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

UNITED STATES OF AMERICA ex rel. JOSHUA HARMAN, Plaintiff/Relator, v. TRINITY INDUSTRIES, INC. and TRINITY HIGHWAY PRODUCTS, LLC, Defendants.	CIVIL ACTION NO. 2:12-CV-00089

TRINITY'S MOTION FOR NEW TRIAL

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INTRODUCTION

Defendants Trinity Industries, Inc. ("Trinity Industries") and Trinity Highway Products, LLC ("Trinity Highway") (collectively, "Trinity") file this Motion for New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure for purposes of preserving issues for appeal.[1] There are at least five reasons why a new trial is warranted here. First and foremost, the Court should grant a new trial because newly discovered evidence has confirmed both the dimensions and the crashworthiness of the ET Plus. That evidence—which rebuts Joshua Harman's allegations of ongoing fraud and confirms that the government received the benefit of its bargain—would almost certainly have changed the outcome of the trial. Second, a new trial is warranted because the $525 million damages award is excessive. Third, a new trial is necessary to remedy the Seventh Amendment violation that occurred when the Court refused to submit the number of false claims to the jury. Fourth, the damages award and civil penalties in combination—a total of more than $663 million—violate the Eighth Amendment's Excessive Fines Clause. Finally, a new trial is warranted because the verdict is against the weight of the evidence.

ARGUMENT

I. A New Trial Is Warranted Based On Newly Discovered Evidence About the Dimensions and Crashworthiness of the ET Plus

Since the jury returned its verdict in October 2014, a host of newly discovered evidence has emerged confirming key characteristics of the ET Plus. Specifically, on March 11, 2015, the Federal Highway Administration ("FHWA") and the American Association of State Highway and Transportation Officials ("AASHTO") issued a report (the "Dimensions Report") containing the findings of a joint Task Force that evaluated field measurement data from more than 1,000 ET Plus

[1] Trinity does not, of course, waive any issue previously raised and preserved in this litigation. *See* 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2818 (3d ed.) ("a party may assert on appeal any question that has been properly raised in the trial court").

systems with 4″ guide channels installed across the country. Dkt. No. 674; *id.* at Exs. A-B. The joint Task Force concluded, among other things, that "[t]here is no evidence to suggest that there are multiple versions" of the ET Plus with 4″ guide channels on roads across the country. Dkt. No. 674, Ex. A. In addition, the FHWA made two announcements—one on February 6, 2015, and one on March 13, 2015—confirming the official results of a full series of crash tests on the ET Plus with 4″ guide channels. Dkt. No. 644; *id.* at Exs. A-D; Dkt. No. 677; *id.* at Exs. A-K. The FHWA, the Southwest Research Institute ("SwRI"), and an independent engineering expert each separately evaluated the crash test results and determined that, in both cases, "all 4 tests passed the NCHRP Report 350 criteria." Dkt. No. 644, Ex. B; Dkt. No. 677, Ex. F.[2]

Under Rule 59 of the Federal Rules of Civil Procedure, a new trial may be granted based on newly discovered evidence if "(1) the facts discovered are of such a nature that they would probably change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching." *La Fever, Inc. v. All-Star Ins. Corp.*, 571 F.2d 1367, 1368 (5th Cir. 1978) (internal quotation marks omitted); *see also Diaz v. Methodist Hosp.*, 46 F.3d 492, 495 (5th Cir. 1995) (collecting cases). For the reasons that follow, the evidence at issue here—namely, the Dimensions Report and the official crash test results—amply satisfies that standard.

