UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41297

In re Trinity Industries, Inc. and
Trinity Highway Products, LLC,
Defendants.

Petition from the United States District Court for the
Eastern District of Texas, Marshall Division

Civil Action No. 2:12-CV-0089

PLAINTIFF RELATOR'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS AND MOTION FOR A STAY OF POST-TRIAL PROCEEDINGS

Rosemary T. Snider
(Texas State Bar No. 18756900)
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
Ph: (214) 978-4048
rsnider@mckoolsmith.com

T. John Ward
(Texas State Bar No. 20848000)
WARD & SMITH LAW FIRM
PO Box 1231
Longview, TX 75606
Ph: (903) 757-6400
tjw@wsfirm.com

Samuel Baxter
(Texas State Bar No. 01938000)
MCKOOL SMITH, P.C.
104 East Houston Street, Suite 300
Marshall, TX 75670
Ph: (903) 923-9000
sbaxter@mckoolsmith.com

George F. Carpinello
Jeffrey S. Shelly
Teresa Monroe
BOIES, SCHILLER & FLEXNER LLP
30 South Pearl Street, 11th Floor
Albany, NY 12207
Ph: (518) 434-0600
gcarpinello@bsfllp.com

Counsel cont'd on following page

Nicholas A. Gravante, Jr.
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022
Ph: (212) 446-2300
ngravante@bsfllp.com

Karen Dyer
George Coe
BOIES, SCHILLER & FLEXNER LLP
121 South Orange Avenue, Suite 840
Orlando, FL 32801
Ph: (407) 425-7118
kdyer@bsfllp.com

Christopher M. Green
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Ph: (914) 749-8200
cgreen@bsfllp.com

Steven R. Lawrence
(Texas State Bar No. 24038227)
THE LAWRENCE LAW FIRM
700 Lavaca Street, Suite 1400
Austin, TX 78701
Ph: (512) 686-3312
steven@stevenlawrencelaw.com

Josh B. Maness
(Texas State Bar No. 24046340)
PO Box 1785
Marshall, TX 75671
Ph: (903) 407-8455
manessjosh@hotmail.com

Justin Kurt Truelove
(Texas State Bar No. 24013653)
TRUELOVE LAW FIRM, PLLC
100 West Houston
Marshall, TX 75670
Ph: (903) 938-8321
Kurt@truelovelawfirm.com

Wyatt B. Durrette, Jr.
Debbie G. Seidel
DURRETTECRUMP PLC
1111 E. Main St. 16th Floor
Richmond, VA 23219
Ph: (804) 775 6900
wdurrette@durrettecrump.com

CERTIFICATE OF INTERESTED PERSONS

No. 14-41297

In re Trinity Industries, Inc. and Trinity Highway Products, LLC

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

Respondent
United States of America ex rel. Joshua Harman

Counsel for Respondent
Rosemary T. Snider
MCKOOL SMITH, P.C.
300 Crescent Court
Suite 1500
Dallas, TX 75201
Telephone: (214) 978-4048
rsnider@mckoolsmith.com

George F. Carpinello
Jeffrey S. Shelly
Teresa Monroe
BOIES, SCHILLER & FLEXNER LLP
30 South Pearl Street
Albany, NY 12207
Telephone: (518) 434-0600
gcarpinello@bsfllp.com

Karen Dyer
BOIES, SCHILLER & FLEXNER LLP
121 South Orange Avenue, Suite 840
Orlando, FL 32801
Telephone: (407) 425-7118
kdyer@bsfllp.com

Nicholas A. Gravante, Jr.
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022
Telephone: (212) 446-2300
ngravante@bsfllp.com

Josh B. Maness
PO Box 1785
Marshall, TX 75671
Telephone: (903) 407-8455
manessjosh@hotmail.com

Justin Kurt Truelove
TRUELOVE LAW FIRM, PLLC
100 West Houston
Marshall, TX 75670
Telephone: (903) 938-8321
Kurt@truelovelawfirm.com

Wyatt B. Durrette, Jr.
Debbie G. Seidel
DURRETTE CRUMP PLC
1111 E. Main St. 16th Floor
Richmond, VA 23219
Telephone: (804) 775-6900
wdurrette@durrettecrump.com

Samuel F. Baxter
Jennifer Truelove
MCKOOL SMITH
104 E. Houston St., Suite 300
Marshall TX 75670
Telephone: (903) 923-9001
sbaxter@mckoolsmith.com

T. John Ward
WARD & SMITH LAW FIRM
PO Box 1231
Longview, TX 75606
Telephone: (903) 757-6400
tjw@wsfirm.com

Steven R. Lawrence
THE LAWRENCE LAW FIRM
700 Lavaca Street, Suite 1400
Austin, TX 78701
Telephone: (512) 686-3312
steven@stevenlawrencelaw.com

Petitioners
Trinity Industries, Inc.

Trinity Highway Products, LLC – a wholly-owned subsidiary of Trinity Industries, Inc.

Counsel for Petitioners
Robert M. (Randy) Roach, Jr.
Manuel López
Daniel W. Davis
John W. Newton, III
ROACH & NEWTON, LLP
1111 Bagby Street, Suite 2650
Houston, TX 77002
Telephone: (713) 652-2032
rroach@roachnewton.com
mlopez@roachnewton.com
ddavis@roachnewton.com
jnewton@roachnewton.com

Roger D. Townsend
Robert B. Dubose
ALEXANDER DUBOSE JEFFERSON & TOWNSEND LLP
1844 Harvard Street
Houston, TX 77008-4342
Telephone: (713) 523-2358
rtownsend@adjtlaw.com
rdubose@adjtlaw.com

Dana Livingston
ALEXANDER DUBOSE JEFFERSON & TOWNSEND LLP
515 Congress Ave, Suite 2350
Austin, TX 78701-3562
Telephone: (512) 482-9304
dlivingston@adjtlaw.com

Warren W. Harris
BRACEWELL & GIULIANI LLP
711 Louisiana Street, Suite 2300
Houston, TX 77002-2770
Telephone: (713) 221-1490
warren.harris@bgllp.com

Heather Bailey New
Jason Steed
BELL NUNNALLY &MARTIN, LLP
3232 McKinney Ave., Suite 1400
Dallas, TX 75204
Telephone: (214)740-1400
heathern@bellnunnally.com

Nina Cortell
Jeremy D. Kernodle
HAYNES and BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Telephone: (214) 651-5000
nina.cortell@haynesboone.com

jeremy.kernodle@haynesboone.com

Ethan Shaw
SHAW COWART LLP
1609 Shoal Creek Blvd., Ste. 100
Austin, TX 78701
Telephone: (512) 499-8900
elshaw@shawcowart.com

J. Mark Mann
MT2 LAW GROUP
300 West Main Street
Henderson, TX 75652
Telephone: (903) 657-8540
mark@themannfirm.com

Mike Miller
201 W. Houston St.
Marshall, TX 75670
Telephone: (903) 938-4395

Russell C. Brown
THE LAW OFFICES OF RUSSELL C. BROWN, P.C.
PO Box 1780
Henderson, TX 75653-1780
Telephone: (903) 657-8553
russell@rcbrownlaw.com

Sarah R. Teachout
Arnold Spencer
AKIN GUMP STRAUSS HAUER & FELD LLP
1700 Pacific Avenue, Suite 4100
Dallas, TX 75201-4624
Telephone: (214) 969-2859
steachout@akingump.com
aspencer@akingump.com

Nominal Respondent
Hon. Rodney Gilstrap
United States District Court for the Eastern District of TX, Marshall Division
Sam B. Hall, Jr. Federal Building and United States Courthouse
100 East Houston Street
Marshall, TX 75670
Telephone: (903) 935-3868

Other Interested Party, Not a Party to the Case
TX A&M University System

Counsel for Other Interested Party
James C. Ho
Robert Vincent
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201-6912
Telephone: (214) 698-3264
JHo@gibsondunn.com

/s/ Rosemary T. Snider
Rosemary T. Snider
MCKOOL SMITH, P.C.
Attorney of record for Respondent
United States of America ex rel.
Joshua Harman

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Plaintiff/Relator Joshua Harman submits this response brief in opposition to Trinity Industries, Inc.'s and Trinity Highway Products, LLC's (hereinafter "Defendants" or "Trinity") Petition for Writ of Mandamus and Motion for a Stay of Post-Trial Proceedings.

