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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INTRODUCTION

Harman's core argument boils down to this: "It does not matter what federal officials actually do." Harman Br. 23. "Thus, the FHWA's decision in June 2014 to allow the ET-Plus to stay on the market is *not relevant* to the issue of whether Trinity committed fraud." *Id.* at 24 (emphasis added).

That is a radical revision of the False Claims Act. The Act authorizes relators to bring suits *on behalf of* the United States, not to wage war against it—to "vindicate civic interests," not "the parochial interests of relators." *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340 (6th Cir. 2000). Yet that is what Harman is doing here—attacking FHWA for private financial gain.

That cannot be right. Indeed, Harman's version of the FCA has been rejected by this Court, by multiple other courts of appeals, and again recently by the U.S. Supreme Court. *See Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2002-04 (2016). Under that precedent, continued government payment is—far from "not relevant," as Harman claims—"*strong evidence*" that an alleged false statement is "not material." *Id.* at 2003-04 & n.6 (emphasis added).

This case is even easier. Here, the government has not only continued to pay for the ET-Plus—it has repeatedly reaffirmed that the ET-Plus is, and always has been, fully eligible for federal reimbursement. And Harman has done nothing to rebut that conclusion. That should be the end of this case.

Not surprisingly, then, Harman has difficulty meeting any—let alone all—of the elements of the FCA. As to materiality, he attacks arguments Trinity does not make. As to falsity and scienter, his arguments conflict with FHWA regulations and legal standards he does not mention, let alone refute. And on damages, he has no response to FHWA's statements confirming that the government received exactly what it paid for—a product that was compliant with NCHRP Report 350.

At bottom, Harman's case amounts to little more than a policy disagreement with federal regulators. Harman (and his amici) disagree with the experts at FHWA, the American Association of State Highway and Transportation Officials (AASHTO), the Southwest Research Institute (SwRI), and various state DOTs about whether the ET-Plus is Report 350 compliant.

But adjudicating policy disagreements is not the business of the FCA. The Act punishes fraud, not "garden-variety . . . regulatory violations"—and certainly not policy disputes in which the United States agrees with the defendant. *Escobar*, 136 S. Ct. at 2003. The Court should reverse.

ARGUMENT

I. There Is No "Material" False Statement Because the ET-Plus Is, and Always Has Been, Eligible for Federal Reimbursement

A. Statements of Government Approval Provide "Strong Evidence" That Any Alleged False Statement Was Immaterial

1. Harman offers a radical reconception of the FCA, in which the government's conduct is "not relevant" to materiality because "[i]t does not matter what federal officials actually do." Harman Br. 23-24.

That vision has been rejected both by this Court and other courts of appeals. Trinity Br. 21-26 (collecting cases). And it was rejected again recently, and unanimously, by the Supreme Court in *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016).

As the Court noted, materiality is a "demanding" and "rigorous" requirement that turns on "the likely *or actual behavior* of the recipient of the alleged misrepresentation." *Id.* at 1996, 2002-03 (emphasis added). Accordingly, "if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is *strong evidence* that the requirements are not material." *Id.* at 2003-04 (emphasis added).

Escobar squarely rejects Harman's vision of the FCA. Far from "not relevant," Harman Br. 24, government conduct is "strong evidence" of

immateriality, warranting dismissal "on a motion to dismiss or at summary judgment." 136 S. Ct. at 2004 & n.6 (rejecting assertion that "materiality is too fact intensive" to be decided by the court).

The principles articulated in *Escobar* readily apply to this case: Continued "regular[]" payments by the government, with "no change in position," can establish immateriality as a matter of law. *Id.* at 2003-04. That is all the more true where—as here—the government also investigates the allegations and reaffirms its approval of the product. Trinity Br. 22-25.

Indeed, multiple courts of appeals have found no materiality as a matter of law where the government learned of the alleged false statement after payment, and continued to pay for and approve the product.

Most notably, this Court examined FHWA's "authoritative June 17, 2014 letter" affirming the eligibility of the ET-Plus, in a mandamus opinion Harman fails to even mention. *In re Trinity Indus., Inc.*, No. 14-41067 (5th Cir. Oct. 10, 2014). The Court concluded that "a strong argument can be made that *the defendant's actions were n[ot] material*" as a matter of law. *Id.* (emphasis added).

That conclusion is amply supported by other authority. *See, e.g.*, *U.S. ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556, 563 (7th Cir. 2015) (alleged false statements "immaterial" as a matter of law because government "learned of plaintiffs' concerns, thoroughly investigated them, and determined that they were

meritless," while "continu[ing] to pay for and use" the product), *cert. denied*, 2016 WL 932681 (U.S. June 27, 2016); *U.S. ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1456, 1460, 1462 n.3 (4th Cir. 1997) ("no reasonable jury could have . . . found" materiality where government rejected relator's allegations while continuing to pay); *U.S. ex rel. Smith v. Boeing Co.*, 2014 WL 5025782, at *14, *27 (D. Kan. Oct. 8, 2014) (alleged false statements "not material" as a matter of law because government "rejected relators' claims of safety problems and regulatory non-compliance" and continued to purchase the product), *aff'd*, 2016 WL 3244862 (10th Cir. June 13, 2016); *see also U.S. ex rel. Thomas v. Black & Veatch Special Projects Corp.*, 820 F.3d 1162, 1168-75 (10th Cir. 2016) (alleged false statements "not material" because government "issued notices of final completion and acceptance of work" and "continued to pay" "even after learning of and investigating" relator's allegations).