A. The Newly Discovered Evidence Probably Would Have Changed the Outcome of the Trial

1. The Dimensions Report Rebuts Harman's Allegations of Ongoing Fraud

The Dimensions Report issued by the AASHTO – FHWA Task Force directly confronts—and rejects—one of Harman's primary theories of liability. Harman repeatedly argued that Trinity

[2] The newly discovered evidence referenced herein was previously filed with the Court at Docket Nos. 644, 674, and 677. Trinity hereby incorporates by reference all such evidence, as if attached hereto, for purposes of filing this Motion.

had committed an ongoing fraud against the FHWA by withholding information about recent design changes to the ET Plus. *See* Oct. 13, 2014 PM Tr., 151:24-152:2 ("Q: You've also claimed that the end terminal being marketed and sold is significantly different from the version that was crash-tested; isn't that correct? A: Yes, sir."). Harman's expert, Dr. Brian Coon, further claimed that he did not conduct crash testing on the ET Plus because "I wouldn't have an idea of *which of the different designs* to use . . . . I wouldn't know *which version* of their – 4-inch ET Plus to use." Oct. 15, 2014 PM Tr., 123:21-124:1 (emphasis added). And Harman himself repeatedly asserted that further investigation by the FHWA would ultimately substantiate his claims. *See* Oct. 14, 2014 AM Tr., 33:1-3 ("Q: It appears that the FHWA has reopened the investigation? A: Yes, sir. I would – I would hope and pray that they're finally looking at it.").

The Dimensions Report issued on March 11, 2015 squarely debunks Harman's claim that there are "multiple versions" of the ET Plus with 4″ guide channels on the roads today. The joint Task Force that issued the Dimensions Report was "aimed specifically to further investigate allegations of multiple versions of the ET-Plus." Dkt. No. 674, Ex. A; Dkt. No. 674, Ex. B at 4. To that end, the joint Task Force—which included federal, state, and international transportation authorities—"evaluated field measurement data collected by FHWA engineers from more than 1,000 4-inch ET-Plus devices installed on roadways throughout the country." Dkt. No. 674, Ex. A. Following months of data collection and analysis, the joint Task Force concluded that "[t]here is no evidence to suggest that there are multiple versions (*i.e.*, ET-Plus 4-inch devices with markedly different dimensions) on our nation's roadways." *Id.* The joint Task Force further concluded that the ET Plus units that had been crash tested in December 2014 and January 2015 "are representative of the devices installed across the country." *Id.* Notably, the members of the joint Task Force included 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 Ontario. Dkt. No. 674, Ex. B at 14.

If the Dimensions Report had been available at trial, it would have conclusively disproved Harman's allegations of recent design changes to the ET Plus and—even more importantly—undercut a principal tenet of Harman's theory of "ongoing fraud" against the FHWA. The jury would have had the benefit of a reasoned rebuttal of Harman's allegations by a group of respected professionals representing all sectors of the transportation industry—federal and state, public and private, domestic and foreign. Under these circumstances, it is probable that the Dimensions Report would have changed the outcome of the trial.

2. The Crash Test Results and Dimensions Report Undercut Harman's Theory of Fraud and Confirm That the Government Received the Benefit of Its Bargain

The official results of the post-trial crash tests similarly rebut a key premise of Harman's theory at trial. Harman punctuated his jury presentation with repeated references to the absence of a full series of NCHRP Report 350 crash tests for the ET Plus with 4″ guide channels, claiming that Trinity made unannounced modifications to the ET Plus because it was "afraid" of the crash test results. *See, e.g.*, Oct. 13, 2014 PM Tr., 35:17-19 ("Now, one of the reasons they want to make it unannounced is because they are afraid that it will not pass the 3-31 critical . . . test"). In particular, Harman argued that the crash test with a pickup truck was "critical" to evaluating the ET Plus, and that the absence of the pickup truck test was evidence of a plot by Trinity to defraud the FHWA. *See, e.g.*, Oct. 13, 2014 PM Tr., 37:9-15 ("Now, the Federal Highway Administration, TTI knows, Trinity knows, they all know that what is critical is the pickup test. Trinity doesn't run the pickup test.").