PRELIMINARY STATEMENT

This mandamus petition, Defendants' second, and the accompanying motion for stay should be denied for several reasons:

First, it is well-established that a mandamus petition is not a substitute for an appeal. Nowhere in their papers do Defendants make a credible argument that this Court must decide immediately the legal issues that Defendants raise, rather than awaiting the "reasoned ruling" that Defendants will get from the district court in ruling on their Rule 50(b) motion. That motion was not filed until November 17, 2014 – almost a month after the trial ended. Plaintiff's response is due just three days from now on December 4, 2014, and the district court has indicated that it will act promptly. This Court should have the benefit of the trial court's ruling on that motion, particularly since the trial court has heard all the evidence. As this Court explained in *In re Occidental Petroleum Corp.,* 217 F.3d 293, 295 (5th Cir. 2000), Defendants must show not only that the district court clearly and indisputably erred but also that the error cannot be remedied on appeal. Clearly, if Defendants are correct that the verdict cannot stand, then they will get the relief

they seek when the district court rules or when this Court has the opportunity to review the entire trial record and make a reasoned decision.

Defendants' only justification for short-circuiting the established process is their claimed need to "navigate the waters between an improper and oppressive judgment and a premature and coercive mediation." P. Br. 2.[1]

Defendants' justification is meritless. They are in no different position and face no greater "coercion" than any other defendant faces after an adverse jury verdict: either settle the case or take an appeal. Nothing the district court has done, including the district court's very sensible and timely order of mediation – given there remain extensive post-verdict proceedings as well as an appeal regardless of which side prevails – has a more coercive effect on Defendants than what any defendant faces. If Defendants believe they will prevail on appeal, then they should simply decline to settle and file their appeal.

Second, contrary to Defendants' assertion, they do not face "two binding, yet flatly irreconcilable decisions – one regulatory and one judicial." P. Br. 4. There is no final "regulatory" decision. The FHWA and the 40 states that have banned the use of the ET-Plus are in the process of reevaluating its safety and eligibility. That process will proceed whether review by this Court is a rushed mandamus or a considered appeal.

[1] Petitioners' Brief in Support of the Petition for Writ of Mandamus is denominated as "P. Br."

Third, Defendants contend that they are "clear[ly] and indisputabl[y]" entitled to mandamus "because the district court refused to follow any of this Court's guidance" in its first mandamus decision. P. Br. 14. Respectfully, this is nonsense. The key "guidance" Defendants point to is strictly conditional and based on a subset of the alleged facts that, even assuming they were complete at the time of the initial mandamus petition – and they were not – are no longer complete. Moreover, Defendants' argument that the district court has failed to follow the guidance in its earlier decision *denying* mandamus is also premature, since the district court has had no opportunity to rule on Defendants' Rule 50(b) motion.

The Court's first mandamus decision begins by denying mandamus but noting – unsurprisingly, coming on the heels of a mistrial – that "this is a *close case*." App A. [2] Next, the Court notes its "*concern*" that "the trial court … has never issued a reasoned ruling rejecting the defendant's motions for judgment as a matter of law." *Id.* (emphasis added). The Court then states that the FHWA letter "*seems* to compel the conclusion that FHWA, after due consideration of all the facts, found the defendant's product sufficiently compliant with federal safety standards and therefore fully eligible, in the past, present and future, for federal reimbursement claims" *Id.* (emphasis added). Lastly, the Court describes

[2] Respondent's Appendix is denominated as "App. A-MM." Petitioners' Appendix is denominated as "App. 1-35."

certification for interlocutory review as "a course that *seems* prudent," and states that "a strong argument *can be made* that the defendant's actions were neither material nor were any false claims based on false certifications presented to the government." *Id.* (emphasis added).

Those statements were made by the first mandamus panel based upon an assumption, derived from a very limited record, that the FHWA had undertaken "due consideration of all the facts" and had reached a final conclusion finding the ET-Plus compliant. But, in fact, it is now clear that the opposite is true. Indeed, very critical facts were not disclosed until after the first panel's decision, including the FHWA's announcement on October 10, 2014, before the trial and resulting verdict, that the FHWA was ordering a review of the ET-Plus. Then, at the trial, it was revealed, for the first time, that Trinity and Texas A&M Transportation Institute ("TTI") knew that the ET-Plus was particularly vulnerable to failure if hit at a shallow angle *and* that they had failed to disclose to the FHWA – as they were required to do – *five* failed tests which demonstrated that vulnerability.

In light of the evidence adduced at trial showing that the FHWA was not previously fully informed by Trinity, the recent Ohio and Missouri study showing the ET-Plus to be substantially more dangerous than its predecessor model (App. B), and a number of recent accidents involving the ET-Plus, the FHWA has ordered Defendants, as a first step, to undertake a new battery of tests and may

possibly order Defendants to do a full in-service review of the performance of the ET-Plus on the road.

Fourth, Defendants' underlying position on the merits is simply wrong. The evidence presented at trial is very different from Defendants' one-sided statement of the facts, and the full factual record in this case is readily distinguishable from the facts at issue in *United States v. Southland Mgmt. Corp.*, 326 F.3d 669 (5th Cir. 2003) (en banc). In *Southland*, this Court held – on a complete appellate record – that the owners of an apartment complex were contractually entitled to HUD money because HUD knew *prior to the certification* that the apartments were in need of corrective action and HUD expressly approved payments with *full knowledge* of the unsanitary conditions, on the contractual grounds that the owners would take corrective action and improve the property.

That is in stark contrast to what happened in this case. Here, the FHWA did not know the material facts about the changes to the ET-Plus prior to the issuance of any of its "approvals" because Defendants intentionally concealed *both* the changes *and* the crash test results confirming that those changes made the product dangerous. The jury heard evidence at trial that:

- Defendants could not change the ET-Plus without disclosing such change to the FHWA and conducting the tests directed to be made by the FHWA;

- Defendants changed the ET-Plus in a number of different ways, without disclosing those changes to the FHWA;

- Defendants conducted five failed tests of the changed product without disclosing those results to the FHWA;

- Defendants sold the ET-Plus for seven (7) years knowing that they had changed the ET-Plus and knowing that they had not disclosed the changes or failed tests to the FHWA;

- During all that time, Defendants knowingly and falsely certified to the purchasers of the ET-Plus and the states that received federal reimbursement that the ET-Plus had the same "chemistry, mechanical properties and geometry" as what was tested and approved by the FHWA; and

- Defendants knew that the secretly modified ET-Plus performed substantially worse than its predecessor and had the five failed tests to prove it, but did not inform the FHWA of those tests.

- The FHWA learned some of these changes only when informed by Relator; learned of the five failed tests only when they were disclosed at the second trial; and has never been fully informed (even today) by Trinity of all the changes it made to the ET-Plus.

It is black letter law that a defendant cannot commit fraud if the government knows the material facts before it accepts a claim or makes payment. But that is very different from excusing fraud after it occurs and doing so without knowing all the facts. Here, there is overwhelming evidence – much of which is uncontroverted – that Defendants made changes, the changes were significant because they adversely affect the ET-Plus's performance, and Defendants did not disclose those changes. As the district court held, Defendants' conduct, as alleged by the Relator, states a claim for fraud. And the jury, considering all the evidence,

found Defendants liable for fraud. The FHWA has no power *post hoc* to absolve Defendants or immunize them for their past fraud.

Finally, there is no merit to Defendants' multiple and intemperate criticisms of the district court. The district court did nothing to inflame the jury and certainly did not let bias, prejudice or sympathy play any part in its deliberations. Defendants complain about the admission of photographs showing the effect of a defective ET-Plus on an automobile, but those photographs were clearly necessary for the jury to understand why the changes to the ET-Plus were material and should have been disclosed. The district court carefully excluded any photographs showing accident victims, blood, body parts, or victims' personal effects. Moreover, to the extent there was any error in the admission of such photos – and there is not – that is an issue for an appeal, not mandamus.

In addition, Defendants' criticism of the admission of the supposed "evidence about a non-party's experimental project that was not at issue" (P. Br. 11) is completely disingenuous. The evidence that Defendants refer to is the evidence of the five failed crash tests, described above, that show that the ET-Plus was vulnerable to crashes at a shallow angle. And that was not a "non-party's experimental project." That was testing of the ET-Plus, which was a Trinity product, and the tests were performed pursuant to a joint venture between Trinity and TTI to seek approval from the FHWA for a so-called "flared ET

configuration." Again, in any event, any error in admission – of which there is none – is an issue for appeal, not mandamus.

