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

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

REPLY IN SUPPORT OF DEFENDANTS' REQUEST FOR JUDICIAL NOTICE OF FHWA AND AASHTO'S FINDINGS ON DIMENSIONS OF ET PLUS GUARDRAIL END TERMINAL

Defendants, Trinity Industries, Inc. and Trinity Highway Products, LLC (collectively, "Trinity") hereby file this Reply in Support of Trinity's Request for Judicial Notice of FHWA and AASHTO's Findings on Dimensions of ET Plus Guardrail End Terminal, and would show the Court as follows:

INTRODUCTION

The Federal Highway Administration ("FHWA") and the American Association of State Highway Transportation Officials ("AASHTO") have, following months of data collection and analysis, made significant findings in their March 11, 2015 Report (the "Report"), including their conclusion that there is a single version of the ET Plus 4" Guardrail End Terminal installed on roadways around the country. The Report issued by the AASHTO–FHWA Task Force explicitly rejects Harman's oft-repeated allegations of recent design changes to the ET Plus, concluding that: "[T]here is no evidence in the data that there are multiple versions of the ET-Plus device." Report at 9, Dkt. No. 674-3. The Report also finds that the ET Plus units successfully crash tested in recent tests are representative of the devices installed on the nation's roadways. *Id.*

In response to these findings, Harman launched a renewed and vicious attack on the integrity and professionalism of the FHWA, AASHTO—a non-profit entity that publishes highway safety standards used in all fifty states—and the various state Departments of Transportation who participated in the joint Task Force. Far from discrediting the Report, Harman's spurious attacks simply expose the fundamental flaw in Harman's case—namely, that Harman's case is based on views consistently rejected by the FHWA, the "real party in interest" in this action. Harman's personal disagreements with the FHWA are wholly irrelevant for purposes of False Claims Act liability and for Trinity's current request for judicial notice.

ARGUMENT

A. The Report—issued by the real party in interest in this action—conclusively rejects allegations made by Harman concerning the ET Plus.

Once again, the federal agency that was supposedly defrauded in this action has determined that Harman's claims about the ET Plus are unfounded. Once again, Harman's response is to vilify the very party he claims to represent. *Cf. United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009). Among other things, Harman claims that the FHWA engaged in "questionable behavior," that the "veracity of its conclusions" is in doubt, that the agency "asked the wrong question" and "did not comply with its own guidelines," that the joint Task Force "skewed the statistics" in a way that "obscures" the truth, that the conclusion of the Report is a "red herring," and that "the public cannot depend upon the FHWA" to police fraud. Resp. at 5, 7, 9, 10, Dkt. No. 686.

To accept Harman's specious allegations, one must believe that the entire process that generated these findings—the assembly of the joint Task Force, the collection of extensive field measurement data, the evaluation of that data set, and the publication of the Report—was an elaborate ruse to mislead the public. One must further believe that the parties to this far-flung

conspiracy include not only the FHWA, but also (1) AASHTO, the non-profit entity that publishes highway design and construction standards used throughout the United States; (2) the state Departments of Transportation of South Dakota, New Hampshire, Missouri, Ohio, Delaware, and Wyoming; and (3) the Ministry of Transportation of the province of Ontario, Canada. Report at 14, Dkt. No. 674-3 (listing members of joint Task Force). According to Harman, all of these respected transportation professionals—federal and state, public and private, domestic and foreign—have colluded together for the sole purpose of thwarting his crusade against the ET Plus. That is patently absurd.

The far more compelling inference to be derived from these conspiracy allegations is that Harman has no interest in representing the federal government in this action and never did. Instead, he seeks to undermine—for his personal financial gain—the FHWA's authority and ability to perform its highway safety functions. And the more the FHWA engages in the inconvenient habit of publicly undermining Harman's fraud claims, the more virulent Harman's attacks will become.

Equally unpersuasive is Harman's assertion that the fact of the joint Task Force review somehow demonstrates that Trinity made material, undisclosed changes to the ET Plus. This argument is both circular and baldly opportunistic. First, Harman manufactures a media firestorm by alleging additional, untested design changes to the ET Plus. Then, when the FHWA fully considers—and rejects—his allegations, Harman contends that the substance of the investigative report is of no consequence, because the mere *fact* of the investigation means that his claims must have had merit in the first place. Thus, Harman (incredibly) purports to declare victory based on the very agency action that was necessary to counter and discredit his allegations.

B. Harman has put the Report and its findings at issue in this case.

Harman's claim that the Report and its determinations are not relevant to this case is contradicted by his own statements. Harman has argued in his post-trial briefing that this case involves more than the five-to-four inch reduction of the ET Plus guide channels in 2005, and that Trinity has allegedly made "ongoing, undisclosed changes which have resulted in multiple versions of the ET-Plus being installed on the roadways." *See* Pl.'s Opp'n to Trinity's Renewed Rule 50(b) Mot. for J. as a Matter of Law at 11, Dkt. No. 609. The Report, which documents the FHWA's public determination that "there is no evidence in the data that there are multiple versions of the ET-Plus device," is squarely relevant to this claim. Report at 9, Dkt. No. 674-3.