The official results of the crash tests rebut these spurious arguments. The February 6, 2015 announcement made clear that the FHWA, SwRI, and Dr. H. Clay Gabler—a Professor of Biomedical Engineering Graduate Studies at Virginia Polytechnic Institute and State University—had "each independently evaluated the crash test results, both the test report and the video documentation, and determined that all 4 tests [run at the 27 ¾″ guardrail height] passed the NCHRP Report 350 criteria." Dkt. No. 644, Ex. B. On March 13, 2015, the FHWA made a parallel announcement that—along with SwRI and Dr. Gabler—it had independently evaluated the results of the crash tests run at the 31″ guardrail height, and had again "determined that all 4 tests passed the NCHRP Report 350 criteria." Dkt. No. 677, Ex. F. Both series of tests included Test 3-31, which Harman had touted as the "critical" test for crash performance—and both times, the ET Plus passed.

If introduced at trial, the official crash test results would have rebutted any concerns about the safety of the ET Plus and, together with the Dimensions Report, undercut Harman's theory of fraud. They also would have conclusively demonstrated that the government received the full benefit of its bargain—namely, a product that is NCHRP Report 350 compliant. That, of course, is the linchpin of the jury's damages award. Under the "benefit of the bargain" measure of damages, the government's damages are equal to the difference between the value of the ET Plus system that was sold—one that allegedly was *not* compliant with NCHRP Report 350—and the ET Plus system as it was represented to be. *See United States v. Bornstein*, 423 U.S. 303, 316 n.13 (1976). Harman's expert, William Chandler, admitted that "*[t]he premise of my calculations is that the ET-Plus is not compliant* with the Federal Highway Administration standards and that Trinity has certified that . . . it was compliant with the FHWA standards." Oct. 15, 2014 PM Tr., 190:8-12 (emphasis added). The official crash test results have now proven that premise to be false. And the Dimensions Report has further confirmed that the ET Plus systems that were crash tested "*are*

representative of the devices installed across the country." Dkt. No. 674, at 2 (emphasis added). In combination, the crash test results and the Dimensions Report make clear that the government paid for a highway guardrail system that was NCHRP Report 350 compliant—and it received a highway guardrail system that was NCHRP Report 350 compliant. Thus, the damages from the alleged fraud are not $175 million, because *there are no damages at all*.

B. The Newly Discovered Evidence Was In Existence at the Time of Trial But Could Not Have Been Discovered Until After Trial

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

The rule in the Fifth Circuit is that newly discovered evidence "must be in existence at the time of the trial." *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 364 (5th Cir. 1978). The seminal Fifth Circuit case on whether evidence is "in existence" at the time of trial is *Chilson v. Metropolitan Transit Authority*, 796 F.2d 69 (5th Cir. 1986). In *Chilson*, an engineer who had been fired from his position with the Metropolitan Transit Authority of Houston (MTA) brought suit for retaliatory discharge, asserting that he had been fired for criticizing a contract between MTA and a consultant consortium. *Id.* at 69. At trial, the engineer sought to prove that the contract in question wasted public funds, but the jury found insufficient evidence that he had been discharged in retaliation for criticizing the contract. Nearly a year later, the engineer moved for relief from the judgment under Rule 60(b)(2) of the Federal Rules of Civil Procedure,[3] alleging newly discovered evidence in the form of an internal MTA audit that disclosed a $2.6 million overpayment to the consultant consortium. The Fifth Circuit held that the evidence was newly discovered, reasoning that "[t]he $2,600,000 overpayment was in existence at the time of the trial," even though "[i]t was not known

[3] Because "both Rule 59(a) and Rule 60(b)(2) permit a remedy when new evidence is discovered following the trial," "[c]ourts have noted that Rule 60(b)(2) cases may be cited in support of Rule 59 motions, and vice versa." 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.42[1][a] (3d ed.).