Further, the Court acted entirely properly in admitting evidence of *both* Harman's *and* Defendants' lobbying and political contributions (another meritless appellate issue at most, not one for mandamus). Such evidence was clearly relevant given Defendants' arguments that the FHWA's prior communications supported their position. Significantly, Defendants did not advise this Court that, originally, the FHWA had drafted letters in 2012 demanding that Trinity produce the ET-Plus prototype that was tested in 2005 (which TTI and Trinity destroyed), as well as the drawing of the dimensions of the prototype (which never existed or was destroyed), and do an in-service review (which Trinity never did). But that draft letter was never sent by the FHWA. Instead, after Defendants' lobbying efforts, the FHWA shelved it.

Today, however, in the face of a firestorm of criticism and unrebutted evidence of failures of the ET-Plus, the FHWA has once again changed its position and ordered a new, full review.

The very fact that the FHWA has changed its position so many times is, in and of itself, the best evidence of why an agency's actions or inaction, after a defendant's fraud is brought to light, should not be a bar to a False Claims Act

recovery. Whether that fraud has occurred is an issue for the courts, as Congress mandated when it passed the False Claims Act.

For all the above reasons and others set forth below, Defendants' mandamus petition and accompanying motion for stay should be denied.

STATEMENT OF FACTS

A. Background

All roadside hardware, including guardrail end terminals, must be accepted for use by the Federal Highway Administration (FHWA) before it is eligible for reimbursement with federal funds. App. C, 122:17-124:3. Under the NCHRP Report 350 standards which were applicable to FHWA acceptance of roadside hardware between 1997 and 2009, there are seven crash tests necessary to determine the eligibility of hardware to be used on the nation's roadways. App. D; App E. The seven tests are spelled out in the NCHRP Report 350 guidelines. *See* App. D.

The FHWA determines which crash tests should be run on a roadside device based upon the type of hardware and the proposed changes. App. F, at 30:8-17; App. G, at 52:16-53:22. In order to determine the appropriate crash tests, the manufacturer must first disclose to the FHWA all the changes intended to be made to the device. App. F, at 120:16-121:13; 129:8-13; App. H, at 63:5-22. Only after a roadside device has been crash tested and accepted by the FHWA can the

device be sold for use on federally-funded highways, but even then hardware placed on the roadways must "replicate the crash-tested device." App. C, at 145:21-146:19. And any changes made to the device after crash testing must also be disclosed to the FHWA, reviewed by the FWHA, and accepted by the FHWA before the test article is sold by the manufacturer for use on the federal and state roadways. App. C, at 145:21-146:19; App. I, at 11:8-24.

B. Trinity Failed to Disclose Dimensional Changes to the ET-Plus.

The ET-Plus is designed to cushion the crash resulting from a vehicle's head-on impact with the end of a guardrail. App. J, at 147:17-23. The ET-Plus, like other guardrail end treatments, works by flattening or ribboning the W-beam guardrail away from the road as the vehicle travels down the length of the guardrail. App. F, at 65:8-66:5. Working properly, the ET-Plus prevents the "spearing" of the car by the W-beam. *Id*.

The dimensions of the ET-Plus are critical. As NCHRP Report 350, the testing protocol under which the ET-Plus was tested, makes clear, small changes can have very significant effects on performance of a product like the ET-Plus. App. D; App. F, at 39:16-25; 54:8-14. A minor change in dimensions can prevent the guardrail from flattening and lead to a "lock up" in the ET-Plus. *Id*. at 52:20-53:19. If this happens, the guardrail is prone to bending and breaking rather than flattening and ribboning out. *Id*. When the ET-Plus fails to work, the guardrail

becomes a dangerous spear which can enter the car, go through the passenger compartment and come out the back of the car. App. K; App. L; App. M, App. N.

In 2005, Trinity decided to change the dimensions of the ET-Plus. It did so for two (2) apparent reasons: first, an internal Trinity e-mail indicates that Trinity would save $2.00 per head if it made the changes, App. O; second, it is clear from Trinity's own literature that Trinity anticipated that the changes would significantly reduce the reusability of the ET-Plus, and would require the purchase of a replacement of any ET-Plus engaged in a significant crash, App. G, at 27:21-32:11. The predecessor of the ET-Plus, the ET-2000, was marketed as "99% reusable," and evidence introduced at trial indicated that, routinely, both the ET-2000 and the ET-Plus, prior to the modifications, could often be reused. *Id*. The re-usability changed dramatically after the undisclosed modifications. ***Id*.**

C. The 2005 Crash Test

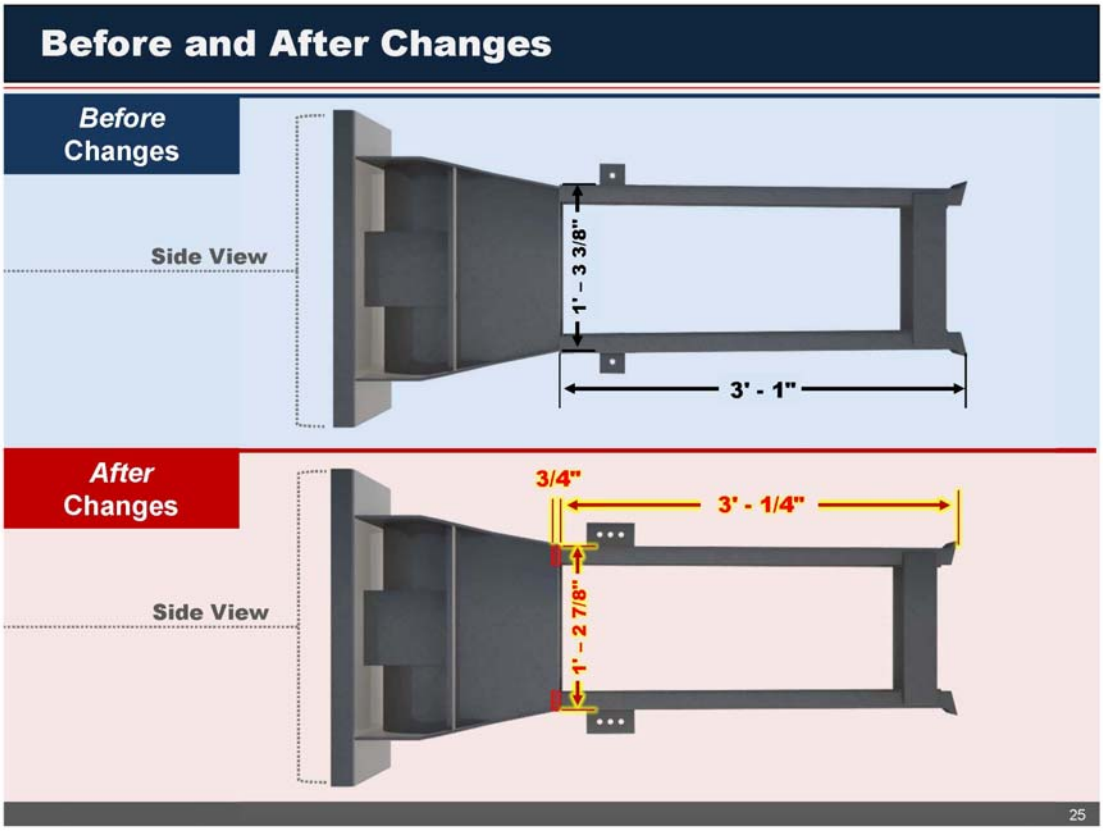
At trial, both Trinity and TTI claimed they had tested the undisclosed changes in the ET-Plus in a test undertaken in May 2005. However, the report from that test that was submitted to the FHWA by Trinity said nothing about the changes. App. P. Rather, the report affirmatively misrepresented that a standard, unmodified ET-Plus was tested with a guardrail having a 31-inch height rather than the standard 27-¾-inch height. App. C, at 125:9-24. Nowhere in the report was there any reference to any dimensional changes to the ET-Plus. *Id*. In fact, the

report claimed, in forty (40) separate places, that the head tested was a "standard" ET-Plus terminal. App. P; App. Q, at 199:22-200:4; App. G, at 134:13-20. In their telephone communications with the FHWA before the 2005 test, neither Trinity nor TTI disclosed any of the dimensional changes to the ET-Plus. App. G, at 47:24-48:8.