Additionally, the declaration of Harman's expert, Brian Coon, filed in support of his current Response also demonstrates the relevance of the Report to Harman's claims. In his declaration, Dr. Coon claims under oath that the dimensions evaluated by the FHWA and AASHTO in the Report "were essentially the undisclosed modifications *at the heart of this action*." *See* Coon Decl. ¶ 9, Dkt. No. 686-1 (emphasis added). Yet again, the Report squarely addresses this claim, finding "no evidence" that there are multiple versions of the ET Plus and that the dimensions of the tested ET Plus units are representative of the units installed on the roadways. The FHWA and AASHTO together have now thoroughly investigated the alleged "undisclosed modifications at the heart of this action" and have determined—as the FHWA determined in 2012, 2013, 2014, and now again in 2015—that there were no additional modifications to the ET Plus and Harman's claims are wrong.

Indeed, Harman's relevancy arguments are so obviously contrived that he cannot even keep them straight in his own filings. On one hand, Harman argues that this case relates solely to changes made to the ET Plus guide channels in 2005. *See* Resp. at 3-4, Dkt. No. 686.

Elsewhere, however, Harman argues that the Report somehow corroborates "the fact that [the FHWA] first learned of certain material changes to the ET-Plus only because of the evidence Plaintiff presented at trial." *See id.* at 2; *see also* Dkt. No. 609 at 11. Harman's inability to cogently argue that the Report is irrelevant is unsurprising given: (1) to the extent his claims are based solely on the 2005 modifications to the ET Plus guide channels, the FHWA was made fully aware of those modifications, and repeatedly re-confirmed beginning in 2012 that the ET Plus has continuously met federal crash testing criteria since 2005; and (2) the Report disproves any claim by Harman that Trinity made allegedly "ongoing, additional" modifications to the ET Plus since 2005.

C. Judicial notice is proper with respect to the government's position on Harman's allegations of additional changes to the ET Plus.

It is undisputed that the FHWA, the real party in interest in this case, has reached certain conclusions in its publicly released Report. Even Harman does not dispute that the FHWA issued the Report or the fact of the substantive conclusions included therein. Judicial notice of these indisputable facts is thus proper for this reason alone. *See* FED. R. EVID. 201(b).

In addition, the Fifth Circuit authorities cited in Harman's Response do not weigh against the taking of judicial notice here. Harman incorrectly claims that these cases prohibit judicial notice after the close of discovery on due process grounds. *See* Resp. at 4-5, Dkt. No. 686. But neither *Colonial Leasing Co. of New England, Inc. v. Logistics Control Grp. Int'l*, 762 F.2d 454 (5th Cir. 1986), nor *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980), even mentions discovery. Further, both cases acknowledge that there is no *per se* rule against the taking of judicial notice post-trial and even on appeal. *See* 762 F.2d at 461 (expressly refusing to hold that post-trial judicial notice is *per se* improper); 610 F.2d at 366 (noting possibility that Court would *sua sponte* take judicial notice even for first time on appeal, on clear data that was

not before the Court).

Harman's Response attacking the Report and the joint Task Force that authored it amounts to nothing more than his personal disagreement with the Report's and the FHWA's conclusions, which is irrelevant to the judicial notice determination and improper in an FCA case. As Trinity has previously argued in this case, the FCA does not allow a private party like Harman to supplant an agency's authority and decision-making. *See, e.g.*, Defs.' Mot. to Dismiss at 32-34, Dkt. No. 29 (collecting cases). Despite this prohibition, Harman has repeatedly used this FCA case as a vehicle to attempt to usurp and undermine the FHWA's expertise and authority in interpreting and applying its own rules and regulations. Now, he defiantly attacks them.

For example, in his Response, Harman brazenly rejects the FHWA's conclusion and determination regarding the application of *the agency's own guidelines* concerning the testing of highway safety devices under NCHRP Report 350. Harman and his expert argue that the FHWA should have interpreted and applied the agency's policy memorandum[1] to require end terminals with "worst-case" dimensions be tested. *See* Resp. at 7-8, Dkt. No. 686. The FHWA, however, expressly concluded in the joint Task Force Report that NCHRP Report 350 applies "worst-case testing conditions" only to the "*types of tests* to be conducted" and "does not apply worst-case testing conditions to the test article" itself. *See* Report at 10-11, Dkt. No. 674-3. Despite the FHWA's definitive interpretation of its own guidelines, Harman (a non-engineer) and his expert (a traffic engineer for the City of Wichita) criticize the FHWA—and all of the joint Task Force members—for failing to comply with an interpretation of the FHWA's guidelines that the FHWA itself has squarely rejected. *See* Resp. at 7-8, Dkt. No. 686. Harman and his expert do not dictate highway safety policy for the nation, and his latest attempts to evade and undermine

[1] FHWA Memorandum "Identifying Acceptable Highway Safety Features," July 25, 1997, Trial Ex. D-10.

the agency authority of the FHWA through this FCA suit are irrelevant, improper, and should be rejected.