2. Harman does not cite a single case that disagrees with the authority collected above. Instead, he attacks arguments Trinity does not make.

First, Harman accuses Trinity of advocating an "outcome materiality" standard that courts have disparaged. Harman Br. 32. Trinity does no such thing.

Courts have rejected outcome materiality for a simple reason: The statutory definition of materiality is not dependent on the actual "outcome," but on whether

the alleged false statement has a "natural tendency to influence" the government's payment decision. 31 U.S.C. § 3729(b)(4); Trinity Br. 21.

Thus, a relator "need not *prove* that the government would have made a different decision" absent the alleged misrepresentation—for example, by presenting testimony from a government employee—because there may be other ways to demonstrate "natural tendency." *U.S. ex rel. Am. Sys. Consulting, Inc. v. ManTech Advanced Sys. Int'l*, 600 F. App'x 969, 974 (6th Cir. 2015) (emphasis added); *see also U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 468-69 (5th Cir. 2009) (rejecting outcome materiality).[1]

At the same time, "the government's actual conduct" is certainly "relevant to assessing materiality." *Marshall*, 812 F.3d at 563. After all, what the government "said and did" is often the "*best available evidence* of whether alleged misrepresentations had an objective, natural tendency to affect a reasonable government decision-maker." *Am. Sys.*, 600 F. App'x at 976 (emphasis added).

That is exactly what Trinity argues here. Trinity Br. 23 n.5. And the Supreme Court unanimously confirmed this understanding of materiality in

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[1] *See, e.g.*, *United States v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015) (rejecting outcome materiality), *cert. granted, judgment vacated*, 2016 WL 3461558 (U.S. June 27, 2016); *U.S. ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 94-96 (2d Cir. 2012) (rejecting argument "that materiality *must be established* in each case based on the testimony of a decisionmaker") (emphasis added); *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 917 (4th Cir. 2003) (rejecting outcome materiality).

Escobar. The Court examined the common law origins of materiality and concluded that, "[u]nder any understanding of the concept," materiality takes into account the recipient's "actual behavior." 136 S. Ct. at 2002.

In sum, Trinity does not advocate outcome materiality. It is Harman's materiality argument that conflicts with established precedent, including *Escobar*.

Second, Harman devotes an entire section of his brief to attacking the "government knowledge" defense. Yet Harman acknowledges that "Trinity Does Not Assert a 'Government Knowledge' Defense." Harman Br. 41. Trinity agrees. The government knowledge defense goes to scienter, not materiality—and is not at issue in this appeal. *See United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 263 (5th Cir. 2014).

Third, Harman cites cases that disparage the actions of low-level government employees. *See, e.g.*, *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 668 F. Supp. 2d 548, 568-70 (S.D.N.Y. 2009) ("[A]n individual government employee's decision to approve or continue such funding . . . does not demonstrate that the falsity was not material.").[2]

But that, of course, is not this case. As Trinity has explained—and Harman does not dispute—FHWA's official agency memorandum, issued in direct

[2] On this view, Harman would presumably agree that this Court should ignore the amicus brief of James Hatton, who retired from FHWA 18 years ago.

response to "inquiries from FHWA Division Offices and State DOTs," reaffirmed that the ET-Plus has an "*unbroken chain of eligibility*." Trinity Br. 25-26. In addition, DOJ made clear that the June 17, 2014 memorandum "addresse[d] all of the issues" raised by Harman. ROA.4308. These statements—which represent the views of the government itself, submitted in lieu of testimony—cannot be derided as the work of an "inattentive disbursing officer[]." *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008).

Finally, Harman argues that government conduct "after the fraud" is "irrelevant," because federal officials cannot "forgive" fraud. Harman Br. 23-24; *see also id.* at 33, 35, 42. But once again, that misses the point. No one is arguing that agency action can "forgive" fraud or somehow "estop" the Attorney General from intervening in an FCA suit. *Id.* at 33. Instead, Trinity argues that an official agency memorandum confirming an "unbroken chain of eligibility" for federal reimbursement is "strong evidence" of immateriality—and thus, *there is no fraud* here in the first place. *See Escobar*, 136 S. Ct. at 2003-04.

Numerous courts have found no materiality as a matter of law where, as here, the government learned of the alleged false statement "after the fact," and nevertheless continued to pay for and approve the product. *See supra* at 3-5.

3. There is an additional deficiency in Harman's materiality argument. Harman claims that Trinity's certifications of Report 350 compliance were

material because "[w]ithout such certifications, Trinity could not sell its product for use on any federally-subsidized highway." Harman Br. 29-30. That is wrong on two levels.

