publications—NCHRP Report 350 and FHWA's 1997 Policy Memorandum—contained the relevant guidance on crash testing and acceptance of roadside safety devices. Neither mandates disclosure of "any changes."

Report 350, a 1993 publication of the Transportation Research Board, lays out recommended procedures for conducting and evaluating crash tests of roadside safety devices.[9] ROA.19282-19355 (DX-3). Report 350 expressly acknowledges that "[i]t is not uncommon for a designer/tester to make design changes . . . after successful completion of the test series." ROA.19306. It further states that "[q]uestions 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*." *Id.* (emphasis added). If there is no "reasonable uncertainty" regarding the effect of the change, there is no need to retest. *Id.*

On July 25, 1997, FHWA issued a policy memorandum implementing Report 350 and announcing that FHWA would review crash test reports and issue acceptance letters. ROA.19678 (DX-10) ("1997 Policy Memorandum"). That memorandum provides that FHWA has "the right to modify or revoke its

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[9] The Transportation Research Board is an arm of the National Academies of Science, Engineering, and Medicine, a private, nonprofit research institution. A reference to Report 350 appears in the Non-Regulatory Supplement to the Federal-aid Policy Guide. *See* N.S. 23 C.F.R. § 625(16)(a)(12), https://www.fhwa.dot.gov/design/0625sup.cfm (listing "publications that are primarily informational or guidance in nature").

acceptance" if it determines that "the device being marketed is *significantly different* from the version that was crash tested." ROA.19679 (emphasis added). In other words, modifications that render the product "significantly different" would give FHWA the option to revoke its acceptance. By implication, *non*-significant modifications would not.

Neither of these publications expressly addresses when modifications to an approved device require a new FHWA approval letter. But Report 350 does provide that, in the exercise of "good engineering judgment," certain changes can be made without re-testing. And the 1997 Policy Memorandum contemplates that changes may render an approval letter voidable only if they result in a "significantly different" product. Both of these rules are wholly at odds with the district court's assertion that "*any changes*" had to be disclosed to, and approved by, FHWA.[10]

Moreover, FHWA has since made clear that the district court was wrong—disclosure of "any changes" was not required during the relevant time period. In May 2015, FHWA announced a series of "changes to the eligibility letter process" that—for the first time—required a manufacturer to notify FHWA and seek a new

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[10] The district court did not mention, let alone analyze, FHWA's 1997 Policy Memorandum. Instead, the court cited a single snippet of deposition testimony for the proposition that "[t]he hardware actually installed on the highway system must 'replicate the crash-tested device.'" ROA.13289 (quoting Dkt. 577 at 145:21-146:19 (ROA.16876:21-16877:19)). That testimony is wholly inapposite, since it relates to when a *copy* of an approved device can be sold by another manufacturer. ROA.16876:8-10.

eligibility letter for "any modification" to roadside safety hardware. FHWA Letter, May 18, 2015, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/openletter051815.pdf. FHWA made clear that its announcement was a break from prior practice, issuing the following FAQ:

> Question: Do "non-significant" modifications to roadside safety hardware devices made prior to May 18th, 2015 need to be reported to FHWA?
>
> Answer: No. . . . Prior to May 18, 2015, FHWA did not expect submitters to notify FHWA of "non-significant" modifications if the modification was thought to have no effect on how the device would slow, stop, or redirect the vehicle.

FHWA, *Eligibility Letter Request FAQs* (Dec. 9, 2015), http://safety.fhwa.dot.gov/roadway_dept/Policy_guide/road_hardware/elig_ltr_faq.cfm. Thus, there was no "any change" disclosure rule until May 2015—a full decade after the events at issue here.

For his part, Harman did his best to muddy the contours of the disclosure rule by invoking the "standard provisions" that appear in certain FHWA acceptance letters. *See* ROA.6108-6110 (PX-216) ("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 it will meet the crashworthiness requirements of the FHWA and the NCHRP Report 350."). That effort fails for multiple reasons. First, Harman failed

to introduce any acceptance letter—much less an ET-Plus acceptance letter—that contained the "standard provisions" language as of 2005.[11] In any event, the "essentially the same" provision does not require disclosure of "any changes." Rather, the standard provisions make clear that the only changes that "will require a new acceptance letter" are those "that may adversely influence the crashworthiness of the device." ROA.6110.

Thus, the district court erred on this critical threshold issue by imposing a requirement that finds no support in the relevant regulations. As a result, the balance of its falsity analysis is fatally flawed. *See U.S. ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707, 717-18 (6th Cir. 2013) (FCA liability "untenable" where "district court's reasons for assessing liability . . . were based on a combination of laws not in effect at the time").

