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

UNITED STATES OF AMERICA EX REL. JOSHUA HARMAN, Plaintiff, VS. TRINITY INDUSTRIES, INC. AND TRINITY HIGHWAY PRODUCTS, LLC, Defendants.	§ § § § § § § §	CIVIL ACTION NO. 2:12-CV-0089

TRINITY'S RENEWED RULE 50(b) MOTION
FOR JUDGMENT AS A MATTER OF LAW

ORAL HEARING REQUESTED

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Defendants, Trinity Industries, Inc. and Trinity Highway Products, LLC (collectively "Trinity") file this Renewed Rule 50(b) Motion for Judgment as a Matter of Law.

INTRODUCTION

Harman did not (and could not) prove a valid claim under the False Claims Act. The overarching flaw with Harman's claim is that, under *Southland*, there cannot be a "false claim" as a matter of law if the ET-Plus was eligible for federal reimbursement. Here, the undisputed evidence shows that the ET-Plus has been continuously eligible for federal reimbursement. The Texas A&M Transportation Institute ("TTI"), a third party, conducted the crash-testing for the product in 2005. The government granted approval for the product based on those tests in 2005. In 2012, the government conducted an investigation into Harman's allegations and reaffirmed that eligibility in numerous letters culminating in the June 17, 2014 letter. *See* Ex. D-2 (the "June 17 Letter"). After trial, the FHWA again reaffirmed its eligibility decision.

In light of these undisputed facts, no other fact is relevant—even if Harman could show an alleged "false statement." Under *Southland*, any "false statement" would be immaterial and non-actionable as a matter of law because the ET-Plus was eligible for federal reimbursement.

But this overarching flaw is not the only reason that Harman's FCA claims fail. Harman failed to meet even the most basic elements of an FCA claim. Instead, he opted to present evidence of irrelevant matters to inflame the jury rather than prove his case—because there is no evidence to satisfy the strict requirements of an FCA case. Given Harman's widespread failure of proof, the Court should enter judgment as a matter of law in Trinity's favor.

LEGAL STANDARD

Under Rule 50, entering judgment as a matter of law is proper when "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue …." FED. R. CIV. 50(a). "[Rule 50] allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 447-48 (2000) (Ginsburg, J.) (quoting 9A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2521 (2d ed. 1995)).

Under Rule 50(b), a party can file a "renewed" motion for judgment as a matter of law. FED. R. CIV. P. 50(b). "The court applies the same standard provided under Rule 50(a) to evaluate a Rule 50(b) motion …." *Allen v. Radio One of Tex. II, L.L.C.*, 515 F. App'x 295, 301 (5th Cir. 2013). "A court should grant a Rule 50(a) motion not only when the non-movant presents no evidence, but also when there is not a sufficient conflict in substantial evidence to create a jury question." *Travis v. Bd. of Regents of the Univ. of Tex. Sys.*, 122 F.3d 259, 263 (5th Cir. 1997) (citations and quotation marks omitted). To be substantial, evidence must be "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 n.16 (5th Cir. 1969) (en banc), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc).

DISCUSSION

I. There are no "false claims" under *Southland*.

The FHWA's investigation and decision should end this case as a matter of law. FCA liability cannot attach if a defendant is entitled to payment: "It is only those claims for money or property to which a defendant is not entitled that are 'false' for purposes of the False Claims Act." *U.S. v. Southland Mgmt. Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003) (en banc).

Here, the FHWA (1) received more-than-adequate notice of allegedly false statements regarding the eligibility of the ET-Plus for federal reimbursement, (2) conducted its own investigation, and (3) confirmed that the ET-Plus has been continuously eligible for reimbursement since September 2, 2005. These facts were undisputed at trial. As to notice, the FHWA received notice of Harman's claims from Harman himself and his lawyers. *See, e.g.*, Ex. D-8 (Harman's 109-page presentation regarding alleged defects in the ET-Plus); Ex. D-112 (letter from Harman to FHWA, enclosing presentation); Ex. D-46 (letter from Harman's attorneys to FHWA describing Harman's allegations); Oct. 13, pm Tr. 123:8-130:11 (describing two meetings between Harman and an FHWA official regarding changes to the ET-Plus). In fact, the FHWA's Letter on its face acknowledges Harman's allegations, *i.e.*, that "modifications" to the ET-Plus "had not been presented to FHWA." Ex. D-2.

As to the FHWA's investigation, the letter itself describes the details of the FHWA's investigation. *See id.*; *see also* Oct. 14, pm Tr. 125:25-129:8; Oct. 13, pm Tr. 124:19-125:12. Finally, the June 17 Letter declares the FHWA's conclusions—confirming the ET-Plus' eligibility for reimbursement:

> Our September 2, 2005 letter (FHWA No. CC-94) to Trinity is still in effect and the ET-Plus w-beam guardrail end terminal became eligible on that date and continues to be eligible for Federal-aid reimbursement.
>
> ***
>
> An ***unbroken*** chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005 and the ET-Plus continues to be eligible today.

Ex. D-2 (emphasis added).

The Fifth Circuit has issued an order ***in this case*** describing the FHWA's June 17 eligibility decision as "authoritative." To attack that authoritative ruling at trial, Harman cited

another letter from the FHWA dated October 10, 2014, requesting state departments of transportation to share ET-Plus field performance information with the FHWA. Ex. P-1286. But that October 10 letter actually reaffirms the FHWA's June 2014 decision:

> In general, FHWA's eligibility letters confirm that roadside safety hardware was crash tested to the relevant criteria, that those crash test results were presented to FHWA, and that FHWA confirmed that the device met the relevant crash test criteria.

Id. The FHWA's October 10 Letter also confirms that the actions of some states to suspend the ET-Plus from their qualified products lists "are local decisions and not the result of instructions from the FHWA." *Id*.

Moreover—with full notice of the trial and verdict—the FHWA publicly confirmed on November 12, 2014 that the "ET-Plus four-inch guardrail terminal was crash tested in 2005 … and met the required crash test criteria." *See* **Exhibit A**, attached hereto (available at http://www.fhwa.dot.gov/guardrailsafety/). That is the same conclusion that led the FHWA to conclude in June 2014 that the ET Plus has had "[a]n unbroken chain of eligibility … since September 2, 2005." Ex. D-2. Thus, the new testing required by the FHWA relates to "[t]he *future* use of the end terminal on U.S. roads." *See* **Exhibit A** (emphasis added). In fact, in that November 12 statement, the FHWA provided further reasons why the ET Plus is "still eligible for funding." *See id*. Trinity asks the Court to take judicial notice of the FHWA's November 12th statements. *See* FED. R. EVID. 201(b)(2) & (c)(2).

At trial, Harman attacked the FHWA's eligibility decision in multiple ways, implying that it was wrongly decided. For example, Harman claimed that the alleged changes to the ET-Plus made it dangerous. *See, e.g.*, Oct. 13, pm Tr. 123:2-7. He criticized Trinity for not running additional crash tests. *See, e.g.*, Oct. 13, pm Tr. 96:19-22; Oct. 14, pm Tr. 18:4-14, 190:14-21. None of those allegations are legally relevant. First, Congress has entrusted these decisions to the

FHWA's discretion, and they cannot be second guessed in court. The FHWA's 1997 Policy Memorandum confirms that the FHWA has the discretion to confirm or revoke eligibility based on Harman's allegations. Ex. D-10, p. 4. Second, the FCA does not give Harman standing to challenge the expert regulatory decisions of a federal agency. Third, the FCA does not give this Court jurisdiction to set aside (or disregard) the FHWA's eligibility decision.

II. Given the FHWA's authoritative ruling, there is a fatal gap in the evidence of an FCA violation.

Judgment as a matter of law is independently appropriate because Harman provided legally insufficient evidence that the ET-Plus is ineligible for payment. Under *Southland*, the question of the eligibility of the product for reimbursement (that is, whether Trinity made a "false claim") is a threshold question. *Southland*, 326 F.3d at 674-75. As the Fifth Circuit confirmed in its mandamus order, the existence of a purported false statement is immaterial without a preliminary finding that the product was ineligible for reimbursement.

This *Southland* doctrine is a fundamental part of the FCA. As the *Southland* Court itself recognized, the requirement that there be a "false claim" (in addition to a "false statement") is reflected in the text of the statute. *See Southland*, 326 F.3d at 675 (explaining that § 3729(a)(2) [now § 3729(a)(1)(B)] requires proof of "a false or fraudulent claim."). As the Ninth Circuit put it, "[i]t seems to be a fairly obvious notion that a False Claims Act suit ought to require a false claim." *U.S. v. Kitsap Physicians Serv.*, 314 F.3d 995, 997 (9th Cir. 2002).