First, *Escobar* confirms that "[a] misrepresentation *cannot be deemed material* merely because the Government designates compliance with a particular . . . requirement as a condition of payment." 136 S. Ct. at 2003 (emphasis added). "Nor is it sufficient . . . that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." *Id.* So even if Harman had evidence that Report 350 compliance were a condition of payment, that would not be sufficient to prove materiality.

This case is even easier, because Report 350 compliance is not a condition of federal payment. As explained, FHWA has specified certain conditions of payment—and Report 350 compliance is not among them. Trinity Br. 48-50 (citing 23 C.F.R. § 630.112(a), (c)).

Harman derides this argument as "pure sophistry," citing a statute that purportedly links "reimbursement from the federal government" to installation of approved "safety protective devices." Harman Br. 39-40. But Harman omits critical language from that statute. Read in full, it requires safety devices to be installed at "any highway *and railroad grade crossing or drawbridge* on that

portion of the highway with respect to which such expenditures are to be made." 23 U.S.C. § 109(e)(1) (emphasis added).

Thus, contrary to Harman's assertion, § 109(e)(1) requires the installation of "proper safety protective devices" (*e.g.*, crossing-arm barriers) only at "grade crossings and drawbridges." It does not govern safety devices generally (or end terminals in particular).[3]

* * *

In sum, Harman's argument that FHWA's conduct is "not relevant" is foreclosed by precedent from the Supreme Court, this Court, and other courts of appeals.

B. There Is No Serious Question That FHWA Has At All Times Approved the ET-Plus for Federal Reimbursement

As explained, Harman's primary materiality argument is that government approval is "irrelevant as a matter of law." Harman Br. 24. Alternatively, he also tries to question the legitimacy of FHWA's approval of the ET-Plus. *Id.* at 24, 43. That argument is Harman's fallback position—for good reason. There is no serious dispute that FHWA has at all times approved the ET-Plus for federal reimbursement.

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[3] Contrary to Harman's claims of waiver, Trinity made the conditions-of-payment argument in its Rule 50(b) papers—and the district court addressed it. ROA.8464; ROA.9446-9447; ROA.13304-13305.

1. Harman halfheartedly asserts that, "[a]t the time the [June 17, 2014] letter was issued," FHWA "was unaware . . . of any of the dimensional changes that Trinity had made other than the change from the 5″ to 4″ channel." Harman Br. 18-19. That is demonstrably false.

As Trinity has explained in detail, FHWA was well aware of the other alleged modifications, because *Harman identified them* in his January 2012 presentation to FHWA (ROA.18232-18275), his May 2013 Amended Complaint (ROA.197-200), and again in his March 2014 *Touhy* request (ROA.5039). Trinity Br. 28-30. Trinity also disclosed and discussed those modifications in a February 2013 letter that FHWA received. *Id.* at 29; ROA.20391-20392. Harman does not bother to engage these citations, much less refute them.

2. Harman also claims that FHWA's June 17, 2014 memorandum was procured by fraud because Trinity "concealed" the results of "five failed crash tests." Harman Br. 24.

But Harman fails to mention a critical defect in his argument: Those five crash tests did not involve an ET-Plus system, but an *experimental* "flared" system that was never commercialized—and thus never sold or installed. Trinity Br. 30 n.8; ROA.16814:4-16815:23; ROA.17194:3-17195:1. And there is no FHWA rule requiring disclosure of experimental tests.

So it is not surprising that the district court excluded those tests from the first trial. ROA.14031:1-14. And even after the second trial, the district court was careful not to cite the flared tests as a justification for disregarding FHWA's June 17, 2014 memorandum. ROA.13314-13316. Instead, the court rested its disregard of the June 17, 2014 memorandum on the theory debunked above—namely, that FHWA was unaware of the modifications related to the 5″ to 4″ change. *Id.*

And of course, FHWA is aware of the experimental "flared" testing—and continues to pay for and approve the ET-Plus to this day. ROA.9410.

3. Harman next contends that two post-trial developments—FHWA's debarment inquiry and a subpoena issued by the U.S. Attorney's Office in Massachusetts, *see* Trinity Br. 18 n.4—have undermined FHWA's repeated approvals of the ET-Plus. Harman Br. 21, 24. The opposite is true.

FHWA has now resolved its inquiry without opening a debarment action. Harman claims that the resulting administrative settlement somehow supports his materiality argument. Harman 28(j) 1-2. But the settlement changes nothing about FHWA's June 17, 2014 memorandum.

The agreement makes clear that it does not alter FHWA's prior statements reaffirming the eligibility of the ET-Plus. Administrative Settlement § II.D (Harman 28(j), Ex. B). To this day, FHWA continues to "reaffirm[] that the ET-Plus meets the appropriate NCHRP criteria and has been and continues to be

eligible for Federal-aid reimbursement." FHWA, *History of the ET-Plus*, https://www.fhwa.dot.gov/guardrailsafety/history.cfm (last visited July 21, 2016).