. . . until the internal audit revealed it after the trial was over." *Id.* at 72; *see also id.* ("Although [Chilson] could not prove the overpayments at the time of trial, they did exist.").[4]

Under a straightforward application of *Chilson*, the newly discovered evidence here was also "in existence" at the time of trial. The dimensions of the ET Plus systems installed on roads across the country were surely "in existence" at the time of trial, and Trinity presented testimony to that effect. *See, e.g.*, Oct. 16, 2014 PM Tr., 94:8-15 (Hopkins) ("Q: [H]ave you ever—in measuring those on the side of the road, . . . have you ever found any to be out of certification for what should be coming out of your plant? In other words, have they all met the criteria that they should have as far as size, width, length, welding, how they're put together? A: Yes, sir. I've seen no problems."). But Trinity had no ability to commission a government audit, and was therefore "unable to establish [the dimensions] in detail as the later audit did." *Chilson*, 796 F.2d at 72. Even though Trinity could not have presented an external dimensions audit at the time of trial, those dimensions "did exist." *Id.*

The same is true for the crash tests. Just as the dimensions of the ET Plus were "in existence" at the time of trial, the physical properties of the ET Plus under a certain set of conditions were also in existence. Courts have recognized that post-trial tests verifying the physical characteristics of an object or substance may constitute newly discovered evidence. *See, e.g., Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 822-25 (5th Cir. 1965) (post-trial analyses of well sands were newly discovered evidence). Courts have further recognized that post-trial tests demonstrating the physical *reaction* to a certain set of measurable conditions may also constitute newly discovered evidence. *See Swift Agric. Chem. Corp. v. Usamex Fertilizers, Inc.*, 27 Fed. R. Serv. 2d 930, 931 (E.D. La. 1979) (post-trial tests establishing the reaction time in a manufacturing

[4] Other cases are in accord. *See Nat'l Anti-Hunger Coal. v. Exec. Comm'n of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1074-76 (D.C. Cir. 1983) (post-trial task force reports were newly discovered evidence); *see also Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509, 515-17 (8th Cir. 1984) (post-trial grand jury testimony was newly discovered evidence of perjury); *Kettenbach v. Demoulas*, 901 F. Supp. 486, 493-94 (D. Mass. 1995) (post-trial recording was newly discovered evidence of wiretap).

process were newly discovered evidence). In the same way, the crash tests at issue here measured the physical reaction of the ET Plus to a certain set of conditions—namely, impact by a test vehicle of a certain size, at a certain speed, and at a particular angle and location. *See, e.g.*, Dkt. No. 644, Ex. B. (summarizing NCHRP Report 350 Tests). That the ET Plus reacts to specified physical stimuli in a particular way is a fact that was "in existence" at the time of trial.

Harman may, of course, argue that Trinity should have conducted its own additional crash testing prior to trial, notwithstanding that the FHWA had never requested that such testing be performed. But the Fifth Circuit in *Chilson* did not fault the plaintiff for failing to present his *own* audit of the contract; instead, the post-trial audit by the relevant agency was considered newly discovered evidence. 796 F.2d at 69-70. Under *Chilson*, Trinity cannot be faulted for the timing of the crash test results. Moreover, even if Trinity had tried to introduce its own crash test results at trial, it would have done so without the benefit of the Dimensions Report, which concluded that the ET Plus units that were crash tested "are representative of the devices installed across the country." Dkt. No. 674, at 2. On these facts, it cannot be said that Trinity failed to demonstrate reasonable diligence.

In any event, the Fifth Circuit has held that "the ends of justice may require granting a new trial *even though proper diligence was not used* to secure such evidence for use at the trial." *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 698 (5th Cir. 1955) (emphasis added). Although subsequent case law has suggested limits to *Ferrell* in dicta, *see Johnson Waste Materials v. Marshall*, 611 F.2d 593, 599-601 (5th Cir. 1980), the Fifth Circuit has never abrogated that decision.

C. The Evidence Is Not Merely Cumulative

Finally, there can be no question that the newly discovered evidence at issue is not "merely cumulative" of the evidence at trial. *Trans Miss. Corp. v. United States*, 494 F.2d 770, 773 (5th Cir.