Thus, under the plain language of the statute, Harman has the burden to show that the ET-Plus was ineligible for federal reimbursement. *See id*. at 1002. Harman failed to meet that burden. Under the *Southland* doctrine, there is a fatal gap in Harman's evidence. Harman's evidence focused on whether a "false statement" purportedly exists—and ignored the predicate question. There was no evidence at trial that the ET-Plus was ineligible for reimbursement and

thus that claims for such reimbursement constituted "false claims." Harman's failure of proof defeats the other elements of an FCA claim as well, most notably materiality and causation. That is, because the FHWA continuously approved the ET-Plus for reimbursement, the alleged "false record or statement" is not material and did not cause any damage to the government fisc.

The Court should measure Harman's failure of proof against the backdrop of the FHWA's June 17 Letter finding that ET-Plus has had "[a]n unbroken chain of eligibility for Federal-aid reimbursement … since September 2, 2005." Ex. D-2. In the face of that letter, Harman failed to bring any contradictory expert testimony that the FHWA would have reached a different result. He provided no one from the FHWA nor any FHWA expert to show why, this time, his allegations would have changed the FHWA's decision. Ultimately, the FHWA's June 17 Letter constitutes the only competent evidence of what the FHWA considers material and how it would have acted in light of Harman's allegations.

Harman is thus left with asking the jury ***to speculate*** as to how or if the FHWA would have rejected the eligibility of the ET-Plus for reimbursement. The Fifth Circuit, however, notified this Court that an agency ruling like the FHWA's June 17 Letter prohibits any further speculation about what the FHWA would have done. *See* Oct. 10, 2014 Mandamus Op., p. 2 (citing *U.S. ex rel Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 831 (7th Cir. 2011), for the proposition that evidence of how an agency acted following revelations of purported FCA violations ends the need to speculate about how else the agency "might have acted").

To summarize:

(1) The existence of a "false claim" is a predicate requirement under *Southland*. The existence of a "false statement" is immaterial without such a finding.

(2) Under the Fifth Circuit's mandamus order in this case, there is no "false claim" as a matter of law when (a) the agency has notice of possible false statements; (b) investigates; and (c) concludes that the payments are nevertheless eligible for reimbursement.

(3) That is exactly what happened here. According to the Fifth Circuit, the face of the June 17 Letter shows that the FHWA obtained notice of possible false statements, undertook a full and complete investigation and determination of eligibility, and found that the ET-Plus was continuously eligible for reimbursement. Ex. D-2.

(4) Harman provided no evidence at trial to invalidate the FHWA's determination. Instead, he relied on mere speculation to conclude that the FHWA's eligibility determination would have changed—when the Fifth Circuit's mandamus order prohibited such speculation pursuant to *Yannacopoulos*.

(5) As a result of Harman's failure of proof, there is no false claim, no materiality, and no causation as a matter of law. Thus, Trinity cannot be liable under the FCA.

III. Harman failed to negate the FHWA's authoritative decision letter by asserting that the letter was procured by fraud.

At trial, Harman attempted to avoid the FHWA's June 17 Letter by claiming that the letter was procured by fraud. But Harman's attempts to negate the effect of the Letter failed both procedurally and substantively. Accordingly, the decision letter must be given its authoritative and dispositive effect. *See* Oct. 10, 2014 Mandamus Op., p. 2.

A. Harman did not follow the required procedures to invalidate the FHWA's ruling.

Harman failed to bring any complaint regarding fraud in the procurement of the June 17 Letter to the FHWA itself. Doing so is a predicate requirement of the FCA. *See* 31 U.S.C. § 3730(e)(4)(B) (requiring a relator to "voluntarily disclose[] to the Government the information on which allegations or transactions in a claim are based"); 31 U.S.C. § 3730(b)(2) (requiring a

relator to serve the government, *in camera*, with "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses").

Harman admitted that he did not comply with these requirements in connection with his claims that Trinity fraudulently procured the June 17 Letter:

> Q. Have you ever told anyone at FHWA, the Federal Government, anyone that they need to do an investigation into how this particular letter was written and your belief that it was procured by fraud?
>
> A. No, sir. Not in the last months, no, sir.
>
> Q. Ever?
>
> A. I didn't know about the letter just for a couple months ago.
>
> Q. Have you done it in the last couple of months?
>
> A. No, sir.
>
> Q. In fact, this … here is the first tribunal of any sort that you've ever raised that particular allegation, isn't that true?
>
> A. Yes, sir.

Oct. 14, am Tr. 50:5-18. Harman's failure to raise with the FHWA allegations of fraud in the procurement of the June 17 Letter deprives Harman of his FCA claim. *See U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175 (5th Cir. 2004).

In addition, contrary to Harman's failed argument to the Fifth Circuit, this Court does not have the authority to invalidate the FHWA's eligibility ruling. The FCA does not contain any judicial remedy provisions that allow courts to invalidate regulatory decisions. *See generally* 31 U.S.C. § 3729(a). Congress authorized the FHWA to evaluate product eligibility. *See* 23 U.S.C. § 109(a); 49 U.S.C. § 104(c); 23 C.F.R. § 625.3(a); *see also* 23 C.F.R. § 625.2(c). It is particularly improper to ask a jury to invalidate a regulatory decision. *See* 42 C.F.R. § 137.309.

To set aside the FHWA's decision letter, Harman needed to follow the established procedures for setting aside agency action. *See Fla. Rock Indus., Inc. v. U.S.*, 791 F.2d 893, 898 (Fed. Cir. 1986) ("[T]he proper way to challenge the [agency] decision … would be under the Administrative Procedure Act …."). He has not done so.

B. Harman failed to plead his challenge to the decision letter with the requisite particularity.

Under Rule 9(b), to prosecute an FCA claim, Harman was required to plead the circumstances that purportedly negate the decision letter with particularity. *See* FED. R. CIV. P. 9(b); *U.S. ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999) ("The complaint in a False Claims Act suit must fulfill the requirements of Rule 9(b)."). Neither the complaint nor the pre-trial order refer to particular circumstances that constitute fraud in procurement of the June 17 Letter.

Instead of meeting this requirement, Harman admitted on cross-examination that he altogether failed to plead that the decision letter was procured by fraud:

> Q. No, I'm talking about Defendants' Exhibit No. 2, Mr. Harman.
>
> Are you aware anywhere in any of the official papers that you have filed with this Court making the allegations that you make about the fraud being perpetuated upon the Government to secure this letter? Have you ever specifically alleged that in any papers with this particular Court?
>
> A. Not that I'm aware of.

Oct. 14, am Tr. 51:6-14. This failure is dispositive. Harman's allegations regarding the alleged fraudulent procurement of the FHWA's June 14, 2014 Letter should not even have been part of the trial. Moreover, Trinity brought this failure to the Court's attention before trial by filing an Emergency Motion to Dismiss under Rule 12(c).

C. Harman was not the original source of any evidence regarding procurement of the decision letter.

Even if Harman had properly notified the government and properly pled his claims that the June 17 Letter was procured by fraud, Harman was not the original source of the information. *See* 31 U.S.C. § 3730(e)(4)(B). The Fifth Circuit has rejected the idea that investigation would elevate a relator to an "original source." *See Reagan*, 384 F.3d at 179 (5th Cir. 2004) ("Reagan took disclosures that had already been investigated and reported by BCBS and HCFA and, based on her own experience, claimed that they were fraudulent; this disagreement with the legal conclusions of BCBS and HCFA does not qualify as 'information' under the original source exception."); *U.S. ex rel. Lockey v. City of Dall.*, No. 13-10884, 2014 WL 3809754, at *4 (5th Cir. Aug. 4, 2014) (discussing *Reagan*).

Harman has not alleged that he had any direct knowledge of the circumstances surrounding the FHWA's decision letter. Harman was not privy to FHWA's investigation or its decision-making process. All Harman has is his own "investigation" of publicly-available documents. Thus, Harman's attempt to negate the FHWA's June 2014 eligibility ruling is defective because he is not a proper party to bring that allegation. *See* 31 U.S.C. § 3730(e)(4)(B).

D. Harman lacks standing to bring a common-law fraud claim regarding the decision letter.

If Harman styles his challenge to the decision letter as a common-law fraud complaint, he lacks standing because the FCA only conveys standing to bring FCA claims on behalf of the government—not common law claims, no matter how related. *See U.S. ex rel. Ligai v. ETS-Lindgren Inc.*, No. CIV.A. H-112973, 2014 WL 4649885, at *15 (S.D. Tex. Sept. 16, 2014) ("There is no assignment to bring claims under the common law or other statutes, even if the

claims relate to the same events."). In other words, Harman cannot artfully plead around the requirements imposed by the government to prevent rogue *qui tam* relators.

E. Harman failed to present legally sufficient evidence that the decision letter was procured by fraud.

Finally, Harman failed to present any evidence supporting his fraud allegations regarding the FHWA's June 17 Letter. Harman is not entitled to assume that the decision letter was procured by fraud—he must prove it. For example, under either the FCA or common-law fraud, Harman was required to prove that a false representation was made in order to procure the decision letter. *See* 31 U.S.C. § 3729(a)(1); *Reece v. U.S. Bank Nat'l Ass'n*, 762 F.3d 422, 424 (5th Cir. 2014). He has failed to do so. To the extent that Harman is alleging fraud by omission, the FHWA had full knowledge of Harman's allegations when it issued the June 17 Letter. As Trinity will show below, the evidence at trial establishes that Harman and his attorneys fully informed the FHWA of every basis for his fraud claims.