The agreement further makes clear that FHWA will not suspend or debar Trinity—*regardless of the outcome of this appeal*. Administrative Settlement § III.C.1 ("FHWA has agreed not to pursue a suspension or debarment action premised upon the civil judgment . . . or the underlying alleged facts and events"). The agreement also expressly states that it does not reflect any view on the merits of this appeal. *Id.* § II.D.

Harman ignores all of this, and instead focuses on the monitoring provisions in the agreement. But Harman admits that the entry of judgment triggered the debarment inquiry. Harman 28(j) 1. So Harman is engaged in circular logic. He cites the administrative consequences of the largest judgment in FCA history as a reason to affirm the judgment—based on a document that expressly forecloses that inference.

If the government were actually abandoning its approval of the ET-Plus, surely it would say so (and presumably stop paying for it). It would not bury such a dramatic reversal in an administrative monitoring provision. A government agency does not change its position in a document that disclaims any change in position.

Cf. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").[4]

Harman and his amici also try to undermine FHWA's June 17, 2014 memorandum on the ground that "FHWA, Trinity, and TTI are all the subject of an ongoing criminal investigation by the DOJ and the FBI." Harman Br. 24.

That is a wild exaggeration. Trinity received a records subpoena from the U.S. Attorney's Office in Massachusetts over a year ago. Trinity Br. 18 n.4. As Harman acknowledges, that subpoena was issued in response to the proceedings below—again, as one would expect following the largest FCA judgment in history. Harman Br. 27. Once again, Harman is citing the judgment to support the judgment.

There have been no substantive developments since Trinity received the subpoena. Trinity is aware of no DOJ investigation into the actions of FHWA or its alleged "relationship" with Trinity (save for one media account it believes to be inaccurate). And there is certainly no investigation into any relationship between Trinity and the numerous entities that have confirmed FHWA's analysis of the ET-Plus. Trinity Br. 16-17.

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[4] Harman also attacks Trinity over the timing of the settlement. Harman 28(j) 1 (agreement finalized "*one day after*" Harman filed his response brief). But the timing was dictated by FHWA, not Trinity. In any event, Harman suffered no prejudice: He promptly filed a Rule 28(j) letter, and his six amici had ample opportunity to opine on the agreement.

4. Finally, Harman and his amici strain mightily to imply that FHWA was somehow corrupted by Trinity. Harman Br. 36.

This "corruption" allegation turns primarily on Trinity's campaign contributions and lobbying. *Id.* at 17-18; Four Victims Br. 2-3. But this is nothing more than "fundamental First Amendment activit[y]." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). Indeed, Harman has engaged in the very same First Amendment-protected activity, as federal lobbying disclosures confirm.[5]

* * *

At bottom, Harman's real argument (and that of his amici) is not that FHWA disagrees with Trinity—but that he disagrees with FHWA.[6] And not only with FHWA—but with every other entity that has independently validated FHWA's conclusions, including: (1) SwRI, the non-profit research facility that conducted the post-trial testing, (2) independent engineering expert Dr. Gabler, who peer reviewed SwRI's tests, (3) AASHTO, the non-profit organization that publishes highway standards, (4) the dozen state DOTs that participated in Task Forces I and

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[5] Similarly, Harman's amici disparage the former senior DOJ officials and state attorneys general who support Trinity as amici. *But see, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (relying on amicus briefs of former federal officials and state attorneys general); Transcript of Oral Argument at 28-29, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-4019) (Roberts, C.J.) (describing amicus brief as "extraordinary document").

[6] For example, Harman and his amici disagree with FHWA's decision not to impose "new, more stringent testing standards"—known as "MASH"—on products developed before 2011. Harman Br. 20, 24; *see* Safety Institute Br. 19. *But see* ROA.8490.

II, and (5) the Ministry of Transportation of the province of Ontario. ROA.11483; ROA.11823; ROA.11464; Joint AASHTO-FHWA Task Force, *Safety Analysis of Extruding W-Beam Guardrail Terminal Crashes* 2 (Sept. 11, 2015), https://www.fhwa.dot.gov/guardrailsafety/safetyanalysis/safetyanalysis.pdf.

Adjudicating policy disagreements is not the province of the FCA. *See supra* at 1-2. Harman "may think that [FHWA's] decision was wrong, but that does not make [Trinity's] statements materially false." *U.S. ex rel. Sanders v. N. Am. Bus Indus.*, 546 F.3d 288, 299 (4th Cir. 2008); *see also U.S. ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 831-32 (8th Cir. 2013) (same); *U.S. ex rel. Polansky v. Pfizer, Inc.*, 822 F.3d 613, 620 (2d Cir. 2016) (same).

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

Materiality remains the simplest ground for reversal. But Harman's falsity argument fares no better. Indeed, his primary argument conflicts with FHWA policies and regulations he fails to mention.

A. Harman Doubles Down on an Erroneous "Any Changes" Disclosure Standard That Did Not Exist in 2005

Trinity's opening brief explained that the district court's falsity analysis is premised on an erroneous "any changes" disclosure standard that finds no support in Report 350, FHWA's 1997 Policy Memorandum, or any other FHWA policy applicable in 2005. Trinity Br. 31-35.