1974). Although Trinity certainly presented evidence regarding the dimensions of the ET Plus at trial, the Dimensions Report itself is different in kind—an official audit—from the dimensions evidence Trinity was able to present. And the official crash test results cannot, of course, be characterized as "merely cumulative"—particularly since Harman himself emphasized the absence of recent crash tests at every opportunity.

* * *

For all these reasons, a new trial is warranted based on newly discovered evidence regarding the dimensions and crashworthiness of the ET Plus. In the alternative, if the Court disagrees that the newly discovered evidence was "in existence" at the time of trial, the Court should vacate the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. *See Bell v. Bd. of Cty. Comm'rs of Jefferson Cty.*, 451 F.3d 1097, 1102 (10th Cir. 2006) ("Rule 59(e) motions may be based . . . [on] evidence arising after the initial ruling (in which even the party's diligence in seeking the evidence is obviously not a consideration)").

II. A New Trial Is Warranted Because the Damages Award Is Excessive

A new trial is also warranted because the jury's $525 million damages award is excessive. *See, e.g.*, *Enter. Ref. Co. v. Sector Ref., Inc.*, 781 F.2d 1116, 1118 (5th Cir. 1986) ("[A] damages award cannot stand when the only evidence to support it is speculative or purely conjectural.") (quotation marks omitted). The government's damages under the "benefit of the bargain" rule "are equal to the difference between the market value of the [products] it received and retained and the market value that the [products] would have had if they had been of the specified quality." *Bornstein*, 423 U.S. at 316 n.13. Thus, to be entitled to a damages award, Harman must prove (1) the amount the government paid in ET Plus reimbursements and (2) the value of the ET Plus

systems the government received. Because Harman—who has the burden to prove damages, *see* 31 U.S.C. § 3731(d)—failed to establish either of those figures, the damages award is excessive.

1. First, Harman failed to prove how much the FHWA paid in reimbursements for the ET Plus. Although reasonable estimates of damages are permissible in certain circumstances, those estimates must be "just and reasonable" and "based on *relevant data*." *United States v. Killough*, 848 F.2d 1523, 1531 (11th Cir. 1988) (emphasis added). That is not what Harman has done. Because Harman relies on a proxy that bears no relationship to what the FHWA actually paid for the ET Plus, his damages model does not constitute a reasonable estimate.

The critical flaw in Harman's damages model is how it tries—and fails—to account for the fact that the only ET Plus units that qualify for federal reimbursement are those installed on federal-aid highways. Harman's expert admitted that he did not connect any ET Plus purchases to specific payments by the federal government. Oct. 15, 2014 PM Tr., 178:11-25 (Chandler). Rather, in an attempt to estimate the percentage of ET Plus sales that were federally reimbursed, Harman's expert used Internet data regarding states' *total* highway-related expenditures. *Id.* at 203:12-16 ("I don't have specific, you know, city money or private money or local money to make that calculation. I relied on the percentage that the states would spend on federal-eligible highways to calculate that percentage."). To calculate his final damages figure, Harman then multiplied Trinity's total ET Plus sales revenue by the percentage of states' total highway-related expenditures that were spent on federal highways. He then applied an 80 percent federal reimbursement rate.

The problem, of course, is that there is no correlation between how much a state spent on federal highways and the percentage of Trinity's total ET Plus sales that were federally reimbursed. *See* Oct. 17, 2014 AM Tr., 98:5-7 (Matthews) ("Just as Mr. Chandler has testified, there's no correlation between that percentage and an actual reimbursement by the Federal Government.").