B. Under the Proper "Significant Changes" Disclosure Standard, There Is No False Statement

As explained above, the policies and regulations that existed in 2005 did not require disclosure of non-significant changes. TTI, the designer of the ET-Plus,

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[11] The district court invoked trial testimony by THP President Gregg Mitchell that Trinity "will be expected to" and "did certify" to the standard provisions. ROA.13298. That testimony—which is based on a post-2005, non-ET-Plus acceptance letter, ROA.17363:5-17634:18—cannot alter the language of the certifications in the record, which simply state that the ET-Plus is "Report 350 Compliant." Any argument that those certifications somehow implicitly incorporate the standard provisions language is both waived and premised on an implied certification theory that this Court has declined to recognize. *See Steury I*, 625 F.3d at 268.

reasonably determined that the 2005 changes to the ET-Plus were non-significant—a judgment that was confirmed by the successful crash tests in 2015. Because reasonable "scientific judgments . . . cannot be false," *U.S. ex rel. Hill v. Univ. of Med. & Dentistry of N.J.*, 448 F. App'x 314, 316 (3d Cir. 2011), the determination that the 2005 changes were non-significant cannot give rise to an actionable false statement.[12]

It is well established that the FCA "is not suited to resolving scientific disputes or identifying scientific misconduct." *U.S. ex rel. Milam v. Regents of Univ. of Cal.*, 912 F. Supp. 868, 886 (D. Md. 1995). For that reason, "'[e]xpressions of opinion, scientific judgments or statements as to conclusions [about] which reasonable minds may differ *cannot be false*'" within the meaning of the FCA. *Hill*, 448 F. App'x at 316 (emphasis added). That is particularly true where "the governing authority contemplates the contractor's use of its own discretion or scientific judgment." *U.S. ex rel. Chilcott v. KBR, Inc.*, 2013 WL 5781660, at *6 n.7 (C.D. Ill. Oct. 25, 2013).

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12 That the engineers who made the determination were employed by TTI rather than Trinity is of no moment, since the focus of the falsity inquiry is the scientific judgment itself. *See U.S. ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App'x 980, 983-84 (10th Cir. 2005) (no FCA liability for ERISA plan administrator where characterization of medical care required scientific judgment).

Here, whether a particular change should have been disclosed turned on whether that change was "significant." ROA.19679 (DX-10). And determining whether a change was significant required the exercise of "[g]ood engineering judgment." ROA.19306 (DX-3). TTI reasonably determined that the 2005 changes were non-significant. *See, e.g.*, ROA.16995:1-4 (Dr. Bligh) ("[Q.] [W]as there any uncertainty in your mind regarding the effect of that change? A. No, sir, there was not."); ROA.17023:9-12 ("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."); ROA.17609:6-12 (Dr. Buth) ("[Q.] [A]re the internal workings of this particular unit from the welds of the guide channels down essentially the same one to the other? A. For both the one with the five-inch and the four-inch, they're the same.").[13]

Because that determination required the exercise of engineering judgment, it "cannot be false" under the FCA. *Hill*, 448 F. App'x at 316. That Harman disagrees simply underscores that, "[a]t most, the Court is presented with a legitimate scientific dispute." *Milam*, 912 F. Supp. at 886; *see U.S. ex rel. Bettis v.*

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[13] Nothing in the district court's Rule 50(b) opinion contradicts this conclusion. To be sure, the district court did reject Trinity's argument that "the modifications to the ET-Plus were matters of 'good engineering judgment'"—instead finding sufficient evidence to support Harman's claims that Trinity made the modifications for financial reasons. ROA.13303. But the issue here, as to falsity, is not why the modifications *were made*, but whether it was reasonable to conclude that the modifications *were non-significant*.

Odebrecht Contractors of Cal., Inc., 297 F. Supp. 2d 272, 294-95 (D.D.C. 2004) ("there is no basis for imposing FCA liability based on faulty or mistaken engineering judgments").

C. Nothing in the 2005 Crash Test Report Undermines the Fact That the ET-Plus Is, and Always Has Been, Report 350 Compliant

Having misinterpreted the governing regulatory regime to require disclosure of "any changes," the district court further concluded that language in the 2005 Report describing the test article as a "standard" ET-Plus rendered Trinity's certifications of Report 350 compliance false. But nothing in the 2005 Report undermines the truth of Trinity's statements that the ET-Plus is Report 350 compliant. And the district court's contrary conclusion—which depends on an erroneous reading of the Report—cannot sustain the judgment below.

1. To state the obvious: The alleged false statement in this case is Trinity's certification of Report 350 compliance—not the passing references to "standard" ET-Plus in the 2005 Report. Harman has repeatedly made clear that his complaint "is not based on the 2005 submission to the FHWA." ROA.495. Thus, it is no surprise that there is no mention of the "standard" ET-Plus language in the Amended Complaint, the Joint Pretrial Order, or the jury instructions.

2. Moreover, the district court grounded its critique of the 2005 Report on yet another false premise. Specifically, the court claimed that "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)." ROA.13295 (emphasis added). The court then asserted that, because these references were false, Trinity had falsely certified that the ET-Plus was Report 350 compliant. ROA.13297.