Instead of analyzing the relevant policies, Harman reprises the district court's error, baldly asserting that "*[a]ny changes* made to a device after crash testing and approval must be disclosed to the FHWA." Harman Br. 3-4 (emphasis added). But the only citation he supplies for that proposition—other than his expert's self-serving assertion—is testimony discussing the standards applicable *in 2012*, following the rollout of a new disclosure regime. *Id.* (citing ROA.16876-16877).

Harman does not even mention, let alone refute, FHWA's official statement that there was no "any change" disclosure rule until May 2015—a full decade after the events at issue here. FHWA, *Eligibility Letter Request FAQs* (Dec. 9, 2015), http://safety.fhwa.dot.gov/roadway_dept/Policy_guide/road_hardware/elig_ltr_faq.cfm ("Question: Do 'non-significant' modifications to roadside safety hardware devices made prior to May 18th, 2015 need to be reported to FHWA? Answer: No.").

With the operative policies squarely against him, Harman resorts to sleight of hand. He claims that devices installed on highways must "replicate the crash-tested device"—citing testimony about when a *copy* of an approved device can be sold by another manufacturer. Harman Br. 3; *see* Trinity Br. 33 n.10. He further claims that FHWA directives "since 1997" required manufacturers to certify to

certain "standard provisions"—citing an acceptance letter for an unrelated device issued in 2007. Harman Br. 3.[7]

None of Harman's extraneous citations alters the fact that FHWA's policies and regulations in 2005 did not require disclosure of non-significant changes. Rather than rehabilitating the district court's falsity analysis, Harman simply repeats the error in hopes this Court will not notice.

B. Under the Applicable Disclosure Standard, There Is No False Statement

As FHWA's continuous approval of the ET-Plus makes clear, Trinity's certifications of Report 350 compliance were not false. Indeed, Harman does not dispute that 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) (emphasis added).

Rather than acknowledge the relevant standard, Harman treats the absence of formal "studies" about the 2005 changes as *per se* proof that there was no exercise of "good engineering judgment." Harman Br. 10 n.2.

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[7] Harman attempts to justify this argument because "Trinity continued to certify that no changes had been made until 2012." Harman Br. 10 n.2. But the changes at issue were made in 2005—and the 2005 ET-Plus acceptance letter contains no such language. ROA.381-382. Harman provides no authority—because there is none—for the proposition that the "standard provisions" are retroactive. So any certifications later in time are entirely beside the point.

But there is no requirement to perform a formal "study" before assessing the effect of a change. All that Report 350 provides is that "[g]ood engineering judgment must be used" to determine "the effect the change will have." ROA.19306. The Report elsewhere indicates that "design and analysis tools" include basic "principles of mechanics." ROA.19296; *see also* ROA.27863; ROA.27915.

Consistent with those principles, TTI engineers—after observing ET-Plus installations, *see* ROA.16919:11-16921:6—reasonably determined that the 2005 changes were non-significant. *See, e.g.*, ROA.16995:1-4. That determination required the exercise of engineering judgment and, therefore, "cannot be false." *Hill*, 448 F. App'x at 316.[8]

C. Harman Acknowledges That the 2005 Crash Test Report Cannot Support the Damages Award

Harman agrees that Trinity's certifications of Report 350 compliance—not the 2005 Report—are "at the heart of this case." Harman Br. 26. He further concedes that any falsity theory premised on the 2005 Report cannot sustain the damages award—because that Report relates only to the ET-Plus at the 31″ height,

[8] Harman also quotes testimony regarding a letter to Florida DOT. Harman Br. 11-12. But that letter discusses the *ET-2000*, not the ET-Plus. ROA.9379. And testimony regarding a Florida DOT letter about the ET-Plus makes clear that there were no "major design changes." ROA.17366:13-17367:22; ROA.9377. In any event, Harman does not—because he cannot—claim that the judgment below should be sustained based on a letter to Florida DOT. Instead, his theory of liability depends on the falsity of *every* certification of Report 350 compliance.

whereas Harman seeks damages for all ET-Plus sales. *Id.* at 53 n.15; Trinity Br. 41. Accordingly, this Court need not consider the 2005 Report to decide falsity.

Indeed, Harman contends that the 2005 Report is "relevant" only because Trinity uses it as "a sword and a shield." Harman Br. 27. But Trinity does not contend that the 2005 Report somehow absolves it of liability. Rather, Trinity argues only that the 2005 Report in no way undermines the truth of its certifications that the ET-Plus is Report 350 compliant. Trinity Br. 39.

Harman's claims about the 2005 Report are wrong in any event. He accuses Trinity of "creative writing"—but completely misstates Trinity's argument. Trinity has never claimed that "standard" in the 2005 Report referred "to the 31″ height being tested." Harman Br. 26. Of course the 31″ height "was not 'standard.'" *Id.* The very purpose of the 2005 Report was to obtain approval for modifications made "*to accommodate the . . . (31-inch) high W-beam guardrail*." ROA.306 (emphasis added).