Harman's proxy data is not specific to the ET Plus. *See* Oct. 15, 2014 PM Tr., 185:12-18 (Chandler) ("Q: And there's no numbers anywhere on this table that you could find that would identify even a specific claim for payment by a state to the FHWA for an ET-Plus? That's not anywhere on this table? A: No, this is just expenditure data. It doesn't include any information about a request for reimbursement by the state for their expenditures."). Indeed, Harman's proxy data is not limited to expenditures on guardrails or even roadway-safety devices, but instead includes state spending on everything from bridges to tunnels to mass transit. *Id.*

Because the proxy Harman adopted has no correlation to the amount the FHWA paid in ET Plus reimbursements, Harman's model is not a reasonable estimate of damages "based on relevant data." *Killough*, 848 F.2d at 1531. Instead, Harman has supplied only "guesswork" and "speculation," which cannot support any damages award—much less one of the largest FCA verdicts in history. *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 46 (5th Cir. 1972) (noting the "responsibility not to allow damages to be determined by 'guesswork' or 'speculation'").

2. As to the second figure in the "benefit of the bargain" equation—the value of the ET Plus systems the government received—Harman's approach is equally flawed.

First, Harman's expert did not even attempt to ascertain the value of the ET Plus systems reimbursed by the FHWA. Oct. 15, 2014 PM Tr., 189:10-12 (Chandler) ("I cannot render an opinion with respect to what the actual benefit to the United States Government would be"). Instead, he simply assumed—based on the representations of Harman's counsel—that those ET Plus units were worth only scrap value. *Id.* at 188:17-21 ("I was advised by counsel that the evidence presented in this trial will show that the units themselves have no value, but that I should provide and I was requested to provide a calculation of the scrap metal value simply to present to this Court and the

jury for their consideration."). While it is true that the government is entitled to full damages when it receives no value at all, the government must prove—not just assume—that it received no value.

Second, the assumption that the ET Plus units were worth only scrap metal is even more problematic given that Harman's expert failed to even consider the FHWA's public statements regarding the value of the ET Plus units it paid for. *Id.* at 195:17-21 ("Q: Mr. Chandler, in your damage calculations, did you consider the Federal Highway Administration's June 17, 2014 letter? A: I did not. That letter was also issued after my reports had been issued."). That omission is especially troubling because the FHWA's June 17, 2014 letter directly addressed—and rejected—the premise of Harman's calculations. *Compare* Dkt. No. 279, Ex. A (FHWA Letter, June 17, 2014) ("An unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005 and the ET-Plus continues to be eligible today."), *with* Oct. 15, 2014 PM Tr., 190:8-12 (Chandler) ("The premise of my calculations is that the ET-Plus is not compliant with the Federal Highway Administration standards").

* * *

In light of Harman's complete failure of proof, this is the rare case where "a jury's award exceeds the bounds of any reasonable recovery." *Gough v. Nat. Gas Pipeline Co. of Am.*, 996 F.2d 763, 767 (5th Cir. 1993). Accordingly, a new trial on damages is warranted—and because damages and liability are wholly "interwoven," the Court should order a complete new trial. *Hadra v. Herman Blum Consulting Eng'rs*, 632 F.2d 1242, 1245 (5th Cir. 1980) (collecting cases).

III. A New Trial Is Warranted Because the Court Violated the Seventh Amendment by Failing to Submit the Number of False Claims to the Jury

A new trial should also be granted because the Court failed to properly submit the number of false claims to the jury in violation of the Seventh Amendment. *See* 12 James Wm. Moore et al.,

Moore's Federal Practice § 59.13[2][b] (3d ed.) ("Issues that are improperly . . . withdrawn from . . . the jury's consideration may be grounds for a new trial.").

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. Const. amend. VII. The Supreme Court has construed this language "to require a jury trial on the merits in those actions that are analogous to 'Suits at common law.'" *Tull v. United States*, 481 U.S. 412, 417 (1987). To determine whether the right to a jury trial attaches to a particular cause of action, courts examine "both the nature of the action and of the remedy sought." *Id.* At common law, "a civil penalty suit was . . . within the jurisdiction of the courts of law," and "[a] civil penalty was a type of remedy . . . that could only be enforced in courts of law." *Id.* at 418, 422 (analyzing Clean Water Act civil penalties). For that reason, "[b]y virtually all authorities, parties generally have the right to a jury trial under the False Claims Act." 2 John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 5.08[B] (4th ed. 2015); *see U.S. ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, 675 F.3d 394, 405 (4th Cir. 2012) (defendant was deprived of jury trial right in an FCA case).