That claim is wrong on multiple levels. First, the phrase "standard ET-Plus" does not appear in "forty separate places" in the 2005 Report—it appears *twice*. The word "standard" is used as an adjective nineteen times in the Report. In all but two of those instances, "standard" modifies other nouns. ROA.313-317, ROA.325, ROA.333, ROA.345. So the district court's claim that "standard" ET-Plus is a defined term that appears forty times in the 2005 Report is flagrantly incorrect.[14]

Second, in the two instances where "standard" ET-Plus does appear, the Report accurately summarizes modifications that were made to the ET-Plus system—as a whole—for attachment to a 31″ guardrail. *See* ROA.306 ("Several modifications were made to the standard ET-PLUS *to accommodate the . . . (31-inch) high W-beam guardrail*") (emphasis added); ROA.314 ("A standard ET-PLUS guardrail terminal was modified *for attachment to a . . . (31-inch) guardrail system*") (emphasis added). By contrast, where the Report refers to the ET-Plus

[14] The error stems from an erroneous assertion by Harman's counsel. ROA.9137:22-9138:1 ("[Q.] Do you know that you told the Federal Highway Administration 40 times in this report it was a standard ET-Plus head? A. We may have. I didn't count how many times that phrase was in there.").

extruder head, it does so explicitly by referring to the "ET head." ROA.340; *see also* ROA.345 ("ET-PLUS Head").

These statements are accurate, because they relate to modifications made to the ET-Plus for a particular purpose—to attach the entire ET-Plus system to a 31″ guardrail. In the list of modifications, the Report does not mention the 5″ to 4″ change to the width of the ET-Plus guide channels. That is because the ET-Plus with 4″ guide channels is used with *both* the 27¾″ and the 31″ guardrail. So it would make no sense to include the 5″ to 4″ change on the list of modifications made *to accommodate the 31″ guardrail*. Thus, Trinity fully and accurately disclosed all modifications made "to match the ET-Plus terminal . . . to the [31″ guardrail]." ROA.381 (DX-78).

3. Harman points to various snippets of trial testimony to bolster his falsity argument. But a proper understanding of the "standard" ET-Plus references in the 2005 Report explains why that testimony is inapposite. The district court leaned heavily on the following exchange with THP President Gregg Mitchell:

> Q. Okay. And – – and when the 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.

ROA.13296 (emphasis added).

But the premise of the entire exchange is incorrect. At no point in the 2005 Report did Trinity represent that it "*used a standard ET-Plus*." Quite the contrary, the Report explicitly stated that Trinity "*modified*" the ET-Plus for attachment to the 31″ guardrail. As explained above, that statement is accurate.[15]

In any event, whatever statements about "standard" ET-Plus were elicited by skillful trial counsel, there is an additional reason why they cannot possibly sustain the judgment. As noted above, Trinity sells the ET-Plus for use at both 27¾″ and 31″ guardrail heights. The 2005 Report—in which the "standard" ET-Plus language appears—relates only to the ET-Plus at the 31″ height. ROA.306 (DX-6); ROA.381-382 (DX-78). But Harman used *total* ET-Plus sales to calculate the number of false claims and the amount of damages. ROA.17247:9-14; ROA.17248:1-7; ROA.17796:15-17797:16. For that reason, any alleged falsity in the 2005 Report cannot support the judgment. At a minimum, remand would be required for a proper damages calculation.

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15 Harman's counsel proceeded to introduce the same false premise into colloquies with other witnesses. *See* ROA.16953:20-16955:14 (Dr. Bligh) ("[Q.] [T]o say you use a standard ET-Plus is totally wrong, is it not?" "A. Yes, it's not correct, sir."); ROA.17634:22-24 (Dr. Buth) ("[Q.] [T]hat's not true that you used the standard ET-Plus, did you? A. Okay.").

* * *

In sum, the reasonable determination that the 2005 changes were non-significant cannot give rise to an actionable false statement. The district court sustained the falsity finding only by importing an erroneous disclosure standard—one that FHWA has explicitly disavowed—and relying on a wildly inaccurate characterization of the 2005 Report.

III. Trinity Did Not Knowingly Make Any False Statement

As FHWA itself has confirmed, the applicable regulations required disclosure of "significant" changes, not "any" changes. This interpretation is correct. So it is obviously reasonable.

That is particularly true in light of the ambiguity in the regulatory regime in effect in 2005. Because a reasonable interpretation of an ambiguous regulation "belies the scienter necessary to establish a claim of fraud," *U.S. ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 832 (8th Cir. 2013), no reasonable jury could find scienter. *See U.S. ex rel. Farmer v. City of Hous.*, 523 F.3d 333, 340 n.12 (5th Cir. 2008) ("[I]f the regulations were thoroughly unclear, as a matter of law, the FCA's knowledge and falsity requirements have not been met.").

To establish scienter, Harman had to prove that Trinity "knowingly or recklessly cheated the government." *U.S. ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008). Although specific intent to defraud is not required, "the

statute's definition of 'knowingly' excludes liability for innocent mistakes or negligence." *Southland*, 326 F.3d at 681 (Jones, J., specially concurring); *see* 31 U.S.C. § 3729(b)(1).