Ultimately, Harman's allegation that the FHWA's fraud investigation was itself misled by fraud is "absurd." *See U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999) ("The notion that the FTA was somehow being duped by the City at this point in the process is absurd."). For example Harman implies that he can raise a fact issue on fraud if he can raise a fact issue as to what crash tests were conducted in 2005. But, in truth, Harman cannot even identify who allegedly committed the purported fraud:

> Q. Those are the letters that you say were procured by some fraud that was perpetuated upon the Federal -- FHWA, by Trinity, and I assume, Texas A&M University?
>
> A. There was -- who done it, **I don't know**. But as far as the -- the fraud, yes, it was procured by fraud.

Oct. 13, pm Tr. 137-38 (emphasis added). Under Rule 50, the purported evidence of Trinity's alleged "fraud on the FHWA" is legally insufficient and fails.

IV. Harman does not have legally sufficient evidence of the elements of an FCA claim.

Harman failed to present legally sufficient evidence of the four elements of an FCA claim: (1) "a false statement or fraudulent course of conduct"; (2) made with "scienter"; (3) "that was material" to the government's payment decision; and (4) "that caused the government to pay out money or to forfeit moneys due (*i.e.*, that involved a claim)." *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 475 (5th Cir. 2012) (internal quotation marks and citation omitted). Alternatively, the evidence in the record conclusively disproves each element.

A. Element #1: Harman presented no legally sufficient evidence of a false statement or fraudulent course of conduct.

Liability under the FCA requires specific proof that false or fraudulent statements were made to the government to get a false claim paid. *See U.S. ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 380-81 (5th Cir. 2003). Harman does not have legally sufficient evidence of this element. Significantly, the Court mistakenly instructed the jury that it could find an FCA violation if there was a material change in the ET-Plus that was not disclosed to the FHWA. That statement of the law is not correct. Instead, Harman must present legally sufficient evidence of an actual lie. *Southland*, 326 F.3d at 682 (Jones, J. concurring).

Harman failed to meet that element for at least seven reasons:

(1) Harman has not identified the alleged lie.

(2) Harman has not identified the allegedly false "record or statement" under 31 U.S.C. § 3729(a)(1)(B)—by exhibit number or otherwise.

(3) Based on the plain language of the statute, Harman cannot rely on any alleged ***omissions*** to prove the element of falsity, but, instead, he must concretely identify a false "record or statement." 31 U.S.C. § 3729(a)(1)(B). In addition, Harman cannot rely on a fraud by omission theory because he cannot point to any legal duty for Trinity to disclose specific

additional information to FHWA. For example, Trinity had no duty to disclose test results from a non-party's experimental projects.

Nor can Harman create a fraud by omission theory by asking this Court to adopt a so-called "implied certification" theory. The Fifth Circuit has never recognized the implied certification theory. *See, e.g., U.S. ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 207 (5th Cir. 2013). Moreover, to prevail on any certification theory—including implied certification—Harman must prove that Trinity's certifications were *prerequisites* to payment. *See id*. In other words, as a matter of law, the false certification must be relevant to the government's decision to pay. Harman has no such proof.

(4) The FHWA's June 17 Letter conclusively refutes any conceivable falsity. The plain language of FHWA's June 17 Letter confirms that (a) the ET-Plus was properly subjected to crash tests under the relevant safety standards; (b) the ET-Plus is "eligible for … reimbursement"; (c) the ET-Plus is NCHRP 350 compliant; (d) the ET-Plus is "federally approved"; and (e) the ET-Plus did not require additional reporting or testing. Up through the date of the June 17 Letter and beyond, those statements were all true as a matter of law, and there was no false statement.

(5) Alternatively, in the face of the FHWA's June 17 Letter (and similar letters and e-mails from FHWA), Harman has legally insufficient evidence of the falsity of those statements or any other similar statement. *See* Ex. D-2. The letter establishes that the above statements were all true, and Harman did not provide legally sufficient evidence at trial to rebut that presumption. Alternatively, the FHWA's June 17 Letter placed the burden of proof on Harman to rebut the letter and the above conclusions that flow from that letter. Harman did not provide legally sufficient evidence at trial to meet that burden of proof.

(6) As a matter of law, Harman's allegations of fraud concern statements that, at most, were subject to legitimate dispute and could not be objectively false. *See U.S. ex rel. Gudur v. Deloitte Consulting, LLP*, 512 F. Supp. 2d 920, 932 (S.D. Tex. 2007), *aff'd*, 2008 WL 3244000 (5th Cir. Aug. 7, 2008) (per curiam) ("Claims are not 'false' under the FCA when reasonable persons can disagree regarding whether service was properly billed to the Government"); *United States v. Sodexho, Inc.*, No. 03-6003, 2009 WL 579380, at *3-4, 16-17 (E.D. Pa. Mar. 6, 2009) (concluding there was no falsity as a matter of law because defendants' interpretation of the regulation was consistent with the view of the federal agency and therefore reasonable).

At trial, Harman failed to submit legally sufficient evidence of an objective falsehood regarding the issues in dispute, *e.g.*, (a) whether the ET-Plus was properly crash tested under the relevant safety standards; (b) whether the ET-Plus is "eligible for … reimbursement"; (c) whether the ET-Plus is "NCHRP 350 compliant"; (d) whether the ET-Plus is "federally approved"; and (e) whether the ET-Plus required additional reporting or testing. Moreover, the evidence presented at trial conclusively proved that these issues are at least debatable—if not conclusively resolved in Trinity's favor. The FHWA has reached the conclusion that the ET-Plus is "eligible for … reimbursement." *See* Ex. D-2. In fact, the Fifth Circuit itself has indicated that there is a "strong argument" that there are no false claims. *See* Oct. 10, 2014 Mandamus Op.

(7) The questions at the heart of this matter are questions of scientific dispute, differences of scientific or engineering judgment, differences of expert opinion about technical matters, and/or legitimate disagreements over the interpretation of a regulation. As a matter of law, those statements cannot be objectively false. *See, e.g., U.S. ex rel. Hill v. Univ. of Med. & Dentistry*, 448 F. App'x 314, 316 (3d Cir. 2011) ("Because [e]xpressions of opinion, scientific

judgment or statements as to conclusions which reasonable minds may differ cannot be false …, FCA liability will not attach.") (citations and quotation marks omitted).

NCHRP 350 contemplates "changes" being made to a product during or after successful crash testing. Ex. D-3 at 25. Whether such "changes" require re-testing of the product rests on "[g]ood engineering judgment." *Id*. There is a legitimate engineering dispute about whether additional testing of the ET-Plus was necessary under the technical guidelines. *Id*.; *see also* Oct. 15, am Tr. 57:3-16, 59:3-60:4; Oct. 16, pm Tr. 170:9-171:9. The FHWA guidelines were ambiguous about what must be submitted to the FHWA and when additional testing is required. *See* Exs. D-3, D-10. Similarly, whether tests from experimental projects—with characteristics wholly different than the ET-Plus—should have been submitted to FHWA is, at a minimum, subject to scientific and engineering debate. *See, e.g.*, Oct. 17, am Tr. 50:2-17, 55:23-57:16. Thus, there is no false statement as a matter of law. *See U.S. ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 297 F. Supp. 2d 272, 294-95 (D.D.C. 2004) ("[E]ven if plaintiff could suggest a better methodology than was used by defendant, there is no basis for imposing FCA liability based on faulty or mistaken engineering judgments."); *Sodexho*, 2009 WL 579380, at *16 n.7 ("[A]n ambiguous regulatory interpretation that reasonably could be read to authorize Defendants' conduct precludes a finding that Defendants knowingly submitted a false claim.").

B. Element #2: Harman presented no legally sufficient evidence of scienter.

The FCA expressly defines the relevant "knowledge" requirement, providing that there is no violation unless the defendant submits a false or fraudulent claim with actual knowledge that the claim is false, or in deliberate ignorance or reckless disregard of whether the claim is false. 31 U.S.C. § 3729. To show scienter, a relator must provide "evidence that the defendant knowingly or recklessly cheated the government." *U.S. ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008).

Harman's purported evidence of scienter (*i.e.*, of intent) is legally insufficient under Rule 50 and consists of mere insinuation. Moreover, the evidence conclusively establishes that TTI's omission of the detailed drawing was an innocent mistake. The documentary evidence that Harman cites to show an alleged motive for Trinity provides no evidence that Trinity "knowingly or recklessly cheated the government." *Taylor-Vick*, 513 F.3d at 232. To the contrary, merely providing evidence of a profit motive is not sufficient to create a fact issue as to scienter. *U.S. ex del Gudur v. Deloitte & Touche*, 2008 WL 3244000, at *2 (5th Cir. Aug. 7, 2008) (per curiam) ("The FCA is an anti-fraud statute and not the appropriate vehicle for policing regulatory compliance. Gudur's argument, if accepted, would collapse the FCA into such a vehicle and eviscerate the knowledge and intent elements ….").