Harman's confusion on this point appears to stem from his erroneous assumption—here and elsewhere—that the ET-Plus *is* the ET-Plus *extruder head*. But the record is clear that the ET-Plus is a *system* that comprises more than 40 component parts. *Compare* Trinity Br. 7 (citing ROA.17004:6-17), *with* Harman Br. 8 ("ET-Plus Changes" graphic with no record citation).

Thus, the use of "standard" in the 2005 Report clearly refers to the ET-Plus system that preceded that submission—namely, the ET-Plus attached to a 27¾″ guardrail. Trinity Br. 39-40. The Report accurately summarized all modifications made to attach that system to a 31″ guardrail.

* * *

In sum, Harman's core falsity theory rests on an "any changes" disclosure standard that did not exist in 2005, as FHWA has made clear. Under the correct disclosure standard, there is no false statement.[9]

III. Trinity Did Not Knowingly Make Any False Statement

Harman also does not engage, much less refute, the rule that reasonable interpretations of ambiguous regulations "belie[] the scienter necessary to establish a claim of fraud." *Ketroser*, 729 F.3d at 832. And he makes no attempt to identify 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, 288-89 (D.C. Cir. 2015) (quoting *Safeco Ins. v. Burr*, 551 U.S. 47, 70 (2007)). That alone should end the scienter inquiry—and this case.

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[9] Curiously, Dean Sicking's amicus brief—which fails to disclose that he is both a business competitor and Harman's retained expert in this case—expounds a new theory of liability, premised on an alleged fraud dating "back to 1998." Dean L. Sicking Br. 30. That account conflicts with Harman's theory of liability and bears little resemblance to the case tried below.

Instead, Harman appears to treat the marginal cost savings from the 2005 changes as evidence of scienter. Harman Br. 22 ("Trinity made the changes to save money"); *id*. at 10 n.2. But that argument is inconsistent with Report 350, which contemplates changes "to improve performance *or to reduce cost of the design* or both." ROA.19306 (emphasis added).

It is also at odds with the general rule that "evidence of a profit motive . . . is not equivalent to evidence of a *knowing intention to violate the FCA*." *U.S. ex rel. Ruscher v. Omnicare, Inc.*, 2015 WL 5178074, at *28 (S.D. Tex. Sept. 3, 2015) (emphasis added) (citing *U.S. ex rel. Gudur v. Deloitte & Touche*, 2008 WL 3244000 (5th Cir. Aug. 7, 2008)). Indeed, courts have consistently rejected relator-driven attempts to infer scienter from profit motive. *See U.S. ex rel. K&R L.P. v. Mass. Hous. Fin. Agency*, 456 F. Supp. 2d 46, 62 (D.D.C. 2006).[10]

Harman also tries to establish scienter based on "Trinity's own actions to conceal its fraud." Harman Br. 30-31. What follows is a rehash of his falsity argument—albeit in highly argumentative terms, and without record citations.

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[10] Treating cost savings as proof of scienter is even more absurd where, as here, those savings are miniscule. In 2005, Trinity's Construction Products Group earned $63.7 million in operating profit. Trinity Industries, *Annual Report (Form 10-K)* 18 (Mar. 2, 2006), https://www.sec.gov/Archives/edgar/data/99780/000095013406004111/d33283e10vk.htm. The putative cost savings from the 2005 changes—$2.00 per ET-Plus, or $50,000 per year—amount to less than *one tenth of one percent* of the Group's operating profit.

To state the obvious: That Trinity did not discuss the 5″ to 4″ modification with FHWA in 2005 is not enough to prove wrongful intent. Indeed, a rule that conflates falsity with scienter would be contrary to the Supreme Court's recent admonition that the scienter requirement must be "strict[ly] enforce[d]" to address "concerns about fair notice and open-ended liability." *Escobar*, 136 S. Ct. at 2002. Harman's attempt to use proof of nondisclosure as *per se* proof of scienter simply demonstrates how the erroneous "any changes" standard infects his entire argument.

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

A. Disgorgement Is Not an Available Remedy Under the FCA

Harman all but abandons the controlling "benefit of the bargain" standard, arguing instead that Trinity "must *disgorge* all the funds it received." Harman Br. 47 (emphasis added); *see also id.* at 25, 48, 50.

"[D]isgorgement" is, of course, a "restitutionary" remedy traditionally available in equity. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570-71 (1990). It is black letter law that "*restitution* is not *damages*." Dan B. Dobbs, *Law of Remedies* § 4.1(1) (2d ed. 1993).

Because the FCA provides only for "damages" and "civil penalt[ies]," 31 U.S.C. § 3729(a)(1), every court to consider the question has concluded that disgorgement is not available under the FCA. *See, e.g.*, *U.S. ex rel. Taylor v. Gabelli*, 2005 WL 2978921, at *13-14 (S.D.N.Y. Nov. 4, 2005).

B. Harman Failed to Offer a Reasonable Damages Estimate

The reasons that Harman runs from the applicable standard are apparent on closer review.

1. Harman has no response to the headline defect in his damages case—namely, that FHWA has repeatedly confirmed that the government received the benefit of its bargain. Trinity Br. 52-53. Indeed, there is no mention of FHWA's continuous approval of the ET-Plus anywhere in his damages analysis.