It is well established that a "reasonable interpretation of any ambiguity inherent in the regulations belies the scienter necessary to establish a claim of fraud under the FCA." *Ketroser*, 729 F.3d at 832. The Supreme Court has similarly recognized that, where the "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." *Safeco Ins. v. Burr*, 551 U.S. 47, 70 n.20 (2007).

As explained above, under the regulations that existed in 2005, non-significant modifications did not require disclosure. At best, the regulations were ambiguous on that point. And Harman has not identified any "interpretive guidance 'that might have warned [Trinity] away from the view'" that non-significant changes did not need to be disclosed. *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 288 (D.C. Cir. 2015). Because the applicable regulations were at best ambiguous—and because there was "no authoritative contrary interpretation," *U.S. ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010)—there can be no reasonable finding of scienter.

The district court ignored this rule, instead relying almost exclusively on a single email to support the scienter finding. In a November 9, 2004 exchange, then-THP Vice President of Operations Steve Brown stated that the 5″ to 4″ change, "would save $2/ET," for a total savings of "$50,000/year," and result in "a better ET." ROA.7231 (PX-133). Brown added that, "If TTI agrees, I'm feeling that we could make this change with no announcement." *Id.*

That the change "would save $2/ET" says nothing at all about whether Trinity knew its certifications of Report 350 compliance were false. *See U.S. ex rel. Ruscher v. Omnicare, Inc.*, 2015 WL 5178074, at *28 (S.D. Tex. Sept. 3, 2015) ("[E]vidence of a profit motive . . . is not equivalent to evidence of a knowing intention to violate the FCA."). Report 350 itself contemplates changes "to improve performance *or to reduce cost of the design*." ROA.19306 (DX-3) (emphasis added).

Similarly, Brown's suggestion that "we could make this change with no announcement" sheds no light on whether Trinity acted with scienter. The district court touted this statement as a stunning admission. ROA.13303. But FHWA's regulations did not require disclosure of "any change" until a decade after Brown's email. So his statement that "we could make *this* change with no announcement" is hardly evidence that Trinity knew its certifications of Report 350 compliance

were false. The district court's contrary conclusion simply demonstrates that its erroneous "any changes" disclosure standard infected its scienter analysis as well.

* * *

In sum, there can be no reasonable finding of scienter based on a correct—and certainly reasonable—interpretation of an ambiguous regulatory regime.

IV. There Is No False Claim—Because Report 350 Compliance Is a Condition of Participation, Not a Condition of Payment

A final—and independently fatal—flaw in the liability verdict is that there was no "false claim" within the meaning of the FCA.

A. False Certifications Create FCA Liability Only Where the Certification Is a Condition of Federal Payment

It is well established that "'false certifications of compliance' create [FCA] liability only when 'certification is a prerequisite to obtaining a government benefit.'" *U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354, 365-66 (5th Cir. 2014). The rule in this Circuit is clear: "'[A] false certification of compliance, without more, does not give rise to a false claim for payment *unless payment is conditioned on compliance*.'" *Id.* (emphasis added). Harman bears the burden to prove that compliance is a condition of payment. *See U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 710-11 (7th Cir. 2014).

Not all certifications of compliance relate to conditions of payment. Instead, "courts are careful to distinguish between conditions of program *participation* and

conditions of *payment*." *U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008). A condition of participation is "enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program." *Id.* By contrast, "the underlying regulation is a 'condition of payment'" if "the government would not have paid the claim had it known the [contractor] was not in compliance." *Hobbs*, 711 F.3d at 714. Only the latter gives rise to FCA liability.[16]

To determine whether a given requirement is a condition of participation or a condition of payment, courts look to several factors. The first is whether the relevant statute or regulation states that payment is conditioned on compliance with certain requirements. *See Steury I*, 625 F.3d at 268-70. If so, those requirements are conditions of payment—and any others, by implication, are mere conditions of participation. *See U.S. ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 382-83 (5th Cir. 2003). Second, courts examine whether the requirement is phrased in "general[,] sweeping language"—requiring compliance with "all applicable laws and regulations," for example—or whether it provides that "payment is conditioned on perfect compliance with any particular law or

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[16] The conditions-of-payment doctrine is implicated—in a conditional second question presented—in a case currently pending before the Supreme Court. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, No. 15-7 (argument scheduled, Apr. 19, 2016).

regulation." *Conner*, 543 F.3d at 1219-20. Finally, courts examine whether noncompliance is addressed by nonpayment or through other administrative mechanisms. *See Steury I*, 625 F.3d at 269-70 ("[T]he Government's ability to seek a range of remedies in the event of noncompliance suggests that payment is not conditioned on a certification of compliance.").