The district court may, of course, decide particular issues in a case if it "finds that on . . . those issues there is no federal right to a jury trial." Fed. R. Civ. P. 39(a). But the number of false claims is not an issue that can properly be withdrawn from the province of the jury. In an action seeking civil penalties, the "Seventh Amendment require[s] that petitioner's demand for a jury trial be granted to determine his liability," while permitting the court to "determine the amount of penalty, if any." *Tull*, 481 U.S. at 427. The number of false claims is, of course, the linchpin of FCA liability. *See* 31 U.S.C. § 3729(a)(1) ("any person who . . . knowingly presents . . . a false or fraudulent claim . . . is liable to the United States Government for a civil penalty"). For that reason, the jury must decide the number of false claims in order "to preserve the substance of the common-

law right of trial by jury." *Tull*, 481 U.S. at 426 (internal quotation marks omitted). The "amount" of any penalty—within the statutory range—may be determined by the court. *Id.* at 427.

That division of labor between the court and the jury is consistent with standard practice in FCA cases. *See, e.g.*, *Tuomey*, 675 F.3d at 402 (verdict form: "[I]f Tuomey violated the [FCA], how many false claims were submitted by Tuomey, if any?"); *U.S. ex rel. Purcell v. MWI Corp.*, 15 F. Supp. 3d 18, 21 (D.D.C. 2014) (verdict form instructed the jury that, "if it found that MWI had violated the FCA, it was to identify the specific number of false claims"); *Kelsoe v. Fed. Crop Ins. Corp.*, 724 F. Supp. 448, 454 (E.D. Tex. 1988) (jury determined the number of false claims; judge determined the amount of civil penalty).

The Court in this case—over Trinity's objection—refused to submit the number of false claims to the jury. *See* Oct. 20, 2014 AM Tr., 21:17-21 (Counsel: "Defendants object to the failure of the instruction in the verdict form to submit to the jury the task of determining the number of claims and thus the amount of any civil penalty per the pattern." The Court: "That objection is overruled."); *see also* Dkt. No. 569, at 6 (written objections). That was error. The Court then further compounded its error by selecting a number of false claims—16,771—that was hotly disputed at trial. *See* Dkt. No. 713 (imposing civil penalties "for each of the 16,771 false certifications Trinity made in connection with false claims for payment"). Harman presented no evidence that Trinity made 16,771 certifications of compliance, instead counting only Trinity invoices for ET Plus sales (which do not contain the allegedly false certificates of compliance), and estimating that "*the majority* of the – the bill of lading files contain the certifications." Oct. 15, 2014 PM Tr., 197:20-21 (emphasis added).

As a direct consequence of these errors, Trinity is now subject to a civil penalty award of more than $138 million. *See* Dkt. No. 713 (final judgment). Thus, there can be no argument that the

Court's failure to submit the number of false claims to the jury is somehow harmless. *Cf. Moore's Federal Practice* § 59.13[2][b] (noting the harmless error rule). A new trial is necessary to cure the Seventh Amendment violation and remedy the prejudice to Trinity.

IV. A New Trial is Warranted Because the Damages Award and Civil Penalties Violate the Eighth Amendment's Excessive Fines Clause

A new trial is also warranted because the award of trebled damages and civil penalties violates the Eighth Amendment's proscription against excessive fines. *See United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014) ("The FCA's treble damages in combination with the per-claim penalties are punitive for the purposes of the Excessive Fines Clause."). Here, the total award of more than $663 million is grossly disproportionate. Indeed, the excessiveness of the trebled damages and civil penalties is exacerbated by the fact that the government suffered no damages in this case—as evidenced by the fact that (1) the FHWA has affirmed before, during, and after the trial that the ET Plus is, was, and has always been eligible for federal reimbursement; and (2) the FHWA will reimburse states for eligible ET Plus installations.