Further, Harman cannot establish a genuine issue of material fact on scienter because of Trinity's reasonable reliance on the expert advice of the ET-Plus designers, the engineers at TTI. *See Mikes v. Straus*, 274 F.3d 687, 704 (2d Cir. 2001) (affirming summary judgment where defendants presented "ample evidence" of their good faith belief of the truth of their claims). The evidence at trial showed that the inventors of the product, Texas A&M engineers, suggested, knew of, and approved the modifications to the ET-Plus. *See* Oct. 15, am Tr. 84:11-87:7, 88:19-91:8; Exs. D-22, D-38. They, not Trinity, conducted the crash testing. *See, e.g.*, Exs. D-4, D-5, D-6, P-165. They declared that the ET-Plus passed the relevant crash tests and met the criteria for federal funding. *See id*. And they assimilated the crash test data and prepared the crash test report that was submitted to the FHWA. *See* Ex. P-165; Oct. 15, am Tr. 100:21-102:6.

Because of TTI's expertise and its role as the designer of the ET-Plus, Trinity deferred to and relied on TTI's expert advice regarding: (1) the suggestion of, review, and approval of changes to the ET-Plus; (2) the determination that changes to the ET-Plus are improvements that

would not negatively impact performance so as to warrant additional crash testing; (3) the proper crash testing of the ET-Plus according to NCHRP 350 standards; (4) the determination that the ET-Plus is crashworthy and NCHRP 350 compliant; and (5) the compilation of crash test reports and other materials for submission to the FHWA for federal-aid eligibility determinations. *See*, *e.g.*, Exs. D-4, D-5, D-6, P-165; *see also*, *e.g.*, Oct. 14, pm Tr. 36:14-17, 65:23-66:3; Oct. 15, am Tr. 100:25-102:06; Oct. 15, pm Tr. 146:12-147:3, 151:18-25; Oct. 16, am 111:6-12.

The evidence at trial also conclusively shows that Trinity reasonably relied on the FHWA's continued acceptance of the ET-Plus—both before and after FHWA received notice of Harman's allegations. *See*, *e.g.*, Oct. 14, pm Tr. 89:24-90:7, 104:25-105:10. Thus, no FCA liability arises. *See U.S. ex rel. Laird v. Lockheed Martin Eng'g & Science Servs. Co.*, 491 F.3d 254, 262-63 (5th Cir. 2007) ("Most of our sister circuits have recognized that '[w]here the government and a contractor have been working together, albeit outside the written provisions of the contract, to reach a common solution to a problem, no claim arises.'").

Harman also presented legally insufficient evidence of scienter because the questions at the heart of this matter are questions of scientific dispute, differences of scientific or engineering judgment, differences of expert opinion about technical matters, and/or legitimate disagreements over the interpretation of a regulation. As the Third Circuit put it, "plaintiff presented evidence only demonstrating a scientific disagreement … and not evidence as to defendants' knowledge of the falsity …." *Hill*, 448 F. App'x at 317

Finally, the government knowledge defense conclusively negates the element of intent for any claims after January 2012—when Harman notified the FHWA of the FCA allegations and the FHWA conducted its investigation. *See* Ex. D-2. Following the FHWA's 2012 investigation, Trinity and TTI made themselves available to answer any questions or provide any

information required by the FHWA; the FHWA was satisfied with the information provided, and during this timeframe, never required Trinity or TTI to run additional crash tests. *See, e.g.*, Exs. D-161 at 1, D-162 at 1, D-277 at 2; *see also* Oct. 14, am Tr. 104:21-105:24; Oct. 15, am Tr. 118:14-120:9; Oct. 16, am Tr. 104:3-108:1. With more-than-adequate notice, the government repeatedly advised Trinity and its customers that the product was eligible for reimbursement. *See, e.g.*, Exs. D-2, D-29, D-37, D-257, D-260. Trinity cannot be liable for continuing to submit claims in those circumstances. *See Southland*, 326 F.3d at 682 (Jones, J., concurring).

C. Element #3: Harman presented no legally sufficient evidence of materiality.

The Fifth Circuit's mandamus order in this case has provided this Court with the applicable authority regarding materiality under the facts of this case. *See Yannacopoulos*, 652 F.3d at 831 (holding that the following of a payment schedule by an agency ends the need to speculate about how else the agency "might have acted"); *U.S. ex rel. Costner v. U.S.*, 317 F.3d 883, 887 (8th Cir. 2003) (holding false statements immaterial when an agency continues to make payments after receiving notice of the false statements). By citing this authority, the Fifth Circuit made clear that the FHWA's authoritative decision "to make payments after receiving notice" is dispositive of materiality. *Costner*, 317 F.3d at 887; *see also U.S. ex rel. Stephenson v. Archer W. Contractors, L.L.C.*, 548 F. App'x 135, 138-39 (5th Cir. 2013) ("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 USACE was not defrauded ….").

The FHWA's June 17 Letter and the other evidence at trial conclusively prove that Trinity's alleged omissions did not change the FHWA's decision after learning of and

investigating Harman's allegations.[1] The FHWA's decision letter conclusively negates any doubt about the *potential* for the allegedly false statements to influence its eligibility decision.

D. Element #4: Harman presented no legally sufficient evidence of causation.

To establish his FCA case against Trinity, Harman must present legally sufficient evidence of a causal link between Trinity's alleged false statements or certifications and the federal government's loss of federal funds. *See, e.g.*, 31 U.S.C. § 3729(a); *U.S. ex rel. Patton v. Shaw Servs., L.L.C.*, 418 F. App'x 366, 369 (5th Cir. 2011) (stating a relator must establish "(1) … a false statement or fraudulent course of conduct; … (4) that caused the government to pay out money or to forfeit moneys due"); *Stephenson*, 548 F. App'x at 138 (same).

The FHWA's June 17 Letter and the other evidence at trial conclusively shows that Trinity's alleged false statements did not cause any harm. Specifically, the FHWA's decision letter shows that the FHWA rendered the same eligibility decision for the ET-Plus after Harman informed the FHWA of the alleged false claims. *See* Ex. D-2. When a statement does not affect a decision, that statement cannot cause any alleged harm resulting from that decision as a matter of logic and as a matter of law. *See Mitsubishi Aircraft Int'l, Inc. v. Brady*, 780 F.2d 1199, 1201 (5th Cir. 1986) ("If a party claims fraud in the inducement of one contract, but then with knowledge of the fraud, enters into a new contract on the same transaction, his claim of fraud in the inducement of the original contract appears frivolous. He has now done what he claimed the fraud tricked him into doing originally.").

In addition, Harman's failure to identify the allegedly false "record or statement" under 31 U.S.C. § 3729(a)(1)(B) defeats any attempt to establish causation with legally sufficient evidence. That is, if Harman cannot even identify any specific "record or statement," he

[1] Moreover, Dr. Coon's opinions regarding static testing, impacts involving the ET-Plus, and hands-on measurements were irrelevant and scientifically unreliable under Federal Rules of Evidence 702, 401, 403, and *Daubert* case law and failed to provide legally sufficient evidence of materiality (or falsity). *See* Dkt. 252.

certainly cannot show that such a "record or statement" caused the government to wrongly pay funds that it did not owe. *See Laird*, 491 F.3d at 261 (requiring a "nexus" between the allegedly false statement and the government payment). In fact, Harman admitted at trial that he had no ability to trace any specific federal payments for the ET-Plus. *See* Oct. 15, pm Tr. 163:20-164:1; *see also* Oct. 17, am Tr. 90:6-17.

At trial, Harman attempted to establish causation by showing that Trinity made false certifications to (some of) its customers that the ET-Plus was NCHRP Report 350 Compliant or was federally approved. But Harman presented no legally sufficient evidence of a causal link between any such certifications and the federal government's decision to pay federal funds for the ET-Plus. To the contrary: (1) the evidence conclusively established which factors the FHWA considers in making eligibility determinations; (2) the evidence further established that the FHWA does not base its eligibility determinations on a manufacturer's certifications to its customers; and (3) Harman presented insufficient evidence that the alleged false certifications are required to or were in fact communicated to or considered by the federal government in paying claims for reimbursement for the ET-Plus. To paraphrase *Laird*, "[i]n short, the [certifications] were ***immaterial***." *Laird*, 491 F.3d at 261 (emphasis added).

First, the FHWA's own documents conclusively establish what factors are considered in making federal-aid eligibility determinations—which does *not* include consideration of certifications by a manufacturer to its customers. In its 1997 Policy Memorandum, the FHWA states that end terminal products like the ET-Plus must be crash tested pursuant to the criteria set forth in NCHRP Report 350. *See* Ex. D-10 at 1, 5-6, 9; *see also* Ex. D-3 (NCHRP Report 350); Oct. 17, Tr. am 57:17-25 (testifying that the standard used by the FHWA in evaluating

acceptance of roadside devices, is whether the device satisfies the crash test criteria in NCHRP Report 350).