B. The Applicable Regulations Make Clear That Report 350 Compliance Is a Condition of Participation

Whether federal reimbursement for the ET-Plus is conditioned on compliance with Report 350 "depend[s] on the specific statutes, regulations, and contracts at issue." *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 206 (5th Cir. 2013).[17]

1. There is no question that compliance with Report 350 is at least a condition of participation in FHWA's federal-aid reimbursement program. *See* ROA.19676 (DX-10) (requiring "all new installations of highway features on the National Highway System (NHS) that are covered in the NCHRP Report 350 to have been tested and found acceptable according to the guidelines in that report").

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[17] This Court has previously remanded the conditions-of-payment issue "for further factual development" where the relator failed to identify the relevant statutes and regulations. *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902-03 (5th Cir. 1997); *see also Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 476 n.6 (5th Cir. 2012) (citing *Thompson*). But the interpretation of those regulations is a question of law. *See U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1046-47 (S.D. Tex. 1998) (affording *Chevron* deference to agency's regulatory interpretation).

But the question remains whether compliance with Report 350 is a condition of federal reimbursement, such that noncompliance could give rise to FCA liability. The applicable regulations make clear that it is not.

A State seeking federal-aid reimbursement for a transportation project is required by statute to submit a project proposal to FHWA. 23 U.S.C. § 106. If FHWA approves the proposal, it enters a formal Project Agreement with the State that defines the scope of the work and other project-related commitments. The regulation that governs Project Agreements between the states and the federal government contains two types of requirements—found in 23 C.F.R. § 630.112(a) and § 630.112(c), respectively.

Section 630.112(a) requires states to comply with "title 23, U.S.C., the regulations issued pursuant thereto, the policies and procedures promulgated by the FHWA relative to the designated project covered by the agreement, and all other applicable Federal laws and regulations." 23 C.F.R. § 630.112(a). This sweeping language—requiring broad compliance with title 23 of the U.S. Code, the regulations and policies issued thereunder, and "*all other applicable Federal laws*"—is a classic example of a condition of participation. Indeed, it would be wholly "unreasonable" to conclude that requiring "continued compliance with the thousands of pages of federal statutes and regulations" creates "conditions of

payment for purposes of [FCA] liability." *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711 (7th Cir. 2015).

By contrast, § 630.112(c) provides that "[t]he State must stipulate that *as a condition to payment of the Federal funds obligated*, it accepts and will comply with the following applicable provisions." 23 C.F.R. § 630.112(c) (emphasis added). The provisions that follow require the State to maintain a drug-free workplace, abide by lobbying restrictions, comply with suspension and debarment rules, and commence construction within certain time limits. *Id.* This is a paradigmatic condition of payment, since it "explicitly links" federal reimbursement to a specific set of enumerated requirements. *Mikes v. Straus*, 274 F.3d 687, 700-01 (2d Cir. 2001). Notably absent from that list is any reference to compliance with Report 350.

The clear import of § 630.112 is that FHWA has elected to specify certain conditions of payment—and Report 350 compliance is not among them. This conclusion is reinforced by the existence of a detailed remedial scheme that permits FHWA to suspend or debar any contractor for violating the terms of an agreement. 2 C.F.R. Part 180; 48 C.F.R. Subpart 9.4. That the government is authorized "to seek a range of remedies in the event of noncompliance" underscores that "payment was not conditioned on [Trinity's] certification of compliance" with Report 350. *Spicer*, 751 F.3d at 366. Indeed, it would make no

sense "to read the FCA, a statute intended to protect the government's fiscal interests, to undermine the government's own regulatory procedures." *Conner*, 543 F.3d at 1222.

2. The district court scoffed at Trinity's conditions-of-payment argument, dismissing it as "nothing short of incredible" in light of certain trial testimony. ROA.13304. But the court—once again—missed the mark with its repeated assertion that "such certification was essential *for Trinity to sell the ET-Plus.*" *Id.* (emphasis added). The relevant question for FCA purposes is whether the certification is a prerequisite to obtaining payment *from the federal government*—not from private contractors. *Spicer*, 751 F.3d at 365-66.

The district court identified a snippet of trial testimony from Gregg Mitchell purporting to affirm that certifying Report 350 compliance is required "in order for there to be federal reimbursement for the purchase." ROA.13304. That, of course, is a legal conclusion—and one that is wholly at odds with the applicable regulations. And, in any event, the legal conclusions of a fact witness are not binding. *United States v. El-Mezain*, 664 F.3d 467, 511 (5th Cir. 2011) ("It is also generally prohibited for a lay witness . . . to give legal opinions.").

* * *

It is undisputed that FHWA regulations require full compliance with Report 350—and that failure to comply with Report 350 can trigger a variety of

administrative remedies. The only question here is whether those potential remedies include treble damages and civil penalties under the FCA. The applicable regulations make clear that they do not, because the regulations treat Report 350 compliance as a condition of participation, not payment. For that reason, "the underlying claim for payment is not 'false' within the meaning of the FCA." *Steury I*, 625 F.3d at 269.

V. The Damages Award Cannot Stand Because the Government Received the Full Benefit of Its Bargain

Separate and apart from the numerous defects regarding liability, the damages award is fatally flawed on multiple levels. The simplest reason is this: FHWA's repeated statements of ET-Plus approval confirm that the government received the full benefit of its bargain, and therefore suffered no damages at all.