Both TTI and Trinity asserted that the failure to advise the FHWA of the several dimensional changes to the ET-Plus and the affirmative misrepresentations in the 2005 report were an "inadvertent omission." App. G, at 53:5-24 ("We depended on TTI to provide that information at that time"); 134:3-7 ("As we've testified, TTI inadvertently omitted a five to four-inch drawing and communication in that document"). The omissions and misrepresentations were in clear violation of the FHWA's requirement that the report detail and illustrate any dimensional changes. Moreover, the assertion that the omission was inadvertent was flatly contradicted by Trinity's own internal email that revealed that Trinity never intended to tell the FHWA about the change. App. O. Moreover, Trinity's sale of the ET-Plus for over eight (8) years after the dimensional changes and its continued false certification that the modified ET-Plus had been disclosed to, and approved by, the FHWA, was not inadvertent, and the jury so found.

D. The Undisclosed Changes Made By Trinity Resulted In a Product That Was Substantially Different From the Product Approved By the FHWA.

Of Trinity's numerous undisclosed changes to the ET-Plus in 2005, the most prominent was the change of guide channel width from 5 inches to 4 inches. The guide channels are two steel pieces that actually guide the W-beam as it is fed into the ET-Plus throat where the W-beam is flattened. App. J, at 72:20-74:25. Reducing the width of the channel led to a change in the means by which the channel was attached to the throat. The 5-inch channel was attached by what is known as a butt weld. App. R, at 80:16-81:14. The 4-inch channel was fed into the throat ¾ of an inch, and attached by a fillet weld, thereby changing the internal dimensions of the throat, and reducing the vertical height of the chute through which the W-beam traveled from 15-¾ inches to 14-⅞ inches. App. R, at 80:2-11; 102:13-106:11; 132:7-11; App. F, at 30:22-31:10; 32:2-34:25. In addition, Trinity changed, at some point in time, the exit gap through which the W-beam is extruded from approximately 1.5 inches down to one inch. App. F, at 36:9-37:24. The opening to the throat of the ET-Plus was changed from 4 inches to 4-⅜ inches, significantly modifying the internal angle of the chamber through which the W-beam was flattened. App. F, at 36:19-37:7.



Collectively, these changes had a dramatic impact on performance. App. F, at 35:21-36:8. The smaller exit gap increases the force levels when a splice bolt (which is used to connect sections of guardrail) is fed through the terminal head during the extrusion process, leading to increased force levels, buckling of the rail, and failure of the terminal head. *Id*. at 47:1-18. Similarly, a change in the size of the throat inlet from 4 inches to 4-⅜ inches results in increased terminal head failures because it changes the angle of the throat and reduces the ability of the "W" beam to flatten. App. F, at 36:19-37:7.

By replacing the butt weld with a fillet weld, Trinity reduced the amount of space available for the guardrail to flatten out during the extrusion process. App. F, at 37:6-21. The fillet weld also creates an edge inside the terminal head which can catch the guardrail and cause a failure. *Id*. The reduction in the height of the feeder chute impedes the ability of the guardrail to extrude and expand, also resulting in a terminal that is more likely to buckle and fail upon impact. App. F, at 37:22-39:5. Each of the internal geometric changes was significant to the performance of the ET-Plus, and together they make the ET-Plus terminal with a 4-inch channel substantially different from an ET-Plus with a 5-inch channel. *Id*.

E. Trinity Planned to Make the Changes "With No Announcement."

Trinity admitted it never voluntarily disclosed the guide channel change from 5 inches to 4 inches, and made its only disclosures after Mr. Harman went to the FHWA in 2012. App. G, at 35:16-18. But the non-disclosure was no accident. Trinity had planned since at least 2004 to make the dimensional changes in 2005 "with no announcement." App. O; App. G, at 34:17-20. Trinity Highway President Steve Brown told his colleagues he was "feeling we could make this change with no announcement . . . . We did pretty good with the TRACC changes." App. O; App. Q, at 180:2-12 (agreeing that no announcement was ever made to the FHWA).

F. Trinity Falsely Certified to the States That the ET-Plus It Was Selling For Use on Federally-Subsidized Highways Had Been Approved By the FHWA.

Even though Trinity had secretly modified several dimensions of ET-Plus, Trinity continued to certify to the states that the ET-Plus it was selling had been tested and approved in accordance with FHWA Report 350 Standards. App. G, at 74:7-76:10; App. S, at 159:15-161:11; App. T; App. U; App. V; App. W.

In both the certifications that were provided with each bill of lading and in letters sent to the states in order to place the ET-Plus on qualified products lists, Trinity consistently represented that the product had been approved. App. G, at 74:7-76:10; App. T; App. U.

At trial, Trinity Highway President Gregg Mitchell admitted that those certifications were false. App. G, at 74:7-76:10. He also confirmed that some states had recently removed the ET-Plus from their qualified products lists "because Trinity did not disclose the changes." App. G, at 74:7-76:10; App. X.

Each of these false certifications – and there were 16,771 such certifications– constituted false statements for federal funding under the False Claims Act. App. at 159:15-161:11; App. T; App. U; App. V; App. W.

G. Even If Trinity Crash-Tested an ET-Plus With a Four-Inch Guide Channel in 2005, That Test Does Not Demonstrate That the ET-Plus Sold by Trinity From 2005 to the Present Is NCHRP Report 350 Compliant.

It is unknown what device Trinity crash tested in May 2005. The prototype was not designed by an engineer but was cobbled together by welders at one of the Trinity's plants. App. F, at 136:19-137:16; App. Q, at 182:20-21. No one made a drawing or even wrote down the dimensions of the prototype and the prototype was destroyed after the test. App. G, at 60:4-25; App. Y; App. R, at 83:3-6; App. Z, at 6:18-20; 9:10-22. What is certain is that Trinity could not have crash tested a terminal head with all of the dimensional changes made by Trinity to the head which occurred after that test. App. F, at 41:21-42:22. Trinity's manufacturing weldment drawings and internal communications show that at least seven changes were made to the 4-inch head *after* the 2005 crash test, none of which were disclosed to the FHWA. App. AA; App. BB; App. C, at 142:10-143:11. And because the changes were not disclosed, the FHWA had no way to know if the changes were tested in the 2005 test because detailed drawings were never provided of the devices used in those tests. App. C, at 142:10-143:11. Some of the undisclosed dimensional changes were not made to the terminal head until months after the 2005 crash test. App. F, at 41:21-42:22. Moreover, Trinity has made ongoing, undisclosed changes which have resulted in the installation of multiple versions of the ET-Plus on the roadways. App. F, at 99:13-18 ("I have

come to know that what you see in the field varies a lot, and what test I would run and what test I would pick . . . there's so much out there, I wouldn't even know what to test.").

Even if the ET-Plus used in the 2005 crash test had incorporated all of the dimensional changes in the units sold by Trinity in 2005 and beyond, the crash test would not have rendered the ET-Plus compliant with NCHRP Report 350. App. F, at 82:18-22. The changes were so substantial that, if disclosed, the changes would have required more than one crash test to show compliance under NCHRP Report 350.[3] App. F, at 134:8-23; 135:11-23.

H. The 2010 Crash Tests Do Not Demonstrate Compliance With NCHRP Report 350.

Among the submissions made by Trinity to the FHWA in 2012 to "prove" that the ET-Plus was purportedly NCHRP Report 350 compliant were two crash tests run in 2010. App. C, at 148:16-18; App. J, at 145:11-19. But as the evidence demonstrated at trial, there are multiple reasons the 2010 tests do not show compliance with NCHRP Report 350. First, the single-end terminal saved by Trinity from the crash tests in 2010 had different dimensions from the ET-Plus terminals Trinity claims to be manufacturing. App. F, at 43:15-45:4. Even if

[3] Confirmation of this came the day after the verdict was rendered at trial, when the FHWA directed Trinity to conduct a total of eight crash tests. App. CC, at 1 (ordering that four tests be run on an ET-Plus with a height of 27-¾ inches and four tests on a 31-inch high ET-Plus). As outlined in more detail in Section K, the letter was issued after the FHWA became aware of more facts concerning Trinity's fraud.

Trinity had used terminal heads of the correct dimensions, the 2010 tests were non-compliant with NCHRP Report 350 in other respects. Both tests were run at speeds outside the parameters of NCHRP 350 and neither test could have been submitted for approval by the FHWA. App. F, at 43:15-45:4; 54:15-55:11. App. H, at 116:8-15. Indeed, neither test was run for the purpose of demonstrating NCHRP Report 350 compliance; both were run for other purposes.

I. Trinity Withheld From the FHWA Five Crash Tests That Demonstrate the ET-Plus With a Four-Inch Guide Channel Fails When Hit at Shallow Angles.