As to what the FHWA requires parties to submit to the government, the 1997 Policy Memorandum requires documentation of "a) the feature(s) tested; b) the conditions and results of the testing; … c) the complete design, construction, and installation details and specifications for the version(s) of the feature for which acceptance is being sought." *See* Ex. D-10 at 9. More particularly, the 1997 Policy Memorandum requires "two copies of a test report prepared according to the guidance in … Report 350 showing … that Report 350 testing procedures were followed and that Report 350 acceptance criteria were met." *See id*. at 10. Neither the 1997 Policy Memorandum nor NCHRP Report 350 indicates that the FHWA bases its federal-aid eligibility determinations on certifications by a manufacturer to its customers. Nor is there any other evidence that suggests that the FHWA relies on statements to customers in assessing the federal-aid eligibility of roadside safety devices.

Second, the evidence presented at trial conclusively establishes that, in making its specific eligibility determination for the ET-Plus, the FHWA applied the guidelines discussed above, which involve consideration of crash testing materials and data—not statements to customers. Accordingly, it was undisputed that, in seeking the FHWA's acceptance for the ET-Plus in 2005, Trinity submitted "Test Reports and Crash Videos" of crash testing conducted by TTI pursuant to NCHRP Report 350, as required by the 1997 Policy Memorandum. *See* Ex. D-11; Ex. D-6. In its 2005 acceptance letter for the ET-Plus, the FHWA cited the successful NCHRP Report 350 testing. *See* Ex. D-78 at 1-2; *see also* Oct. 14, Tr. pm 153:5-10 (testimony by FHWA official Nicholas Artimovich that "FHWA Letter CC-94, is based on the tests that were conducted and reported on in July 2005").

In addition to its initial eligibility determination, the FHWA repeatedly re-confirmed the continued eligibility of the ET-Plus—and those decisions were always based on crash testing materials, not on customer certifications by Trinity. *See* Ex. D-2 at 1-2. As the FHWA explained, "FHWA's eligibility letters confirm that roadside safety hardware was crash tested to the relevant standards, that those crash test results were presented to FHWA, and that FHWA confirmed that the device met the relevant crash test standards." *Id*.

Third, Harman failed to present any evidence suggesting that the FHWA considered customer certifications in its eligibility determination. Nor did Harman present any evidence that the federal government even sees those certifications. Likewise, there is no evidence concerning whether States, in requesting federal reimbursement for the ET-Plus, communicate to the federal government any certifications made by Trinity. In fact, no evidence concerning the contents of any State submissions to the federal government, such as vouchers requesting reimbursement, was presented at trial. Because Harman has failed to present legally sufficient evidence of any causal link between the allegedly false certifications to its customers and the federal government's payment decision, there is no causation.

E. Harman failed to present legally sufficient evidence that the decision letter was procured by fraud.

Finally, the evidence affirmatively establishes that the FHWA had full knowledge of all of Harman's allegations of fraud and theories of liability under the FCA, when it issued the June 17 Letter—which negates all of the above elements, particularly materiality and causation.

Starting in January 2012, Harman fully informed the FHWA of every basis for his allegations that Trinity fraudulently procured the FHWA's approval of the ET-Plus—and he certainly had every opportunity to do so. *See, e.g.*, Ex. D-112 (January 2012 letter signed by Joshua Harman to the FHWA, enclosing "report discuss[ing] differences between the early

production ET-Plus design and the current production ET-Plus design"); Ex. D-8 (Harman's 109-page presentation describing in detail with photographs and diagrams Harman's version of the alleged redesign of the ET-Plus and alleged "differences between productions"); Ex. D-46 (*Touhy* request from Harman detailing each of Harman's FCA allegations, including claims that Trinity secretly modified the ET-Plus, the alleged motives for the purported modifications, Trinity's alleged failure to crash test the modified design properly, Trinity's alleged false certifications about the product, and Trinity's alleged continued fraudulent concealment of the modifications); *see also* Oct. 13, pm Tr. 119:2-130:11, Oct. 14, am Tr. 52:23-53:8 (testimony by Harman that he informed the FHWA with regard to the changes he alleges in this lawsuit, including that there was a "defect" and "other changes" to the ET-Plus, that there were "accidents" involving the ET-Plus with four-inch guide channels, that the ET-Plus was "dangerous," that the ET-Plus was "failing," that there were changes to the guide channels, internal dimensions and exit gap, insertion of the guide channels into the extruder chamber, shortening of the guide channel, and "significant other changes," and further admitting that he provided the FHWA both with physical demonstrative end terminal heads to examine and that he provided the FHWA with his Failure Assessment of Guardrail Extruder Terminals); Harman Dep. 143:20-143:24, 144:2, Apr. 28, 2014 ("Q: ... "[B]ut you do know that at the time of the retroactive approval that was provided by FHWA, all of the information that you are complaining about here was provided to Nick Artimovich by you, was it not? ... A: Yes.").

Further, Trinity and TTI have made numerous efforts to fully address Harman's allegations with the FHWA. *See, e.g.*, Ex. D-277 (February 2012 letter from Trinity to FHWA detailing response to Harman's presentation and attaching documentary evidence demonstrating the product conforms to NCHRP 350 crash tested designs); Oct. 13, pm Tr. 99:6-100:4, 101:5-

10, 102:19-103:21, 105:11-18, 106:7-109:2, 118:10-16 (testimony from Brian Smith concerning Harman's presentation; a February 2012 meeting between Trinity, TTI, and FHWA concerning Harman's allegations; and follow-up with FHWA); Oct. 15, am Tr. 114:24-120:9 (same as to Dr. Roger Bligh of TTI); *see also* Exs. D-161 and D-162 (further correspondence from Trinity and TTI to FHWA addressing Harman's allegations and offering to answer further questions or provide additional information to FHWA); D-47 and D-93 (additional statements from Trinity and TTI addressing Harman's allegations).

V. Harman presented no legally sufficient evidence of damages.

Harman presented legally insufficient evidence of damages. The FHWA's June 17 Letter and other evidence at trial conclusively show that the government suffered no losses. By continually agreeing to reimburse the ET-Plus 100% after its investigation of Harman's FCA allegations, the FHWA found that it received the benefit of the bargain. *See U.S. ex rel. Stebner v. Stewart & Stevenson Servs., Inc.*, 305 F. Supp. 2d 694, 703 (S.D. Tex. 2004), *aff'd*, 144 F. App'x 389 (5th Cir. 2005) ("Likewise, the Government's past and continuing decision to work with S & S reflects that it regards itself as receiving the benefit of the bargain: vehicles that will resist corrosion for ten years."). Thus, the government suffered no damages.

By law, the proper measure of damages is the "benefit of the bargain." Under the FCA, loss is measured by the difference between the amount the government bargained to receive and the value of the product or services the government actually received. *See U.S. v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972) (describing measure of FCA damages as the "difference between what the government paid and what it should have paid" absent the false statement). If the government received what it paid for—even if the defendant had submitted a false claim—then the government did not incur any damages. *See U.S. ex rel. Davis v. District of Columbia*, 679 F.3d 832, 840 (D.C. Cir. 2012) ("The government got what it paid for and there are no

damages."); *U.S. v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1279 (D.C. Cir. 2010) ("To establish damages, the government must show not only that the defendant's false claims caused the government to make payments that it would have otherwise withheld, but also that the performance the government received was worth less than what it believed it had purchased.").

Harman has the burden of proof on damages. *See* 31 U.S.C. § 3731(d). Yet he did not provide legally sufficient evidence of—and admits he does not know—the amount actually paid by the federal government for any ET-Plus units. Oct. 15, pm Tr. 178:20-25; 179:3-9; Oct. 17, am Tr. 90:3-9; 98:3-99:15.[2] Harman's claim for damages fails on this point alone. Further, Harman provided no evidence at trial of the market value of the product. For example, to recover the full purchase price of the product, it was Harman's burden to prove that the ET-Plus had absolutely no value. *Cf. U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 923 (4th Cir. 2003). But there was no such evidence. In fact, the record shows that the government continues to reimburse ET-Plus units at full value. There was a complete *failure of proof* as to damages.