It is well established that "[t]he Government's actual damages" under the FCA "are equal to the difference between the market value of the [products] it received and retained and the market value that the [products] would have had if they had been of the specified quality." *United States v. Bornstein*, 423 U.S. 303, 316 n.13 (1976). Under this "benefit of the bargain" rule—which penalizes fraud while preventing windfall judgments—Harman needed to prove both (1) the value of the ET-Plus systems the government received and (2) the amount the government actually paid in ET-Plus reimbursements. Because Harman failed to

carry his burden to establish either of those figures, *see* 31 U.S.C. § 3731(d), the damages award cannot stand.

1. The first—and most obvious—flaw in the damages award is that FHWA has repeatedly confirmed that the government received the full benefit of its bargain. It is black-letter FCA law that "[w]hen the government gets what it paid for despite a contractor's misstatements, it has suffered no 'actual damages.'" *United States v. United Techs. Corp.*, 782 F.3d 718, 731 (6th Cir. 2015). As explained above, FHWA's June 17, 2014 memorandum confirmed that the ET-Plus has an "unbroken chain of eligibility" for federal reimbursement. ROA.4306 (DX-2). That continuous approval makes clear that the government received exactly what it paid for—a product that was at all times Report 350 compliant and eligible for federal reimbursement. Thus, the government's damages cannot possibly be $175 million, because *there are no damages at all*.

FHWA's June 17, 2014 memorandum refutes the premise of Harman's damages calculations. *See* ROA.17275:8-12 (Chandler) ("The premise of my calculations is that the ET-Plus is not compliant with the Federal Highway Administration standards"). But instead of considering FHWA's statements, Harman's expert simply ignored them. ROA.17280:17-21 ("[Q.] [I]n your damage calculations, did you consider the Federal Highway Administration's June 17, 2014 letter? A. I did not."). Indeed, Harman's expert did not even *attempt* to

ascertain the value of the ET-Plus systems reimbursed by the government. ROA.17274:10-12 ("I cannot render an opinion with respect to what the actual benefit to the United States Government would be."). Instead, he simply assumed, based on the representations of counsel, that the ET-Plus systems were worth only scrap value. ROA.17273:17-21 ("I was advised by counsel that the evidence presented in this trial will show that the units themselves have no value.").

2. Harman also failed to prove how much the government paid in ET-Plus reimbursements. Specifically, Harman's damages model failed to account for the fact that the federal government will reimburse states only for ET-Plus systems installed on federal-aid highways. Harman's expert admitted that he failed to trace any ET-Plus sale to a specific payment by the federal government. Instead, he used data from the Internet regarding the states' *total* highway-related expenditures. ROA.17268:2-17270-18; ROA.17288:4-23; ROA.13525-26. To calculate his damages figure, he multiplied Trinity's total ET-Plus revenue by the percentage of states' total highway-related expenditures that was spent on federal highway projects. ROA.13527; ROA.17248:1-17251:4.

The problem, of course, is that there is no correlation between the percentage of states' highway-related expenditures that was spent on federal projects and the percentage of ET-Plus sales that was federally reimbursed. ROA.17770:5-7 ("Just as Mr. Chandler has testified, there's no correlation

between that percentage and an actual reimbursement by the Federal Government."). Harman's proxy data is not specific to the ET-Plus. ROA.17270:7-18 (Chandler) ("Q. And there's no numbers anywhere on this table . . . that would identify even a specific claim for payment by a state to the FHWA for an ET-Plus?" "A. No, this is just expenditure data."). Indeed, his data is not even limited to spending on roadside safety devices—it includes spending on everything from bridges to tunnels to mass transit. ROA.17269:1-17270:11.

Because Harman relies on a proxy that bears no relationship to what the government actually paid for the ET-Plus, his damages model is not a "just and reasonable" damages estimate "based on *relevant data*." *United States v. Killough*, 848 F.2d 1523, 1531 (11th Cir. 1988) (emphasis added). Instead, he has supplied only "guesswork" and "speculation," which cannot support any damages award—much less the largest FCA judgment in history. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 46 (5th Cir. 1972).[18]

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[18] The district court repeatedly chided Trinity for failing to "ke[ep] records regarding the reimbursements actually paid by the federal government," going so far as to invoke "the absence of any data *from Trinity*" in concluding that Harman's damages model was a reasonable estimate. ROA.13308-13309 (emphasis added). But that critique upends the burden of proof—which rests squarely with Harman. It also badly misunderstands the federal-aid reimbursement process. Trinity sells the ET-Plus to private contractors, who in turn may sell to State DOTs, which in turn may seek federal reimbursement for systems installed on federal-aid highways. So it is no surprise that Trinity has no data about federal reimbursement—since Trinity is not party to the relevant transactions with the federal government.