But no amount of wishful omission can alter the import of FHWA's confirmation that the ET-Plus has an "unbroken chain of eligibility" for federal reimbursement. ROA.4306. That approval makes clear that the government received exactly what it paid for—and therefore "sustain[ed]" no damages "because of [any] act" by Trinity. 31 U.S.C. § 3729(a)(1).

FHWA's approval is also the critical distinction between this case and *Longhi*, where part of the government's bargain was to obtain research from a *particular type of entity*—an "eligible deserving small business[]." 575 F.3d at 473. Because the grant recipients were not "eligible," the "intangible benefit" of the government's bargain "was lost." *Id.*

Here, by contrast, the government bargained for—and received—a product that was at all times Report 350 compliant. No "intangible benefit" was lost. No "substitut[ion]" was required. *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1008-

09 (5th Cir. 1972). Thus, the government's damages cannot possibly be $175 million, because *there are no damages at all*. Indeed, the government continues to reimburse ET-Plus purchases to this day.[11]

2. Harman's calculation of the amount the government paid in ET-Plus reimbursements is equally flawed.

Trinity's opening brief explained that Harman's damages model was premised on irrelevant proxy data. Trinity Br. 53-54. Harman's lead retort is not that his data is relevant or that his estimate is reasonable. Instead, he says his model is "conservative." Harman Br. 52. He then emphasizes that his expert "reduced his estimate" to reflect the "lowest" reimbursement rate of 80 percent, excluded data for sales after December 2013, and calculated scrap value using the weight of the entire ET-Plus system. *Id.* at 53-55.

But "merely applying conservative limitations to unfounded projections does not change the fact that they are unfounded." *Helft v. Allmerica Fin. Life Ins. & Annuity*, 2009 WL 815451, at *13 (N.D.N.Y. Mar. 26, 2009). Unless there is "reliable and tangible evidence" to support a damages model—and Harman

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[11] The "four victims of the ET-Plus" claim that the government did not receive the benefit of its bargain because they were injured in crashes involving the ET-Plus. Four Victims Br. 1. But the government bargained for a product that complied with Report 350—not one that eliminated all crash-related injuries. (Indeed, no such product exists.) In any event, each amici has separately filed a products liability suit, and the merits of their allegations will be addressed in those cases.

presented none—selecting the "conservative estimate" is no more than an "arbitrary gesture." *GoDaddy.com LLC v. RPost Commc'ns Ltd.*, 2016 WL 2643003, at *7-9 (D. Ariz. May 10, 2016).

Alternatively, Harman claims that Trinity is "largely responsible" for the flaws in his damages model because "it never came clean with its records." Harman Br. 55-56. But Trinity does not sell directly to, and is not directly reimbursed by, the federal government—and therefore has no data about federal reimbursement. Trinity Br. 54 n.18; ROA.30173-30178.

Indeed, even FHWA "does not maintain a segregable list of reimbursement payments made to states for individual pieces of highway equipment like the ET-Plus." ROA.5235-5236. Trinity cannot be faulted for Harman's failure to obtain that data from state DOTs.

V. The Civil Penalties Award Is Fatally Flawed

1. Harman does not dispute Trinity's Seventh Amendment right to a jury trial on the number of false claims. Instead, he asserts that Trinity "knowingly waived its right to a jury trial" at a July 10, 2014 evidentiary hearing. Harman Br. 58-59. Not so.

At that hearing, Trinity did not waive its rights—it simply repeated the Court's ruling:

> THE COURT: I'm not going to give this jury an issue on how many false claims were made. That is for the Court to decide. . . .
> MS. TEACHOUT: Your Honor, *with that guidance*, I don't think this type of evidence is relevant then.

ROA.14231:11-14232:7 (emphasis added); ROA.14235:14-15 ("We would assert, *with the Court's guidance now*, that this isn't an issue that the jury's going to decide.") (emphasis added).

Nothing in the hearing transcript reflects an "express[] and unequivocal[]" waiver of Trinity's right to a jury trial on the number of false claims. *Country (Soc.) Club of Savannah, Inc. v. Sutherland*, 411 F.2d 599, 600 (5th Cir. 1969); *see also Allstate Ins. v. Cmty. Health Ctr.*, 605 F. App'x 269, 271 (5th Cir. 2015) ("A party may waive this right in only two circumstances: either by express action or by failing to demand a jury trial within the requisite time.").

To the contrary, Trinity expressly demanded a jury trial in the first instance, ROA.2066, and then—before both trials—submitted jury instructions and a proposed verdict form that included the number of false claims. ROA.4870; ROA.4968; ROA.7468-7469; ROA.7537; *see also* ROA.8344-8345. When the final verdict form omitted the number of false claims, Trinity objected both in writing and in court. ROA.8354; ROA.17903:14-20. The court overruled these objections—but never indicated that Trinity had waived its jury-trial right. ROA.17903:21.