Further, Harman's complaints about the Report, which was prepared by a coalition of highway safety experts from the FHWA, AASHTO, several state Departments of Transportation, and a foreign transportation authority, lack substantive merit. As previously briefed in further detail by Trinity, *see generally* Dkt. No. 662, Harman's current Response contains the same flawed arguments he has asserted before. *First*, Harman has again raised arguments that confuse design specifications relating to the performance of the ET Plus system with manufacturing guidelines for building the product. *See id.* at 6-7. *Second*, Harman selectively cites or ignores evidence from the Texas A&M designers of the ET Plus about the system's design specifications, including, as one example, testimony by the ET Plus designers concerning the 1" minimum (not *maximum*) design tolerance for the ET Plus exit gap. *See id.* at 6-7 & nn.3-4 (citing testimony by Dr. Bligh). *Third*, Harman and his expert are, as a factual matter, incorrect on the manufacturing specifications for the ET Plus, including the manufacturing tolerance applied to the guide chute height. *See id.* at 7-8.[2] *Fourth*, Harman's arguments on "dimensions," including that the ET Plus systems recently crash tested are "out of compliance," ignores that NCHRP Report 350 does not require any particular manufacturing "tolerance" or for manufacturers to identify any such tolerances. *See id.* at 9 n.7. *Fifth*, Harman again makes the illogical claim that minor variations in measurements in the 100th of an inch—which are expected in the manufacture of any product—amount to changes in the design of a product. *See id.* at 9. This is not the standard, nor could it be, as all manufacturers of highway safety products expect to have minor manufacturing

[2] As previously briefed in further detail by Trinity, *see* Dkt. No. 662 at 7-8, Harman and Dr. Coon confuse the dimensions of the guide channel sub-assembly of 14 7/8" with the assembled dimension of 15" after the sub-assembly is fractionally inserted and welded into the extruder head entrance. The 1/8" tolerance is applied to the 15" height of the entrance to the extruder throat. Despite Harman's claims, this subject was the topic of extensive discovery.

variances in products, and such variations in any particular unit produced does not equate to a change in the product's design. *Finally*, neither Harman nor his expert provides any actual evidence, data, or analysis to support their criticisms of the FHWA's Report or their accusations about the performance of the ET Plus, including Harman's conclusory statement that "worst-case dimensions are tested only in real-world accidents with disastrous results." *See* Resp. at 8, Dkt. No. 686. As before, Harman offers no science, no evidence, and no data concerning any purported dimensions in any "accidents" to support his claims. For these reasons, and for those discussed in more detail in Trinity's previous filing, *see* Dkt. No. 662, Harman's attacks on the joint Task Force Report lack merit and should be squarely rejected.

D. Information about the ET Plus design was subject to discovery.

At trial and during discovery, witnesses from Trinity and Texas A&M University's Transportation Institute ("TTI") offered testimony concerning the design specifications or tolerances that Harman now attacks. For example, Dr. Roger Bligh of TTI testified that the ET Plus with four-inch guide channels attached has an exit gap with a "1-inch minimum." *See* Dkt. No. 662 at Ex. C (Testimony of Dr. Roger Bligh, Oct. 15, a.m. Tr. 96:9-15). Trinity witnesses also testified to the 1" minimum design specification for the ET Plus exit gap, both at trial and in discovery. *See, e.g., id.* at Ex. A (Depo. of Brian Van Ness at 223:4-19), Ex. B (Testimony of Wade Malizia, Oct. 14, a.m. Tr. 112:1-13); *see also* Dkt. No. 662 at Ex. D (Depo. of Dr. Malcolm Ray at 250:12-251:8).

Harman's argument that TTI's design tolerances were "concocted post-trial" or were concealed from him during discovery is yet another instance of Harman confusing, conflating, and failing to differentiate between ***design*** specifications or tolerances relating to the performance of the ET Plus system, on the one hand, and ***manufacturing*** guidelines for building

the product, on the other. Contrary to Harman's Response and his baseless request for sanctions, Harman had a full opportunity for discovery and examination of witnesses concerning the design specifications or tolerances for the ET Plus. Harman should not be entitled to re-plow ground that the parties have been over repeatedly merely because he now disagrees with the evidence and the joint Task Force Report.

CONCLUSION

Based on the foregoing, Trinity respectfully requests that the Court grant Trinity's Request for Judicial Notice of FHWA and AASHTO's Findings on Dimensions of ET Plus Guardrail End Terminal (Dkt. No. 674), and any further and just relief to which Trinity may be entitled.

Dated: April 10, 2015

Respectfully submitted,

/s/ Sarah R. Teachout

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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 10th day of April, 2015.

/s/ Sarah R. Teachout
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