Prior to sending in the letter and crash test report to the FHWA in 2005 – which hid from the FHWA all the changes in dimensions – Trinity was aware that there were problems with the performance of the 4-inch ET-Plus in crash tests. Specifically, starting in June 2005 TTI and Trinity jointly ran five crash tests of the ET-Plus head where the guardrail to which the head attached was at an angle or "flare" in relation to the road, and all five crash tests failed in the same way that the 4-inch terminal fails on the roads in real-world crashes. App. F, at 62:5-67:25; App. H, at 61:9-62:11; App. DD; App. Z, at 24:11-20; App. Q, at 207:6-16 (confirming that the five tests had "horrific results" and that the cars were either speared or rolled over). Most importantly, all five tests were run using a modified terminal head. App. Q, at 208:24-209:6; App. F, at 67:18-20; App. EE, at 74:22-25.

Each test was run at an angle of between 4 and 6 degrees, which is within the range at which an end terminal is expected to function under NCHRP Report 350 in a non-flared configuration. App. F, at 131:23-132:25; 134:8-23.[4] Yet, to date, Trinity has failed to disclose those failed tests to the FHWA even though the tests were done under similar impact conditions as the May 2005 test and even though the tests show that the terminal head consistently fails at a critical angle.[5] App. F, at 62:5-67:25; App. Z, at 24:11-20; 32:19-33:6; 125:6-8; 144:24-145:6; App. H, at 61:9-62:11. Although Trinity claims that the use of different component parts in the flared ET-Plus set-up for the crash tests caused the failures, its expert admitted that the parts used in the flared tests had separately been accepted by the FHWA and were in use on the roadways. App. EE, at 74:12-18. Moreover, Defendants' expert was unable to demonstrate how the component parts led to failure, despite having videos and detailed data of the tests. *Id*. As Plaintiff's expert testified, the other component parts had nothing to do with the failures: the reason the five tests failed is that the four-inch terminal head buckled and failed, just as it does on the roadways. App. F, at 152:20-25.

[4] In a flared configuration, the face plate of the ET-Plus is not at a perpendicular, 90º-angle to the highway but rather, because of the flare, is at an angle typically less than 90º. In the five flare tests, the test vehicle impacted the ET-Plus head-on, which has the same physical effect of hitting a perpendicular or non-flared ET-Plus at an angle of 4º to 6º. App. F, at 131:23-132:25; 134:8-23.

[5] Trinity did not even disclose the tests to its expert, Dr. Malcolm Ray, until just a few weeks before trial. App. EE, at 73:19-74:2.

In fact, Trinity was aware after the May 2005 crash test that its terminal head had a defect which caused the car to "yaw" or spin uncontrollably back into traffic after impact with the head. App. Q, at 188:3-189:11. TTI engineers admitted the problem could potentially be catastrophic in real-world crashes. *Id*. But the problem was not addressed by TTI because its engineers had no idea how to fix it. *Id*. Moreover, Trinity was concerned that a larger vehicle—a truck—would perform even worse with an impact with a 4-inch ET-Plus head. App. O (raising concerns about a pickup truck crash test with the 4-inch terminal head).

These failures clearly put Trinity and TTI on notice that the ET-Plus had a particular vulnerability when impacted at a shallow angle. NCHRP 350 requires a terminal head to function properly at angles from 0º to 15º and provides for tests at those angles. But NCHRP 350 also clearly provides that if the product is known to be particularly vulnerable under certain conditions, both the sponsor and the testing agency are required to crash test that product under those conditions to satisfy themselves that the product will work under such conditions. App. D, at 15, 20. Knowing that the modified ET-Plus failed at angles of impact from 4º to 6º, Trinity and TTI were on notice of that vulnerability but simply ignored it and never told the FHWA. Trinity continued selling the ET-Plus despite the fact that the undisclosed modifications clearly had made the product significantly more dangerous. App. F, at 55:12-62:4.

J. The ET-Plus With a 4-inch Guide Channel Fails in Real-World Crashes When Hit at a Shallow Angle, Harpooning Cars and Causing Horrific Injuries and Death.

Plaintiff's expert, Dr. Brian Coon, reviewed accidents involving ET-Plus terminal heads that had speared cars and determined that the terminal head was buckling, failing and, as a result, penetrating vehicles. App. F, at 55:12-62:4. Dr. Coon looked at multiple accidents, including those occurring in Marshall, Texas; Tulsa, Oklahoma; North Carolina; and Tennessee. *Id*., App. K, App, L, App. M, App. N. In all of the accidents, the ET-Plus terminal failed and, in many, penetrated the vehicle. *Id*. The accidents occurred under circumstances in which the terminal should have functioned properly, yet it locked up, failed to extrude properly and instead caused severe injuries or death to the occupants of the vehicles. App. F, at 55:12-62:4. Most of the accidents occurred at shallow angles in relation to the car's orientation to the terminal – in other words at angles of between 4 and 8 degrees. *Id*. This is an angle at which terminal heads are supposed to perform properly under NCHRP Report 350, *id*., but the five tests above showed it did not. *Id*.

A photograph introduced at trial, App. K, shows the damage to a vehicle resulting from a failed ET-Plus.

K. FHWA "Acceptance" of the ET-Plus

As outlined above, the FHWA can only "accept" changes that have been disclosed. Plaintiff's expert, Dr. Brian Coon, compared ET-Plus terminal heads made prior to 2005 with those made after 2005 and noted that there were numerous differences in the internal dimensions that, as of trial, had never been disclosed to the FHWA. App. F, at 30:22-31:10. The changes included a reduction in the size of the exit gap, an increase in size in the throat inlet, a change in the weld and a change in the way the feeder chute was inserted into the extruder throat. App. F, at 30:22-31:10; 32:2-34:25. None of the changes, including the change in the length of the feeder channel and the change in the height of the feeder channel, were disclosed to the FHWA. App. C, at 136:2-23; App. FF; App. P.

Trinity not only failed to disclose these other dimensional changes, it continues to deny that it made such changes. App. F, at 36:9-37:24. For instance, Trinity claims that the 1-inch exit gap in the post-2005 ET-Plus has been the same dimension since the ET-Plus was first approved in 1999. App. F, at 36:9-18. Yet, a larger exit gap in pre-2005 ET-Plus units has been repeatedly documented, including by Trinity's own employees. App. G; App. HH, at 100:20-101:23. Trinity manufacturing plant manager Brent Hopkins testified that he has, over time, measured five-inch terminal heads with exit gaps of between 1.5 and 1.89 inches, which are significantly larger than one inch. *Id*. Defendants' expert, Dr. Malcolm Ray, also measured five-inch ET-Plus terminal heads on the roadways that had exit gaps greater than one inch. App. EE, at 63:8-65:2.

i. Trinity Fraudulently Withheld Crucial Information from the FHWA.

FHWA "acceptance" of a device for use on the highways is not absolute and is subject to change, including revocation, under certain conditions, including (a) if the FHWA discovers subsequent to the issuance of an acceptance letter that the qualification testing was flawed, (b) if in-service performance reveals unacceptable safety problems, (c) if the device being marketed is significantly different from the version that was crash tested, (d) if the device is promoted as acceptable under conditions that are significantly divergent from the test conditions, or (e) if the FHWA discovers there were deliberate misrepresentations during the acceptance

process. App. II, (1997 FHWA Policy Memo); App. J, at 150:25-152:12; App. Z, at 120:19-121:7.

Throughout the trial Trinity touted a June 17, 2014 letter from the FHWA purporting to give retroactive acceptance of the ET-Plus sold by Defendants since 2005 as proof that Trinity had not made any false claims. But the letter showed that the FHWA's "acceptance" of the ET-Plus was based upon incomplete and inaccurate information. App. J, at 27:17-28:16; 29:18-31:11. The letter itself said that it was based upon Trinity's "confirm[ation]" on February 12, 2012 "that the reduction in the width of the guide channels from 5 inches to 4 inches was a design detail inadvertently omitted from the documentation submitted to FHWA." App. JJ, at 1. The fact that the FHWA considered this omission "inadvertent" demonstrates the materially-incomplete information on which the FHWA acted.

The FHWA also said that its June 17, 2014 letter was based upon Trinity's confirmation "that the company's ET-Plus end terminal with the 4-inch wide guide channels was crash tested to the relevant crash test standards (NCHRP Report 350) at the Texas Transportation Institute (TTI) in May 2005 . . . . Therefore *based upon all of the information available to the agency* (including a reexamination of the documentation from ET-Plus crash tests), FHWA validated that the ET-Plus with the 4-inch guide channels was crash tested in May 2005." *Id*. (emphasis added).

ii. Facts Fraudulently Withheld from and Unknown to the FHWA.