While the Court permitted Harman to present evidence of the scrap value of an ET-Plus, this evidence was based on an assumption that the product was not approved for federal reimbursement. But Harman's argument that the jury has the capability to find that an "unapproved" ET-Plus has only scrap value (or no value) is wrong as a matter of law. The FHWA has continuously found, after its investigation of Harman's FCA allegations, that the product is approved and that it was reimbursable at 100% of its value. Harman presented no evidence at trial that the FHWA has ever sought any money back for ET-Plus units sold. The above authorities compel the jury to determine the value of the product as that product is

[2] The testimony from Harman's damages expert, Mr. Chandler, was legally insufficient under Federal Rules of Evidence 702 and 403 and *Daubert* case law for all of the reasons provided in Trinity's Motion to Exclude and Motion to Reconsider. Dkt. 248, 460.

received and used by the government. Because there is no evidence by which the jury could find that the government failed to receive at least the market value of the product—if not the full benefit of its bargain—entry of judgment for Trinity as a matter of law is appropriate. Indeed, to find otherwise would create an absurd result: the government could keep and use on the nation's highways what FHWA has determined are fully functioning and compliant ET-Plus units while also being compensated (times three) for the funds the government spent on them.

VI. Harman presented no legally sufficient evidence to support civil penalties.

As discussed above, at trial, Harman failed to present legally sufficient evidence of any "false claims." As a result, the trial record is likewise devoid of legally sufficient evidence to support the imposition of civil penalties—because the amount of civil penalties is based on the number of "false claims." *See* 31 U.S.C. § 3729(a). By law, the jury should have determined the number of false claims for purposes of civil penalties. And there was legally insufficient evidence for the jury to find any such claims.

At trial, Harman argued that civil penalties should be imposed for each of the 16,771 invoices Trinity submitted to customers for sales of the ET-Plus. Oct. 15, pm Tr. 175:10-14. An invoice, however, is not sufficient to support the imposition of a civil penalty under the FCA. None of the invoices for sales of the ET-Plus were submitted to the federal government. The invoices did not contain the allegedly false representation of compliance with NCHRP Report 350 that allegedly caused the government to reimburse states. And Harman acknowledges that he has no evidence that 16,771 invoices—or any specific number of invoices—were ET-Plus sales that actually resulted in federal reimbursement. Without such evidence, imposing civil penalties for each invoice is improper.

In determining the number of false claims for which this statutory penalty should be assessed, the Supreme Court has instructed courts to focus on "the specific conduct of the person from whom the Government seeks to collect the statutory forfeiture." *U.S. v. Bornstein*, 423 U.S. 303, 313 (1976). The FCA "imposes liability only for the commission of acts which cause false claims to be presented." *Id*. at. 311-12. Thus, in determining the number of causative "acts" and, hence, the number of civil penalties, courts should look to the specific actions defendants committed that allegedly resulted in the submission of "false claims," as opposed to discrete invoices for payment. *See Bornstein*, 423 U.S. at 312 (finding when supplier shipped tubes to contractor in three shipments, and then contractor submitted thirty-five invoices to United States for payment, there were a total of three "claims" for civil penalties); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-43 (1943) (approving a civil penalty, not on each invoice filed, but only for each project that was fraudulently obtained by defendant); *U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 530 F. Supp. 2d 888, 900-01 (S.D. Tex. 2008) (rejecting the government's position that it was entitled to recover a civil penalty for each of the 54 invoices submitted for payment and instead ruling that the government can only obtain four civil penalties because "the false statements were the Four Contracts and that falseness was imputed to the invoices" and although the invoices are tainted by the initial fraud, "it is the contracts themselves that trigger the forfeiture"), *aff'd*, 575 F.3d 458 (5th Cir. 2009); *U.S. ex rel. Hays v. Hoffman*, 325 F.3d 982, 993-94 (8th Cir. 2003) (rejecting district court's finding that 336 false claims were submitted because the false expense impacted 27 Medicaid cost reports and each facility's monthly payment requests, and concluding instead that there were eight false claims because eight of defendants' facilities claimed the false expense).

Harman's assertion that there were 16,771 false claims is unsupportable as a matter of law. Harman must submit legally sufficient evidence to show that particular invoices for ET-Plus sales were associated with a payment by the federal government in order for that invoice to constitute a false claim. *See Bornstein*, 423 U.S. at 312; *Hays*, 325 F.3d at 993 (concluding that to determine number of claims, the number must be supported by documentary records). Harman failed to do so. He presented no evidence showing the amount the federal government paid for ET-Plus purchases. Oct. 15, pm Tr. 178:20-25; 179:3-9; Oct. 17, am Tr. 90:3-9; 98:3-99:15. Harman admitted that Trinity invoices were not submitted to the federal government for payment. Oct. 15, pm Tr. 178:11-19; 196:17-19. He admitted that he did not trace any invoice to a federal reimbursement, and presented no evidence showing that any of the 16,771 invoices involved sales of ET-Plus units that were actually federal reimbursed. Oct. 15, pm Tr. 163:20-164:1; 178:20-25; 181:10-20; 203:4-11; 203:24-204:2; Oct. 17, am Tr. 98:8-22; 99:13-15.

Harman further admitted that he had no evidence of what state DOTs actually submitted to the federal government with a request for reimbursement and did not know whether multiple ET-Plus sales or invoices could be bundled into one request for reimbursement. Oct. 15, pm Tr. 181:21-182:7; 187:7-25; 201:23-202:11; Oct. 17, am Tr. 89:21-90:5. Harman acknowledged that Trinity sold many ET-Plus units for projects that were not eligible for federal reimbursement. Oct. 15, pm Tr. 177:18-22; 203:4-11; *see also* Oct. 17, am Tr. 98:23-99:15. Yet Harman presented no evidence to show which of the thousands of invoices involved sales of non-reimbursable products. Oct. 15, pm Tr. 181:10-20; 203:4-11; Oct. 17, am Tr. 98:23-99:15. Indeed, there was no evidence from which one could even begin to determine the number of invoices that actually resulted in federal reimbursement.

Additionally, the conclusive evidence shows that the invoices issued by Trinity did not contain the representations that Harman alleged caused the federal government to improperly pay federal money. D-230; Oct. 15, pm Tr. 196:20-23; 200:8-201:21; Oct. 17, am Tr. 99:13-100:6. Harman admitted that Trinity invoices were not provided to the federal government. Oct. 15, pm Tr. 178:11-19; 196:17-19. He admitted that Trinity invoices did not contain any representations that the ET-Plus was NCHRP Report 350 compliant or federally approved. D-230; Oct. 15, pm Tr. 196:20-23; 200:8-201:21; Oct. 17, am Tr. 99:13-100:6. In fact, the invoices have little, if any, relation to the false statements or acts Harman alleged were fraudulent. Accordingly, Harman's attempt to simply use the number of ET-Plus invoices to constitute false claims for the imposition of civil penalties is legally improper and not supported by legally sufficient evidence. *Bornstein*, 423 U.S. at 312; *Longhi*, 530 F. Supp. 2d at 900-01.[3]

VII. Harman is not an original source.

Harman was not the original source of the information for any of his fraud claims, and thus dismissal is required. *See* 31 U.S.C. § 3730(e)(4)(B). Again, the Fifth Circuit has rejected the idea that investigation or a compiling publically available information would elevate a relator to an "original source." *See Reagan*, 384 F.3d at 179; *Lockey*, 2014 WL 3809754, at *4. The evidence at trial (and the evidence attached to Trinity's prior motions) conclusively proves that Harman's allegations were publicly disclosed before Harman filed his lawsuit on March 6, 2012 and his FCA claim is "based upon" or "substantially the same" as those prior public disclosures.

[3] Additionally, as set forth in Section V. above, the conclusive evidence shows that the government has not suffered any damages and has received the benefit of its bargain. Thus, an imposition of 16,771 civil penalties in this circumstance also violates the Excessive Fines Clause in the Eighth Amendment. *See United States v. Mackby*, 261 F.3d 821, 831 (9th Cir. 2001) (finding that because FCA damages and penalties have a "punitive purpose," they both must be analyzed under the Eighth Amendment to determine whether they are unconstitutionally excessive); *Hays*, 325 F.3d at 993 (rejecting "approach to deciding a legal question laced with Excessive Fines Clause implications" that would result in "a $1,000,000 penalty that bears no rational relationship to the false claim misconduct-seeking improper reimbursement for spending $6,000 to purchase apples"); *United States ex rel. Smith v. Gilbert Realty*, 840 F. Supp. 71, 74 (E.D. Mich. 1993) (finding penalty award violated Excessive Fines Clause).

See 31 U.S.C. § 3730(e)(4)(B). *See U.S. ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp. 2d 499, 519 (N.D. Tex. 2012); *Reagan*, 384 F.3d at 176. As this Court previously found, the facts forming the basis of Harman's Complaint were available to the public through presentations, websites, and in another related lawsuit before Harman filed his Complaint. Under Fifth Circuit law, that is dispositive and requires the entry of judgment as a matter of law in Trinity's favor.

VIII. Harman's claims are barred by the statute of limitations.

It is the law of this case that "violations accruing before March 6, 2006 are barred by the statute of limitations …." Mem. Op. & Order 14, Dkt. 96; 31 U.S.C. § 3731(b)(1). Thus, any allegation that Trinity made false statements to the federal government to obtain the 2005 approval of the ET-Plus is barred by limitations, as are all other claims that accrued before March 6, 2006—including any alleged false certifications by Trinity to its customers.