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There can be no damages when the government paid for, and received, a product that was Report 350 compliant and approved by FHWA. On these facts, allowing any damages award to stand would allow Harman to reap a windfall judgment. Because "the evidence presented does not support the jury's award," *Transoil (Jersey) Ltd. v. Belcher Oil Co.*, 950 F.2d 1115, 1122 (5th Cir. 1992), this Court should reverse and render a zero-dollar damages award.

At a minimum, a new trial on damages is warranted. And because damages and liability are wholly "interwoven"—since FHWA's statements approving the ET-Plus are implicated in both—a complete new trial is necessary. *Anderson v. Siemens Corp.*, 335 F.3d 466, 475-76 (5th Cir. 2003) ("[P]artial new trials should not be resorted to 'unless it appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.'").

VI. The Civil Penalties Award Is Fatally Flawed, Because the District Court Failed to Submit the Number of False Claims to the Jury

The civil penalties award also suffers a fatal flaw: The district court violated Trinity's Seventh Amendment right to a jury trial by failing to submit the number of false claims to the jury.

"By virtually all authorities, parties generally have the right to a jury trial under the False Claims Act." John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 5.08[B] (4th ed.). Because the number of false claims is the linchpin of

FCA liability, the jury must find the number of false claims "to preserve the 'substance of the common-law right of trial by jury.'" *Tull v. United States*, 481 U.S. 412, 426 (1987) (analyzing Clean Water Act civil penalties). Submitting the number of false claims to the jury is consistent with the model jury instructions and with standard practice in FCA litigation. *See* 3C Fed. Jury Prac. & Instr. § 178:71 (6th ed.) ("[P]lease state the number of false claims you find defendant *[name]* submitted to the government.").

So it is inexplicable that the district court—over Trinity's repeated objections to the jury charge—refused to submit the number of false claims to the jury. *See, e.g.*, ROA.17903:14-21 (Counsel: "Defendants object to the failure of the instruction in the verdict form to submit to the jury the task of determining the number of claims." The Court: "That objection is overruled.").[19]

What's more, the court compounded its error by selecting a number of false claims—16,771—that was hotly disputed at trial. ROA.13328 (imposing "a civil penalty . . . for each of the 16,771 false certifications Trinity made in connection

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[19] The charge error is fully preserved. Nonetheless, in denying Trinity's motion for a new trial, the district court halfheartedly accused Trinity of waiving its "constitutional challenges." ROA.13544. That is incorrect. Trinity demanded a jury trial in its answer, ROA.2066—and unless a party specifies particular issues in its jury demand, "it is considered to have demanded a jury trial on all the issues so triable." Fed. R. Civ. P. 38(c). To find waiver in the face of Trinity's repeated objections on this point would subvert this Court's "obligation to 'indulge every reasonable presumption against waiver.'" *Jennings v. McCormick*, 154 F.3d 542, 545 (5th Cir. 1998).

with false claims for payment"). Harman presented no evidence that Trinity made 16,771 certifications of compliance. Instead, he counted only Trinity *invoices* for ET-Plus sales and estimated that "the *majority* of the . . . bill of lading files"—which are cross-referenced in the invoices—"contain the certifications." ROA.17281:5-17286:22 (emphasis added). Moreover, Harman's expert calculated the number of invoices based on the same flawed proxy—states' total highway-related expenditures—that tainted the damages award. ROA.13529; ROA.17259:22-172560:9; ROA.17287:6-17289:19.

As a direct consequence of these errors, Trinity is now subject to a civil penalty award of more than $138 million. A new trial on all issues is necessary to remedy the prejudice to Trinity. *See* 12 James Wm. Moore *et al.*, *Moore's Federal Practice* § 59.13[2][b] (3d ed.).

VII. A New Trial Is Warranted in Light of Newly Discovered Evidence about the Crashworthiness and Dimensions of the ET-Plus

Finally, a new trial is warranted because newly discovered evidence has emerged in the form of post-trial audits of the ET-Plus—namely, the official results of the post-trial crash tests and the Dimensions Report—that rebut key aspects of Harman's case and confirm that the government received the benefit of its bargain.

A. The Crash Test Results and Dimensions Report Satisfy Rule 59

Under Rule 59, a new trial may be granted based on newly discovered evidence if "(1) the facts discovered are of such a nature that they would probably

change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching." *La Fever, Inc. v. All-Star Ins.*, 571 F.2d 1367, 1368 (5th Cir. 1978). The evidence at issue here amply satisfies that standard.

1. First, the newly discovered evidence is sufficiently compelling—cutting to the core of Harman's fraud theory and damages model—that it "would probably change the outcome" of the trial. *Id.*

The official results of the post-trial crash tests rebut a key premise of Harman's case. Harman openly speculated before the jury that there were no recent crash tests of the ET-Plus with 4″ guide channels because Trinity was "afraid" to run such tests. ROA.16457:17-19. Harman would not have been able to inflame the jury in this manner if the official crash test results had been available. After all, FHWA, SwRI, and an independent expert each "independently evaluated the crash test results," and "determined that *all . . . tests passed the NCHRP Report 350 criteria*." ROA.11483 (emphasis added); ROA.11823; *see also* ROA.11512-115821; ROA.11864-12221.