V. A New Trial Is Warranted Because the Verdict Is Against the Weight of the Evidence

Finally, a new trial should also be granted because the weight of the evidence presented at trial supports Trinity, not Harman. *See Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985). Indeed, as Trinity has previously explained to this Court, the evidence demonstrates that *none* of the elements of an FCA claim is present in this case. Trinity raises these arguments here to preserve them for appeal:

1. There was no false statement or fraudulent course of conduct. The alleged false statement in this case was Trinity's statement in certificates of compliance affirming that the ET Plus was NCHRP Report 350 compliant. But that statement is true. As the FHWA has repeatedly affirmed—before, during, and after trial—the ET Plus has been compliant with all applicable federal

rules and regulations during the entire period of this alleged fraud. *See, e.g.*, Dkt. No. 279, Ex. A (FHWA Letter, June 17, 2014). Thus, it was not false for Trinity to say that the ET Plus was NCHRP Report 350 compliant.

Indeed, even if the Court were to believe that the ET Plus was not NCHRP Report 350 compliant during the time period in question—despite the FHWA's consistent and repeated statements to the contrary—the evidence presented at trial demonstrates that, at a minimum, reasonable minds could disagree on that question. After all, the federal government itself thinks that the ET Plus is and has always been NCHRP 350 compliant. This ambiguity is fatal to Harman's claim. *See, e.g.*, *U.S. ex rel. Gudur v. Deloitte Consulting, LLP*, 512 F. Supp. 2d 920, 932 (S.D. Tex. 2007) ("Claims are not 'false' under the FCA when reasonable persons can disagree regarding whether service was properly billed to the Government.").

2. There was no scienter. The weight of the evidence demonstrates that Trinity did not "knowingly or recklessly cheat[] the government." *U.S. ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008). The alleged false statement was the certification that the ET Plus was NCHRP Report 350 compliant, and there is no evidence that Trinity knew that certification was false.

3. The alleged false statement was not material to the government's payment decision. The government has repeatedly affirmed that it has investigated Harman's allegations and rejected them, concluding that Trinity is and has always been entitled to payment. *See, e.g.*, Dkt. No. 279, Ex. A (FHWA Letter, June 17, 2014) ("[a]n unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005, and the ET-Plus continues to be eligible today"). So the great weight of the evidence makes clear that the FHWA letters were authoritative statements demonstrating that the allegedly false statements were immaterial to the government's payment decision. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 676-77 (5th Cir.

2003) (en banc); *see also U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 830-31 (7th Cir. 2011); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1328-29 (11th Cir. 2009); *U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1219 (10th Cir. 2008); *U.S. ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003); *U.S. ex rel. Smith v. Boeing Co.*, 2014 WL 5025782, at *26 (D. Kan. Oct. 8, 2014).

4. There is no evidence of causation. There is no evidence that statements on a certificate provided to certain customers certifying that the ET Plus was NCHRP Report 350 compliant were the cause of the federal government's disbursement of funds. The federal government made its own payment decision, based on its determination that the ET Plus was NCHRP Report 350 compliant, regardless of what Trinity wrote on a certification to its customers. Indeed, there is no evidence that the federal government even saw Trinity's customer certifications, let alone considered them in their payment decision.

5. In light of Harman's complete failure of proof on damages, the weight of the evidence also favors Trinity. *See supra* at 9-12.

CONCLUSION

For the foregoing reasons, Trinity respectfully requests that the Court grant a new trial on all issues in this case. Alternatively, Trinity requests that the Court vacate the judgment in light of the newly discovered evidence, and award all other relief to which Trinity is entitled.

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Respectfully submitted,

/s/ *Anne M. Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically on July 7, 2015, pursuant to Local Rule CV-5(a), and has been served on all counsel who have consented to electronic service.

/s/ *Anne M. Johnson*
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