During trial it was shown that Trinity never disclosed to the FHWA multiple relevant facts:

- The qualification testing performed in 2005 was flawed because it could not have been done with an ET-Plus incorporating all of the changes made by Trinity in 2005 and beyond. App. F, at 41:21-42:22; *Id*. at 99:13-18. Importantly, based upon the only crash tested ET-Plus available for inspection, the 2010 tests were also done on ET-Plus terminals that did not match the dimensions disclosed by Trinity to the FHWA. *Id*., at 43:15-45:4.

- Real-world crashes reveal serious safety concerns. App. F, at 55:12-62:4; App. M, App. N; App. F, at 55:12-62:4; App. J, at 164:8-21.

- The ET-Plus marketed after 2005 was significantly different from the version that was crash tested. App. F, at 41:21-42:22; *Id*.,at 99:13-18 ("I have come to know that what you see in the field varies a lot, and what test I would run and what test I would pick … there's so much out there, I wouldn't even know what to test.");

- The ET-Plus is promoted by Trinity for use on a flare greater than 25:1, which is significantly divergent from the test conditions in 2005. App. KK; App. F, at 122:4-123:18;

- There were deliberate misrepresentations during the acceptance process given that Trinity planned all along to make the changes with no disclosure (App. O), but later told the FHWA that its failure was inadvertent.

- In addition, Trinity fraudulently omitted to disclose to the FHWA that the ET-Plus terminal head with a 4-inch guide channel fails when hit at a shallow angle (between 4-6 degrees) and that Trinity knew this due to the five failed flare tests in 2005-2006 that Trinity never disclosed to the FHWA. App. F, at 62:5-67:25; App. H, at 61:9-62:11; App. Z, at 24:11-20; 207:6-16 (confirming that the five tests had "horrific results" and that the cars were either speared or rolled over).

iii. The FHWA Backs Away From ET-Plus "Acceptance".

Even before the trial, the FHWA started to back away from its acceptance of the ET-Plus. App. MM; App. J, at 31:12-33:7. Noting that the states of Massachusetts and Missouri had removed the ET-Plus from their qualified products lists, the FHWA on October 10, 2014 – in a letter *not* before this Court when it issued its initial mandamus opinion – requested in-service performance data concerning the ET-Plus from all 50 states. App. MM. Then, the day after the trial ended, the FHWA issued another letter stating that it was continuing to review the information from the states and "continued to evaluate the eligibility and performance of the ET-Plus." App. CC, at 1. The FHWA then ordered Trinity to do a battery of new tests:

> In light of these events and to support FHWA's ongoing evaluation of the ET-Plus, FHWA has concluded that Trinity must perform additional crash testing of the ET-Plus. Accordingly, FHWA requests that Trinity perform testing and provide to FHWA the information specified in Attachment A to this letter. Please provide the crash testing plan required by Attachment A to FHWA by Friday, October 31, 2014. Should Trinity not comply with this request, FHWA *may* suspend and/or revoke the eligibility of the ET-Plus.

Id.

Trinity has been ordered by the FHWA to complete eight crash tests on the ET-Plus by no later than January 15, 2014. App. CC, at 4.

The FHWA's actions after trial support Plaintiff's position throughout the proceedings that the purported "acceptance" received by Trinity in emails and letters in 2012 and 2014 were not final decisions and would be changed once the FHWA learned the facts that would come out only at trial.

In addition, the FHWA stated that it was also considering ordering a full, in-service review of the ET-Plus – in other words, an in-depth examination of how the ET-Plus is performing on the highways. App. CC, at 1.

ARGUMENT

I. There Is No Reason For This Court to Consider This Case Before It Has Been Fully Addressed By the District Court.

Defendants' petition for mandamus is based in large part on their supposed urgent need for a "reasoned ruling" from the district court considering the parties' respective positions under *Southland*. P. Br. 1. Given that the district court has made clear its intention to issue such an opinion promptly in response to Defendants' pending Rule 50(b) motion, there is absolutely no reason for this Court to grant Defendants' mandamus petition and prematurely seize this case from the district court:

> Trinity filed its Rule 50(b) motion eight days ago. A response from the Relator is presumably imminent, and briefing will be complete within weeks. ***The District Court intends to give thorough consideration to the parties' submissions and issue a written, reasoned opinion with all possible expediency.*** Trinity may prevail on its Rule 50(b) motion for judgment as a matter of law; or, it may not. Regardless of the outcome, the District Court is confident that whichever party fails to carry the day will appeal this action to the Circuit Court in the normal course, and that such appeal will be before the Circuit Court in a short period of time. ***This mitigates against a decision by this Court to employ a post-verdict mandamus petition.***

11/25/14 District Court Response at 2 (emphasis added).

Also, as the district court correctly recognized, neither the magnitude of Trinity's potential liability nor the alleged potential difficulty of its business position during the pendency of an appeal support Defendants' claim that this Court should consider this case without the benefit of a complete record from the district court:

> Further, it is undisputed that Trinity faces serious ramifications if the jury's verdict stands and it is held liable for knowingly submitting false or fraudulent claims to the government. However, this severity mirrors the grave allegations leveled against Trinity – allegations that a jury has heard and accepted as true. ***The importance of this action dictates that the District Court have the opportunity to give Trinity's Rule 50(b) motion full consideration, affording due weight to the parties' competing arguments regarding the controlling law, with the benefit of a now-complete factual record.*** The importance of this case likewise weighs against the grant of the mandamus petition, seeking exceptional and extraordinary relief, so that the Circuit Court may take up this matter after it has been fully addressed at the trial court within the context of Rule 50(b) and with the benefit of a compete record.

11/25/14 District Court Response at 3-4 (emphasis added).[6]

As Defendants concede, a writ of mandamus is an extraordinary remedy that is only available in exceptional circumstances. P. Br. 13 (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004)). These exceptional circumstances are only present where the district court's action amounts to a "judicial 'usurpation of power'" or "'clear abuse of discretion.'" *Id.* (quoting cases); *In re Volkswagen of America, Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) (en banc), *cert. denied*, 555 U.S. 1172 (2009). "A party seeking a writ bears the burden of proving that it has no other means of attaining the relief desired and that the right to issuance of the writ is 'clear and indisputable.'" *In re Roche Molecular Systems*, 516 F.3d 1003, 1004 (Fed. Cir. 2008) (internal citation omitted).

Because mandamus is "one of 'the most potent weapons in the judicial arsenal'" it is only available where: (1) the Petitioner establishes there is no other adequate means to obtain the relief requested; (2) the Petitioner shows a clear and indisputable right to the issuance of the writ; and (3) the court, in its discretion, is satisfied that the writ is appropriate under the circumstances. *Cheney,* 542 U.S. at 380-81 (citing cases and quoting *Will v. United States*, 389 U.S. 90, 95 (1967)); *In*

[6] Moreover, as the district court notes, "Trinity's request seeking a post-verdict stay from the Circuit Court has never been presented to the District Court." (11/25/14 District Court Response at 4.) Federal Rule of Appellate Procedure 8 requires that a stay pending appeal first be sought in the district court. Only in circumstances not relevant here may a party bring its request for a stay to the Court of Appeals, *i.e.*, when (a) moving in the district court "would be impracticable", or (b) the district court denies the motion for relief.

re Volkswagen, 545 F.3d at 311. Consistent with this standard, the Supreme Court has also warned that petitions for mandamus should not be used to seek interlocutory review of non-appealable orders merely because the petitioner claims an abuse of discretion. *In re Volkswagen,* 545 F.3d at 309-10 (citing *Will v. United States*, 389 U.S. 90, 98 n. 6 (1967), and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-83 (1953)).

Defendants argue that they have no adequate means of obtaining relief through an ordinary appeal because (1) "[e]ntering final judgment on [the] verdict would put two mutually contradictory rulings in place until this Court could resolve the appeal – and would leave Trinity in an untenable position during that appeal" (P. Br. 24), and (2) "the prospect of the judgment here is coercive and thus threatens [Defendants'] ability to obtain appellate review" (P. Br. 25). However, such arguments concerning irreparable injury, even if true (and they are not), have been repeatedly rejected by the courts. *See F.T.C. v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (rejecting Standard Oil's argument that the expense and disruption of trial constituted "irreparable harm," noting that even substantial litigation expenses do not constitute irreparable injury"); *In re Crystal Power Co.,* 641 F.3d 82, 84 (5th Cir. 2011) ("[O]rdinary costs of trial and appeal are not a sufficient burden to warrant mandamus relief.").