PRAYER

In light of the foregoing, Trinity asks this Court to enter judgment in its favor as a matter of law under Rule 50 and grant all other relief to which it is entitled.

Respectfully submitted,

/s/ Robert M. (Randy) Roach, Jr.

Robert M. (Randy) Roach, Jr.
Texas Bar No. 16969100
Manuel López
Texas Bar No. 00784495
Daniel W. Davis
Texas Bar No. 24040767
John W. Newton, III
Texas Bar No. 14983300
Roach & Newton, LLP
1111 Bagby Street, Suite 2650
Houston, Texas 77002
Telephone: (713) 652-2032
Facsimile: (713) 652-2029

J. Mark Mann
Texas Bar No. 12926150
MT2 LAW GROUP
300 West Main Street
Henderson, Texas 75652
Telephone: (903) 657-8540
Fax: (903) 657-6003
mark@themannfirm.com

Ethan Shaw
Texas Bar No. 18140480
SHAW COWART LLP
1609 Shoal Creek Blvd., Ste. 100
Austin, Texas 78701
Telephone: (512) 499-8900
Fax: (512) 320-8906
elshaw@shawcowart.com

Mike Miller
Texas Bar No. 14101100
201 W. Houston St.
Marshall, Texas 75670
Telephone: (903) 938-4395
Fax: (903) 938-3360

Sarah R. Teachout
Texas Bar No. 24008134
Arnold Spencer
Texas Bar No. 00791709
AKIN GUMP STRAUSS HAUER & FELD LLP
1700 Pacific Avenue, Suite 4100
Dallas, TX 75201-4624
Telephone: (214) 969-2859
Fax: (214) 969-4343
steachout@akingump.com
aspencer@akingump.com

Russell C. Brown
Texas Bar No. 03167510
THE LAW OFFICES OF
RUSSELL C. BROWN, P.C.
P.O. Box 1780
Henderson, Texas 75653-1780
Telephone: (903) 657-8553
Fax: (903) 655-0218
russell@rcbrownlaw.com

ATTORNEYS FOR DEFENDANTS,

TRINITY INDUSTRIES, INC. AND
TRINITY HIGHWAY PRODUCTS, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on counsel for all parties via the Court's CM/ECF system on this 17th day of November, 2014.

/s/ Robert M. (Randy) Roach, Jr.

U.S. Department of Transportation
Federal Highway Administration

Office of the Administrator

1200 New Jersey Ave., SE
Washington, D.C. 20590

November 12, 2014

In Reply Refer To:
HCC-1

Mr. Gregg Mitchell
President
Trinity Highway Products, LLC
2525 N. Stemmons Freeway
Dallas, TX 75207

Dear Mr. Mitchell:

The Federal Highway Administration (FHWA) is in receipt of the revised test plan of the ET-Plus (ET-Plus) System submitted by Trinity Highway Products, LLC (Trinity) on November 6, 2014. After review of the plan, FHWA accepts the test plan and directs Trinity to implement the plan, subject to the following:

1. As discussed with Trinity and explained in Mr. Furst's November 4, 2014, communication to Trinity, FHWA requires that the test results from each series of tests (the 27.75" height tests and the 31" height tests) be submitted to FHWA as soon as possible after completion of that series. Under the plan, Trinity intends to complete the 27.75" series before proceeding to the 31" series. The FHWA expects that Trinity will submit to FHWA the results and test report for the 27.75" series expeditiously after that series is completed and not defer submission until completion of the 31" series.

2. The FHWA continues to seek ET-Plus devices for use in the testing. While the test plan provides that Trinity is responsible for identifying and procuring the systems to be used, FHWA retains authority to approve which devices are tested. The FHWA will work with Trinity to procure systems from existing State departments of transportation inventories to be used in the testing and to ensure proper chain of custody.

3. The FHWA requests that Trinity identify the year, make, and model of test vehicles and obtain FHWA approval before procuring the vehicles.

4. The FHWA reiterates its request that Trinity confirm that the ET-Plus units that will be tested are identical to the devices tested in 2005 and 2010.

5. The FHWA accepts Trinity's proposed schedule, recognizing the need to ensure that the tests are performed carefully and properly. We continue to encourage Trinity to make every reasonable effort to complete the testing more quickly than called for in the schedule, without compromising accuracy.

6. As FHWA has communicated to Trinity, the test plan is only one part of our review and analysis of ET-Plus and similar guardrails. The FHWA is currently evaluating requests for additional testing beyond the NCHRP 350 standards. We will review the data and information we are collecting from a variety of sources to determine whether additional analyses or testing, including in-service performance evaluations of the ET-Plus and other end treatments, are needed.

7. The FHWA reiterates its desire that the testing be as transparent as possible

The FHWA looks forward to Trinity's completion of the testing.

Sincerely,

Gregory G. Nadeau
Acting Administrator

U.S. Department of Transportation
Federal Highway Administration
1200 New Jersey Avenue, SE
Washington, DC 20590
202-366-4000

Guardrail Safety

Crash Test Plan for the ET-Plus Guardrail End Terminal – FAQ

Q) What device will be crash tested?

A) The standard production ET-Plus guardrail system using the current production 4-inch guide channel impact head.

Q) What devices will be used?

A) FHWA is working with Trinity and State Departments of Transportation to arrange to have devices tested that have already been sold into the market and are currently part of a State DOT's inventory.

Q) What crash test criteria will be used?

A) The crash tests will be conducted using the National Highway Cooperative Research Program (NCHRP) – 350 criteria, test level 3. These are the criteria applicable to this device as they are the criteria to which the device was tested to receive its eligibility letter in 2005. Devices crash tested to NCHRP 350 prior to 1/1/11 can still be used. All crash testing on or after 1/1/11 must be done according to MASH criteria.

Q) Where will the crash testing take place?

A) The Southwest Research Institute (SwRI) in San Antonio, TX. SwRI is an accredited crash test facility.

Q) Has the Southwest Research Institute been involved in any previous testing of the ET-Plus or have a financial interest in the ET-Plus with 4-inch guide channel impact head?

A) No, SwRI has not performed previous testing on this product and does not have a financial interest in this product.

Q) When will the crash testing take place?

A) From mid November 2014 to mid January 2015.

Q) Why does it take two months?

A) Eight crash tests will take place. Four tests at a guardrail height of 27.75" followed by four tests at a guardrail height of 31". These tests are complex; they involve the installation of hundreds of feet of guardrail, acquisition and instrumentation of the test vehicles, set-up of the vehicles and cameras, and alignment of the test track.

Q) Why only four tests per height, isn't the full range of NCHRP 350 tests larger?

A) These are the tests relevant to the performance of the end terminal. The other tests are for the longitudinal integrity of the guardrail downstream of the head. The longitudinal integrity of the guardrail is not in question.

Q) Why are there two different heights?

A) The 31" height replicates the height of the guardrail from the 2005 tests. The 27.75" height satisfies the test height the Virginia Department of Transportation required of Trinity.

Q) When will results be available?

A) FHWA expects to receive, review and make the crash test results public once testing is complete and data reviewed. We anticipate completion and release of the results in January or February 2015.

Q) Will FHWA observe the crash tests?

A) Yes, FHWA representatives will observe the crash tests. In addition, FHWA will invite representatives from AASHTO and State DOTs, and independent experts.

Q) Will media be able to view the testing as it happens?

A) The testing facility and Trinity must determine whether media will be permitted to view the testing as it happens. FHWA encouraged Trinity to be transparent.

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U.S. Department of Transportation
Federal Highway Administration
1200 New Jersey Avenue, SE
Washington, DC 20590
202-366-4000

Guardrail Safety

Trinity ET-Plus Re-Testing/Guardrail End Terminal Safety -- FAQ

Q) When it comes to guardrails and their components, does FHWA regulate roadside safety hardware like guardrails?

A) No. FHWA does not regulate or prescribe requirements for safety hardware. States and territories install and maintain their highway systems, including hardware.

Q) Does FHWA establish crash test criteria for roadside safety hardware?

A) No. The American Association of State Highway and Transportation Officials (AASHTO), with support and assistance from the Transportation Research Board, develops the crash test criteria and safety standards. In addition to establishing safety standards and crash test criteria, AASHTO recommends assessments of devices in use on roads (also known as "in-service evaluations" of roadside safety hardware). FHWA provides technical input to AASHTO standards but has no vote when a decision is made by AASHTO for establishing those criteria.

Q) What is FHWA's role in the review of roadside safety hardware?

A) FHWA does not regulate roadside safety hardware, nor does FHWA endorse any product. FHWA provides a service to state DOTs by a) reviewing crash test results of roadside safety hardware conducted by accredited testing facilities certified to perform crash testing upon request, b) determining whether or not the test results demonstrate that a device meets applicable crash test criteria; and c) issuing a letter stating a device is eligible for Federal-aid reimbursement if it meets the criteria. FHWA provides its crash test review, verification and eligibility service to reduce the burden upon the states that lack the technical expertise or staff resources to determine whether a particular safety device meets the relevant roadside safety hardware criteria. All eligibility letters are posted on FHWA's Office of Safety website. Importantly, a letter of funding eligibility is not required for federal funding – a state may opt to certify a product's crash worthiness on its own.