"The right to jury trial is too important . . . for courts to find a knowing and voluntary relinquishment of the right in a doubtful situation." *Jennings v. McCormick*, 154 F.3d 542, 545 (5th Cir. 1998). Courts have an "obligation to 'indulge every reasonable presumption against waiver.'" *Id.* There is no waiver here.[12]

2. Harman further contends that the district court's Seventh Amendment error was harmless because the number of false claims was "essentially undisputed." Harman Br. 60. Far from it.

Trinity vigorously disputed Chandler's testimony that there were 16,771 false claims: He did not "provide[] a number of alleged certifications," did not "track[]" the submission of any invoice to the government, and his calculation was tainted by the "same data" used in his damages analysis. ROA.17281:5-17286:22; ROA.17287:6-17289:19.

Given Trinity's litany of methodological objections, it is clear that "all of the evidence, viewed most favorably to [Trinity], would have withstood a motion for a directed verdict." *Roscello v. Sw. Airlines Co.*, 726 F.2d 217, 221-22 (5th Cir.

[12] Harman cannot claim prejudice from his failure to introduce evidence regarding the number of false claims. Harman Br. 59. In the event of a new trial, he would have ample opportunity to introduce any such evidence.

1984). Accordingly, the district court's constitutional error was not harmless, and a new trial is warranted.

VI. A New Trial Is Warranted In Light of Newly Discovered Evidence About the ET-Plus

1. Contrary to Harman's assertion, Trinity's newly discovered evidence amply satisfies Rule 59.

First, Harman contends that the post-trial crash tests and Dimensions Report would not "change the outcome" of the trial, *La Fever, Inc. v. All-Star Ins.*, 571 F.2d 1367, 1368 (5th Cir. 1978), because that evidence is "irrelevant." Harman Br. 46.

That argument is particularly brazen, since Harman has spent years peddling photos of mangled vehicles, claiming those photos as proof that "[t]he changes to the ET-Plus had a devastating impact on its performance." Harman Br. 12. He introduced those photos at trial—and he does so again here, in the apparent hope that the shock value will sway this Court as well. *Id.* at 13-14.

The official crash test results decisively rebut Harman's claims about the "devastating" effect of the modifications on the performance of the ET-Plus. FHWA, SwRI, and an independent expert "determined that *all . . . tests passed the NCHRP Report 350 criteria*," making the ET-Plus the most crash-tested product of its kind. Trinity Br. 58. And the Dimensions Report further confirmed that the ET-Plus systems that were crash tested were "representative of the devices installed across the country." *Id.* at 58-59.

If that evidence had been available at trial, it would have thwarted Harman's use of the inflammatory crash photos, *see* Harman Br. 14 n.4, and confirmed that *there are no damages* because the ET-Plus is Report 350 compliant. Such evidence plainly would have altered the outcome of the trial.[13]

Second, it is well settled that "newly discovered evidence" refers to "*facts* in existence at the time of trial." *Chilson v. Metro. Transit Auth.*, 796 F.2d 69, 70 (5th Cir. 1986) (emphasis added). Here, the dimensions of the ET-Plus systems installed across the country were clearly facts in existence at the time of trial—unlike the evidence addressed in Harman's cases. Harman Br. 44 (party admissions, judicial findings, records of present medical conditions). Similarly, the crash test results confirmed the physical properties of the ET-Plus under specific stimuli—again, facts in existence at the time of trial.

Harman's real argument is that Trinity should have conducted its own dimensions audit and crash testing before trial. Harman Br. 45. But no amount of private auditing could have dispelled Harman's claims about the ET-Plus with the authority of the joint Task Force report. The same is true of the official crash tests,

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[13] The power of this evidence to eviscerate Harman's case is underscored by three of his amici—James Hatton, Dean Sicking, and the Safety Institute—who devote their submissions to attacking the post-trial crash tests and Dimensions Report. Trinity has explained the many methodological problems with these arguments—including the arguments about the occupant compartment deformation guidelines—in its filings below. ROA.13056-13065.

which were independently supervised and evaluated by FHWA, SwRI, and an independent engineering expert.

Finally, Harman weakly contends that the crash test results and Dimensions Report are merely "cumulative." Harman Br. 46. That assertion cannot be squared with Harman's arguments at trial, where he repeatedly emphasized the lack of recent crash tests. Trinity Br. 58, 60-61.

2. Harman defends the district court's cavalier treatment of Trinity's Rule 59 motion, arguing that the motion was a "re-hash" of Trinity's prior motions for judicial notice. Harman Br. 1, 46. The court summarily denied those motions in the Final Judgment. ROA.13329 ("All other pending motions are hereby DENIED.").

But even if the court had supplied a fulsome explanation of its reasons for denying judicial notice, that analysis would not implicate—much less resolve—Trinity's Rule 59 arguments. Thus, Harman cannot escape the fact that the district court simply "*decline[d] to address*" Trinity's newly discovered evidence, ROA.13544 (emphasis added)—and thereby forfeited any deference from this Court.

CONCLUSION

This Court should reverse and render judgment for Trinity or, alternatively, remand for a new trial.

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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 6,999 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 July 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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