Defendants cite *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995), for the proposition that settlement pressure of a large verdict is grounds for mandamus. P. Br. 26. Among other errors in the district court's rulings in that case, the appellate court found that the district court's decision to certify a class changed the defendants' estimated potential liability from approximately $125 million to potentially more than $25 billion. It was that change of extraordinary magnitude that might require the defendants to settle cases even where the defendants had no liability. In *Rhone-Poulenc*, the district court's decisions regarding trial of a group of plaintiffs' claims were subject to mandamus because the decisions fundamentally altered the nature of the case and scope of liability for the defendants. That case is simply inapposite to Defendants' petition in this case. In this case, there is nothing in the proceedings below that changed the nature or scope of Defendants' liability. Defendants point to no case law where potentially significant liability or the fact that future sales might be impacted by an adverse verdict have been found to be irreparable injury supporting mandamus before that verdict is reduced to a judgment. There is no reason to set such a precedent in this case.

If this Court were to accept Defendants' argument, mandamus would lie in every antitrust or qui tam case because the trebling of the verdict would place each defendant found liable by a jury in a "coercive" position. That is not the law.

II. Defendants' Claim of Error Is Without Merit.

Defendants' primary argument in their several motions in the district court, and the argument they urge on this Court, is that their fraud is immaterial because the FHWA can retroactively declare a violation of its mandated requirements to be immaterial and has the power to excuse Defendants' fraud. That argument is wholly unsupported by the law.

A. The Jury Correctly Found That Defendants Violated the False Claims Act.

In order to prevail on his False Claims Act claim, the Relator was required to prove (1) that Defendants made or, by record or statement, caused to be made a claim for payment against the government; (2) that the claim, record, or statement was false or fraudulent; (3) that the claim, record, or statement was material to the government's payment; and (4) that Defendants knowingly made the false or fraudulent claim, record, or statement. *See United States v. Southland Mgmt. Corp.*, 288 F.3d 665, 675 (5th Cir. 2002); *see also U.S. ex rel. Longhi v. United States*, 575 F.3d 458, 467-68 (5th Cir. 2009) (setting forth the elements for a violation of the False Claims Act).

The jury was presented overwhelming, indeed almost entirely uncontroverted, evidence establishing all these elements, and the jury found that Defendants knowingly certified falsely for eight (8) years that the version of the ET-Plus that they sold had been approved by the FHWA. Trinity's executives

admitted on the stand, under oath, that their certifications were false. Those misrepresentations were material because the undisclosed, unapproved changes severely compromised the performance of the ET-Plus and have resulted in multiple documented failures of the ET-Plus on the highways.

Courts have consistently held, with the district court here, that government action or inaction *after the fraud* is irrelevant to a finding of liability. *United States v. Toyobo Co., Ltd.*, 811 F. Supp. 2d 37, 49-50 (D.D.C. 2001) (finding continued government purchases irrelevant); *United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, 442 (E.D.N.Y. 1995) (same); *United States ex rel. Thomas v. Siemens AG*, 708 F. Supp. 2d 505, 513 (E.D. Pa. 2010) (pointing to government need as reason for purchasing despite possible fraud); *United States ex rel. Harrison v. Westinghouse Savannah River Co*., 352 F.3d 908, 917 (4th Cir. 2003) (identifying "instances in which a government entity might choose to continue funding the contract despite earlier wrongdoing by the contractor"); *see also United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952-53 (10th Cir. 2008) ("[T]he proper focus of the scienter inquiry under [the FCA] must always rest on the defendant's 'knowledge' of whether the claim is false, a knowledge which may certainly exist even when a governing agency misinterprets its own regulations and chooses – *with full comprehension of the facts* – to pay a false claim.") (citing

United States v. Southland Mgmt. Corp., 326 F.3d 669, 672 (5th Cir. 2003) (emphasis added)).

Government knowledge does not negate liability when a defendant is not "forthcoming" about the facts that make a claim false. *Shaw v. AAA Engineering & Drafting, Inc*., 213 F.3d 519, 534-35 (10th Cir. 2000). Defendants, even today, have not been forthright about the changes they made to the ET-Plus and the effect of those changes. Indeed, they still maintain that the five (5) failed tests have no relevance to the performance of the ET-Plus. Until the October trial, the FHWA was completely unaware of those tests. And even at the trial, Defendants denied they had made certain dimensional changes, despite evidence to the contrary.

There is no provision in the False Claims Act giving the FHWA the power to convert false statements into true ones. Congress has never given the FHWA – or any other agency – any such authority. Moreover, because the FHWA failed to produce a witness for deposition or at trial,[7] the FHWA's "approvals" are irrelevant, because there was no discovery "concerning the standards [the FHWA] employ[ed] to determine the existence of [fraud] and whether those standards are at all similar to the elements of an FCA claim." *See United States ex. rel. Feldman v. van Gorp*., 697 F.3d 78, 97-98 (2d Cir. 2012) (upholding the district court's

[7] The deposition of the FHWA's Nicholas Artimovich, which was introduced at trial, was taken in July 2012 as part of the prior Virginia patent litigation brought by Trinity and TTI against Mr. Harman's companies.

exclusion of evidence of the agency's failure to act in response to relator's complaints because, absent discovery on the decisional standards applied by the agency, that failure "did not speak to the seriousness of those complaints or the likelihood that false claims had been made"). This is especially relevant here where the evidence is so striking of the extent of the deception of the FHWA and the agency's reliance on demonstrably false after-the-fact assertions by Trinity such as that the omissions and misrepresentations in the 2005 test report were "inadvertent."

B. The Cases Cited By Defendants and In This Court's First Mandamus Decision, Including *Southland*, Do Not Conflict With the Jury's Verdict.

This Court's holding in *United States v. Southland Mgmt. Corp.*, 326 F.3d 669 (5th Cir. 2003), on which Defendants rely so heavily, is not in conflict with the jury's verdict in this case. In *Southland*, the Court held that the owners of an apartment complex who were eligible for funds through the U.S. Department of Housing and Urban Development ("HUD") did not violate the FCA. The apartment owners submitted vouchers attesting to "safe and sanitary" housing conditions at the complex during a corrective action period. *Id.* at 674. This Court determined that the owners were contractually entitled to HUD money during that time period because HUD knew *prior to the certification* that the apartments were in need of corrective action and HUD expressly approved payments with full

knowledge that the apartments were not "safe and sanitary" on the contractual grounds that the owners would take corrective action and improve the property. *Id.* at 672-74. When the owners failed to improve the property, the United States filed an FCA claim because the apartments were out of compliance with HUD's regulations during the corrective action period. *Id.* at 674. But this Court found that the owners were not liable for fraud because HUD was aware that the apartments were out of compliance and had nonetheless agreed to make payments during the corrective action period. *Id.* at 677. Those facts are not even remotely similar to the case here. In this case, the FHWA did not know about the changes to the ET-Plus because, not only did Defendants intentionally conceal them, but also affirmatively made misrepresentations to the FHWA in their 2005 test report.

U.S. ex rel. Stebner v. Stewart & Stevenson Services, Inc., 305 F. Supp. 2d 694 (S.D. Tex. 2004), which, like *Southland*, was decided on the basis of a contract between the relevant government agency and the defendant – and therefore can, like *Southland*, be distinguished from this case on that ground also – is not in conflict with the jury verdict here either. As this Court wrote in an unpublished opinion affirming summary judgment for the defendant in *Stebner*, the government had full knowledge of the relevant facts *contemporaneously with* the submission of the allegedly false claims:

> The Government was involved in the design, production, testing, and modification of the FMTVs; and S & S and the Government

> negotiated contract modifications in response to the well-documented corrosion problem. The Government retained, and exercised, its discretion to conditionally accept or refuse to accept FMTVs that did not meet contractual standards; and the DD250 was not signed by the Government until it was ready to accept a vehicle. [cite omitted.] As a result, S & S's subcontractor, MBC, did not "cause[ ] a prime contractor to submit a false claim to the Government".

U.S. ex rel. Stebner v. Stew(5th Cir. 2005)*a*" \s \c 3 *U.S. ex rel. Stebner v. Stewart & Stephenson Services, Inc.*, 144 Fed. Appx. 389, 394, 2005 U.S. App. LEXIS 16582 at *13 (5th Cir. 2005) (unpublished).