Q) What is the role of the states?

A) States own and operate the Federal-aid highway system, make the day-to-day decisions on the use of federal funding within the statutory requirements prescribed by Congress and oversee the design, construction, maintenance, and operation of the system in compliance with federal and state regulations. States decide which safety hardware to install on their roads and are responsible for maintaining such hardware. They also set the safety criteria for roadside safety hardware as members of AASHTO.

Q) Are FHWA eligibility letters a regulatory requirement for guardrails, guardrail end terminals and

other types of roadside safety hardware to be installed in states?

A) No. An FHWA eligibility letter is not required for states to use roadside safety hardware and receive federal aid. States may make their own determinations, relying on certifications from accredited crash test facilities or crash test data from a manufacturer. A state DOT may also place limits on the use of a device, require additional testing or in-service evaluation. However, it is FHWA policy that any roadside safety hardware placed on the National Highway System meet the applicable crash test criteria in order for the state to receive reimbursement for that hardware.

Q) Does FHWA have the authority to force a company to recall highway equipment?

A) No. FHWA does not have recall or regulatory authority.

Q) Was Trinity's ET-Plus four-inch guardrail end terminal crash-tested?

A) Yes. FHWA determined that the Trinity ET-Plus four-inch guardrail terminal was crash tested in 2005 by Texas Transportation Institute (TTI), an accredited testing facility, and met the required crash test criteria. FHWA also reviewed two crash tests conducted in 2010 in which the ET-Plus four-inch guardrail terminal met the required crash test criteria.

Q) What actions has FHWA taken to confirm that the ET-Plus meets AASHTO's evaluation criteria for crash testing?

A) In 2012 FHWA re-reviewed crash test information, including photographic evidence and test results. A visual examination of the position and location of the device's feeder channel and the type of welds used confirmed that the 2005 test subject was the four-inch version (the four-inch feeder channel fits into the extruder head while the five-inch version butts up to the back end of the extruder head). Additionally, FHWA used scaled measurements from photographs to confirm that the 2005 test had been conducted on the four-inch design. In 2012, Trinity and TTI provided FHWA additional test data from 2010 that reaffirmed that the four-inch wide version met the crash test criteria. The extruder head tested in 2005 and 2010 is the same design that is in use today. Both met AASHTO standards.

Q) What other reviews has FHWA conducted to determine whether the ET-Plus is performing as designed?

A) In 2012, FHWA asked AASHTO to survey all state DOTs about the performance of w-beam end terminals (the ET-Plus four-inch is in that category of end terminals). None of the 20 respondents identified any performance issues with the ET-Plus.

In 2014, FHWA reviewed results of another AASHTO survey. The 2014 survey was sent to members of its Subcommittee on Design (which includes 48 state DOTs, Puerto Rico DOT and District of Columbia DOT) and focused specifically on the ET-Plus. Of the 33 states that responded, only one (Missouri) noted specific issues with the device. FHWA is analyzing guardrail end terminal crash data provided by the Missouri Department of Transportation.

In the summer of 2014, FHWA reviewed data from the National Motor Vehicle Crash Causation Study, a congressionally mandated, on-scene crash study conducted by NHTSA to better understand the causes of different types of crashes. FHWA extracted and analyzed all crashes involving w-beam end terminal hits. A total of 14 cases involving the ET-Plus 4-inch were found and the evidence available did not indicate a performance issue with the device in any of these cases.

In October 2014, FHWA requested all state DOTs provide information they may have on crashes involving the ET-Plus with the four-inch terminal end on their roads. The agency is reviewing those results now.

FHWA is also reviewing results of an October 2014 study from the University of Alabama-Birmingham entitled *"Relative Comparison of NCHRP 350 Accepted W-Beam Guardrail End Terminals."*

Q) Why is FHWA requesting that Trinity re-test the ET-Plus?

A) The Federal Highway Administration has not and will never waver on safety. We have requested that Trinity re-test the ET-Plus guardrail end terminal to ensure it meets both the criteria established by the states and the expectations of motorists on our highways. The safety of U.S. motorists and the roads on which they travel is our number one priority. We reviewed, strengthened and accepted a plan that will be used to re-test the ET-Plus four-inch guardrail end terminal. The future use of the end terminal on U.S. roads will be determined by whether or not the device meets the applicable crash-test criteria in tests conducted by an accredited, independent testing facility, with FHWA engineers and interested state DOT representatives present. FHWA will proceed in a data-driven manner in order to confirm whether or not the end terminal meets crash test criteria.

Q) When and where will the re-testing take place?

A) The required re-testing of Trinity's ET-Plus is scheduled to begin the week of November 17, 2014, at the Southwest Research Institute in San Antonio, Texas. This facility did not participate in any previous tests of the ET-Plus and has no financial interest in the product. All required tests are scheduled to conclude in January 2015.

Q) Why is FHWA requesting Trinity to test the ET-Plus to the specifications under NCHRP 350? Why is FHWA not asking Trinity to test to the current MASH criteria implemented in 2011?

A) All roadside safety hardware receiving an eligibility letter before 2011 must meet the appropriate crash test criteria that existed at the time, which is NCHRP 350 (or its predecessor). The ET-Plus device being tested received its acceptance letter in 2005 (eligibility letters were called acceptance letters in 2005). Any roadside safety hardware developed after 2011 and any hardware with significant modifications after 2011 are required to be tested using the MASH criteria.

Q) Why is FHWA not requesting low angle crash testing which has been requested by outside parties?

A) We are assessing these requests by collecting and reviewing data to determine whether the ET-Plus and other comparable end treatments have vulnerabilities under conditions not covered by NCHRP 350 testing. We will consider whether additional analyses, including evaluations of the end treatments' performance on roads (in-service performance evaluations), are warranted.

Q) When will the crash-test results be made available?

A) FHWA expects to receive, review and make the crash test results public once testing is complete and data reviewed. We anticipate completion and release of the results in January or February 2015.

Q) Will media be able to view the testing as it happens?

A. The testing facility and Trinity must determine whether media will be permitted to view the testing as it happens. FHWA encouraged Trinity to be transparent.

Q) What action will FHWA take if the ET-Plus four-inch guardrail end terminal fails this latest round of testing?

A) If the ET-Plus does not meet the crash test criteria, the device will immediately be ineligible for federal funding.

Q) Why is the Trinity ET-Plus still eligible for funding when there are questions about the product's safety?

A) FHWA must rely on and take appropriate action based on credible data and information provided by the states, AASHTO and other stakeholders. There is no conclusive evidence at this time that indicates this product is not performing in the field as designed. When queried in 2012 and 2014, the states did not provide information claiming otherwise.

Q) How does FHWA help states reduce the number of crashes that result from roadway departures and guardrail collisions?

A) A roadway departure crash is defined as a non-intersection crash which occurs after a vehicle crosses an edge line or a center line, or otherwise leaves the traveled way. FHWA's Roadway Departure Safety Program provides technical assistance, tools and information for transportation practitioners, decision makers, and others to assist them in preventing and reducing the severity of roadway departure crashes, at http://safety.fhwa.dot.gov/roadway_dept/. FHWA provides training to states regarding the proper design, installation, and maintenance of roadside safety hardware. Information on roadside safety hardware that has been tested for crashworthiness according to recommended procedures can be found at http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/.

Q) What are the factors that come into play when there are fatalities related to crashes involving guardrails?

A) There are many factors that can affect the performance of a guardrail and its components when it is struck by a vehicle. Road and weather conditions, the volume of traffic, the speed of the vehicle striking the guardrail, the type and size of the vehicle that hits a guardrail, the angle of impact and the installation and maintenance of the device can all affect how the device performs. That is why it is important to know details about the crash before determining whether or not a piece of roadside safety hardware did or did not perform correctly. Crash testing is intended to assess worst practical conditions, but no testing can replicate every accident scenario that could happen on a road.

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

UNITED STATES OF AMERICA EX REL. JOSHUA HARMAN, Plaintiff, VS. TRINITY INDUSTRIES, INC. AND TRINITY HIGHWAY PRODUCTS, LLC, Defendants.	§ § § § § § § §	CIVIL ACTION NO. 2:12-CV-0089

ORDER GRANTING TRINITY'S RENEWED RULE 50
MOTION FOR JUDGMENT AS A MATTER OF LAW

On this ____ day of November, 2014, the Court considered Trinity's Renewed Rule 50 Motion for Judgment as a Matter of Law. After considering the Motion, all of the evidence submitted at trial, any response or opposition, and the arguments of counsel, the Court finds that the Motion is meritorious and should be GRANTED.

It is therefore ORDERED, ADJUDGED, AND DECREED that judgment as a matter of law is granted in favor of Trinity on all allegations and claims in the above-referenced matter.