In addition, the Dimensions Report—issued by a joint Task Force of federal and state transportation experts—rejected Harman's claims that there are "multiple versions" of the ET-Plus, and confirmed that the ET-Plus units crash tested at SwRI were "representative of the devices installed across the country."

ROA.11447 ("There is no evidence to suggest there are multiple versions (*i.e.*, ET-Plus 4-inch devices with markedly different dimensions)."); ROA.11450-11464.

Together, the crash test results and the Dimensions Report make clear that there is only one version of the ET-Plus with 4″ guide channels, that the product is Report 350 compliant, and that the government's damages cannot be $175 million, because *there are no damages*. Such evidence eviscerates the whole premise of Harman's claims, and thus plainly would have altered the outcome of the trial.

2. Second, the evidence is "actually newly discovered and could not have been discovered earlier by proper diligence." *La Fever*, 571 F.2d at 1368.

Newly discovered evidence "must be in existence at the time of the trial." *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 364 (5th Cir. 1978). The dimensions of the ET-Plus systems installed on roads across the country were surely in existence at the time of trial, and Trinity presented testimony to that effect. But Trinity had no ability to commission a government audit, and was therefore "unable to establish" the dimensions "as the later audit did." *Chilson v. Metro. Transit Auth.*, 796 F.2d 69, 72 (5th Cir. 1986) (post-trial government audit confirming contractual overpayment was newly discovered evidence).

The same is true for the crash tests. Courts have recognized that post-trial tests verifying an object's physical characteristics or its reaction to a set of stimuli may constitute newly discovered evidence. *See, e.g.*, *Laguna Royalty Co. v.*

Marsh, 350 F.2d 817, 822-25 (5th Cir. 1965) (well sands); *Swift Agric. Chem. Corp. v. Usamex Fertilizers, Inc.*, 27 Fed. R. Serv. 2d 930 (E.D. La. 1979) (reaction time). In the same way, the crash tests here measured the physical properties of the ET-Plus under certain stimuli—namely, impact by a test vehicle of a certain size, at a certain speed, and at a particular angle. ROA.11483-11485 (summarizing Report 350 tests).

Below, Harman argued that Trinity should have conducted its own audit or additional crash testing prior to trial, notwithstanding that FHWA had never requested that such testing be performed. But this Court did not fault the plaintiff in *Chilson* for failing to present his *own* audit of the contract—instead, it held that the post-trial government audit was newly discovered evidence. 796 F.2d at 72 (overpayment "was in existence at the time of the trial," even though "[i]t was not known . . . until the internal audit revealed it after the trial was over"). Under *Chilson*, Trinity cannot be faulted for the timing of the official crash test results and Dimensions Report.

3. Finally, there can be no question that Trinity's newly discovered evidence is not "merely cumulative" of the evidence at trial. *La Fever*, 571 F.2d at 1368. The Dimensions Report is different in kind—an official audit—from the dimensions evidence Trinity was able to present at trial. And the official crash test

results cannot be characterized as cumulative—particularly since Harman emphasized the absence of recent crash tests at every opportunity.

B. The District Court Abused Its Discretion by Failing to Even Consider Trinity's Newly Discovered Evidence

Notwithstanding Trinity's robust showing that its newly discovered evidence satisfies the Rule 59 standard, the district court refused even to consider that evidence. Instead, the court cut short the briefing schedule—denying Trinity the opportunity to file a reply brief—and issued a one-paragraph order stating that "[c]ertain of the issues" raised by Trinity "are wholly new and were never raised prior to trial," and that others "the Court has already dealt with" in its Rule 50(b) opinion. ROA.13544. It then stated that "[t]he Court *declines to address/readdress these issues*," and denied the motion. *Id.* (emphasis added).

This is peculiar logic. Trinity obviously could not have "raised" its newly discovered evidence "prior to trial." After all, "newly discovered evidence," by its very definition, is not discovered until after trial. Nor was that evidence before the court in connection with the Rule 50(b) motion. ROA.13321 ("Such [crash] 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).").

Thus, the clear import of the Rule 59 order is that the district court simply "*decline[d] to address*" Trinity's newly discovered evidence—even though it was

properly before the court for the first time. Because the district court "failed to exercise the 'sound discretion' entrusted to [it], the reason for such deference by an appellate court disappears." *Renico*, 559 U.S. at 775. This Court should review the Rule 59 order de novo, and vacate and remand for a new trial on all issues.

CONCLUSION

This Court should reverse and render judgment as a matter of law for Trinity, because Harman failed to meet any of the required elements under the False Claims Act. Defendants are further entitled to relief from the judgment due to fatal defects in the damages and civil penalty awards, and due to the district court's refusal to consider Defendants' newly discovered evidence.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,981 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that, on March 21, 2016, a true and correct copy of the foregoing motion was served via the Court's CM/ECF system on all counsel of record.

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