U.S. ex rel. Yannacopoulos v. General Dynamics, 652 F.3d 818 (7th Cir. 2011), is also not in conflict with the jury's verdict in this case. In *Yannacopoulos*, the relator claimed that the defendant committed fraud by submitting a contract for approval without advising the government that a particular clause in the contract had been omitted. But the defendant had given the government *actual* notice of the deletion:

> The undisputed facts show that it was not material. ***Before General Dynamics submitted any of the allegedly fraudulent interim invoices for payment, it sent the DSAA a letter explaining that "the provision for imputed interest in Article 11 of the Draft Contract is no longer applicable."*** By sending this letter to the DSAA, General Dynamics notified the DSAA that, even though the language of the EPA clause remained in the draft contract for the time being, the parties no longer intended for that clause to have any effect.

Id. at 830 (emphasis added). The Seventh Circuit's immateriality conclusion was bolstered by the fact that the deleted EPA clause was also unenforceably vague:

> If that were not enough, recall that the draft EPA clause was incomplete and could not have been given any specific content. Annex AC, which would have been needed to calculate any price reductions under the draft contract, was nowhere to be found in that draft contract. ***No reasonable juror could think that the DSAA would care about the deletion of an unenforceably vague contract provision.*** Given all of this, no reasonable juror could find that the DSAA, having taken no action when first told that the EPA clause was "no longer applicable," and having continued to take no action when provided with a final contract lacking that clause, could have been goaded into action if only it had been told again, and a little more specifically, of the EPA clause's deletion at some time in between.

Id. at 831 (emphasis added).

This case is legally and factually different because (1) it is undisputed that the FHWA *did not* have notice; (2) the non-disclosure and affirmative misrepresentations were material because the overwhelming evidence at trial showed that the undisclosed changes had severely and adversely affected the performance of the ET-Plus; and (3) Defendants *knew* of the adverse effects and told no one.

The facts in *U.S. ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003) are similarly distinguishable from the facts in the case before this Court because in *Costner* the government had actual knowledge of all the material information on which the Relator based his false claims allegations *at the time* it approved payments to the defendants. Specifically, in *Costner*, the Eighth Circuit held that information about operational problems allegedly withheld by contractors

while performing hazardous waste treatment and disposal services under a contract with the Environmental Protection Agency (EPA) was not relevant to EPA's decision to pay them, precluding liability under the False Claims Act, *because the EPA was informed of those operational problems* and did not consider them to be contractual violations. Instead, it worked with the contractors to resolve problems as they arose. *Id.* at 877.

Finally, *U.S. ex rel. Conner v. Salina Regional Health Ctr., Inc.*, 543 F.3d 1211 (10th Cir. 2008) and *Hopper v. Solvay Pharmaceuticals, Inc.*, 588 F.3d 1318 (11th Cir. 2009), merely stand for the respective propositions that "[a] false certification is . . . actionable under the FCA only if it leads the government to make a payment which it would not otherwise have made" and "even a false statement is not actionable under the FCA when the government does not improperly pay a false claim." Relator agrees with both of these propositions. In this case, it is undisputed that (i) Defendants concealed the changes from the FHWA, and (ii) they would not have been able to sell a single ET-Plus but for the fact Defendants misrepresented to the states that its modified design was approved by the FHWA.

CONCLUSION

For all the foregoing reasons, Defendants' second petition for mandamus and the accompanying motion for a stay of post-trial proceedings should be denied.

Dated: December 1, 2014

Respectfully submitted,

/s/ Rosemary T. Snider

Samuel Baxter
(Texas State Bar No. 01938000)
MCKOOL SMITH, P.C.
104 East Houston Street, Suite 300
Marshall, TX 75670
Ph: (903) 923.9000
sbaxter@mckoolsmith.com

Rosemary T. Snider
(Texas State Bar No. 18756900)
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
Ph: (214) 978-4048
rsnider@mckoolsmith.com

T. John Ward
(Texas State Bar No. 20848000)
WARD & SMITH LAW FIRM
PO Box 1231
Longview, TX 75606
Ph: (903) 757-6400
tjw@wsfirm.com

Nicholas A. Gravante, Jr.
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022
Ph: (212) 446-2300
ngravante@bsfllp.com

George F. Carpinello
Jeffrey S. Shelly
Teresa Monroe
BOIES, SCHILLER & FLEXNER LLP
30 South Pearl Street, 11th Floor
Albany, NY 12207
Ph: (518) 434-0600
gcarpinello@bsfllp.com

Karen Dyer
George Coe
BOIES, SCHILLER & FLEXNER LLP
121 South Orange Avenue, Suite 840
Orlando, FL 32801
Ph: (407) 425-7118
kdyer@bsfllp.com

Christopher M. Green
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Ph: (914) 749-8200
cgreen@bsfllp.com

Steven R. Lawrence
(Texas State Bar No. 24038227)
THE LAWRENCE LAW FIRM
700 Lavaca Street, Suite 1400
Austin, TX 78701
Ph: (512) 686-3312
steven@stevenlawrencelaw.com

Josh B. Maness
(Texas State Bar No. 24046340)
PO Box 1785
Marshall, TX 75671
Ph: (903) 407-8455
manessjosh@hotmail.com

Justin Kurt Truelove
(Texas State Bar No. 24013653)
TRUELOVE LAW FIRM, PLLC
100 West Houston
Marshall, TX 75670
Ph: (903) 938-8321
Kurt@truelovelawfirm.com

Wyatt B. Durrette, Jr.
Debbie G. Seidel
DURRETTECRUMP PLC
1111 E. Main St. 16th Floor
Richmond, VA 23219
Ph: (804) 775 6900
wdurrette@durrettecrump.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Opposition to the Petition for Writ of Mandamus And Motion For a Stay of Post-Trial Proceedings has been filed in the office of the Clerk for the United States Court of Appeals for the Fifth Circuit, and a true and correct copy of the same has been provided to the parties listed below in the manner indicated on this 1st day of December, 2014.

By email and Federal Express:

Hon. Rodney Gilstrap
United States District Court for the Eastern District of Texas, Marshall Division
Sam B. Hall, Jr. Federal Building and United States Courthouse
100 East Houston Street
Marshall, TX 75670

Mike C. Miller
Law Office of Mike C. Miller, P.C.
201 West Houston St.
Marshall, TX 75670
mikem@millerfirm.com

Robert M. (Randy) Roach, Jr.
Manuel Lopez
Daniel W. Davis
John W. Newton, III
ROACH & NEWTON, L.L.P.
1111 Bagby Street, Suite 2650
Houston, TX 77002
rroach@roachnewton.com
jnewton@roachnewton.com
mlopez@roachnewton.com
ddavis@roachnewton.com

Sarah R. Teachout
Arnold Spencer
Akin Gump Strauss Hauer & Feld LLP
1700 Pacific Avenue, Suite 4100
Dallas, TX 75201-4624
steachout@akingump.com

Ethan L. Shaw
Shaw Cowart LLP
1609 Shoal Creek Blvd., Ste. 100
Austin, TX 78701
elshaw@shawcowart.com

aspencer@akingump.com

Russell C. Brown
Law Office of Russell C. Brown, P.C.
PO Box 1780
Henderson, TX 75653-1780
russell@rcbrownlaw.com

J. Mark Mann
Mann | Tindel | Thompson
300 West Main Street
Henderson, TX 75652
mark@themannfirm.com

Roger D. Townsend
Robert B. Dubose
ALEXANDER DUBOSE JEFFERSON & TOWNSEND LLP
1844 Harvard Street
Houston, TX 77008-4342
Telephone: (713) 523-2358
rtownsend@adjtlaw.com
rdubose@adjtlaw.com

Heather Bailey New
Bell Nunnally & Martin LLP
3232 McKinney Avenue, Suite 1400
Dallas, TX 75204
heathern@bellnunnally.com

Dana Livingston
ALEXANDER DUBOSE JEFFERSON & TOWNSEND LLP
515 Congress Ave, Suite 2350
Austin, TX 78701-3562
Telephone: (512) 482-9304
dlivingston@adjtlaw.com

Warren W. Harris
BRACEWELL & GIULIANI LLP
711 Louisiana Street, Suite 2300
Houston, TX 77002-2770
Telephone: (713) 221-1490
warren.harris@bgllp.com

Nina Cortell
Jeremy D. Kernodle
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Telephone: (214) 651-5000
nina.cortell@haynesboone.com
jeremy.kernodle@haynesboone.com

Certificate of Privacy Redactions

I certify that all required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13.

/s/ Rosemary T. Snider
Rosemary T. Snider

Certificate of Electronic Submission

I certify that the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1.

/s/ Rosemary T. Snider
Rosemary T. Snider